UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
Borla Performance Industries, Inc.,	)	**Docket No. CAA-09-2020-0044**[1]
	)	
Respondent.	)	

ORDER GRANTING COMPLAINANT'S MOTION FOR ACCELERATED DECISION ON LIABILITY AND TO STRIKE AFFIRMATIVE DEFENSES

I. RELEVANT PROCEDURAL HISTORY

This matter commenced on June 30, 2020, when the Director of the Enforcement and Compliance Assurance Division of the U.S. Environmental Protection Agency ("EPA"), Region 9 ("Complainant" or "Agency"), filed a Complaint and Notice of Opportunity for Hearing ("Original Complaint") against Borla Performance Industries, Inc. ("Respondent" or "Borla"), pursuant to section 205(c)(1) of the Clean Air Act ("CAA" or "Act"), 42 U.S.C. § 7524(c)(1). The Original Complaint was amended on August 6, 2020 ("First Amended Complaint"), and again on March 12, 2021 ("Second Amended Complaint"). The Second Amended Complaint alleges in one count that, between January 15, 2015, and September 26, 2018, Respondent committed 5,338 violations of section 203(a)(3)(B) of the CAA, 42 U.S.C. § 7522(a)(3)(B), by manufacturing, selling, or offering to sell 57 different types of motor vehicle parts (the "Subject Products" described in Appendix A of the Second Amended Complaint) that bypass, defeat, or render inoperative catalytic converters designed to assure the vehicle's compliance with EPA air emissions standards. Respondent filed its Answer to the First Amended Complaint on September 28, 2020. Respondent filed its Answer to the Second Amended Complaint ("Answer") on March 29, 2021. Both Answers denied the violations, raised nineteen affirmative defenses, and requested a hearing.

A Prehearing Order was issued on October 19, 2020, and the parties thereafter filed their Prehearing Exchanges ("PHE"): Complainant filed its Initial Prehearing Exchange on January 8, 2021; Respondent filed its Prehearing Exchange on March 16, 2021; Complainant filed its Rebuttal Prehearing Exchange on March 19, 2021. On April 22, 2021, Complainant filed a First Amendment to its Prehearing Exchange. Respondent filed its First Amended Prehearing Exchange on August 12, 2021.[2]

[1] Several documents filed by the parties in this case incorrectly identify the case number as "CAA-R9-2020-0044." The caption of this Order reflects the correct case number which should be utilized on all future filings.

[2] The parties both submitted an extensive number of exhibits with the Prehearing Exchanges and identified many of the documents submitted as containing material claimed to be confidential business information pursuant to 40 C.F.R. § 2.203(b) or personally identifiable information under the Privacy Act of 1974 (codified at 5 U.S.C. § 552a).

On April 20, 2021, Complainant's Motion for Accelerated Decision on Liability and to Strike Affirmatives Defenses ("Motion") was filed. The Motion was accompanied by Complainant's Statement of Material Facts Concerning Liability Not in Reasonable Dispute (Attachment A) as well as a Compilation of Citations (Attachment D), and supported by the April 19, 2021 Declarations of Jason Gumbs (Attachment B) and Andrew Chew (Attachment C).[3]

Respondent's Opposition to the Motion ("Opposition") was filed on June 12, 2021. Attached thereto were seven supporting documents identified as follows: Racer.com Sports Car Club of America ("SCCA") Articles (Attachment 1); the June 10, 2021 Declaration of Ted Wofford (Attachment 2); the June 11, 2021 Declaration of Jason Isley (Attachment 3) including two exhibits referenced therein; the June 10, 2021 Declaration of Thomas Deery (Attachment 4); the June 10, 2021 Declaration of Allen Stoner (Attachment 5) including two exhibits referenced therein; selected pages from the 2001 Ford Racing Performance Parts Catalog (Attachment 6); and selected pages from the 2010 Mopar [Chrysler Motor Parts Corporation] Racing Performance Parts Catalog (Attachment 7).[4]

On July 26, 2021, Complainant filed a Reply to Respondent's Opposition, accompanied by the July 23, 2021 Declaration of Andrew Chew in Support of Complainant's Total Number of Alleged Violations (Attachment A).

II. APPLICABLE ADJUDICATORY STANDARDS

This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Consolidated Rules"), set forth at 40 C.F.R. Part 22. The Consolidated Rules authorize the presiding Administrative Law Judge to:

> render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law.

Those documents were submitted separately to the Tribunal and are omitted from the public record or are included therein with redactions. Complainant's Prehearing Exchange exhibits are cited as "CX," and Respondent's Prehearing Exchange exhibits are cited as "RX."

[3] Mr. Gumbs is an Environmental Engineer with EPA's Air Enforcement Division, Vehicle & Engine Enforcement Branch in Washington, D.C. (Mot. Attach. B ¶ 2), and Mr. Chew is an Environmental Engineer with EPA Region IX in California (Mot. Attach. C ¶ 1).

[4] Mr. Wofford is Respondent's Manager of Research and Development (Opp'n Attach. 2 ¶ 1), and Mr. Stoner is its Chief Financial Officer (Opp'n Attach. 5 ¶ 1). Mr. Deery is an Event Management Consultant and Industry Ambassador for Performance Racing Industry (Opp'n Attach. 4 ¶¶ 2–3), and Mr. Isley was formerly an Associate Editor for SCCA's SportsCar magazine, and he and his wife, Jennifer Isley, are national champion SCCA racers (Opp'n Attach. 3 ¶¶ 2–4).

40 C.F.R. § 22.20(a). This standard is analogous to the standard governing motions for summary judgment prescribed by Rule 56 of the Federal Rules of Civil Procedure ("Federal Rules"), and while the Federal Rules do not apply here, the Environmental Appeals Board ("EAB") has consistently looked to Federal Rule 56 and its jurisprudence for guidance in adjudicating motions for accelerated decision filed under section 22.20(a) of the Consolidated Rules. *See, e.g.*, *Consumers Scrap Recycling, Inc.*, 11 E.A.D. 269, 285 (EAB 2004); *BWX Techs., Inc.*, 9 E.A.D. 61, 74–75 (EAB 2000); *Clarksburg Casket Co.*, 8 E.A.D. 496, 501–02 (EAB 1999). Federal courts have endorsed this approach. For example, the United States Court of Appeals for the First Circuit described Federal Rule 56 as "the prototype for administrative summary judgment procedures" and the jurisprudence surrounding it as "the most fertile source of information about administrative summary judgment." *P.R. Aqueduct & Sewer Auth. v. EPA*, 35 F.3d 600, 607 (1st Cir. 1994) (rejecting the argument that federal court rulings on motions for summary judgment are "inapposite" to administrative proceedings).

As for the particular standard set forth in Federal Rule 56, it directs a federal court to grant summary judgment upon motion by a party "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In construing this standard, the Supreme Court has held that a fact is material where, under the governing substantive law, it might affect the outcome of the proceeding. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In turn, a factual dispute is genuine if a fact finder could reasonably resolve the dispute in favor of the non-moving party under the evidentiary standards applicable to the particular proceeding. *Id.* at 248, 250–52.

The Supreme Court has held that the party moving for summary judgment bears the burden of showing an absence of a genuine dispute as to any material fact. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). This burden consists of two components: an initial burden of production, which shifts to the non-moving party once it is satisfied by the moving party, and the ultimate burden of persuasion, which always remains with the moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986) (Brennan, J., dissenting) (citing 10A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice and Procedure* § 2727 (2d ed. 1983)). To establish that a dispute over a material fact does not or does exist, respectively, the movant and non-movant must cite to "particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials" or show "that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1).

In determining whether a genuine issue of material fact exists for trial, a federal court is required to construe the evidentiary material and reasonable inferences drawn therefrom in a light most favorable to the non-moving party. *See Anderson*, 477 U.S. at 255 ("The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor."); *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) ("On summary judgment the inferences to be drawn from the underlying facts contained in [evidentiary] materials must be viewed in the light most favorable to the party opposing the motion."). The court is then required to consider whether a fact finder could reasonably find in favor of the non-moving party under the applicable

evidentiary standards. *Anderson*, 477 U.S. at 252–55. Where the evidence viewed in the light most favorable to the non-moving party is such that the fact finder could not reasonably find in favor of that party, summary judgment is appropriate. *See id.* at 249–50; *Adickes*, 398 U.S. at 158–59. Conversely, where conflicting inferences may be drawn from the evidence and a choice among those inferences would amount to fact-finding, summary judgment is inappropriate. *Rogers Corp. v. EPA*, 275 F.3d 1096, 1105 (D.C. Cir. 2002). Even where summary judgment appears technically proper, sound judicial policy and the exercise of judicial discretion may support denial of the motion so the case may be more fully developed at hearing. *Roberts v. Browning*, 610 F.2d 528, 536 (8th Cir. 1979).

The EAB has applied the foregoing principles in adjudicating motions for accelerated decision under Section 22.20(a) of the Consolidated Rules, holding that the moving party "assumes the initial burden of production on a claim, and must make out a case for presumptive entitlement to summary judgment in his favor." *BWX Techs.*, 9 E.A.D. at 76. Where the moving party bears the burden of persuasion on an issue, it is entitled to an accelerated decision only if it presents "evidence that is so strong and persuasive that no reasonable [fact finder] is free to disregard it[.]" *Id.* Where the moving party does not bear the burden of persuasion, it has the "lesser burden of 'showing' or 'pointing out' to the reviewing tribunal that there is an absence of evidence in the record to support the nonmoving party's case on that issue[.]" *Id.* Once the moving party has discharged this burden, the burden of production shifts to the non-moving party bearing the burden of persuasion on the issue to identify specific facts from which a finder of fact could reasonably find in its favor on each element of the claim. *Id.*

As noted by the EAB, "neither party can meet its burden of production by resting on mere allegations, assertions, or conclusions of evidence." *Id.* at 75. Likewise, a party opposing a properly supported motion for accelerated decision is required to "provide more than a *scintilla* of evidence on a disputed factual issue to show their entitlement to a[n] . . . evidentiary hearing: the evidence must be substantial and probative in light of the appropriate evidentiary standard of the case." *Id.* at 76.

Consistent with the jurisprudence of Federal Rule 56, the EAB has held that a tribunal adjudicating a motion for accelerated decision is required to consider whether the parties have met their respective burdens in the context of the applicable evidentiary standard. *Id.* at 75. As prescribed by section 22.24(b) of the Consolidated Rules, 40 C.F.R. § 22.24(b), the evidentiary standard that applies here is proof by a preponderance of the evidence. Section 22.24(a) provides that the complainant bears the burdens of presentation and persuasion that a violation occurred as set forth in the complaint and that the relief sought is appropriate, while the respondent bears the burdens of presentation and persuasion for any affirmative defenses.

III. SUBSTANTIVE LAW

The CAA "was intended comprehensively to regulate, through guidelines and controls, the complexities of restraining and curtailing modern day air pollution." *Bunker Hill Co. Lead & Zinc Smelter v. EPA*, 658 F.2d 1280, 1284 (9th Cir. 1981); *see also* 42 U.S.C. § 7401(b) ("The purposes of this subchapter are— (1) 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 . . . ."). Subchapter ("Title") II of the Act covers mobile (moving) sources of air emissions such as motor vehicles (passenger vehicles and trucks), nonroad vehicles, buses, and aircraft. 42 U.S.C. § 7521 *et seq.* Part A of Title II and EPA regulations promulgated thereunder, inter alia, set the legal limit for the emission of certain air pollutants from motor vehicles, including non-methane hydrocarbons ("NMHC"), carbon monoxide ("CO"), oxides of nitrogen ("NOx"), and particulate matter. *Id.* §§ 7521(a), 7525(a)(1), 7547(a); *see, e.g.*, Control of Air Pollution from Motor Vehicles: Tier 3 Motor Vehicle Emission and Fuel Standards, 79 Fed. Reg. 23,414 (Apr. 28, 2014).

Relatedly, section 203 of Title II, 42 U.S.C. § 7522, identifies certain enumerated "acts and the causing thereof" as prohibited. Section 203(a)(1) prohibits manufacturers of new motor vehicles[5] or new motor vehicle engines, referred to herein as "original equipment manufacturers" ("OEMs"), from introducing those products "into commerce" in the United States unless they are "covered by a certificate of conformity" ("COC"). 42 U.S.C. § 7522(a)(1); *see also* Mot. Attach. C (Chew Decl.) ¶ 81. EPA issues COCs to OEMs once they establish the vehicle's compliance with the air emissions standards established by EPA under Title II.[6] 42 U.S.C. §§ 7522(a)(1), 7525; *see also* Mot. Attach. C (Chew Decl.) ¶¶ 82–83. The CAA allows OEMs to utilize whatever combination of devices and/or "elements of design"[7] for emissions control they wish in their vehicles so long as they achieve compliance with the legal limits. 40 C.F.R. §§ 86.094-21(b)(1), 86.1843-01, 86.1844-01(d)–(e). For decades, OEMs have utilized catalytic converters as the major emission control devices on their vehicles to meet Title II standards.[8] Mot. at 6 (citing Mot. Attach. B (Gumbs Decl.) ¶¶ 9–10)); Sale and Use of Aftermarket Catalytic Converters, 51 Fed. Reg. 28,114, 28,114 (Aug. 5, 1986) ("The converter is the major emission control device used by vehicle manufacturers on light-duty vehicles primarily to reduce hydrocarbons and carbon monoxide emissions."); *United States v. Mac's Muffler Shop, Inc.*, Civ. A. No. C85-138R, 1986 WL 15443, at *6 (N.D. Ga. Nov. 4, 1986) ("A catalytic converter is a 'device or element of design' installed on motor vehicles in order to comply with emission regulations promulgated under subchapter II of the Clean Air Act." (citing 40 C.F.R. § 86.085-8 (1985))); *United States v. Econ. Muffler & Tire Ctr., Inc.*, 762 F. Supp. 1242, 1243–44 (E.D. Va.

[5] A "motor vehicle" is "any self-propelled vehicle designed for transporting persons or property on a street or highway." 42 U.S.C. § 7550(2). A "new motor vehicle" is "a motor vehicle the equitable or legal title to which has never been transferred to an ultimate purchaser." *Id.* § 7550(3). In common parlance, a new motor vehicle would be a new automobile from the time of manufacture until it is ultimately purchased by a consumer.

[6] A COC covers engines and vehicles belonging to a specific engine family or, in the case of light-duty vehicles, a specific test group for each manufacturer. 42 U.S.C. § 7525(a)(1); 40 C.F.R. §§ 86.417-78(a), 86.437-78(a)(2), 1051.255(a).

[7] An "element of design" is defined as "any control system (i.e., computer software, electronic control system, emission control system, computer logic), and/or control system calibrations, and/or the results of systems interaction, and/or hardware items on a motor vehicle or motor vehicle engine." 40 C.F.R. § 86.1803-01.

[8] Three-way catalytic converters ("TWCCs") are currently "the dominant technology for controlling tailpipe emissions from gasoline-fueled vehicles." Mot. at 6 (citing Mot. Attach. B (Gumbs Decl.) ¶ 9). OEMs specifically formulate their TWCCs to simultaneously control NMHC, CO, and NOx. Mot. at 6 (citing Mot. Attach. B (Gumbs Decl.) ¶ 9). The devices use precious metals as catalysts to rapidly convert NMHC, CO, and NOx into water (H_2O), carbon dioxide (CO_2), and nitrogen (N_2). Mot. at 6. "The TWCCs installed in most gasoline-powered motor vehicles since the early 1990s typically control more than 90% of the regulated pollutants passing through them and typically account for more than 70% of all the pollution control achieved by the emissions control systems installed on these motor vehicles." Mot. at 6 (citing Mot. Attach. B (Gumbs Decl.) ¶¶ 9–10).

1991); *Auto. Parts Rebuilders Ass'n v. EPA*, 720 F.2d 142, 147 n.14, 153 n.40 (D.C. Cir. 1983) (citing 42 U.S.C. § 7541(b)(2); H.R. Rep. No. 95-294, at 292–93 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 1077, 1371–72); *United States v. Shaffer Muffler Shops, Inc.*, CIV. A. No. C-86-240, 1989 WL 200887, at *1 (S.D. Tex. Feb. 28, 1989).

Section 203(a)(3)(A) makes it unlawful "for any person to remove or render inoperative any device or element of design installed on or in a motor vehicle or motor vehicle engine in compliance with [CAA] regulations[.]" 42 U.S.C. § 7522(a)(3)(A). This section is generally referred to as the "anti-tampering law" or "tampering prohibition." *In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prods. Liab. Litig.*, 959 F.3d 1201, 1221 (9th Cir. 2020) ("[T]he text and structure of the CAA expresses a general policy to prohibit tampering by 'any person' at any time."); *Econ. Muffler*, 762 F. Supp. at 1243–44 (referring to the language in what is now section 203(a)(3)(A) as the "tampering provision" and finding anti-tampering violation where repair shop replaced factory-installed three-way catalytic converters with two-way catalytic converters); *see also In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prods. Liab. Litig.*, 264 F. Supp. 3d 1040, 1047 (N.D. Cal. 2017) (citing EPA, EPA-420-F-93-003, *Mechanics: An Important Law that Affects You: Don't Tamper with Emissions Controls!* (1993) ("Tampering includes: Removing such devices as the catalytic converter . . . .")).

Section 203(a)(3)(B), most relevant here, makes it unlawful—

> [F]or 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 requirements under this subchapter [Title II of the CAA], and where the person knows or should know that such part or component is being offered for sale or installed for such use or put to such use[.]

42 U.S.C. § 7522(a)(3)(B). This provision is generally referred to as the "defeat device prohibition." Mot. at 5; Opp'n at 9; *Utah Physicians for a Healthy Env't v. Diesel Power Gear LLC*, No. 2:17-cv-00032-RJS-DBP, 2020 WL 4282148, at *9, *16–17 (D. Utah Mar. 6, 2020) (holding defendants liable in citizen suit for the sale of "defeat devices" via the internet and installing, or knowingly causing another to install, "defeat devices"), *aff'd in part, rev'd in part*, No. 20-4043, 2021 WL 6122914 (10th Cir. Dec. 28, 2021). Many aftermarket car parts and components have been found to be "defeat devices," including "(1) straight pipes, (2) delete pipes (including turbo back exhaust pipes and downpipes-back), (3) vertical stacks, (4) delete tunes, (5) delete kits, and (6) onboard diagnostics malware." *Id.* at *7. *But see id.* at *8 n.82. "Straight pipes, delete pipes, and vertical stacks . . . mechanically bypass, defeat, or render inoperative emission control devices like the oxidation catalyst, the catalytic converter, the diesel particulate filter, the selective catalytic reduction system, oxygen sensors, and NOx sensors." *Id.* at *7. "Delete tunes, delete kits, and onboard diagnostics malware . . . electronically bypass, defeat, or render inoperative emission control devices or systems like the diesel particulate filter, the malfunction indicator light, limp mode, and the exhaust gas recirculation system." *Id*. at *8.

IV. FACTUAL BACKGROUND

Respondent is a family-owned California corporation founded in 1978; it is successfully engaged in the design and manufacture of automobile exhaust systems. Opp'n at 4; Sec. Am. Compl. ¶ 3; Answer ¶ 3; Opp'n Attach. 2 (Wofford Decl.) ¶ 1. It has its headquarters and manufacturing facility in Johnson City, Tennessee, and a research and development facility in Oxnard, California. Opp'n Attach. 2 (Wofford Decl.) ¶ 1; CX 6 at 1–2, 15. The parts Respondent manufactures are used by OEMs as originally installed equipment on new passenger vehicles and sold as aftermarket or replacement parts for such vehicles as well. Opp'n Attach. 2 (Wofford Decl.) ¶ 4; CX 6 at 2. Additionally, Respondent holds itself out as "a well-established manufacturer of racing parts with undeniable and extensive ties to the racing industry[.]" Opp'n at 1; Opp'n Attach. 2 (Wofford Decl.) ¶ 4. Respondent avers that its co-founder and CEO, Alex Borla, is an engineer "hold[ing] multiple patents for innovative exhaust technologies" as well as an experienced race car owner and driver. Opp'n at 4. The company represents that it has decades of "racing connections" with OEMs such as DaimlerChrysler, Ford, General Motors, Mazda, Nissan, Lexus, Toyota, and Honda. Opp'n at 4. It has also "sponsored, partnered with, and supplied race teams and drivers" for "traditional road and oval course racing and other motorsports such as drag racing, drift racing, autocross, and off-road competition series." Opp'n at 4. Sales of parts for racing vehicles make up [redacted] of the revenue of Respondent's business. CX 6 at 2.

Respondent acknowledges that it designed, manufactured, advertised, sold, and shipped to "United States customers" 4,787 units of the 57 different auto emissions parts and components referred to by the parties in this action as the "Subject Products" between January 15, 2015, and September 26, 2018.[9] Opp'n at 5, 7; Opp'n Attach. 5 (Stoner Decl.) ¶¶ 8, 19; Answer ¶ 53; *see also* Mot. Attach. A (Complainant's Statement of Material Facts Concerning Liability Not in Reasonable Dispute) (hereinafter "Statement of Material Facts" or "SMF") ¶ 2; Mot. Attach. C (Chew Decl.) ¶¶ 13–80; CX 8. These Subject Products were specifically designed by Respondent for installation on vehicles manufactured and sold by OEMs as street-legal passenger cars (hereinafter "street vehicles") such as the Chevrolet Corvette, Ford Focus, Mini Cooper S, and Jeep Wrangler. Mot. Attach. B (Gumbs Decl.) ¶¶ 26–85; Mot. Attach. A (SMF) e.g., ¶¶ 107, 188, 224, 245, 258, 305, 406, 466, 532. The sale of such street vehicles in the United States was authorized by EPA pursuant to COCs issued upon the OEM's demonstration of compliance of the vehicle's emission system with Title II's emissions standards. Mot. Attach. A (SMF) e.g., ¶¶ 5–7, 17–19, 29–35, 48–49, 59–65, et al.; Mot. Attach. D (Citations) ¶ 2; Mot. Attach. C (Chew Decl.) ¶¶ 86–92. The street vehicles' emission systems as originally designed and installed by the OEMs, and approved by the COCs, contained one or more three-way

[9] The "Subject Products" are those listed in a spreadsheet identified as "Appendix A" to the Second Amended Complaint. Mot. at 2 n.1. This spreadsheet is a reproduction of portions of an Excel spreadsheet Respondent submitted to Complainant on October 29, 2018, as part of its Response to Complainant's Second Request for Information. Sec. Am. Compl. ¶¶ 49, 50; Answer ¶ 50; Mot. Attach. C (Chew Decl.) ¶¶ 8–12. The spreadsheet responded to Complainant's inquiries as to any "exhaust system or exhaust system component" Respondent "offered for sale" "that enables the customer or end-user to bypass, defeat, or otherwise render inoperative a motor vehicle Emission Related Part[,]" the vehicles for which they were designed, and descriptions of their function. Sec. Am. Compl. ¶¶ 49, 50; Answer ¶ 50; CX 6; CX 7. The Subject Products are described as a Turbo Upgrade Kit, Downpipe w/o Cat., "X" Pipe, Front Pipe, Downpipe, Cat-Back, Long Tube Header, Adapters, Header/Muffler, Mid Pipe, and Manifold-Back. Sec. Am. Compl. App. A; Mot. Attach. D (Citations) ¶ 3.

catalytic converters ("TWCCs"). Mot. Attach. A (SMF) e.g., ¶¶ 8–10, 21–23, 36–42, 50–51, 66–72. The 57 Subject Products were designed to replace a portion of a street vehicle's emission system and, when installed on a street vehicle with original OEM equipment, resulted in the removal of one or more of the existing TWCCs from the vehicle's exhaust system. Mot. Attach. B (Gumbs Decl.) ¶¶ 12, 22, 25–86; Mot. Attach. A (SMF) e.g., ¶¶ 4, 12–13, 15, 25–26, 28, 44–45, 47, 53–54, 58, 74–77; Mot. Attach. D (Citations) ¶¶ 3, 5.

Respondent asserts that the Subject Products were "designed and intended for use in a competition-only vehicle" to "improve performance[.]" Opp'n at 5 (citing Opp'n Attach. 2 (Wofford Decl.) ¶¶ 5–6). More specifically, the Subject Products were designed for "the most popular models [of OEM street vehicles] for conversion to dedicated racing."[10] Opp'n at 5 (citing Opp'n Attach. 2 (Wofford Decl.) ¶¶ 6–7); RX 37–RX 65. Respondent advises that the sanctioning bodies for amateur racing such as the National Auto Sport Association ("NASA") and the SCCA establish rules for specific racing classes that specify the types of modifications that can be made to street vehicles in order to preserve equal competition within the classes, including modifications to the vehicle's exhaust system involving installation of the type of aftermarket racing parts that Respondent sells. Opp'n at 5–6 (citing RX 69 at 20 (Porsche Club of America ("PCA") Racing Rules for modification of stock cars stating "[a]ll components which serve only to control emissions may be removed"); RX 66 at 192 (SCCA Road Racing General Competition Rules (2019 ed.) for the Spec Mustang racing class allowing installation of "Long tube headers: Borla PN 17237 with X pipe")). After a street vehicle is converted for racing "[i]t is never driven on public streets and is not registered or insured for such use[,]" Respondent claims. Opp'n at 7 (citing Opp'n Attach. 3 (Isley Decl.) ¶ 14). According to Respondent, "[t]hese racing vehicles are trailered to the track to protect the racer's investment and due to the elimination of safety, emissions and other vehicle attributes that make them unsuitable for public roads." Opp'n Attach. 4 (Deery Decl.) ¶ 14(c).

As evidence that the Subject Products were intended solely for use with racing competition vehicles, Respondent avers that it voluntarily incorporated into its sales and marketing materials, including in its technical documentation supplied with parts, on its invoices,

[10] As an example of such a conversion, Respondent offers the Declaration of Jason Isley and articles he penned for Racer.com's online magazine. Opp'n Attach. 1 (Racer.com articles); Opp'n Attach. 3 (Isley Decl.) ¶ 2, 7–8. Mr. Isley states he and his wife are "active participant[s] in amateur road racing and autocross," both having won SCCA national championships in road racing and autocross. Opp'n Attach. 3 ¶¶ 3–4. In both his Declaration and his articles, Mr. Isley details his wife's conversion of a street-legal 1999 Mazda Miata to a "Spec Miata," an amateur racing vehicle consistent with SCCA General Competition Rules. Opp'n Attach. 1; Opp'n Attach. 3 ¶¶ 6–9. The conversion included modification of the car's exhaust system involving removal of the catalytic converters and installation of one of Respondent's kits containing two Subject Products (Parts 12667 & 60538). Opp'n Attach. 3 ¶ 10–11; Opp'n Attach. 1 at 13. The kit was given to Mr. Isley by Respondent as a promotional item in connection with the articles he intended to publish. Opp'n Attach. 3 ¶ 11. Mr. Isley indicates that post-conversion, the car has been used exclusively for racing, is transported by trailer and "never driven on public streets," and is neither registered nor insured for street operation, like other, similar vehicles he has converted. Opp'n Attach. 3 ¶¶ 12–14, 17. Based upon his experience, he believes all amateur race vehicles are transported by trailer or trucks. Opp'n Attach. 3 ¶¶ 15. As additional support, Respondent submits as Exhibit B to the Isley Declaration photographs of what appears to be Ms. Isley's vehicle both racing and trailered, bearing the insignia "Borla Exhaust," and the Declaration of its expert Thomas Deery regarding the "breadth and diversity" of amateur racing generally using OEM vehicles converted to a race car "piece by piece." Opp'n Attach. 3 Ex. B at 1–4; Opp'n Attach. 4 (Deery Decl.) ¶¶ 11–12, 15.

and in its digital catalogs, an informational disclaimer (based upon another parts manufacturer's settlement with the California Air Resources Board) stating that the parts were "LEGAL ONLY FOR RACING VEHICLES THAT MAY NEVER BE USED, OR REGISTERED, OR LICENSED FOR USE, UPON A HIGHWAY" (or something similar). Mot. Attach. D (Citations) ¶¶ 1, 4; Opp'n at 8; Opp'n Attach. 2 (Wofford Decl.) ¶ 10; Mot. Attach. A (SMF) e.g., ¶¶ 11, 24, 43, 52, 73. Respondent asserts it also physically affixed that warning to each product sold by way of a tag secured by a bolt which the purchaser had to manually remove with a tool in order for the part to be used in the vehicle. Opp'n at 8 (citing Opp'n Attach. 2 (Wofford Decl.) ¶ 10; RX 32–RX 35). However, Respondent sold the vast majority—[redacted]—of the units of the 57 Subject Products directly to wholesalers, including online wholesalers, with no interaction with, or tracking of, the end user or ultimate part usage. CX 6 at 3; Mot. Attach. C (Chew Decl.) ¶¶ 78–80; Mot. Attach. A (SMF) ¶ 604.

V. COMPLAINANT'S PRIMA FACIE CASE AS TO LIABILITY

Complainant argues in its Motion and Reply that the material facts demonstrating Respondent's liability for violating section 203(a)(3)(B) of the CAA, 42 U.S.C. § 7522(a)(3)(B), as set forth in Attachment A to its Motion, are not genuinely in dispute.[11] Mot. at 10–11; Reply at 2–5.

First, Complainant states that it is undisputed that Respondent is a "person" as that term is defined by the CAA.[12] Mot. at 12. The Act defines a "person" to include any "corporation, partnership, [or] association." Mot. at 12 (citing 42 U.S.C. § 7602(e)). Respondent has admitted in its Answer that it is a corporation organized under the laws of California. Mot. at 12 (citing Sec. Am. Compl. ¶ 3; Answer ¶ 3); *see also* Sec. Am. Compl. ¶ 34 ("Respondent is a 'person' as defined under section 302(e) of the CAA, 42 U.S.C. § 7602(e)."); Answer ¶ 34 ("Admitted.").

Second, Complainant states it is undisputed that the 57 Subject Products: (a) were manufactured and sold by Respondent; and (b) intended for use with, or as part of, motor vehicles or motor vehicle engines. Mot. at 12–13. As evidence of Respondent's manufacture and sale of the 57 Subject Products, Complainant cites the information and documents provided with Respondent's Response (dated October 29, 2018) to Complainant's August 16, 2018 Request for Information ("2018 RFI Response") (CX 5). Mot. at 13. Such information included Respondent's sales invoices, installation manuals for the Subject Products, a comprehensive spreadsheet, and public advertisements. Mot. at 13 (citing CX 7; CX 8; CX 353; Mot. Attach. D (Citations) ¶ 1); Reply at 2; *see also* Answer ¶ 53 ("Admitted that Respondent has previously

[11] Complainant's Statement of Material Facts Concerning Liability Not in Reasonable Dispute sets forth a total of 604 facts and citations in support thereof. Mot. Attach. A (SMF). Respondent did not file a statement specifically admitting or denying each of the numbered material facts set forth in Complainant's Statement of Material Facts. And, while Respondent indicated in its Opposition that there were "material facts" in dispute, it did not indicate any of those facts were ones listed in Attachment A to the Motion with the exception of a portion of Fact no. 604 as to the total number of Subject Products Respondent sold. Opp'n at 25–44. As such, this Tribunal takes the balance of the facts listed in Attachment A to the Motion (Facts nos. 1–603) as uncontroverted.

[12] The numeration here relies upon the recitation of the five elements of the alleged violations identified by Complainant in its Motion. Mot. at 11–18. For whatever reason, Complainant chose to reallocate the statutory language of CAA § 203(a)(3)(B) to identify only four elements in its Reply. Reply at 2–5.

sold or offered for sale the products identified in Appendix A through its website."); Opp'n Attach. 5 (Stoner Decl.) ¶¶ 8, 19 (conceding that Respondent sold 4,787 units of the Subject Products to "United States customers" during the relevant time span); Reply Attach. A (Chew Decl.) ¶ 67 (calculating Respondent sold 4,813 of the Subject Products during the relevant time span).

In support of the assertion that the Subject Products were "intended for use with or as part of any motor vehicle or motor vehicle engine," Complainant cites Respondent's installation manuals for the 57 Subject Products; the first page of each indicates that the Subject Product is "designed for" use on one or more specific makes and models of "motor vehicles" (hereinafter "Subject Vehicles").[13] Mot. at 12–13 (citing Attach. D (Citations) ¶ 1); Reply at 2 (citing CX 7; Mot. Attach. D (Citations) ¶ 1). The Subject Vehicles identified in the manuals, Complainant states, are all covered by COCs demonstrating they were manufactured by their OEMs to conform with the OEM's "motor vehicle" design as certified by the EPA to meet emission standards for street vehicles. Mot. at 13 (citing 42 U.S.C. § 7525(a)(1); 40 C.F.R. §§ 86.417-78(a), 86.437-78(a)(2), 1051.255(a); Mot. Attach. D (Citations) ¶ 2); Reply at 2–3. In addition, Complainant advises these vehicles are "motor vehicles" because they are self-propelled and "designed for transporting persons or property on a street or highway." Mot. at 13 (citing 42 U.S.C § 7550(2)); Reply at 3 (citing 42 U.S.C § 7550(2); Mot. Attach. D (Citations) ¶ 2 (Certification Applications)).

Third, as to the allegation that "a principal effect of the part or component is to bypass, defeat, or render inoperative any device or element of design" installed in compliance with CAA regulations, Complainant asserts that it is undisputed that the "effect" of the Subject Products was the removal of one or more of the TWCCs, which had been installed by the OEMs on the Subject Vehicles as "elements of design" to comply with EPA certification requirements for street vehicles. Mot. at 14; Reply at 3–5 (citing Mot. Attach. B (Gumbs Decl.) ¶¶ 12–13, 24–25). Complainant explains that the Subject Products fit in the vehicle's exhaust system where the OEM had previously installed one or more TWCCs. Reply at 4 (citing Mot. Attach. B (Gumbs Decl.)). According to Complainant, after such installation, the vehicle's exhaust system lacked one or more TWCCs that the OEMs had installed on such vehicle to meet CAA emission standards. Reply at 4–5 (citing CX 7 ("Function" column); Mot. Attach. B (Gumbs Decl.) ¶ 12). Complainant asserts Respondent acknowledged this effect in its 2018 RFI Response:

> The spreadsheet [attached thereto] included a column entitled "Function" that provided a response to request 2.b in the EPA's August 2018 Information Request. In request 2.b, the EPA asked for the following information: "Describe the function of the component in an exhaust system and, based upon the component's design, explain how it could enable the customer or end-user to bypass, defeat, or otherwise render inoperative an Emission Related

[13] For example, one installation manual states that Part no. 17251 "has been designed for the Jeep Wrangler equipped with a 3.8L V6 engine, two or four-wheel drive and automatic or manual transmissions." CX 103 at 1. Another installation manual reads that Part no. 17259 "is designed for the Chevrolet Corvette equipped with a 5.7L V-8 engine, automatic or manual transmissions." CX 118 at 1. A full compiled list can be found in the Motion. *See* Mot. Attach. D (Citations) ¶ 1.

> Part." In its response to request 2.b, Borla made similar statements for all 57 types of Subject Products. A typical example of these statements is, "Only if the original exhaust system is still in place, has not been modified, and retains the original catalytic converters, an end-user could decide to install this part to remove or replace the original catalytic converters."

Mot. at 14 (citing Mot. Attach. D (Citations) ¶ 3).

Separate and apart from Respondent's admission, Complainant states it performed a "series of analyses comparing each type of Subject Product with the OEM design of one or more of the motor vehicle(s) in which the Subject Product was designed to be used." Mot. at 14. According to Complainant, "[t]hese analyses consisted of a side-by-side comparison of one or more schematics for each type of Subject Product with a schematic of the OEM vehicle exhaust system or a portion of that system." Mot. at 14–15. A narrative report on EPA's analyses of the 57 Subject Products is set out in Mr. Gumbs's Declaration submitted as Attachment B to Complainant's Motion. Mot. at 15 (citing Mot. Attach. B (Gumbs Decl.) ¶¶ 26–82; Mot. Attach. D (Citations) ¶ 5). Mr. Gumbs avers in his Declaration that "[a]ll 57 of the Borla Products were designed to replace a portion of the motor vehicle's OEM-installed exhaust system. Each of the 57 Borla Products, when installed, would result in removal of one or more TWCCs installed by the OEM to comply with CAA requirements." Mot. Attach. B (Gumbs Decl.) ¶¶ 12, 22, 26–86.

Fourth, Complainant asserts it is undisputed that the catalytic converters removed upon installation of the Subject Products were a "device or element of design installed on or in a motor vehicle or motor vehicle engine in compliance with regulations under [CAA Title II]." Mot. at 15–16; Reply at 3–4 (citing Mot. Attach. B (Gumbs Decl.) ¶ 24). In support it explains that:

> (a) as indicated by Respondent's installation manuals, "each type of Subject Product was designed to fit one or more specific EPA-certified motor vehicle" (Mot. at 15 (citing 2018 RFI Resp.; CX 7; Mot. Attach. D (Citations) ¶ 1));
>
> (b) each of those specific motor vehicles was manufactured by the OEM pursuant to a COC issued by EPA based upon its evaluation of the COC application submitted to it by the OEM (Mot. at 15 (citing Mot. Attach. D (Citations) ¶ 2));
>
> (c) each COC application indicated the motor vehicle contained "one or more TWCCs to serve as pollution control devices or elements of design" (Mot. at 15–16, 15 n.8 (citing Mot. Attach. D (Citations) ¶ 2; Mot. Attach. B (Gumbs Decl.) ¶¶ 83–85); Reply at 4 (citing Mot. Attach. B (Gumbs Decl.) ¶ 24)); and
>
> (d) EPA "issued a COC for each test group vehicle, and the OEM[]installed TWCCs in the motor vehicles in conformity with the applicable COC and in compliance with the Act" (Mot. at 16

(citing 42 U.S.C. § 7525(a)(1); 40 C.F.R. §§ 86.417-78(a), 86.437-78(a)(2), 1051.255(a); Mot. Attach. D (Citations) ¶ 2); Reply at 3–4 (citing Mot. Attach. B (Gumbs Decl.) ¶¶ 12–13, 24–25)).

Fifth, Complainant asserts that it is undisputed that Respondent "knew or should have known" that the Subject Products it was selling would be "put to such use," i.e., the removal of catalytic converters installed by OEMs.[14] Mot. at 16; Reply at 5. As evidence thereof, Complainant states that Respondent's installation manuals for the Subject Products and advertisements convey that the products are "designed for" use on specific types of motor vehicles and Respondent has "admitted" in the Excel spreadsheet that the function of the Subject Products would result in the removal of OEM-installed TWCCs. Mot. at 17 (citing Mot. Attach. D (Citations) ¶ 1; CX 353, CX 7 ("Function" column)); Reply at 5. Complainant further cites the statements in Respondent's 57 installation manuals declaring the Subject Products could not be legally installed on a vehicle which would be "used, or registered, or licensed for use, upon a highway." Mot. at 17 (citing Attach. D (Citations) ¶ 4). Complainant states that this statement evidences that "Respondent knew or should have known that the Subject Products would be put to the use for which they were designed, and this use would require the removal of TWCCs installed by OEMs in motor vehicles." Mot. at 18.

VI. RESPONDENT'S ARGUMENTS IN OPPOSITION

A. Statutory Language

Respondent's principal argument in opposition to Complainant's Motion rests upon statutory interpretation. It asserts that the 57 Subject Products were designed and intended for installation "in a competition-only vehicle." Opp'n at 5 (citing Opp'n Attach. 2 (Wofford Decl.) ¶ 5). Vehicles "used solely for competition" are not "motor vehicles" under Title II of the CAA, Respondent claims, and therefore its actions are not prohibited by CAA § 203(a)(3)(B). Opp'n at 12.

In support of its "competition-use" argument, Respondent first cites the "plain language" of the statute. Opp'n at 13. Respondent states there are three categories of vehicles recognized under Title II: motor vehicles, nonroad vehicles, and vehicles used solely for competition. Opp'n at 13 (citing 42 U.S.C. § 7550(2), (10)–(11)). According to Respondent, "motor vehicles" are defined by their use, that is, they are "designed for transporting persons or property on a street or highway." Opp'n at 13. Respondent avers that a vehicle designed for non-street use, such as "a purpose-built race car even if based on a related consumer platform and parts," is "not a motor vehicle and parts for such competition vehicle would not constitute defeat devices." Opp'n at 13.

Respondent claims Complainant's ability to prevail in this case is dependent upon it proving that the "'attributes and design' of a car are static and can never be changed after the

[14] Complainant asserts that the "knowledge element" in section 203(a)(3)(B) does not require it prove that Respondent knew the Subject Products were actually installed in vehicles or to prove how the modified motor vehicles were used. Mot. at 16 (citing S. Rep. No. 101-228, at 124 (1989), *as reprinted in* 1990 U.S.C.C.A.N. 3385, 3509).

initial sale or importation of a new motor vehicle." Opp'n at 14–15. Respondent asserts that a vehicle's status under the CAA is not static, but mutable. Opp'n at 12–16. Respondent reasons that a motor vehicle converted to a competition-only vehicle "such that it is no longer designed for or even suitable or practical for use on the streets and highways" is no longer a "motor vehicle." Opp'n at 13. Similarly, a new "motor vehicle" manufactured by an OEM pursuant to a COC which is subsequently "stripped to its component parts and reassembled into an object of art or even just left as a pile of scrap at a junkyard is *not* a 'motor vehicle,' regardless of its past status." Opp'n at 12. Respondent supports this malleability argument by noting that unlike "motor vehicles" defined by the purpose for which they were initially designed, racing vehicles are defined by their "use," that is they are "vehicles used solely for competition." Opp'n at 14 (citing 40 C.F.R § 85.1703 (excluding from the definition of "motor vehicle" a vehicle lacking features customarily associated with safe and practical street or highway use, such as lacking a reverse gear, a differential, or safety features required by state and/or federal law)). At hearing, Respondent claims, it can and will support its malleability proposition by introducing evidence of the "steps typically followed to convert a street-legal vehicle into a racing vehicle involv[ing] extensive modification of many aspects of the car's structure and design and render[ing] it wholly unsuited for street use[.]" Opp'n at 14–15.

Additionally, Respondent suggests that upholding Complainant's argument—which it characterizes as prohibiting removal of "the relevant emissions device or design element [which] may have *previously* been part of a certified motor vehicle, even if such vehicle is *no longer* a motor vehicle[—]would lead to absurd results." Opp'n at 15. "Under such a 'past tense' view of the statute," Respondent claims, "even a wrench or other tool designed for removing a catalytic converter in order to replace it would be a 'part' 'intended for use with' a motor vehicle whose principal effect would be to defeat or render inoperative that emissions device," and so unlawful to sell. Opp'n at 15. According to Respondent, a "plainer and more sensible reading" of the statutory language is "that the phrase 'installed on or in a motor vehicle' refers to the *present* tense of whether the part is *currently* 'installed on or in a motor vehicle'" and the phrase "'installed . . . in compliance with regulations under this chapter' is most sensibly read to mean in *current* compliance with those regulations." Opp'n at 15–16 (citing *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1722 (2017)). Once that "present-tense reading of the relevant language is accepted," Respondent avers, "the language best supports the non-coverage of vehicles 'used solely for competition' . . . because even if they once were motor vehicles, they are such no longer and hence the devices on them are not presently 'installed on or in a motor vehicle.'" Opp'n at 16.

B. Legislative History and Intent

Respondent buttresses its interpretation of the plain language of the statute with citation to the CAA's legislative history. Opp'n at 16, 23. It explains that prior to the 1990 CAA Amendments, it was "understood" that "vehicles used solely for competition were not designed for use on the streets and highways and hence not encompassed by the CAA definition of a 'motor vehicle' or subject to pollution requirements." Opp'n at 16, 23. In support it cites an exchange during the consideration of the prior 1970 amendments, wherein it was represented at one point that "*the act deals only with automobiles used on our roads in everyday use*. The act would not cover the types of racing vehicles to which the gentleman referred ['vehicles or

vehicle engines manufactured for, *modified for or utilized in organized motorized racing events*'], and present law does not cover them either." Opp'n at 23 (citing RX 71 (Staff of S. Comm. on Pub. Works, 93d Cong., A Legislative History of the Clean Air Act Amendments of 1970, Ser. No. 93-18, at 117 (Comm. Print 1974))).

Respondent claims, however, that with the 1990 Amendments adding emission requirements for "nonroad vehicles," it became necessary for Congress to consider adding an "express exemption" for competition-only vehicles "in order to maintain their unregulated status[,]" as the term "nonroad" could encompass racing vehicles "absent an express exclusion." Opp'n at 16–17. Respondent reasons that Congress found that adding such an express general exemption was unnecessary, because "[i]f a vehicle is not a 'motor vehicle,' there [is] no need to create an exception and doing so would add confusion rather than clarity." Opp'n at 18. Thus, Respondent claims, the addition of the "express exemption for competition vehicles from nonroad vehicle regulations, but not from 'motor vehicle' regulations, perfectly illustrates the point that such vehicles were *never* 'motor vehicles' needing an exemption from prior regulations but were plainly 'nonroad vehicles' subject to that separate set of requirements but for the express exemption." Opp'n at 19. As such, the lack of express exemption, Respondent asserts, "confirms, rather than refutes, that vehicles used solely for competition are not 'motor vehicles' under the CAA." Opp'n at 19.

Further, Respondent asserts, that "[e]ven if one were to assume, arguendo, that some further exclusion was required for racing vehicles, EPA itself, of course, recognizes such an exclusion elsewhere in its regulations and guidance." Opp'n at 19 (citing, inter alia, 40 C.F.R. § 85.1511(e) (allowing importation of racing vehicles provided the vehicle meets one or more of the exclusion criteria described in 40 C.F.R. § 85.1703)). Respondent advises that the exclusion criteria in § 85.1703 relate to the existing physical attributes of the vehicle, "but nowhere does the regulatory criteria indicate that the vehicle must have been designed or manufactured with such physical attributes *ab initio*." Opp'n at 19. Therefore, it suggests a street vehicle modified or retrofitted to exhibit racing vehicle characteristics would no longer be a "motor vehicle." Opp'n at 19. In further support, it cites to EPA guidance on importing vehicles which states that vehicles "exclusive[ly] use[d] for competition or racing, or lack[ing] features associated with practical street or highway use" are excluded from the CAA's emission requirements, but "note[s] that some vehicles excluded from the motor vehicle requirements may be subject to non-road vehicle and emission standards which have become effective in recent years." Opp'n at 19–20 (quoting RX 73 (EPA, EPA-420-B-11-015, *Overview of EPA Import Requirements for Vehicles and Engines* (2011)) at 17, 18, and citing RX 72 (EPA, EPA-420-B-10-027, *Procedures for Importing Vehicles and Engines into the United States* (2010))). Further, Respondent notes that EPA's guidance mandates that applications seeking importation approval for a competition vehicle contain "[a] list of *street* features that are lacking (features *that have been removed* or have never been installed that would permit safe driving on streets or highways)." Opp'n at 20 (quoting RX 73 at 18). Respondent insists this guidance supports its position that "previously covered motor vehicles can be redesigned into non-covered racing vehicles." Opp'n at 20.[15]

[15] In further support for this point, Respondent cites RX 72 at 66, 68; 40 C.F.R. § 1039.801 (defining "model year" for an engine "converted to a nonroad engine"); *id.* §§ 1051.801, 1054.801; Control of Emissions From Nonroad Spark-Ignition Engines and Equipment, 73 Fed. Reg. 59,034 (Oct. 8, 2008) (recognizing the conversion of engines

C. Genuine Issues of Fact

In addition to its legal assertions supporting its competition-use argument, Respondent suggests that Complainant's Motion should be denied on the basis that there are genuine issues of material fact in dispute. Opp'n at 25–44. Specifically, it suggests that Complainant is required to, but has not, presented evidence regarding its "intent" and whether "it knew or should have known that its parts would be used on motor vehicles, and **not** on vehicles used solely for competition." Opp'n at 25, 27, 38–40. On the other hand, it states that it has presented direct testimony and supporting evidence "both as to the intended and actual use of the parts in competition-only vehicles[.]" Opp'n at 25, 27 (citing Opp'n Attach. 2 (Wofford Decl.) ¶¶ 5–6, 8, 9; Opp'n Attach. 4 (Deery Decl.) ¶¶ 12–15; RX 37–RX 69). Specifically, Respondent advises that it voluntarily incorporated in its sales and marketing materials the disclaimer stating the parts were "LEGAL ONLY FOR RACING VEHICLES THAT MAY NEVER BE USED, OR REGISTERED, OR LICENSED FOR USE, UPON A HIGHWAY." Opp'n at 8, 32. Additionally, Respondent asserts that it physically affixed that warning to each product it sold by way of a tag secured by a bolt which the purchaser had to manually remove with a tool in order for the part to be used in the vehicle. Opp'n at 8, 30 (citing Opp'n Attach. 2 (Wofford Decl.) ¶ 10; RX 32–RX 35).

Moreover, Respondent contends that the Subject Products did not have the "principal effect" of removing emissions devices from "motor vehicles," as required for there to be a violation, reiterating the claim that the legality of the removal of the catalytic converters is dependent upon "whether the vehicle on which the part is to be used constitutes a motor vehicle." Opp'n at 34. It claims "[i]f the [street] vehicle has been, or is in the process of being, redesigned into a vehicle used solely for competition, then the Subject Products are not bypassing or defeating any emissions devices 'on or in a motor vehicle.'" Opp'n at 34. Thus, according to Respondent, "catalytic converters included in compliance with the COC governing the past status of a vehicle [as a 'motor vehicle'], but no longer required given the changed current status of such vehicle [to a vehicle 'used solely for competition'] can no longer be deemed to *currently* be 'installed in compliance with regulations' that no longer apply." Opp'n at 34–35.

Finally, Respondent contests the number of parts properly at issue in this case, stating that the appropriate number of units at issue for purposes of this matter should be 4,787, reflecting the number it sold to United States customers. Opp'n at 40–44 (citing Opp'n Attach. 5 (Stoner Decl.); RX 2; RX 7).

VII. COMPLAINANT'S RESPONSE TO RESPONDENT'S COMPETITION USE ARGUMENT

In its Motion, Complainant characterizes Respondent's "competition-use argument" as an "artifice," "illusory," "without statutory basis," and "pure speculation," which "fails as a matter

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from one category to another); EPA, EPA-420-F-09-014, *Mini Trucks: Importing Used Motor Vehicles As Nonroad Vehicles* (2009). *See* Opp'n at 20–23.

of law." Mot. at 20, 22–23; *see also* Reply at 5–6; Answer at 7. In direct contrast to Respondent's mutability claim, Complainant staunchly takes the position that "motor vehicles" cannot be converted or "redesigned" to be "'vehicles used solely for competition' and thereby, somehow disappear from the jurisdiction of the CAA." Mot. at 20–22 (citing Resp't PHE at 7–11). Complainant states that the CAA's definition of a "motor vehicle" turns on a vehicle's *initial* "designed" capabilities as built into it by the OEM and certified by EPA. Mot. at 22; Reply at 9 (citing 42 U.S.C. § 7550). As the term "designed" is not defined in the statute, Complainant argues that it takes its common meaning of "to create, fashion, execute, or construct according to plan." Mot. at 25 (citing Dictionary by Merriam-Webster, www.merriamwebster.com)*; see also* Reply at 13 (citing *Consumers Scrap Recycling,* 11 E.A.D. at 296, as support that "design" means "to devise for a specific function or end" or "to have [as] a purpose"). Such definition does not encompass "to use," Complainant reasons. Mot. at 25. Thus, according to Complainant, a vehicle initially "designed" to transport passengers on the streets by its OEM, and so certified by EPA, remains a "motor vehicle" under the CAA, even if it is subsequently modified or used for competition motorsports or is not used on public roads. Mot. at 22; Reply at 9–10.

Further, Complainant observes that the "CAA expressly lists exemptions to the Defeat Device prohibition in section 203(b) and nowhere mentions competition use[,]" and so, there is no exemption in section 203(a)(3)(B) for parts or components for vehicles used in competition motorsports. Mot. at 22 (citing 42 U.S.C. § 7522(b); Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles—Phase 2, 80 Fed. Reg. 40,138, 40,527 (July 13, 2015)); Mot. at 27 (citing *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616–17 (1980) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.")). Complainant declares that the listed exemptions would be "superfluous" "if a 'motor vehicle' could morph into something else, and thereby escape the purview of section 203(a)(3)(B)[.]" Mot. at 28 (citing *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is 'a cardinal principle of statutory construction' that 'a statute ought . . . to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'")).

Complainant next advises that if Congress had wanted to build "consumer electability and temporal fluidity into a vehicle's identity," it could have easily included a provision that motor vehicles are "mutable based on [their] post-certification use or physical alterations[.]" Mot. at 25–26. Complainant points out, however, "such options were not enacted by Congress." Mot. at 26. Instead, the Act's anti-tampering provision in CAA § 203(a)(3)(A) explicitly and broadly prohibits consumers from removing or rendering inoperative emission devices and elements of design installed on motor vehicles. Mot. at 26; Reply at 9–10. As such, Complainant concludes that Respondent's interpretation of the statute, that consumer removal of emissions parts "is fine as long as the vehicle is used solely for competition[,]" "is simply untenable with the plain language of section 203(a)(3)(A)." Mot. at 26 (citing *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.")).

Moreover, contrary to Respondent's representation, Complainant asserts that the 1990

CAA Amendments extending the EPA's CAA dominion "to nonroad vehicles and nonroad engines (snowmobiles, ATVs, off-highway motorcycles, locomotives, agricultural equipment, and the like)" actually "support finding that no competition use exemption exists for motor vehicles." Mot. at 28. The category of "vehicle used solely for competition" is only an exception to the definition of "nonroad vehicle . . . meaning Congress did not intend to create a 'used solely for competition' exemption for motor vehicles[,]" Complainant declares.[16] Mot. at 28–29 (citing S. Rep. No. 101-228, at 103 (1989), *as reprinted in* 1990 U.S.C.C.A.N. 3385, 3489 (noting the phrase "a vehicle used solely for competition" in the nonroad definition "means racing vehicles not capable of safe and practical use on streets and highways" and "does not include those vehicles that are capable of being modified for safe and practical use on streets and highways")); Reply at 12–13. Therefore, "[p]urpose-built, dedicated race vehicles, such as vehicles raced in the NASCAR Sprint Series and IndyCar Series are examples of such vehicles excluded under the Act[,]" Complainant acknowledges.[17] Mot. at 29. However, Complainant avers, by such amendments, "[c]learly, Congress did not want to exempt vehicles that had even the potential for use on streets and highways from coverage under the CAA." Mot. at 29–30 (citing *United States v. McDuffy*, 890 F.3d 796, 800 (9th Cir. 2018) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.")); Reply at 12–13.

Complainant defends its foregoing arguments by stating that its "plain meaning" reading of the word "designed" as marking a vehicle's status at the beginning of its life aligns with the CAA's "structure and purpose." Mot. at 30–31 (citing *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) ("In ascertaining the plain meaning of [a] statute, [this Tribunal] must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.")); Reply at 11–12 (quoting *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) ("A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.")). The CAA mandates that "EPA administer a certification program for new motor vehicles, in which manufacturers must first demonstrate through emissions testing of a prototype vehicle, that their

[16] Complainant advises that consistent with the Act, EPA's certification regulations set forth an exemption for nonroad engines/equipment used solely for competition, but state that such exemptions do not apply to "motor vehicles." Mot. at 28 n.12 (citing 40 C.F.R. §§ 85.1701(a)(1), 1068.235).

[17] Complainant observes in its Reply that "Respondent focuses its discussion of its competition exclusion exclusively on either purpose-built nonroad racing vehicles or motor vehicles converted to nonroad competition vehicles," suggesting "that Respondent is not challenging the applicability of the Act to motor vehicles that are tampered, used sometimes for competition, but also used on the public roads, or motor vehicles that are not converted such that the vehicle loses the features that would allow the vehicle to be capable of use on streets or highways." Reply at 9 n.4. However, Complainant remarks that Respondent has "not put forth any evidence as to how many of the vehicles that are used for competition really fit the [full conversion] criteria[.]" Reply at 9 n.4. Complainant notes EPA's regulations already exempt nonroad equipment used solely for competition from certification (40 C.F.R. § 1039.620): "the regulations for compression-ignition engines clearly indicate that equipment manufacturers may use *uncertified engines* if the vehicles or equipment in which they are installed will be used solely for competition" (*id.* § 1039.620(a)); "EPA considers a vehicle or piece of equipment to be one that will be used solely for competition *if it has features that are not easily removed that would make its use other than in competition unsafe, impractical, or highly unlikely*" (*id.* § 1039.620(c)); and "certain other conditions concerning the exemption apply" (*id.* § 1039.620(d), (e)). Reply at 16.

design will satisfy emissions standards" throughout the vehicle's "useful life." Mot. at 30–31 (citing 42 U.S.C. §§ 7521(a)–(b), 7525). Moreover, "there are a whole host of other provisions of the Act established by Congress to ensure emission standards are achieved post-sale of the vehicle." Reply at 10 (citing 42 U.S.C. § 7521(a)(1), (d) (requiring that the CAA emission standards continue to be met for the "useful life" or the vehicle or engine); *id.* § 7525(b) (providing confirmatory emissions testing and certificate voiding procedures); and *id.* § 7541 (providing for compliance by vehicles and engines in actual use, including: emission control warranties; testing of vehicles in actual use; requiring a plan for remedying nonconformity of vehicles in actual use; instructions for maintenance and use; and requiring vehicle or engine certification label or tag)). "Thus, it makes sense that Congress' use of the word 'designed' in defining 'motor vehicle' speaks to the vehicle when certified and not something its users can change[,]" Complainant asserts. Mot. at 31; Reply at 11.

Further, ascribing the definition of "motor vehicle" based on the designed capability, and not use or later physical alterations, is consistent with the CAA's overall policies and objectives to reduce pollution and protect health, Complainant claims. Mot. at 31–32 (citing *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am.*, 508 U.S. 439, 455 (1993) ("[I]n expounding a statute, we [must not be] guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy."); 42 U.S.C. § 7401(a), (b)). Complainant reasons that "a static definition of motor vehicle [] establishes certainty, facilitates compliance, makes the EPA's regulatory authority clear, and enables the EPA to enforce the Tampering and Defeat Device Prohibitions," while reading a competition use exemption into the Act would thwart such purposes and undermine such objectives. Mot. at 32; *see also* Reply at 11 (quoting *United States v. Nader*, 542 F.3d 713, 720 (9th Cir. 2008) ("It is a cardinal canon of statutory construction that statutes should be interpreted harmoniously with their dominant legislative purpose.")).

Additionally, Complainant challenges Respondent's assertion that various sections of EPA regulations and guidance are in accord with its reading of the status of "motor vehicles" as malleable. For example, Complainant advises that the regulation Respondent primarily cites as support for its conversion defense, 40 C.F.R. § 85.1703, which further defines the term "motor vehicle" based upon features, does not mention competition use, or vehicle use at all. Mot. at 32–33 (citing Resp't PHE at 8–10; 40 C.F.R. § 85.1703); Reply at 14–15. Moreover, Complainant recalls that as part of rulemaking conducted in 1974, EPA explicitly rejected a request to exempt from the definition of "motor vehicle" certain vehicles by virtue of their owners' "intended use," stating doing so would be "virtually unmanageable and inconsistent with the Act[.]" Mot. at 34 (emphasis omitted) (quoting Exclusion and Exemption of Motor Vehicles and Motor Vehicle Engines, 39 Fed. Reg. 32,609, 32,609 (Sept. 10, 1974)). Rather, Complainant relates that EPA stated it was adopting a "'capable of' test which is consonant with the literal language and the apparent intent of the Act." Mot. at 34 (quoting Exclusion and Exemption of Motor Vehicles and Motor Vehicle Engines, 39 Fed. Reg. at 32,609).

As to guidance allowing the importation of uncertified converted racing vehicles, Complainant asserts that for all purposes under the CAA a motor vehicle is deemed "new" at the time of importation and must either be covered by a COC or be excepted therefrom. Mot. at 34–35 (citing 42 U.S.C. § 7550(3); Resp't PHE at 10 (referencing RX 72, RX 73)). Complainant asserts that the policies Respondent references apply the regulatory definition of a "motor

vehicle" in 40 C.F.R. § 85.1703 to determine if certification is necessary. Mot. at 35. It further advises that Respondent omits mentioning "that the guidance explicitly provides that a vehicle originally manufactured as a U.S.-version vehicle that has since been modified or altered will not meet U.S. emission requirements, and cannot be imported, unless on condition the importer shows within 120 days that the vehicle has been brought back to its original configuration or imported through an Independent Commercial Importer specially designated by EPA, which will convert the vehicle to meet EPA emission standards." Mot. at 35 (citing RX 73 at 6; RX 72 at 25, 36–37).

In addition, Complainant claims the other non-road vehicle regulations provide no support for Respondent's position. Regarding the provision that Respondent primarily relies upon for supporting that a vehicle can be converted from one status to another because it references the use of a "motor vehicle engine" as a nonroad engine, 40 C.F.R. § 1039.801, Complainant asserts:

> What this provision is really referring to, however, is that a motor vehicle engine can be used in non-motor vehicle purposes, such as when a car engine is marinized for use in boats. But in such instances, the engine, which is not certified, is removed from the motor vehicle, which is certified, and the motor vehicle essentially ceases to exist. The engine, used in the nonroad application, "becomes new" and must be covered by a nonroad certificate and must meet a host of certain other requirements. Under the regulations, certified motor vehicles can be converted to nonroad vehicles, but such vehicles must meet nonroad engine emission certification and a host of other conditions apply. These regulations do not contemplate a conversion of a certified motor vehicle to an unregulated competition vehicle, as Respondent asserts.

Reply at 15 (internal citations omitted) (citing 40 C.F.R. §§ 1039.605, 1039.610, 1048.605, 1048.610, 1051.605, 1051.610).

Moreover, Complainant declares that recognition of Respondent's competition-use defense would effectively "eviscerate" enforcement of the CAA's defeat device prohibition, stating that "the Act's focus on vehicle design [as conceived by the manufacturer] is the fulcrum upon which the Act's control strategy stands." Mot. at 35; Reply at 9. In explanation, it advises that currently it can prove "intent" by showing the defeat device was "designed or advertised as compatible with an EPA-certified motor vehicle regardless of how that vehicle was actually used." Mot. at 35–36. However, under Respondent's defense, where a motor vehicle could lose its identity due to its use or by alteration, Complainant would need to prove each purchaser's use—"a nearly impossible burden," it states, where many manufacturers and sellers do not even know who the end users of these parts are. Mot. at 36. In this scenario, Complainant suggests it would have to show that an alleged violator (1) "intended a defeat device to be installed in a motor vehicle other than a motor vehicle 'converted' to a nonroad vehicle used solely for competition"; and (2) "knew or should [have] known that the defeat device would be installed in a motor vehicle that has not otherwise been converted to a nonroad vehicle used solely for competition and that the motor vehicle still has its emission-related elements of design still

installed." Reply at 6.

Complainant proclaims imposing such an increased enforcement burden on EPA runs counter to the 1990 CAA Amendments, which added the prohibition on the manufacture and sale of defeat devices to the then-existing anti-tampering provision. Mot. at 36 (citing 42 U.S.C. § 7522(a)(3) (1988)). Congress's addition of the defeat device prohibition, it claims, was explicitly intended to "eliminate[] the need for EPA to prove each part was actually installed on a motor vehicle, requiring instead only that the defendant know or should know that the part was intended to be installed on a motor vehicle or motor vehicle engine." Mot. at 36–37 (citing 42 U.S.C. § 7522(a)(3)(B); S. Rep. No. 101-228, at 124, 1990 U.S.C.C.A.N. at 3509 ("Presently, EPA must show that the manufacture or sale of a defeat device is a violation of section 203(a) by proving that such an activity causes tampering by a regulated party. Rather than require such an indirect and cumbersome method of proof, a new section 203(a)(3)(B) has been added to the Act to clearly prohibit the manufacture, sale, or offering for sale of such devices where it is known or should be known that they will be used for tampering." (internal citation omitted))).

Second, Complainant suggests that under Respondent's proposed statutory construction, "ambiguities would abound resulting in an unworkable construction" that this Tribunal should not embrace. Mot. at 37 (citing *Robers v. United States*, 572 U.S. 639 (2014); *United States v. Cleveland Indians Baseball Co*., 532 U.S. 200 (2001); *Mac's Shell Serv., Inc. v. Shell Oil Prods. Co. LLC*, 559 U.S. 175 (2010)). Such ambiguities could "paralyze" EPA's enforcement and "essentially enable removal of emission controls on potentially millions of vehicles that use our public roads with little risk of consequence[,]" Complainant declares. Mot. at 38 (citing *United States v. Volvo Powertrain Corp*., 854 F. Supp. 2d 60 (D.D.C. 2012) ("An interpretation 'which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable,' . . . [or] unreasonably difficult to enforce."); *Griffin*, 458 U.S. at 571 (statutory construction must be consistent with legislative purpose)).

In sum, Complainant represents, as a matter of fact, that all of Respondent's Subject Products were "advertised and designed for use on vehicles that manufacturers built and obtained EPA certification to meet emission standards for motor vehicles." Mot. at 23. "Therefore, even if Respondent claimed (which it does not) and could prove that its products are used exclusively on competition-only vehicles (which it has not), those vehicles remain 'motor vehicles' subject the CAA Defeat Device Prohibition because they were designed for on-road use and EPA certified them as 'motor vehicles.'" Mot. at 23. However, Complainant submits that this Tribunal need not decide the purely legal issue of the existence of a racing exclusion in the definition of "motor vehicle" or the defeat device prohibition, "because Respondent has failed to provide any evidence showing that any of the Subject Products at issue in this Proceeding were indeed installed or used on a vehicle used solely for competition." Mot. at 23 (citing *United States v. Gear Box Z Inc.*, 526 F. Supp. 3d 522, 528 (D. Ariz. 2021)); *see also* Mot. at 24 (citing *Fed. Trade Comm'n v. Morton Salt Co*., 334 U.S. 37, 44–45 (1948) ("[T]he burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits[.]")). Rather, Complainant states the facts show that "Respondent

sold the Subject Products indiscriminately to the public, mainly to wholesalers,[18] and advertised the Subject Products to the public without taking any affirmative act to insure or confirm its Subject Products were only used on vehicles solely for competition." Mot. at 23. Complainant also proclaims that "Respondent provides no information to show its various disclaimers about 'competition only' had any effect at all on keeping the defeat devices off public roads." Mot. at 23.

VIII. DISCUSSION

A. Statutory Interpretation

As detailed above, the primary dispute in this case is one of statutory interpretation.

Regarding statutory interpretation, the EAB has instructed that:

> When interpreting the language of a statute, the starting point is always the language of the statute itself. "If the statute is clear and unambiguous, that is the end of the matter, for the court * * * must give effect to the unambiguously expressed intent of Congress." In addition, "[t]he plain meaning of legislation should be conclusive, except in the rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters."
>
> A statute is ambiguous if it is "capable of being understood in two or more possible senses or ways." As the Supreme Court has emphasized, "[t]he meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." Thus, "[i]t is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" "In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole."

U.S. Army, Fort Wainwright Cent. Heating & Power Plant, 11 E.A.D. 126, 141 (EAB 2003) (Remand Order on Interlocutory Appeal) (citations omitted).

CAA section 203, the provision in dispute here, reads in relevant parts, as follows:

> (a) Enumerated prohibitions
>
> The following acts and the causing thereof are prohibited—

[18] Complainant asserts that Respondent sold [redacted] of the units of the Subject Products to wholesalers and/or distributors of automotive parts, one of whom is "one of the largest e-commerce companies in the world." Mot. at 24 (citing Mot. Attach. C (Chew Decl.) ¶ 78; CX 8 at 873–76, 878, 886).

> (1) in the case of a manufacturer of new motor vehicles or new motor vehicle engines for distribution in commerce, the sale, or the offering for sale, or the introduction, or delivery for introduction, into commerce, or (in the case of any person, except as provided by regulation of the Administrator), the importation into the United States, of any new motor vehicle or new motor vehicle engine, manufactured after the effective date of regulations under this part which are applicable to such vehicle or engine unless such vehicle or engine is covered by a certificate of conformity issued (and in effect) under regulations prescribed under this part or part C in the case of clean-fuel vehicles (except as provided in subsection (b));
>
> * * *
>
> (3)(A) for any person to remove 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 prior to its sale and delivery to the ultimate purchaser, or for any person knowingly to remove or render inoperative any such device or element of design after such sale and delivery to the ultimate purchaser; or
>
> (B) 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[.]

42 U.S.C. § 7522(a)(1), (a)(3)(A), (a)(3)(B).

A "motor vehicle" is defined in Title II as a "self-propelled vehicle *designed* for transporting persons or property on a street or highway." *Id.* § 7550(2) (emphasis added). The phrase "vehicle used solely for competition," on which Respondent's argument is based, neither appears in section 203 nor is defined in whole or in part in Title II. *Id.* § 7522. However, the phrase is used in the statutory definitions provided for "nonroad vehicle" and "nonroad engine." *Id.* § 7550(10), (11). A "nonroad vehicle" is defined as "a vehicle that is powered by a nonroad engine and that is not a motor vehicle *or a vehicle used solely for competition*." *Id.* § 7550(11) (emphasis added). Similarly, a "nonroad engine" is defined as "an internal combustion engine (including the fuel system) that is not used in a motor vehicle *or a vehicle used solely for*

competition[.]" *Id.* § 7550(10) (emphasis added). "Nonroad vehicles" and "nonroad engines" are also not referenced in section 203, but they are, like motor vehicles, currently subject to emissions limitations set by EPA. *Id.* § 7547. The definitions of "nonroad vehicle" and "nonroad engine" provide the foundation for Respondent's statutory argument that vehicles "used solely for competition" are not "motor vehicles" to which section 203 applies, and that, therefore, selling the 57 Subject Products designated for vehicles "used solely for competition" is not prohibited by section 203(a)(3)(B).

As contextual support for its conclusion, Respondent states that by including reference to "vehicles used solely for competition" when Title II's coverage was broadened to nonroad vehicles in 1990, Congress intended to retain the implicit exclusion which existed in Title II's definition of "motor vehicle" for "vehicles used solely for competition." Opp'n at 54–55. The rationale is that "vehicles used solely for competition" are not "motor vehicles" because they are not "designed for transporting persons or property on a street or highway," but could arguably be interpreted to be "nonroad vehicles" as they are driven on racetracks, so an exclusion was provided in that regard. Opp'n at 54–59.

On its face, Respondent's statutory analysis is logical and, to the extent that the phrase "vehicles used solely for competition" refers to professional racing cars, such as Formula 1, IndyCar, or NASCAR vehicles—designed and purpose-built to be driven only on racetracks—is probably correct.[19]

However, as Respondent admits in its Opposition, this case does *not* involve such purpose-built professional competition vehicles or parts for such vehicles. Opp'n at 2. Rather, this case involves parts explicitly manufactured for vehicles which were purpose-built or *designed* by their OEMs to carry passengers on streets and highways, such as the Chevrolet Corvette and Camaro, Ford Mustang, Dodge Challenger, Mazda Miata, and Porsche Cayman. Opp'n at 2, 5, 33 (citing Opp'n Attach. 2 (Wofford Decl.) ¶ 6; RX 37–RX 65). Thus, in terms of general class, type, or category, the parts at issue here are *for "motor vehicles"* under Title II. In addition, Respondent's argument that the categories of "motor vehicle" and vehicle "used solely for competition" are mutually exclusive (*see* Opp'n at 31) is unavailing, and the Tribunal finds that the text of the CAA is clear: The phrase "a vehicle used solely for competition" found in the definitions of "nonroad vehicle" and "nonroad engine" does not carve out competition vehicles from the "motor vehicle" classification. Instead, the proper reading of the statute is that nonroad competition vehicles are exempt from the standards applicable to nonroad vehicles more broadly, and motor vehicles which are used for competition are still motor vehicles. Moreover, it does not seem that the Subject Products are parts designed, manufactured, and sold solely for such motor vehicles *post-conversion* to amateur racing vehicles, i.e. then "vehicles used solely for competition." Rather, Respondent suggests its Subject Products are used to *facilitate* such conversions.[20] Consequently, at the moment of sale, Respondent's parts are primarily intended

[19] Complainant appears to accept the interpretation that purpose-built racing vehicles are not "motor vehicles" subject to the defeat device prohibition. Mot. at 29 ("Purpose-built, dedicated race vehicles, such as vehicles raced in the NASCAR Sprint Series and IndyCar Series are examples of such vehicles excluded under the Act."); CX 309 at 2.

[20] In spite of Respondent's argument that its parts are used on converted vehicles whose emissions equipment "may have long been abandoned or disabled by the owner[,]" its own installation manuals demonstrate that Respondent

to be installed in what are then clearly "motor vehicles," at least in terms of still having their OEM-provided, Title II-compliant, emissions equipment. Opp'n at 2, 5, 29, 33 (citing Opp'n Attach. 2 (Wofford Decl.) ¶ 6, RX 37–RX 65).[21]

Further, the Act makes the mere *manufacture* of such parts for "motor vehicles" unlawful if the manufacturer "knows or should know" of the parts being put to use as defeat devices. 42 U.S.C. § 7522(a)(3)(B). A very large, successful auto parts designer and manufacturer like Respondent can hardly deny being unaware of the potential "dual use" of its parts, beyond merely for vehicles used in officially sanctioned amateur racing competitions, regardless of how they are labeled.[22] *See, e.g.*, EPA & U.S. Dep't of Transp., EPA-420-R-16-901, *Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- And Heavy-Duty Engines and Vehicles—Phase 2: Response to Comments for Joint Rulemaking* (2016), at 1913 ("SEMA [Specialty Equipment Marketing Association (Respondent's main trade organization (Opp'n at 57))] has been working with the EPA on ways to regulate potential dual-use products, defined as

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understood this would not always be the case. Opp'n at 35 ("On such a converted vehicle, major exhaust components, including the catalytic converters, may have long been abandoned or disabled by the owner, and thus the installation of the subject parts will not bypass, defeat, or otherwise have any effect on such absent emissions devices. Thus, even if EPA is correct that a motor vehicle can never be converted into a non-motor vehicle, the parts sold by Borla would have no effect at all on emissions devices already removed by the car's owner."). For example, Exhibit CX 43 is the installation manual for Respondent's Subject Products (part nos. 12563 and 12564) on a Porsche Cayman-S. Figure 2 of the Exhibit shows a technician removing the "original exhaust system," and it is apparent that there are two large components (with ribbed casings) being extracted from the rear of the vehicle. CX 43 at 3. Exhibit CX 47 identifies these structures as the location of the catalytic converters. *See* CX 47 at 1.

As another example, Exhibit 68 is the installation manual for Subject Product no. 12662 on a Cadillac CTS-V Coupe. The installation manual describes how to remove the "OE exhaust system." CX 68 at 3. Figure 3 of the Exhibit shows the underside of a vehicle with the original equipment in place; there are two prominent bulbous structures apparent on the right of the Figure. CX 68 at 3. Exhibit 72 identifies these structures as the location of the catalytic converters. *See* CX 72 at 1. Using other automobile features as landmarks, it is easy to discern that these bulbous structures are absent in the post-conversion photos. CX 68 at 4 (Fig. 5).

[21] Respondent's statutory argument in essence asks this Tribunal to take a huge leap and read the narrow exclusion for "vehicles used solely for competition" from "nonroad vehicle" into "motor vehicle," that is, to encompass all "motor vehicles convertible or ostensibly in the process of being converted to vehicles to be used solely for competition." Respondent cites no other statutory language to bolster its insistence that a motor vehicle may be *redesigned* to a competition-only vehicle and thereby cease to be regulated as a "motor vehicle," and the Tribunal has found none on its own review. The Tribunal is not ruling out that such a shift in regulatory status is possible; Exhibits in this matter allude to the potential of EPA to recognize the sanctioning of vehicles for racing only (without providing many details). *See* RX 77 at 1 ("However, just like the purpose-built, dedicated competition vehicles described above, the EPA likewise has no interest in vehicles that begin their existence as normal, EPA-certified production vehicles used on public roads and are then permanently converted to *sanctioned* competition-use only vehicles." (emphasis added)); CX 342 at 11 ("Application for EPA Racing Exclusion"). However, such a possibility does nothing to shield *manufacturers* of defeat devices like Respondent from liability here. It is clear from the evidence that the target of Respondent's sales were "motor vehicles" by make and model, regardless of the disclaimers Respondent appended to its units.

[22] If anything, the fact that Respondent felt the need to include disclaimers in its manuals and added tags to its parts evidences its awareness of their potential unlawful use. Similar disclaimers stating for "tobacco use only" placed on drug paraphernalia have been held as insufficient to circumvent the prohibition on the manufacture or sale of such prohibited products. *See, e.g.*, *United States v. Dyer*, 750 F. Supp. 1278, 1290 (E.D. Va. 1990) (noting that a drug paraphernalia merchant seeking to hide its true intent might label a bong "The Tobaccomaster" but it is still "prohibited paraphernalia whether or not it is sold containing tobacco, and whether or not it is creatively or deceptively labeled").

products that could be used on both competition-use only and certified motor vehicles."). Respondent's concession that its parts are capable of use in a manner that defeats emissions control equipment conveys it was aware of the Subject Products' possible "dual use" in motor vehicles. Opp'n at 35 ("Even if one imagines that the first replacement headers or tubes defeated or bypassed the original equipment, surely the second, third, and subsequent replacements do nothing of the sort."). And therein lies the problem with Respondent's statutory interpretation arguments which support its claims that its sales fall outside the scope of section 203's defeat device prohibition for "motor vehicles."[23]

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[23] This discussion of statutory interpretation generally assumes, *arguendo*, that the premise of Respondent's Opposition is true, that the parts were purchased primarily for use in converting motor vehicles to amateur racing vehicles. However, as Complainant notes, Respondent has not offered evidence showing that the 4000+ parts were ever, in fact, generally or mostly used for such purpose. Mot. at 24. While Respondent's products came with the disclaimer that they were legal for use only in "racing vehicles that may never be used, registered, or licensed for use upon a highway," it sold [redacted] of such products to internet wholesalers and to the public via the web, and neither requested nor acquired proof as to their ultimate use. Mot. at 24–25; Mot. Attach. C (Chew Decl.) ¶ 78; Opp'n Attach. 2 (Wofford Decl.) ¶ 10; RX 32–RX 35; CX 8.

In a recent, factually similar case, the defendant was charged with violating section 203(a)(3)(B) by virtue of its manufacture and sale of aftermarket products capable of defeating emissions controls installed in motor vehicles, including Ford, General Motors, and Dodge diesel trucks, pursuant to Title II. *Gear Box Z*, 526 F. Supp. 3d at 524–25. A preliminary injunction halting continued sales of defendant's products was sought, and the defendant argued against the likelihood of the Government prevailing on the merits at trial. *Id.* at 526. Like the Respondent here, the defendant in *Gear Box Z* did not refute the functionality of its products or their capability to act as defeat devices, but rather asserted, inter alia, that the parts were legal because they could be used on "motor sports" or competition vehicles. *Id.* at 526–28. As to the competition vehicles exemption, the district court stated—

> Much ink has been spilled already in this case regarding whether a motor sports exception, or exclusion, exists in the CAA and if so, what its limits are. Indeed, the Amicus Curiae brief and its responses examine this question in great detail. But Defendant has not produced a single piece of evidence that a single one of its products has been used on a motor sports vehicle (or an emergency or military vehicle, for that matter). By contrast, the United States has produced ample evidence, as was its burden, that Defendant's products are used in motor vehicles as contemplated by the CAA. Any examination of the question whether a motor sports exception or exclusion exists and is applicable here would be entirely hypothetical at this point. Without any evidence that there is a motor sports use for Defendant's products, the motor sports exclusion issue is moot.

Id. at 528 (record citations omitted). The defendant also invoked the "maintenance exception" under section 203(a) on the basis that installation of its products "can be removed or reversed"; however, the defendant offered no evidence that the installation of any of its products had been reversed, and it claimed it "does not know what its customers ultimately do with its products." *Id.* at 526–27. The court granted the requested preliminary injunction, finding that the United States was "likely to succeed on the merits to show that Defendant is violating the CAA by manufacturing and selling its products." *Id.* at 528–29. The *Gear Box Z* suit settled before trial with the defendant agreeing to, among other actions, halt the manufacture and sale of the offending products and pay a civil penalty of $10,000 over approximately three years (due to its demonstrated financial inability to pay a higher penalty). *See* EPA, *Gear Box Z, Inc., Clean Air Act Settlement* (Aug. 30, 2021), https://www.epa.gov/enforcement/gear-box-z-inc-clean-air-act-settlement.

In the present case, Respondent has proffered evidence of one, and only one, specific instance where one of its Subject Products was used to convert a motor vehicle to a competition vehicle. Opp'n Attach. 3 (Isley Decl.) ¶¶ 10, 11 (noting Ms. Isley converted her Mazda Miata's exhaust system by removing its catalytic converters and installing Respondent's part no. 12667); Mot. Attach. B (Gumbs Decl.) ¶ 38 (identifying Part 12667 for a 1999–2005 Mazda Miata Spec as a Subject Product which "eliminates the catalyst that's part of assembly 6 on the OEM diagrams"). One singular example hardly suffices to establish to any statistically significant extent the use to which its 4000+ Subject Products were put. And although Respondent also suggests that its parts can be used in initially purpose-

Section 203 sets forth three general exceptions to its tampering, defeat device, and other prohibitions in subsection (a).[24] 42 U.S.C. § 7522(a) (ultimate paragraph). The first exception states EPA shall not treat as prohibited any adjustments required for high altitude performance made in accordance with OEM instructions and approved by the EPA Administrator to ensure compliance with Title II emission standards. *Id.* §§ 7522(a) (ultimate paragraph), 7549. The second is for maintenance: any procedure that is "for the purpose of repair or replacement of the device or element, or is a necessary and temporary procedure to repair or replace any other item and the device or element is replaced upon completion of the procedure, and . . . such action thereafter results in the proper functioning of the device or element referred to in [section 203(a)(3)]."[25] *Id.* § 7522(a) (ultimate paragraph).

The third exception *does cover* the conversion of motor vehicles, *but only* to use a clean fuel:

> No action with respect to any device or element of design referred to in [section 203(a)(3)] shall be treated as a prohibited act under that paragraph if the action is for the *purpose of a conversion of a motor vehicle for use of a clean alternative fuel* (as defined in this subchapter) and if such vehicle complies with the applicable standard under section 7521 of this title when operating on such fuel, and if in the case of a clean alternative fuel vehicle (as defined by rule by the Administrator), the device or element is replaced upon completion of the conversion procedure and such action results in proper functioning of the device or element when the motor vehicle operates on conventional fuel.

Id. (emphasis added).

Section 203 contains no express exception to its prohibitions for the purpose of manufacturing or selling defeat devices used in converting a "motor vehicle" to a "vehicle used solely for competition." Therefore, applying the well-established canon of statutory interpretation of *expressio unius est exclusio alterius* (express inclusion of one excludes others), the section appears "clearly and unambiguously" to *not* contain an exclusion to its prohibitions

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built race cars based on motor vehicle models or installed as replacements or upgrades for catalytic converter displacing devices which were previously installed in lieu of OEM equipment, it offers no factual evidence that any of the thousands of Subject Products it sold were in fact used for either of these purposes. Opp'n at 13, 37–38, 53.

[24] The high altitude exemption was added to the Act in 1977. Clean Air Act Amendments of 1977, Pub. L. No. 95-95, sec. 211, § 203(a), 91 Stat. 685, 757 (1977). The latter two exemptions to section 203(a) were added to the Act as part of the 1990 Amendments, which also added subsection 203(a)(3)(B) (prohibiting defeat devices) and expanded subsection 203(a)(3)(A) to prohibit tampering by anyone, not merely dealers or repair shops. Clean Air Act, Amendments, Pub. L. No. 101-549, sec. 228, § 203(a), 104 Stat. 2399, 2507–08 (1990).

[25] The statute's maintenance exception proves the fallacy in Respondent's argument that under Complainant's "'past tense' view of the statute, even a wrench or other tool designed for removing a catalytic converter in order to replace it would be a 'part' 'intended for use with' a motor vehicle whose principal effect would be to defeat or render inoperative that emissions device." Opp'n at 15.

for such purpose. *Travieso v. Glock Inc.*, No. CV-20-00523-PHX-SMB, 2021 WL 913746, at *6 (D. Ariz. Mar. 10, 2021) ("The doctrine of *expressio unius est exclusio alterius* 'as applied to statutory interpretation creates a presumption that when a statute designates certain persons, things, or manners of operation, all omissions should be understood as exclusions.'" (quoting *Silvers v. Sony Pictures Ent., Inc.*, 402 F.3d 881, 885 (9th Cir. 2005))), *appeal dismissed*, No. 21-15539, 2021 WL 4295762 (9th Cir. July 6, 2021); *TRW Inc.*, 534 U.S. at 28 ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." (quoting *Andrus*, 446 U.S. at 616–17)); *see also* Mot. at 27–28.

In its Opposition, Respondent attempts to explain away the absence of a statutory exception for conversion to a competition vehicle by stating that—

> [I]n the clean-fuel conversion scenarios, the relevant car expressly and intentionally *remains* a motor vehicle both before and after conversion, will continue to be used on the streets and highways and to require a COC, but will not, in fact comply with the certificate originally issued for that vehicle. Some mechanism thus was required for a new certificate to be issued or for an exception to the tampering rules that would continue to apply to what remains, without dispute, a motor vehicle intended for use on the streets and highways. With conversion to a racing vehicle, by contrast, the end-product is not a "motor vehicle" at all, and hence there is no need to create an exception to rules that no longer apply by their own terms.

Opp'n at 20–21. Respondent cites no authority whatsoever in support of its proffered explanation. Moreover, I note this explanation focuses on and distinguishes between the "end-products" of the conversion, i.e., a motor vehicle or race car. However, section 203(a)(3)(B) is written to broadly prohibit all defeat devices for motor vehicles from *the devices' very beginning*, that is from their point of manufacture. 42 U.S.C. § 7522(a)(3)(B). As such, the point of violation by Respondent is determined long before, and separate and apart, from the end use of the device, unless an exclusion authorizes such activity. *Cf. Ryers Creek Corp. v. MacMartin*, No. CIV-89-157T, 1989 WL 231304, at *6 (W.D.N.Y. Apr. 20, 1989) ("While the pipe smoker may ultimately decide whether a specific pipe will be used for legitimate or illegitimate purposes, the Mail Order Drug Paraphernalia Control Act is not limited in its application merely to end users of drug paraphernalia. It is intended to prevent any use of the mails, or of interstate commerce, in order to profit in any way from the sale of drug paraphernalia. Thus, § 857 applies to any party on the distribution chain—from manufacturer to end user—who has 'knowledge that there is strong probability that [the items will be used illegally.]'" (internal citation omitted) (quoting *United States v. 57,261 Items of Drug Paraphernalia*, 869 F.2d 955, 957 (6th Cir. 1989), *abrogated by Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513 (1994))). If, as Respondent suggests, Congress wanted to allow the manufacture and sale of defeat devices to facilitate the conversion of street vehicles to competition vehicles, it could have, and presumably would have, explicitly carved out a narrow exception to the general prohibition regarding manufacturing and selling such devices for that very limited purpose, imposing on EPA the burden of implementing it. However, Congress did

not include such exception in either the 1970 Amendments or, more significantly, in the 1990 Amendments that expanded the scope of the Act and added the term "vehicles used solely for competition" as well as the broad prohibition in section 203(a)(3)(B) on selling defeat devices. *See Washington v. U.S. Dep't of State*, 996 F.3d 552, 562 (9th Cir. 2021) ("We agree generally 'that all omissions from a statute should be understood as intentional exclusions.'" (citation omitted)).

Further, finding the plain language of section 203(a)(3)(B) to include a prohibition on the sale of defeat devices, even ostensibly for the purpose of converting motor vehicles, would be completely consistent with the balance of section 203(a). In seemingly every way possible, section 203 attempts to foreclose motor vehicles from ever operating without Title II-compliant emissions equipment. 42 U.S.C. § 7522(a) ("The following acts *and the causing* thereof are prohibited . . . ." (emphasis added)). As noted above, it first prohibits an OEM from offering for sale "*any* new motor vehicle" without such equipment. *Id.* § 7522(a)(1) (emphasis added). Next it prohibits "any person" from ever removing or rendering inoperative the emissions equipment. *Id.* § 7522(a)(3)(A). Third, it broadly prohibits "any person" from manufacturing, selling offering to sell, or installing defeat devices to bypass the equipment or render the equipment inoperative. *Id.* § 7522(a)(3)(B); *see also Mac's Muffler Shop*, 1986 WL 15443, at *6 ("The purpose of Section 203(a)(3)(B) is 'to assure that vehicle emission control systems will function as intended during the time the vehicle is in use.'" (citing H.R. Rep. No. 95-294, at 297, 1977 U.S.C.C.A.N. at 1376)); *Econ. Muffler*, 762 F. Supp. at 1244 ("[T]he provision [CAA section 203(a)(3)(B)] does not prohibit the use of aftermarket parts 'except where the use of such parts or the service performed would adversely affect the emission control system of the vehicle.'" (quoting S. Rep. No. 95-127 (1977)). Fourth, it limits exceptions to the foregoing prohibitions to three narrow circumstances—high altitude, maintenance, and conversion to use of clean fuel—and even in those circumstances requires Title II emissions limitations ultimately be met. 42 U.S.C. § 7522(a) (ultimate paragraph). Thus, reading section 203(a)(3)(B) to disallow the manufacture of devices defeating Title II's emissions requirements, even ostensibly for use in converting motor vehicles to amateur racing vehicles, would be completely consistent with the remainder of the section.

On the other hand, as Complainant suggests, reading the statute as Respondent proposes would utterly eviscerate the beneficial intent of all of section 203's prohibitions. Mot. at 35. Under such an interpretation, instead of eliminating almost all defeat devices from the general marketplace, parts manufacturers and/or sellers could simply do exactly what the Respondent has done here—mark their products as "for use in competition vehicles only" and then sell them indiscriminately, without any risk of liability if they are used for unlawful tampering. Such activities allow individual buyers or mechanics to easily alter vehicle emission equipment, all under the guise of purportedly converting the vehicles to race cars. Moreover, instead of going after manufacturers or even large repair facilities, where defeat devices are handled in bulk, EPA would be burdened with the cumbersome process of enforcing the prohibitions buyer by buyer, vehicle by vehicle, proving that the "racing conversion" was a sham or incomplete.

Such dilution of section 203's prohibitions and imposition of a more cumbersome enforcement process is exactly the opposite of what Congress intended in passing the 1990 CAA

Amendments. The Senate Report that accompanied the amendments adding the defeat device prohibition and expanding the tampering provision states:

> Experience with the mobile source provisions in title II of the Act has shown that the enforcement authorities in this title need to be strengthen [sic] and broadened in several ways.
>
> * * *
>
> In its 1988 Motor Vehicle Tampering Survey, EPA concluded that 23 percent of the passenger cars and light-duty trucks surveyed in areas not covered by inspection/maintenance (I/M) programs and/or anti-tampering programs (ATP) showed evidence of tampering with at least one component. . . .
>
> Tampering can cause dramatic increases in emissions of hydrocarbons (HC), carbon monoxide (CO) and nitrogen oxides (NO). For example, a missing or damaged catalytic converter can increase HC and CO emissions by an average of 475 percent and 425 percent, respectively. For vehicles equipped with three-way converters, substantial increases in NO emissions are also expected. The 1988 Tampering Survey found tampering with the catalytic converter on 8 percent of the vehicles in areas without an I/M or anti-tampering program. . . .
>
> * * *
>
> The bill also makes illegal the manufacture, sale, or offering for sale of so-called "defeat devices" that render inoperative elements of a vehicle emission control system. Such devices include "test tubes" used to replace catalytic converters on vehicles. They also include aftermarket computer programmable read-only memory chips that enrich the air/fuel mixture, increasing emissions, or bypass emission control devices. Although the installation of defeat devices is tampering and is currently prohibited under the Act for certain classes of persons, the Act does not now explicitly prohibit the manufacture or sale of such devices. Presently, EPA must show that the manufacture or sale of a defeat device is a violation of section 203(a) by proving that such an activity causes tampering by a regulated party. *See, e.g.*, *Ced's Inc. v. U.S. E.P.A.*, 745 F.2d 1092 (7th Cir. 1984).[26] *Rather than require such an*

[26] *Ced's* affirmed EPA's entitlement to obtain the defendant's business records pursuant to an administrative warrant. *Ced's Inc. v. EPA*, 745 F.2d 1092 (7th Cir. 1984). Similar to Respondent here, Ced's manufactured and distributed defeat devices, including a "test tube" shaped and fitted to replace the catalytic converter in an automobile exhaust system. *Id.* at 1094. At the time, section 203(a)(3)(B) (1977) prohibited only repair facilities from removing or rendering inoperative Title II compliant emission devices, not the vehicle's owners, and included

> *indirect and cumbersome method of proof, a new section 203(a)(3)(B) has been added to the Act to clearly prohibit the manufacture, sale, or offering for sale of such devices where it is known or should be known that they will be used for tampering*.

S. Rep. No. 101-228, 1990 U.S.C.C.A.N. at 3508–09 (emphasis added). This broadly written expression of clear legislative intent suggests that Congress was determined in 1990 to close loopholes and even more severely restrict activities that rendered inoperative elements of a street vehicle's emission control system installed pursuant to Title II. Specifically, it intended to add a provision cutting off such devices at their source—the manufacturer—strongly supporting Complainant's position here.

In contrast, the evidence of legislative history Respondent offers in support of the legality of its activities is nominal and weak. Such evidence consists merely of a single verbal exchange, made in connection with the proposed 1970 amendments, between two Congressmen. Opp'n at 23 (citing RX 71 at 9). The exchange opens by mentioning "Talladega," "Daytona," and "Indianapolis"—references to venues even a layperson would recognize as sites of professional motor racing. Such references render the Congressmen's statements ambiguous and make it unclear if they were thinking of NASCAR Sprint Series racing (and the like) or the type of racing at issue here. Moreover, as Complainant observes, such a source is generally given little weight. Mot. at 37 (citing *Kenna v. U.S. Dist. Ct. for Cent. Dist. of Cal.*, 435 F.3d 1011, 1015 (9th Cir. 2006) ("Floor statements are not given the same weight as some other types of legislative history, such as committee reports, because they generally represent only the view of the speaker and not necessarily that of the entire body."); *Hernandez v. Williams, Zinman & Parham PC*, 829 F.3d 1068, 1080 (9th Cir. 2016) ("[W]e generally view an official committee report as a reliable indicator of congressional intent.")); *see also United States v. Dyer*, 750 F. Supp. 1278, 1288–89 (E.D. Va. 1990) ("[S]tray comments by individual legislators, not otherwise supported by statutory language or committee reports, cannot be attributed to the full body that voted on the bill." (quoting *In re Kelly*, 841 F.2d 908, 912 n.3 (9th Cir. 1988), and citing *S.C. Educ. Ass'n v. Campbell*, 883 F.2d 1251, 1262 (4th Cir. 1989) (stating "[i]t is axiomatic that if motivation is pertinent, it is the motivation of the entire legislature, not the motivation of a handful of voluble members, that is relevant"))). *See generally Green v. Bock Laundry Mach. Co.,* 490 U.S. 504, 528 (1989) (Scalia, J., concurring) (stating "[t]he meaning of terms on the statute books ought to be determined, not on the basis of which meaning can be shown to have been understood by a larger handful of the Members and Congress; but rather on the basis of which meaning is (1) most in accord with the context and ordinary usage . . . and (2) most compatible with the surrounding body of law into which the provision must be integrated").

Furthermore, reading section 203's defeat device prohibition to proscribe sales for conversion purposes is completely consistent with the overall purpose of the statute. The CAA

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no prohibition on manufacturing and selling defeat devices. *Id*. The defendant argued that EPA had no authority to carry out its inspection and copying of its records because its products had perfectly legal uses and that only repair facilities were covered by section 203(a)(3)(B)'s prohibitions. *Id*. at 1096–97. Interpreting the plain language of the statute, the appeals court upheld the warrant, relying in part on the fact that the statute prohibited not only certain enumerated acts but the "causing" of the those acts, and that "Congress could have written in such a restriction [limiting liability to repair facilities], but it did not, and we decline to supply it here." *Id.* at 1097.

"was intended comprehensively to regulate, through guidelines and controls, the complexities of restraining and curtailing modern day air pollution." *Bunker Hill*, 658 F.2d at 1284; *see also* 42 U.S.C. § 7401(b) ("The purposes of this subchapter are— (1) 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 . . . ."); *Gear Box Z*, 526 F. Supp. 3d at 525 ("By circumventing or defeating emissions controls, a driver can obtain enhanced vehicle performance through greater power, torque, and/or fuel economy, because emissions controls consume engine power and fuel. On the flip side, excess emissions cause known harm to human health and the environment—an issue the Clean Air Act attempts to remedy.").

In addition, Respondent's arguments as to the statute's plain language and congressional intent as permitting its activities seem undermined by subsequent and recent congressional action. As Respondent acknowledges, in 2017 and 2021, bills were introduced before Congress which would amend section 203(a) to be consistent with Respondent's interpretation of the statute offered here by adding an additional exemption thereto and amending the definition of a "motor vehicle." Opp'n at 61 n.26 (citing the Recognizing the Protection of Motorsports Act of 2017, H.R. 350, 115th Cong. (2017), and the Recognizing the Protection of Motorsports Act of 2019 [sic], H.R. 3281, 117th Cong. (2021)). Specifically, those bills proposed in pertinent part the following revision of the Act:

> Section 203 of the Clean Air Act (42 U.S.C. 7522) is amended by adding at the end of subsection (a) the following: "No action with respect to any device or element of design referred to in paragraph (3) shall be treated as a prohibited act under that paragraph if the action is for the purpose of *modifying a motor vehicle into a vehicle to be used solely for competition*.".

H.R. 350 § 3 (emphasis added). Further, a "motor vehicle" would be redefined as "any self-propelled vehicle designed for transporting persons or property on a street or highway and that is not a vehicle used solely for competition, including any vehicle so used that was converted from a motor vehicle." *Id.* § 4.

The House Report on the 2017 bill stated that—

> Under current law, EPA may impose penalties against any company that manufactures or sells illegal parts, such as defeat devices, that can bypass emissions controls. . . .
>
> According to officials in EPA's Office of Civil Enforcement, the agency currently focuses its efforts on manufacturers and sellers of defeat devices that affect emissions from vehicles that are operated on public roads. *Although, EPA has the legal authority under current law to pursue such violations for any motor vehicle—including those converted for use in motorsports—the agency has*

> *historically neither enforced that rule nor collected penalties from the motorsports industry*.[27]
>
> Because the bill would shift the legal focus of enforcement cases to how a motor vehicle is ultimately used, it would significantly increase the burden on EPA's enforcement officials to prove that manufacturers and sellers are complicit in the use of defeat devices for purposes other than competition.

H.R. Rep. No. 115-1073, at 6–7 (2018) (emphasis added).

It is noted that, to date, neither of those proposed bills have passed, and the House Report on the 2017 bill, on which a hearing was held, indicates that there was significant opposition to that bill.[28] The rationale offered for the dissenting view was, in part, as follows:

> Ultimately, the RPM [Recognizing the Protection of Motorsports] Act creates a loophole in the CAA that blocks EPA's ability to enforce against those manufacturing or selling emissions control defeat devices, regardless of how they are used. The bill grants immunity to manufacturers of defeat devices, so long as the manufacturer says the product is intended for racing. But, the intent of the manufacturer is not predictive of, nor does it impact how consumers will use these products. Once they are installed EPA will have little ability to penalize those using a product beyond its intent. By preventing EPA from enforcing against the manufacture and sale of defeat devices, this bill takes away an important tool for stopping illegal vehicle pollution.
>
> Without this EPA enforcement authority, there is no assurance that motor vehicles modified with defeat devices would, in fact, be used solely for competition. Previous EPA enforcement cases suggest that marketing and sales of defeat devices can be widespread and difficult to control, and the additional pollution released is significant. In fact, this is the same authority EPA recently used to detect that a company, H&S Performance, had been manufacturing and selling products resulted [sic] in nearly double the illegal NOx emissions of the Volkswagen diesel scandal. EPA must retain

[27] On the other hand, the House Report noted that "[o]ver the 2013–2017 period, EPA settled 13 cases—mostly against manufacturers—for CAA violations related to defeat devices, resulting in the collection of $14 million in penalties." H.R. Rep. No. 115-1073, at 7.

[28] The House Report notes that a hearing was held on the bill on September 13, 2017, and that "[o]n November 15, 2017, the Subcommittee on Environment met in open markup session and forwarded H.R. 350, without amendment, to the full Committee by a record vote of 13 yeas and 9 nays. On December 6, 2017, the full Committee on Energy and Commerce met in open markup session and ordered H.R. 350, without amendment, favorably reported to the House by a record vote of 33 yeas and 21 nays." H.R. Rep. No. 115-1073, at 2.

> meaningful enforcement authority to prevent widespread tampering that will undermine air quality and harm public health.

H.R. Rep. 115-1073, at 15 (footnote omitted).

While this Tribunal cannot infer why Congress did *not* pass the 2017 bill, the fact that such a carve-out was proposed, *expressly* directed towards "vehicles used solely for competition," suggests that this Tribunal is correct to hold that Respondent's interpretation of the statute is erroneous and its activities are unlawful.

Finally, this Tribunal is not persuaded by any of Respondent's citations to various EPA regulations and the arguments it makes based thereon. It cites, for example, 40 C.F.R. § 85.1511(e), a provision which sets forth EPA importation exemptions to emissions requirements for motor vehicles and states in pertinent part: "Racing vehicles may be imported by any person provided the vehicles meet one or more of the exclusion criteria specified in § 85.1703." Opp'n at 19. The exclusion criteria in section 85.1703 include the absence of features "customarily associated with safe and practical street or highway use" such as a reverse gear, a differential, and safety features required by state or federal law. 40 C.F.R. § 85.1703(a)(2). Because the regulation does not state that the imported vehicle "must have been designed or manufactured with such physical attributes *ab initio*[,]" Respondent argues that it supports its position that "a motor vehicle could be modified to exhibit such physical characteristics and it would no longer be a motor vehicle." Opp'n at 19. Regardless of whether that is the case, the regulation provides no direct support for Respondent's position here which is that it may legally manufacture and widely distribute defeat devices, designed for installation in what are clearly "motor vehicles" in terms of their emission equipment, if it merely labels them for "competition vehicles only."

It is noted that Respondent has cited no case upholding its interpretation of section 203, and this Tribunal has found none. As observed above, and as Respondent acknowledges, at the time of sale the Subject Products are, for the most part, *not* most likely to be installed in "vehicles used solely for competition," that is vehicles which were manufactured, previously modified, or presently being utilized in organized motorized racing events. Rather, according to Respondent, they can and are most likely to be installed in what are technically "motor vehicles" which, at the time of sale, retain their original Title II compliant emissions equipment. In conclusion, Respondent's Subject Products are not exempted from the purview of CAA section 203(a)(3)(B)'s prohibition.[29]

B. Disputed Facts

In addition to its legal arguments, Respondent suggests that Complainant's Motion should be denied on the basis that there are "genuine issues of material fact." Opp'n at 25–40. Specifically, it suggests that Complainant is required to, but has not, presented undisputed evidence establishing the statutory elements of intent, knowledge, and effect. Opp'n at 25, 27, 31–40. These claims of factual disputes appear to be mostly a reiteration of Respondent's legal

[29] Respondent's other arguments raised in defense of its actions, such as fair notice, are discussed below in connection with this Tribunal's ruling on the Motion to Strike.

argument discussed in detail above—that it never intended, knew, or expected its products to affect the emissions of "motor vehicles" because they were sold as labeled for installation only in "vehicles used solely for competition," which Respondent interpreted as including motor vehicles ostensibly being converted to amateur racing vehicles.[30] Opp'n at 31, 34, 38. Nevertheless, the issues Respondent raises as disputed facts will be briefly addressed here.[31]

1. Intent

In relevant part, section 203(a)(3)(B) provides that it is unlawful for someone to sell any defeat device "*intended* for use with, or as part of, any motor vehicle or motor vehicle engine[.]" 42 U.S.C. § 7522(a)(3)(B) (emphasis added). Respondent argues that its products were not "intended" for use with "motor vehicles" because "they were instead manufactured, sold, and offered for use on or as part of vehicles designed and used solely for competition, and such vehicles are not 'motor vehicles.'" Opp'n at 31. Respondent also claims that:

> Because [Complainant] must prove *mens rea* in addition to other elements of any violation, it must shoulder the burden of demonstrating that Borla understood that it was marketing and selling to forbidden customers rather than to customers that everyone believed were entitled to build and use converted competition vehicles and who have been doing so openly and without threat or liability for decades.

Opp'n at 32.

As factual support for its lack of intent, Respondent points to its product disclaimer. Opp'n at 32. It states that it undertook the voluntary and affirmative step of using the disclaimer language in the "regulatory vacuum" created by EPA publicly stating that "it had no interest in pursuing parts for converted racing vehicles" while providing no guidance to manufacturers on their continued sales of racing-only parts. Opp'n at 32. Respondent further contests Complainant's characterization of the sale of its products through wholesalers as "indiscriminate," claiming "wholesale sales are a primary distribution mechanism for conversion racing parts, so there is no presumption to be made that such sales are likely not to be for racing purposes." Opp'n at 33 (citing Attach. 3 (Isley Decl.) ¶ 17). As further evidence of its lack of intent, Respondent advises that "many purpose-built cars, for example Ford Mustang and Honda Civic are built by OEMs using stock components with the addition of racing aftermarket parts[,]" including Respondent's parts. Opp'n at 34.

In its Reply, Complainant preliminarily observes that "the CAA generally 'imposes strict

[30] Complainant's Reply Brief does not directly challenge Respondent's assertion of "material facts" being in dispute, observing that this claim is premised on Respondent's interpretation of the statute as having an "expansive 'competition use' exclusion." Reply at 1. "[I]f Respondent's interpretation of the Act is wrong, then its assertion that Complainant has failed to factually support the elements of a section 203(a)(3) claim falls apart, and accelerated decision on liability should be granted[,]" Complainant declares. Reply at 1–2; *see also* Reply at 5 (observing that Respondent does not challenge any of the material facts laid out by Complainant as undisputed).

[31] The parties' dispute as to the exact number of parts at issue is discussed in Section X below.

liability upon owners and operators who violate the Act.'" Reply at 18 (quoting *Pound v. Airosol Co., Inc.*, 498 F.3d 1089, 1097 (10th Cir. 2007)). Although section 203(a)(3)(B)'s use of the term "intended" suggests a strict liability standard does not apply to its violations, neither does it suggest that the criminal requirement of specific intent or "*mens rea*" applies, Complainant asserts. Reply at 18–19 (citing S. Rep. No. 100-231, at 143 (1987) ("As another means of discouraging the knowing disabling of emissions controls, the bill also makes illegal the manufacture or sale of so-called 'defeat devices' that render inoperative elements of a vehicle emission control system. The requirement that such use be within the specific knowledge of the manufacturer is not intended to establish a standard of proof more appropriate to criminal actions, since this is a civil enforcement action."")). Further, Complainant suggests that "this Tribunal should view whether the 57 Subject Products are 'intended for use' on a motor vehicle through an objective, not subjective lens." Reply at 19. It notes that this objective standard "tack" has been taken with another statute: Under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136 *et. seq.*, the definition of "pesticide" includes substances "intended for" repelling or destroying pests. Reply at 19–20 (citing *N. Jonas & Co., Inc. v. EPA*, 666 F.2d 829, 833 (3d Cir. 1981)). "Given that the Respondent has represented to the public that the Subject Products are designed for specified makes and models of vehicles that are certified motor vehicles, then, under an objective intent standard, the Subject Products are clearly 'intended for use' in a motor vehicle under section 203(a)(3)(B)[,]" Complainant argues. Reply at 20.

"Intent" is "[t]he state of mind accompanying an act, esp[ecially] a forbidden act" and "general intent" is defined as "[t]he intent to perform an act even though the actor does not desire the consequences that result." *Black's Law Dictionary* (11th ed. 2019). Crimes under the CAA have been held to be crimes of general rather than specific intent. *United States v. Hunter*, 193 F.R.D. 62, 65 (N.D.N.Y. 2000) (citing *United States v. Itzkowitz*, No. 96-CR-786 (JG), 1998 WL 812573, *2 (E.D.N.Y. May 13, 1998)), *aff'd*, 37 F. App'x 10 (2d Cir. 2002); *United States v. O'Malley*, 739 F.3d 1001, 1007 (7th Cir. 2014) (citing *United States v. Buckley*, 934 F.2d 84 (6th Cir. 1991) (holding that the statutory language of the CAA requires only general intent)). As such, it is illogical to demand that administrative or civil violations under the CAA require greater proof of specific intent. *Cf. Posters 'N' Things*, 511 U.S. at 515–22 (holding prohibition on sale of items "primarily intended . . . for use" with illegal drugs in 21 U.S.C. § 857 imposes an objective (general intent) standard based upon the objective characteristics of the item rather than defendant's state of mind).

Respondent has acknowledged that it specifically designed, manufactured, advertised, and sold the 57 Subject Products, which are exhaust system parts and components, to fit vehicle models such as the Chevrolet Corvette and Camaro, Ford Mustang, Mazda Miata, Dodge Challenger, and Porsche Cayman. Opp'n at 5, 33 ("Borla designed its racing exhaust systems and parts to improve performance for specific vehicle models . . . including the most popular models for conversion to dedicated racing, such as the Chevrolet Corvette and Camaro, Ford Mustang, Dodge Challenger, Mazda Miata, and Porsche Cayman.); Sec. Am. Compl. ¶¶ 50, 53; Answer ¶¶ 50, 53; CX 7; Opp'n Attach. 2 (Wofford Decl.) ¶ 6. It acknowledges that these vehicle models are designed and sold by the OEMs to carry passengers on the street, that is, they are "motor vehicles" as that term is defined under Title II of the CAA. Opp'n at 28 (citing Opp'n Attach. 4 (Deery Decl.)). As such, Respondent cannot *factually* dispute that the Subject

Products as manufactured were "intended for use with, or as part of, any motor vehicle or motor vehicle engine[.]" 42 U.S.C. § 7522(a)(3)(B).

2. Effect

Section 203(a)(3)(B) provides in pertinent part that "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[.]" 42 U.S.C. § 7522(a)(3)(B) (emphasis added). As to this, Respondent argues that "[i]f the vehicle has been, or is in the process of being, redesigned into a vehicle used solely for competition, then the Subject Products are not bypassing or defeating any emissions devices 'on or in a motor vehicle.'" Opp'n at 34. "It is the present status of a vehicle, not its past status, that matters[,]" Respondent asserts. Opp'n at 34. Thus, Respondent's argument goes, catalytic converters installed in compliance with the COC governing the past status of a vehicle, but no longer required given the changed (present) status of the vehicle, "can no longer be deemed to *currently* be 'installed in compliance with regulations' that no longer apply." Opp'n at 34–35. Moreover, Respondent insists it would be Complainant's "burden to prove" "whether the products sold by Borla were used on vehicles that still had their catalytic converters, and hence use of such products removed or bypassed such existing catalytic converters[.]" Opp'n at 35. As such, "the answer to that factual question may vary for each individual sale." Opp'n at 36. Respondent suggests that the description of the "function" of the 57 Subject Products in its 2018 RFI Response indicating that they "*could enable* the customer or end user" to defeat an admissions control device was merely a "theoretical possibility exist[ing] only in a limited set of circumstances" and "depends on the independent and potentially improper actions of the end-user rather than on the ordinary or intrinsic use of the parts themselves." Opp'n at 36.

As noted above, catalytic converters are parts of a motor vehicle's exhaust system installed by the OEM to achieve compliance with Title II's emissions standards. Mot. Attach. B (Gumbs Decl.) ¶¶ 26–82; *Mac's Muffler Shop*, 1986 WL 15443, at *6. Respondent does not dispute that the Subject Products it manufactured were designed to be used in lieu of the motor vehicle's catalytic converter, that is, each product fit in the area of the exhaust system where the original OEM catalytic converter was located, resulting in the removal of original equipment. Mot. Attach. B (Gumbs Decl.) ¶ 12; Mot. Attach. A (SMF) e.g., ¶¶ 12–13, 25–26, 44–45; Mot. Attach. D (Citations) ¶¶ 1–3. Thus, there is no factual dispute that the "principal effect" of the 57 Subject Products was to remove and "render inoperative" the catalytic converters—devices or elements of design installed on or in the motor vehicles by the OEM in compliance with regulations under Title II. There is no basis in the statute for imposing upon Complainant the burden of proving that that "principal effect," in fact, came to fruition for each individual part manufactured and sold.

3. Knowledge

Section 203(a)(3)(B) indicates that a violation occurs only if the alleged violator "*knows or should know* that such part or component is being offered for sale or installed for such use or put to such use[,]" with "such use" including rendering inoperative Title II compliant emissions equipment. 42 U.S.C. § 7522(a)(3)(B) (emphasis added). In its Opposition, Respondent asserts

that "[Complainant] should have to prove that Borla knew or should have known both the status of the vehicles on which its parts would be used, and the physical condition of such vehicles at the time of sale, *i.e.*, whether they still had any previous emissions devices or whether such devices had long since been removed by the owners." Opp'n at 38. "Actual knowledge, of course, is a factual question, and Borla plainly did not know of the details of each and every purchaser of its parts[,]" it states. Opp'n at 38–39. Respondent continues: "While it obviously knew about a limited number of its end-users—those sponsored racers and racing schools to which it provided promotional parts—many of its other parts were sold by distributors and Borla had no contact with the final purchasers." Opp'n at 39. Respondent proffers that "it had no reason to believe that its parts were going towards non-racing uses or on a significant number of racing vehicles that still had catalytic converters at the time the parts were purchased and used." Opp'n at 39.

In direct contradiction to Respondent, Complainant asserts in its Motion that it is not required "to prove the Respondent knew the Subject Products were actually installed or to prove how the modified motor vehicles were used." Mot. at 16 (citing S. Rep. No. 101-228, at 124, 1990 U.S.C.C.A.N. at 3509); Reply at 26–30 (citing, inter alia, *United States v. Haney Chevrolet, Inc.*, 371 F. Supp. 381 (M.D. Fla. 1974)).[32] Rather, Complainant declares "if the Respondent knew or should have known its Subject Parts fit with and had a principal effect of defeating an emissions-related element of design of a motor vehicle, that is enough to establish liability." Reply at 29. It suggests that the knowledge element is established by Respondent's installation manuals, its 2018 RFI Response, and its web advertisements—all indicating that the devices were "designed for" certain motor vehicles and would result in the removal of the OEM-installed TWCCs. Mot. at 17 (citing Mot. Attach. D (Citations) ¶¶ 1, 4; CX 7 ("Function" column); CX 353).

Like Respondent here, the defendant in *Gear Box Z* manufactured and sold aftermarket engine parts for the modification of motor vehicles' engines, including Ford, General Motors, and Dodge trucks. 526 F. Supp. 3d at 524. That defendant too asserted that the government could not show it knew or should have known that its products were "being offered for sale or

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[32] In *Haney*, an automobile dealer was charged it with a violation of CAA § 203(a)(3) (then codified as 42 U.S.C. § 1857f-2(a)(3)) prohibiting "knowingly" removing or rendering inoperative any emission control device. The dealer claimed it had removed the devices on the Corvette as a temporary solution to test the car's engine problems. 371 F. Supp. at 384. The court stated—

> It is well-settled that an act is done knowingly when it is done voluntarily and intentionally, and not by mistake or accident. The Court interprets that the prohibited act of "removal or rendering inoperative a device or element of design" is complete within the meaning of this statute when the dealer knowingly removes or renders inoperative the emission control devices or elements of design on a particular vehicle and voluntarily relinquishes custody and control of the vehicle, (or custody and control by an agent or employee of the dealer) with the emission control devices or elements of design removed or rendered inoperative.

Id.; *see also Mac's Muffler Shop*, 1986 WL 15443, at *6 (same); *Econ. Muffler*, 762 F. Supp. at 1245 ("The term 'knowingly' modifies the verbs 'remove' and 'render' and applies not to the law but to the offensive act. . . . [It is] established that the inclusion of the term 'knowingly' in an environmental statute does not 'carv[e] out an exception to the general rule that ignorance of the law is no excuse.' Lack of intent to violate the law may be considered in mitigation of a civil penalty but assessment of such a penalty does not require a showing of willfulness or negligence." (citations omitted)).

installed" as defeat devices because it did not know what its customers did with its products, suggesting they could be lawfully used for maintenance or for installation on motorsports vehicles. *Id.* at 526, 528. In response the court stated—

> Defendant's own product manuals and advertisements . . . demonstrate that Defendant knows its products are installed as defeat devices. Defendant cannot claim a lack of knowledge simply by not keeping sales records, and the evidence clearly shows that Defendant knows the purpose of its products is for use as defeat devices.

Id. at 528 (record citations omitted).

In this case, Respondent knew the 57 Subject Products it was offering for sale could work as unlawful defeat devices in that they rendered inoperative the OEM-installed Title II emissions equipment, because Respondent designed them and its instruction manuals indicated that the products *replaced such equipment*. Respondent also knew or should have known that if available, defeat devices will be used to tamper with motor vehicles driven on the streets, as that fact is obvious from the existence of section 203(a)(3)(A)'s prohibition on tampering and its labeling of its products as "only for competition vehicles." There is no validity to Respondent's claim that Complainant must prove that each and every product Respondent sold was used for tampering, as sale of the product is not an element of a violation; manufacture or offering to sell is sufficient. Therefore, Respondent had or should have had the requisite "knowledge" necessary to find a violation under section 203(a)(3)(B). 42 U.S.C. § 7522(a)(3)(B). *Cf. Posters 'N' Things*, 511 U.S. at 523 (holding in regard to knowledge requirement that the government is not required to prove seller knew items were "drug paraphernalia" or that any particular customer will actually use item with illegal drugs and stating "[t]he purpose of a seller of drug paraphernalia is to sell his product; the seller is indifferent as to whether that product ultimately is used in connection with illegal drugs or otherwise. . . . It is sufficient that the defendant be aware that customers in general are likely to use the merchandise with drugs"). Therefore, there is no genuine dispute as to this element of the violations.

In sum, this Tribunal does not find any material facts relevant to the violations to be genuinely in dispute.

IX. MOTION TO STRIKE

In addition to seeking a ruling on liability, Complainant has moved to strike Respondent's Fourth through Twelfth, Fourteenth, and Nineteenth Defenses set forth in the Answer. Mot. at 38–58 (citing, inter alia, Fed. R. Civ. P. 12(f)). These defenses seem to be affirmative defenses. "A true affirmative defense, which is avoiding in nature, raises matters *outside* the scope of the plaintiff's prima facie case." *New Waterbury, Ltd.*, 5 E.A.D. 529, 540 (EAB 1994) (Remand Order) (quoting 2A James W. Moore et al., Moore's Federal Practice ¶ 8-17a (2d ed. 1994)); *see also City of Salisbury*, 10 E.A.D. 263, 289 n.38 (EAB 2002) (observing that petitioner's defense was not technically an affirmative defense since it raised an issue that directly challenged portions of EPA's prima facie case); *Barnes v. AT&T Pension Ben. Plan-*

Nonbargained Program, 718 F. Supp. 2d 1167, 1173–74 (N.D. Cal. 2010) ("[A]n affirmative defense . . . does not negate the elements of the plaintiff's claim, but instead precludes liability even if all of the elements of the plaintiff's claim are proven." (quoting *Roberge v. Hannah Marine Corp.*, No. 96–1691, 1997 WL 468330, at *3 (6th Cir. 1997))). Respondent bears the burden of presentation and persuasion on the affirmative defenses it raises. 40 C.F.R. § 22.24(a); *Salisbury*, 10 E.A.D. at 289 & n.39. The standard of proof here is "a preponderance of the evidence." 40 C.F.R. § 22.24(b).

Although the Consolidated Rules contain no specific provision regarding motions to strike, it is well settled that the Federal Rules of Civil Procedure may be used as guidance where the Consolidated Rules are silent. *Euclid of Va., Inc.*, 13 E.A.D. 616, 657 (EAB 2008); *Salisbury*, 10 E.A.D. at 285 n.31. Federal Rule 12(f) provides as to such motions that "[t]he court may strike from a pleading an insufficient defense[.]" Fed. R. Civ. P. 12(f). The phrase "insufficient defense" is not defined in the Federal Rules, but it has been interpreted as meaning those defenses which do not "present substantial questions of law or fact" upon which the party "may succeed after a full hearing on the merits." *Murray v. Conseco, Inc.,* No. 1:03-cv-1701-LJM-JMS, 2009 WL 1357235, at *1–2 (S.D. Ind. May 7, 2009) (quoting *United States v. 416.81 Acres of Land*, 514 F.2d 627, 631 (7th Cir. 1975)).

"In general, 'motions to strike are disfavored . . . because [they] potentially serve only to delay.'" *Id.* at *1 (quoting *Heller Fin., Inc. v. Midwhey Powder Co., Inc*., 883 F.2d 1286, 1294 (7th Cir. 1989)). "However, 'where . . . motions to strike remove unnecessary clutter from the case, they serve to expedite, not delay.'" *Id.* (quoting *Heller*, 883 F.2d at 1294). It is observed that a well-founded motion to strike can "avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial." *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993) (quoting *Sidney-Vinstein v. A.H. Robins Co.*, 697 F.2d 880, 885 (9th Cir. 1983)), *rev'd on other grounds*, 510 U.S. 517 (1994); *see also Fortune Dynamic, Inc. v. Blossom Footwear, Inc.*, No. CV 09-01058 RGK (AJWx), 2009 WL 10674356, at *2 (C.D. Cal. July 22, 2009) ("The function of a Rule 12(f) motion to strike is to avoid the expenditure of time and money arising from litigation and to streamline the ultimate resolution of an action."). "The decision to grant or deny a motion to strike is vested in the trial judge's sound discretion[.]" *Ecological Rts. Found. v. EPA*, No. CV 19-980 (BAH), 2021 WL 2209380, at *4 (D.D.C. June 1, 2021) (quoting *Sacchetti v. Gallaudet Univ.*, 344 F. Supp. 3d 233, 251 (D.D.C. 2018)).

A. Fourth Defense – EPA Guidance

In its Answer, Respondent raises as its Fourth Defense that "EPA's actions in pursuing enforcement against Respondent are inconsistent with its own guidance for pursuing administrative enforcement." Answer at 7. In support it states that:

> EPA has issued guidance (Susan Bodine, *Memorandum re Implementation of Executive Order 13924*, November 25, 2020), providing that its administrative enforcement proceedings must comply with various practices designed to ensure due process, fairness, and lenity. EPA has failed to act consistently with the

> recommended practices in its own guidance in prosecution of this case, has failed to consider best practices, and thus has acted in an arbitrary and capricious manner.[33]

Answer at 7–8.

In moving to strike the defense, EPA states that "President Biden revoked Executive Order 13,924 on February 24, 2021, and directed agency heads to promptly rescind any orders, rules, regulations, guidelines, or policies implementing or enforcing Executive Order 13,924." Mot. at 40 (citing Exec. Order No. 14,018, 86 Fed. Reg. 11,855 (Feb. 24, 2021)). Further, Complainant asserts the defense should be stricken because "Respondent does not have legal grounds to challenge the EPA's enforcement action under Executive Order 13,924 because the Order pertains to the internal management of executive agencies and explicitly disclaims any such private right." Mot. at 40 (citing *Michigan v. Thomas*, 805 F.2d 176, 187 (6th Cir. 1986); *Meyer v. Bush*, 981 F.2d 1288 (D.C. Cir. 1993); *Kimberly-Clark Corp.*, EPA Docket No. RCRA-88-04-R, 1988 WL 429706, at *2 (April 8, 1988) (Order)); *see also* Exec. Order No. 13,924 § 9(d), 85 Fed. Reg. 31,353, 31,356 (May 19, 2020); Reply at 33.

In response, Respondent asserts—

> Notwithstanding that rescission, the agency was subject to that order during the development of this action, operated under its own internal directives implementing the order, and, in any event, should need no express command from the President to live up to such universal principles and to, at a minimum, comport with its own internal rules and procedures. Any other course would be almost definitionally "arbitrary and capricious" and hence contrary to fundamental rules of administrative procedure.
>
> While the principles contained in such executive and agency guidance might have a degree of leeway for agency implementation and might not therefore serve as a sufficient basis for a cause of action against the agency, they certainly are a sufficient basis for a defense, whether ultimately conceived of in administrative law terms or due process terms. In fact, other defenses, such as fair notice and confusion, take into account numerous factors, including internal agency guidance, and this should be no different.
>
> Finally, regardless whether such guidance is enforceable by a court, to the extent the Presiding Officer and later the EAB view themselves as making a decision on behalf of the EPA and as part of the EPA's internal decision-making process, then Complainant's arguments miss the point. The Presiding Officer would be

[33] Neither party identified the Bodine Memorandum as an exhibit and while it is available on the EPA intranet, it appears not to be publicly accessible on the web. However, the Executive Order the guidance implements is publicly available. *See* Exec. Order No. 13,924, 85 Fed. Reg. 31,353 (May 19, 2020).

> exercising her own discretion to implement, or not, prior guidance, on behalf of the EPA itself and should hew to the fundamental principles outlined in those orders as a matter of discretion, even if she did not consider herself formally bound by them. In such circumstances, the administrative adjudicatory process *is* part of the "internal management" of the EPA delegated to the Presiding officer and the EAB, and accordingly this defense is properly directed at them and should not be stricken.

Opp'n at 45–46.

Discussion

Executive Order 13,924, issued on May 19, 2020, directed that "[t]he heads of all agencies shall consider the principles of fairness in administrative enforcement and adjudication" and more particularly that—

> The heads of all agencies shall consider whether to formulate, and make public, policies of enforcement discretion that, as permitted by law and as appropriate in the context of particular statutory and regulatory programs and [certain] policy considerations . . . , decline enforcement against persons and entities that have attempted in reasonable good faith to comply with applicable statutory and regulatory standards, including those persons and entities acting in conformity with a pre-enforcement ruling.

Exec. Order No. 13,924, §§ 5(b), 6, 85 Fed. Reg. at 31,354–55.

On November 25, 2020, Susan Bodine, then EPA's Assistant Administrator for Enforcement and Compliance Assurance, issued a Memorandum regarding implementation of Executive Order 13,924 ("EPA Memorandum").[34] In that Memorandum, EPA stated that pursuant to the Executive Order it had considered the statutes, regulations, policies, and procedural rules under which it conducted administrative enforcement proceedings and, in sum, found that they already address the principles raised in the Executive Order. EPA Mem. *passim*.

As Complainant advises, on February 24, 2021, Executive Order 13,924 was explicitly revoked. Mot. at 40; Exec. Order No. 14,018, 86 Fed. Reg. 11,855.[35] As such, Executive Order 13,924 currently has no legal force or effect, and so, consequently, neither does EPA's

[34] The EPA Memorandum advises that its issuance is consistent with the Director of the Office of Management and Budget's ("OMB") Memorandum, dated August 31, 2020, providing guidance to agencies on implementing Executive Order 13,924. *See* OMB, M-20-31, *Memorandum for the Deputy Secretaries of Executive Departments and Agencies* (2020), *accessible at*: https://www.whitehouse.gov/wp-content/uploads /2020/08/M-20-31.pdf.

[35] Executive Order 14,018 also indicates that "[t]his order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person." Exec. Order No. 14,018, § 3(c), 86 Fed. Reg. at 11,856.

Memorandum explicitly issued to implement it. *See Armstrong v. Exec. Off. of the President*, 90 F.3d 553, 562 (D.C. Cir. 1996) (noting the burden is on the proponent "to show that a regulation issued pursuant to a superseded Executive Order remains in effect, and he has not even tried to do so"); *Associated Fisheries of Me., Inc. v. Daley*, 954 F. Supp. 383, 390 (D. Me. 1997) (noting the revocation of the executive order was effective and "[a]s a result, Executive Order 12,291 does not apply to this case"), *aff'd*, 127 F.3d 104 (1st Cir. 1997).

Moreover, even prior to revocation of Executive Order 13,924, that document established that no valid legal claim or defense could accrue to Respondent: It states "[t]his order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person." Exec. Order No. 13,924, § 9(d), 85 Fed. Reg. at 31,356; *see Daley*, 954 F. Supp. at 390 (citing *Michigan v. Thomas*, 805 F.2d 176, 187 (6th Cir. 1986); *Ishtyaq v. Nelson*, 627 F. Supp. 13, 24 (E.D.N.Y. 1983)) (finding no private cause of action under Executive Order 12,866 because of similar language). The EPA Memorandum made a similar declaration, stating that it "does not create any rights or benefits enforceable against the United States." EPA Mem. at 1 n.1.

Regarding this defense, Respondent has not specified which provision(s) of the Executive Order or EPA Memorandum it believes Complainant has not complied with in bringing this proceeding, much less offered facts in support thereof. Opp'n at 45–46. More importantly, it has failed to offer a cogent legal argument or authorities that support the conclusion that Executive Order 13,924 or the EPA Memorandum ever effectively provided it with a legal defense and remain effective to do so today. Opp'n at 45–46. Finally, Respondent does not explicitly describe beyond its generalized allegations how Complainant has failed to "live up to . . . universal principles" such as fairness and due process or "comport with its own internal rules and procedures"—rules and procedures that pre-existed the Executive Order, and that the EPA Memorandum found to address the policy considerations highlighted therein. Opp'n at 45–46. Rather, Respondent's explanation of this defense set forth in its Opposition is no more than a collection of well-known legal terms and phrases cobbled together to opine of some unspecified injustice in being held responsible for its actions. Opp'n at 45–46. As such, Respondent's Fourth Defense raised in its Answer is hereby found legally insufficient and is **STRICKEN**.

B. Fifth Defense – Statute of Limitations

The totality of Respondent's Fifth Defense is "[t]he Statute of Limitations bars the prosecution of all activities that occurred more than five years (plus any tolled period) before the valid initiation of these proceedings." Answer at 8 (citing 28 U.S.C. § 2462).

In support of striking this defense, Complainant states that the Original Complaint in this proceeding was filed on June 30, 2020, and alleges that Respondent violated the CAA by unlawfully selling defeat devices between January 15, 2015, and September 26, 2018. Mot. at 42. It further advises that the parties executed a Tolling Agreement in which they agreed that the period commencing January 15, 2020, and ending on July 1, 2020 (inclusive), would not be included in computing the running of any statute of limitations that might be applicable to this action. Mot. at 42 (citing CX 303). Complainant argues that "the first and subsequent violations alleged by Complainant are within the statute of limitations as tolled by the Tolling Agreement.

Respondent's Fifth Defense should be struck." Mot. at 42.

In response, Respondent acknowledges that—

> While there is no dispute regarding the length and tolling of the 5-year statute of limitations in this case, there is a dispute as to when this action was properly commenced and hence as to the date from which the limitations period should be measured. Insofar as the original complaint was defective for failure to identify the specific parts alleged to violate the CAA, that complaint is not the proper starting point. Rather, the proper measure would be from the subsequent filing of a complete complaint, notwithstanding its characterization as an amended complaint. Using that date of August 6, 2020, the oldest date within the statute of limitations would be February 21, 2015 rather than January 15, 2015. Parts sold prior to that more recent date should be excluded from any penalty calculations.

Opp'n at 46.

To this assertion, Complainant replies in pertinent part that—

> The change associated with the First Amended Complaint was simply the dropping of certain claims, and therefore, [there] was nothing defective about the Original Complaint that would have caused confusion or ambiguity as to the alleged violations that were retained in the First Amended Complaint. Thus there is no basis for Respondent's claim of defect that preserves a statute of limitation defense.

Reply at 34.

Discussion

> Rule 15(c) of the Federal Rules of Civil Procedure provides that an amendment to a pleading relates back to the date of the original pleading if the amended claims arose out of the same conduct, transaction, or occurrence, and the defendant received timely notice of the institution of the action and is not prejudiced in maintaining a defense on the merits.

Bowles v. Reade, 198 F.3d 752, 761–62 (9th Cir. 1999).

The Original Complaint that initiated this proceeding, filed on June 30, 2020, alleges that Respondent violated the CAA between January 15, 2015, and September 26, 2018, by selling the

5,547 defeat devices purportedly listed in "Appendix A" attached thereto.[36] Orig. Compl. ¶¶ 55–67. It further identifies Appendix A as the Excel spreadsheet Respondent provided to the Agency on October 29, 2018, as part of its 2018 RFI Response. Orig. Compl. ¶ 49; CX 7. It appears that EPA erred and failed to attach Appendix A to the Original Complaint as filed with the Regional Hearing Clerk.

Complainant then filed its First Amended Complaint on August 6, 2020.[37] In that pleading, Complainant reduced the number of alleged parts violations to 5,296 but retained the same period of violation—January 15, 2015, to September 26, 2018. First Am. Compl. ¶¶ 55–67. That pleading as filed was accompanied by a document labeled "Appendix A" listing the Respondent's parts at issue by number and name.

On February 23, 2021, Complainant's Unopposed Motion for Leave to [Further] Amend Complaint was filed. Complainant identified therein the additional changes it wished to make to the First Amended Complaint, including adding an allegation regarding the parties Tolling Agreement and increasing the number of alleged violations committed during the January 15, 2015, to September 26, 2018, time period to 5,338. A copy of the proposed Second Amended Complaint was attached to that motion. The unopposed motion was granted by Order dated March 8, 2021, and Complainant filed its Second Amended Complaint on March 12, 2021, with an Appendix A.

Based upon the foregoing, there is no evidence supporting Respondent's assertion that the Original Complaint was substantively "defective." While the Original Complaint failed to include Appendix A referenced therein, Respondent had access to such document and knew exactly what was included in it as it had provided the document to the Agency. Further, Respondent has not argued that the violations alleged in the Amended Complaints do not arise "out of the same conduct, transaction, or occurrence" alleged in the Original Complaint and/or that it did not receive timely notice of the institution of the action or is prejudiced in maintaining a defense on the merits by the amendment. Therefore, there is no basis for the violations alleged in the Amended Complaints, which fall within the same time span and are fewer in number than those alleged in the Original Complaint, to not relate back to the date of the filing of the Original Complaint on June 30, 2020. Hence, the first date of the alleged violations and all subsequent violations are within the five-year statute of limitations as tolled by the parties' Tolling Agreement. Thus, Respondent's Fifth Defense is legally and factually insufficient and is hereby **STRICKEN**.

C. Sixth Defense – Unlawful Delegation of Legislative Authority

As set out in its Answer, Respondent's Sixth Defense is as follows:

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[36] The Original Complaint, First Amended Complaint, and Second Amended Complaint use the terms "Appendix" and "Attachment" interchangeably in reference to the attached spreadsheet. *See* Orig. Compl. ¶¶ 49–52; First Am. Compl. ¶¶ 49–52; Sec. Am. Compl. ¶¶ 50–53.

[37] Complainant was permitted to amend its Original Complaint as a matter of right as Respondent had not yet submitted an answer to the Original Complaint. 40 C.F.R. § 22.14(c).

> Insofar as the Clean Air Act is properly construed to delegate legislative powers to the EPA to resolve ambiguous provisions or to define illegal conduct, the Act violates Article [I] and is an improper delegation of legislative power.

Answer at 8.

In support of this defense, Respondent's Opposition cites the governmental principle of "separation of powers," and more specifically, argues that the Constitution forbids Congress from delegating its legislative power to another branch of government. Opp'n at 46 (citing U.S. Const. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States[.]"); *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 472 (2001)). This constitutional limitation, Respondent advises, mandates that Congress provide the executive branch and its agents with an "intelligible principle" to guide the use of its authority to implement laws. Opp'n at 47 (quoting *Gundy* v. *United States*, 139 S. Ct. 2116, 2123 (2019) (plurality opinion)). Respondent claims the CAA does not provide an "intelligible principle" which supports EPA's expansive interpretation of the phrase "motor vehicle" or its adoption of "a penalty policy setting punitive penalties for violations with little or no demonstrated harm[.]" Opp'n at 47. Alternatively, it suggests that if Congress did provide such an intelligible principle to guide EPA's delegated authority, such principle would be overbroad and therefore, unconstitutional. Opp'n at 47. Respondent acknowledges, however, that this administrative Tribunal lacks authority to rule on its defense challenging the CAA's constitutionality, stating it is merely raising it here "to preserve the issue for later review" and further "urges the Presiding officer to read existing delegation doctrine in light of the modern limitations and concerns emphasized in cases like *Gundy*." Opp'n at 48.

In support of its Motion, Complainant argues this defense "must fail because (1) its non-delegation challenge is refuted by the Act's plain language; and (2) its constitutional challenge to the non-delegation doctrine contravenes settled jurisprudence." Mot. at 42. As to Respondent's first assertion, Complainant claims that it is Respondent, not the Agency, who has asked this Tribunal to adopt a definition of "motor vehicle" which impermissibly deviates from the clear statutory language. Mot. at 42. Further, Complainant asserts that EPA's CAA Penalty Policy[38] is grounded upon the statutory penalty factors set out in section 205(c)(2) of the Act, 42 U.S.C. § 7524(c)(2). Mot. at 42. Complainant also proclaims that Respondent's claim of no demonstrated harm is refuted by its own admission "that its exhaust parts necessitate the removal of catalytic converters for successful installation"—catalytic converters which protect "the public from harmful pollutants such as CO, NOx, and VOC [volatile organic compounds]." Mot. at 42–43 (citing Mot. Attach. D (Citations) ¶ 3).

Next, EPA characterizes Respondent's second argument—that if the Tribunal finds that the CAA provides a sufficiently intelligible principle "to guide the EPA's hand," then the "entire nondelegation framework deviates from the Constitution's structure and should be rejected[,]" as a "broad attack on the non-delegation doctrine and the intelligible principle standard,"

[38] EPA, *Clean Air Act Title II Vehicle & Engine Civil Penalty Policy* (2021), *accessible at:* https://www.epa.gov/sites/default/files/2021-01/documents/caatitleiivehicleenginepenaltypolicy011821.pdf.

challenging almost one hundred years of settled jurisprudence. Mot. at 43 (citing Resp't PHE at 14; *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928) ("If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power."); *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting) ("[W]e have almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law."); *Whitman*, 531 U.S. at 474 ("In the history of the Court we have found the requisite 'intelligible principle' lacking in only two statutes[.]")); *see also* Reply at 34–35.

Discussion

With regard to Respondent's constitutional challenge raised in this defense, this Tribunal notes first that there is the general requirement that cases be decided on non-constitutional grounds whenever possible. *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring). This Tribunal has attempted to follow this requirement when determining the meaning of section 203(a)(3)(B) of the CAA by relying upon general rules of statutory interpretation. Second, federal courts have long recognized broad delegations of adjudicatory and rulemaking authority to administrative agencies as constitutionally valid. *United States v. S.W. Cable Co.*, 392 U.S. 157 (1968); *Fed. Commc'ns Comm'n v. RCA Commc'ns, Inc.*, 346 U.S. 86 (1953); *Yakus v. United States*, 321 U.S. 414 (1944). Third, as Respondent acknowledges, this Tribunal lacks the authority to hold statutory provisions constitutionally invalid. *NPDES Permits for 170 Alaska Placer Mines, More or Less*, 1 E.A.D. 616, 630 (EAB 1980) ("It is generally considered that the constitutionality of Congressional enactments is beyond the jurisdiction of administrative agencies."); *Johnson v. Robison*, 415 U.S. 361, 368 (1974) ("[A]djudication of the constitutionality of Congressional enactments has generally been thought beyond the jurisdiction of administrative agencies."); *San Pedro Forklift*, EPA Docket No. CWA-09-2009-0006, 2010 WL 3324918, at *5 (ALJ, Aug. 11, 2010) (Order on Respondent's Motion for Leave to File a First Amended Answer to Administrative Complaint) ("[C]onstitutional challenges, whether statutory or regulatory, are beyond the jurisdiction of this tribunal."). Therefore, Respondent's Sixth Defense is not well grounded in fact or law and alleges constitutional infirmity in the CAA which cannot be adjudicated here, and so is hereby **STRICKEN**.[39]

[39] In its Opposition, Respondent asks that—

> To the extent the Presiding Officer believes she lacks authority to even consider certain objections to the constitutionality or other aspects of the CAA or of EPA's enforcement regime, she should simply deny the relevant defense on that ground, but not strike it. In such instances, the defense merely serves to provide fair notice to EPA and preserve the issue for subsequent review so that there can be no suggesting of waiver or forfeiture. While respondent believes it is every agency's duty to consider the constitutionality and lawfulness of all aspects of its conduct, including the overall operation of its enforcement actions, it recognizes that such matters are ultimately for the courts and thus urge[s] the Presiding officer to develop a record sufficient for subsequent review.

Opp'n at 44–45. This Tribunal fails to understand the substantive or procedural concern for which Respondent is seeking to have its defenses "denied" rather than "stricken." EPA's Consolidated Rules do not provide specific guidance with regard to this issue, but the Federal Rules explicitly provide for the filing of a "Motion to Strike" in regard to any "insufficient defense." Fed. R. Civ. P. 12(f). "What constitutes an insufficient defense depends upon

D. Seventh Defense – Fair Notice

As its Seventh Defense, Respondent states:

> The EPA's decades-long practice of permitting conduct similar to that alleged in the Amended Complaint affirmatively misled Borla and the public or, at a minimum, failed to provide Borla notice that the EPA considered Borla's actions unlawful, making EPA's current enforcement action for pre-fair-notice conduct a violation of due process as protected by the Fifth Amendment. In addition, EPA's failure to publicly specify what actions a manufacturer must take for EPA to exercise its discretion not to enforce against racing-only sales likewise constituted a lack of fair notice or opportunity to seek such non-enforcement.

Answer at 8*; see also* Resp't PHE at 14–17 (citing, inter alia, *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1328–29 (D.C. Cir. 1995)).

As noted above, Respondent argues in its Opposition that since "motor vehicles converted to competition-use only vehicles are not included within the definition of motor vehicles[,]" their status "cannot provide the basis for a violation of the defeat device provision of the CAA." Opp'n at 49. However, in support of this defense, it asserts that "even if Complainant's contrary interpretation of the statute and regulations is deemed reasonable, Respondent cannot be held liable for any violations or penalties because EPA failed to provide fair notice of its interpretation of what was required under the law." Opp'n at 49. In support, it alleges that EPA made "confusing regulatory pronouncements and public statements" and had a "decades-long practice of knowingly allowing the conduct for which it now seeks penalties[.]" Opp'n at 49. It suggests that because its aftermarket emissions parts "can be and are [lawfully] used on purpose-built racecars of the same underlying make and model" as converted race cars, it could not have "imagine[d] that EPA could prohibit the manufacture of [such] parts[.]" Opp'n at 53; *see also* Opp'n at 53–55 ("The conversion of motor vehicles into racing vehicles has been a growing pastime for decades and is one that pre-dates the Clean Air Act."). Respondent declares that "[h]aving told the entire racing community that it was permitted to use and supply converted racing vehicles, EPA cannot then turn around and punish them *post hoc*" through an exercise of its enforcement discretion. Opp'n at 49–50.

EPA's "first direct regulatory or public statement" seeking to prohibit converted race cars did not come until July 2015, Respondent explains, and it was "[b]uried in a 600-plus page proposed rulemaking" having nothing to do with racing. Opp'n at 55–56 (citing Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles—

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the nature of the claim for relief and the defense in question." *Equal Emp. Opportunity Comm'n v. First Nat'l Bank of Jackson*, 614 F.2d 1004, 1008 (5th Cir. 1980) (citing 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1381). In this case, Complainant has initiated an administrative proceeding and Respondent has raised various defenses based upon the Constitution. As adjudicating such constitutional defenses is beyond the jurisdiction of this administrative Tribunal, the defenses are deemed "insufficient" and subject to being struck as such.

Phase 2, 80 Fed. Reg. at 40,527, 40,565). Moreover, Respondent asserts that EPA received "vehement backlash" from the industry and Congress for the statement and so never finalized the proposed policy change. Opp'n at 57–61 (citing, inter alia, RX 74–RX 77; EPA & U.S. Dep't of Transp., *Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- And Heavy-Duty Engines and Vehicles—Phase 2: Response to Comments for Joint Rulemaking* (2016)). As such, EPA "backtracked" and "restored the status quo," "reinforcing the understanding of the industry and public that EPA did not consider conversion of street vehicles to dedicated race cars, or the sales of parts for those conversions, to be prohibited by the CAA." Opp'n at 60–61. As a result, Respondent advises, there developed a common understanding and practice "for aftermarket parts manufacturers and resellers to include disclaimers on these racing products to inform customers that their use was limited to racing only or off-highway only." Opp'n at 61–64 (citing Opp'n Attachs. 6, 7 (Parts Catalogs); Cal. Code Regs. tit. 13, § 2222). In addition, Respondent supports its fair notice defense by noting that EPA has engaged in inconsistent enforcement, in that it has been aware of the supply of parts for the conversion of vehicles for decades, but took no enforcement action against such activity. Opp'n at 64–66 (citing *Lake Bldg. Prods., Inc. v. Sec'y of Labor*, 958 F.3d 501, 506 (6th Cir. 2020); *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 157–58 (2012)).

For its part, Complainant avers that "fair notice" only requires that the Agency's interpretation "could be ascertained by regulated entities through a plain reading of the statute" and that the plain language of section 203 supports its interpretation that Respondent's conduct was prohibited. Mot. at 44–45 (citing *Tenn. Valley Auth.*, 9 E.A.D. 357, 412 (EAB 2000) (Final Order on Reconsideration); *Harpoon P'ship*, 12 E.A.D. 182, 191–92 (EAB 2005); *V-1 Oil Co.*, 8 E.A.D. 729, 751–53 (EAB 2000)); *see also* Reply at 35 ("The Due Process Clause, however, does not require that a statute be drafted with 'perfect clarity and precise guidance.'" (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989))). It notes that courts tolerate lesser degrees of specificity for enactments with civil penalties than those with criminal penalties "because the consequences of imprecision are qualitatively less severe." Reply at 36 (quoting *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 498–99 (1982) ("The degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment."), and citing *Fed. Trade Comm'n v. Wyndham Worldwide Corp.*, 799 F.3d 236, 250 (3d Cir. 2015)). Finally, Complainant asserts that economic regulation is particularly given wider latitude in terms of fair notice. Reply at 36 (citing *Hoffman Ests.*, 455 U.S. at 498).

Further, Complainant proffers that acts of agency discretion, such as making enforcement of certain provisions a low priority for commitment of resources, "in no way constitutes Agency interpretation of the Act's Defeat Device Prohibition." Mot. at 44. As such, Complainant emphasizes Respondent has no justification for purportedly being misled into thinking its conduct was permitted. Mot. at 44.

Discussion

The Fifth Amendment to the United States Constitution provides in relevant part that "No person shall be . . . deprived of life, liberty, or property, without due process of law[.]" U.S. Const. amend. V. A fundamental principle of our legal system derived from such provision is that "fair notice" of forbidden conduct must be given before culpability for a violation is levied.

Fed. Commc'ns Comm'n v. Fox Television Stations, Inc., 567 U.S. 239, 253 (2012) (citing *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)). As Complainant observes, the level of notice required varies by the type of conduct being regulated, and civil statutes involving economic activity have been held to require only a "low level" of prior public notice because their "subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action." *Wyndham*, 799 F.3d at 250, 255 (quoting *Hoffman Ests.*, 455 U.S. at 498); *Econ. Muffler*, 762 F. Supp. at 1245 (same). The fair notice requirement is deemed unsatisfied only if the violator "could not reasonably foresee that a court might adopt the new interpretation of the statute." *Wyndham*, 799 F.3d at 249.[40]

As discussed in detail above, section 203(a)(3)(B), the CAA's defeat device prohibition, reads to this Tribunal as plainly written. It expressly prohibits the manufacture of defeat devices for "motor vehicles." The Subject Products were defeat devices designed to fit "motor vehicles," that is passenger vehicles normally driven on the street. Section 203 provides exceptions to its prohibitions, including for the conversion of vehicles to use clean fuel, but contains no exception for the sale of parts used to convert a "motor vehicle" to a vehicle "used solely for competition." It is difficult to imagine that Respondent could read section 203(a)(3)(B) and not foresee that a court might find its activities as falling within its confines.

As to Respondent's claim of confusing regulatory pronouncements made by the Agency, the record clearly shows that as early as 2008, *seven years* before the earliest violations alleged here, EPA explicitly advised Respondent's industry that "no," sales of their products could *not* be lawfully made if "the customer was informed that the parts are for racing use only." Opp'n at 55 n.14 (citing CX 341 (EPA's 2008 presentation at SEMA) at 38; CX 342 (EPA's 2010 presentation at SEMA) at 9); *see also Econ. Muffler*, 762 F. Supp. at 1245 (noting Respondent had received fair notice regarding the illegality of catalytic converter replacement through, inter alia, trade journals). Respondent does not deny being aware of EPA's position statements made at that time. Furthermore, as Respondent acknowledges, in 2015, EPA provided official public notice of its position as part of a proposed rulemaking. Opp'n at 56 (citing Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles—Phase 2*,* 80 Fed. Reg. at 40,527, 40,565). In that proposed rule, EPA unequivocally stated: "[I]f a motor vehicle is covered by a certificate of conformity at any point, there is no exemption from the tampering and defeat-device prohibitions that would allow for converting the engine or vehicle for competition use." 80 Fed. Reg. at 40,527.

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[40] While, as indicated above, administrative tribunals are generally held to have no authority to rule on constitutional challenges to the validity of statutes or regulations, where the arguments as to lack of fair notice merely challenge the Agency's interpretation of the statute or regulation as applied to the particular facts of a case, administrative tribunals have ruled on this issue. *See, e.g.*, *Robert Becker*, NOAA Docket Nos. AK1003466, AK1101486, 2015 WL 1776455, at *9 (NOAA 2015) (citing *Howmet Corp.*, EPA Docket Nos. 02-2004-7102, 06-2003-0912 (ALJ, Apr. 25, 2005) (Order on Motions), *aff'd*, 13 E.A.D. 272 (EAB 2007), *aff'd sub nom. Howmet Corp. v. EPA*, 656 F. Supp. 2d 167 (D.D.C. 2009), *aff'd*, 614 F.3d 544 (D.C. Cir. 2010); *Rollins Env't Servs. (NJ) Inc. v. EPA*, 937 F.2d 649, 656, 657 (D.C. Cir. 1991) (Edwards, J., dissenting in part and concurring in part) ("[O]ne need never reach the constitutional question in deciding whether a regulated party has received notice sufficient to justify an enforcement action."); *Adak Fisheries, LLC*, NOAA Docket No. AK035039, 2007 WL 1255138 (NOAA Mar. 12, 2007) (using traditional tools of statutory construction to address the argument of lack of fair warning and adequate notice of prohibited conduct), *aff'd in part, remanded in part*, 2009 WL 1034813 (NOAA App. April 1, 2009)).

While Respondent attempts to minimize the notice given in this rule by stating it was "buried in a 600-plus page document," it simultaneous acknowledges that there was an "uproar" in its industry in response to it, to such an extent that it led Congress to hold public hearings on the issue in March of 2016. Opp'n at 56–58 (citing RX 74); *see also* Opp'n at 57 n.17 (noting numerous industry publications in 2016 reported on EPA's "ban" on converting street cars to race cars). Interestingly, SEMA, Respondent's trade organization, stated at the time that it had "been working with the EPA on ways to regulate potential dual-use products, defined as products that could be used on both competition-use only and certified motor vehicles." Opp'n at 57 (citing EPA & U.S. Dep't of Transp., EPA-420-R-16-901, *Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- And Heavy-Duty Engines and Vehicles—Phase 2: Response to Comments for Joint Rulemaking* (2016), at 1913). These comments make it clear that: (a) the industry recognized that the products for competition vehicles were of "dual use" and (b) the industry has comprehended for a long time that EPA's policy was to prevent their "dual use" in street vehicles.

Respondent declares that after the industry's "backlash" response triggered Congressional hearings, EPA "backtracked" and "restored the status quo" reaffirming that EPA did not consider "the sales of parts for those conversions [from motor vehicles to competition vehicles] to be prohibited by the CAA." Opp'n at 60–61. It notes that EPA responded to congressional correspondence on the matter by stating—

> I'd also like to make it clear that the EPA supports motorsports and its contributions to the American economy and communities all across the country. EPA's focus is not on vehicles built or used exclusively for racing, *but on companies that don't play by the rules and that make and sell products that disable pollution controls on motor vehicles used on public roads.* These unlawful defeat devices pump dangerous and illegal pollution into the air we breathe.
>
> The proposed language in the CAA rulemaking was never intended to represent any change in the law or in EPA's policies or practices towards dedicated competition vehicles. Since our attempt to clarify led to confusion, the EPA has decided to eliminate the proposed language from the final rule.
>
> *We will continue to engage with the racing industry* and others about ways to ensure that we support racing and also keep our focus where it has always been: reducing pollution from the cars and trucks that travel along America's roadways and through our neighborhoods.

Opp'n at 59 (emphasis added) (citing RX 76). Similarly, EPA responded to the Automobile Competition Committee for the United States ("ACCUS"), stating—

> The EPA and the responsible racing community agree on two major points. First, vehicles that are used solely for competition in sanctioned events should be allowed to do so, as they historically have. Second, vehicles driven on public roads must have fully functioning pollution controls as required by the CAA. . . .
>
> *For motor vehicles that are certified for use on public roads, the CAA has always prohibited tampering with or defeating those vehicles' emission control systems.* However, just like the purpose-built, dedicated competition vehicles described above, the EPA likewise has no interest in vehicles that begin their existence as normal, EPA-certified production vehicles used on public roads and are then permanently converted to *sanctioned* competition-use only vehicles.

Opp'n at 59–60 (emphasis added) (citing RX 77). And, in response to comments to the proposed rule, EPA stated—

> The proposal included a clarification related to vehicles used for competition to ensure that the Clean Air Act requirements are followed for vehicles used on public roads. This clarification is not being finalized. EPA supports motorsports and its contributions to the American economy and communities all across the country. EPA's focus is not (nor has it ever been) on vehicles built or used exclusively for racing, *but on companies that violate the rules by making and selling products that disable pollution controls on motor vehicles used on public roads*. These unlawful defeat devices lead to harmful pollution and adverse health effects. The proposed language was not intended to represent a change in the law or in EPA's policies or practices towards dedicated competition vehicles. Since our attempt to clarify led to confusion, EPA has decided to eliminate the proposed language from the final rule.
>
> *EPA will continue to engage with the racing industry and others in its support for racing, while maintaining the Agency's focus where it has always been: Reducing pollution from the cars and trucks that travel along America's roadways and through our neighborhoods.*

Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles—Phase 2 (Final Rule), 81 Fed. Reg. 73,478, 73,957–58 (Oct. 25, 2016) (emphasis added); *see also id.* at 73,529 (noting EPA is "not finalizing the proposed clarification related to highway vehicles used for competition").

A careful reading of these statements demonstrates that they are directed towards vehicle owners: EPA's position seems to be that vehicle owners who utilized defeat devices on motor

vehicles while converting them to *permanent* racing vehicles should not apprehend being targeted by an enforcement action. RX77 at 2 ("The EPA has never taken, and has no intention to take, enforcement action against vehicle owners for removing or defeating the emission controls of an EPA-certified motor vehicle for the purpose of permanently converting it to a vehicle used solely for sanctioned competition."). The quotations Respondent relies on evidence no forbearance on EPA's part towards industry players like Respondent—the manufacturers and vendors of defeat devices. The industry seems to have recognized the precariousness of its position, since SEMA sought to work with EPA on ways to regulate dual use devices, presumably with a goal of protecting industry players like Respondent from enforcement activities. Respondent's attempt to lump itself in with vehicle owners is unconvincing, and Respondent's assertion that "EPA's decision [to alter the Final Rule] effectively restored the status quo and reaffirmed that its 'focus is not (nor has it ever been) on vehicles built or used exclusively for racing,' reinforcing the understanding of the industry and the public that EPA did not consider conversion of street vehicles to dedicated race cars, *or the sales of parts for those conversions*, to be prohibited by the CAA" overstates the reality as the Tribunal sees it. Opp'n at 60–61 (emphasis added) (footnote omitted). Beyond the plethora of statements Respondent utilizes to demonstrate EPA's permissiveness towards such conduct for vehicle owners, Respondent offers nothing that shows that manufacturers and vendors enjoyed the same status as those owners. Thus, while Respondent may have chosen to take EPA's statements in 2016 as an imprimatur to continue its activities *indefinitely* without fear of prosecution, it did so at its own risk.

Moreover, if Respondent honestly found these statements by EPA "confusing," it could have reached out to EPA with a request for clarification of the legality of its activities, particularly as to whether labeling its products as for "competition use only" was sufficient. *See Bellion Spirits, LLC v. United States*, 7 F.4th 1201, 1214 (D.C. Cir. 2021) ("[V]agueness concerns are mitigated when regulated entities 'have the ability to clarify the meaning of the regulation by [their] own inquiry, or by resort to an administrative process.'" (quoting *Hoffman Ests.*, 455 U.S. at 498)). However, there is no evidence that Respondent did so here.

I am also unpersuaded by Respondent's claim that prior to this action "EPA never clearly barred or penalized the manufacture of parts for conversion of motor vehicles to racing vehicles[,]" and that its inaction evinces lack of fair notice. Opp'n at 53. First, "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion" and is not reviewable. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (citing, inter alia, *United States v. Batchelder*, 442 U.S. 114, 123–124, (1979)); *Ass'n of Irritated Residents v. EPA*, 494 F.3d 1027, 1028, 1030 (D.C. Cir. 2007) (acts of enforcement discretion are not reviewable).

Second, in its Reply, EPA cites a series of (settled) enforcement actions under section 203(a)(3) in which it engaged prior to the instant action. Reply at 38 (citing, inter alia, *Casper's Elecs. Inc.* (2007); *Edge Prods. LLC* (2013)).[41]

[41] *See* EPA, *Casper's Electronics Inc. Clean Air Act*, https://www.epa.gov/enforcement/caspers-electronics-inc-clean-air-act; EPA, *Edge Products LLC Settlement* (Jan. 17, 2013), https://www.epa.gov/enforcement/edge-products-llc-settlement.

Third, even if EPA had never previously brought any actions to enforce section 203(a)(3)(B), simply being the first entity against whom EPA seeks a penalty on a certain provision would not evidence a lack of "fair notice." Fourth, this Tribunal has cited herein the litigated cases of *Ced's* and *Gear Box Z. Ced's* indicates that as early as 1984, EPA was pursuing manufacturers of defeat devices for "causing" violations of the CAA, even when they alleged that those parts had "perfectly legal uses." *Ced's*, 745 F.2d at 1096–97. *Gear Box Z* evidences that EPA has continued to pursue such cases. The *Gear Box Z* opinion reveals that, in 2017, EPA notified the defendant, an aftermarket parts manufacturer, like Respondent here, of a section 203(a)(3)(B) violation. 526 F. Supp. 3d at 524–25. In response, that defendant, like the Respondent here, raised as a defense a claim of an exclusion for use of defeat devices in motor sports. *Id*. at 526–28. In support of that defense, an amicus curiae brief was filed, perhaps by Respondent's industry organization. *Id.* at 524, 528. Thus, the evidence suggests that the Agency was bringing enforcement actions against Respondent's competitors alleging section 203(a)(3)(B) violations prior to this action, so Respondent's assertion of lack of fair notice due to the absence of such actions is meritless.

In sum, the record demonstrates that EPA provided "fair notice" that it construed the sale of dual use defeat devices as within the meaning of the CAA's prohibition in section 203(a)(3)(B). As such, Respondent's Seventh Defense is legally and factually insufficient and is hereby **STRICKEN**.

E. <u>Eighth Defense – Sixth Amendment Protections</u>

As its Eighth Defense, Respondent's Answer states:

> Because the penalties proposed by EPA under the Second Amended Complaint are essentially penal in character, this proceeding violates Borla's Sixth Amendment rights to confrontation, compulsory process for obtaining witnesses, and a trial by jury and related procedural rights. It would also violate a panoply of due process protections relating to the burden of proof, obligations to disclose adverse evidence, and others.

Answer at 8–9.

In support of striking this defense, Complainant advises that "[a]dministrative penalties that are characterized by Congress as 'civil' and do not impose any form of criminal punishment are not subject to Sixth Amendment constitutional requirements." Mot. at 45 (citing *United States v. J.B. Williams Co.*, 498 F.2d 414, 421 (2d Cir. 1974); *David D'Amato*, EPA Docket No. CWA-10-2010-0132, 2011 WL 3274057, at *2 n.3 (ALJ, May 27, 2011) (Order on Respondent's Motion to Depose [a Witness])). Complainant points out that "Congress characterized penalties assessed pursuant to CAA section 205(a) as 'civil' and authorized the EPA to bring a 'civil action' to recover such a 'civil penalty.'" Mot. at 45 (citing 42 U.S.C. § 7524(a)–(b)).

Further, the Agency argues that CAA section 205(c)(1) "establishes procedures that the EPA Administrator must follow when assessing a civil penalty." Mot. at 45 (citing 42 U.S.C. § 2524(c)(1)). Complainant asserts that "[t]o the extent that the Respondent finds the procedures

set forth in section 205(c)(1) to violate constitutional due process, an administrative proceeding is not the forum in which to bring forth constitutional challenges to Congressional enactments." Mot. at 45–46 (citing *Johnson*, 415 U.S. at 361; *Irving Mun. Separate Storm Sewer Sys.*, 10 E.A.D. 111 (EAB 2001) (Order Denying Review); *Marlborough Easterly Wastewater Treatment Facility*, NPDES Appeal No. 04-12, 2005 WL 627643, at *6 & n.19 (EAB, Mar. 11, 2005) (Order Denying Petition for Review); *D'Amato*, 2011 WL 3274057 at *2 n.3).

In its Reply, Complainant adds that "Respondent ignores that the primary purpose of civil penalties is deterrence, not punishment." Reply at 39 (citing *Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 548 (EAB 1998)). It advises that—

> In this matter, the size of the proposed penalty is based in large part on the amount of economic benefit (i.e., illegal profits) Respondent enjoyed from committing the violations. The penalty therefore needs to be of a size to deter Respondent and others from engaging in what is otherwise a very profitable enterprise. Moreover, the penalty has to be sizable for deterrence purposes for others in the automotive parts industry, as given the number of violations at issue as well as the prominence of Respondent within the aftermarket exhaust parts industry, others will be looking at the penalty assessed in this Proceeding carefully as part of their calculus as to whether it is worth the legal risks to continue to manufacture and sell defeat devices. The proposed penalty in this case, which is significantly below the statutory maximum authorized by Congress, can hardly be called equivalent to a criminal sanction.

Reply at 39.

Further, Complainant says "the legislative history indicates that Congress increase[d] penalties for Title II violations as part of the 1990 CAA amendments specifically for the purpose of providing 'a stronger deterrent against violations of the relevant provisions, especially with regard to more expensive vehicles.'" Reply at 40 (citing S. Rep. No. 101-228, at 124–25, 1990 U.S.C.C.A.N. at 3510).

In its Opposition, Respondent supports the maintenance of its Eighth Defense based upon the Sixth Amendment in this proceeding by suggesting that "it is premature to dispose of this issue without knowing the full scope and justification for the penalties EPA seeks to impose" and the final penalty it obtains. Opp'n at 66–68. If the penalty imposed is minimal or non-existent, Respondent states, "this defense will become moot." Opp'n at 67–68. "If large penalties are imposed in order to punish and deter conduct out of all proportion to any putative harm, then this defense will be very live indeed[,]" it claims. Opp'n at 68.

Respondent further advises that "[e]ven fines that are nominally civil can be [found] punitive in nature such that they are properly viewed as criminal punishments" based upon such factors as—

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.

Opp'n at 66 (citing *Hudson v. United States*, 522 U.S. 93, 101 (1997), and quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963) (footnotes omitted)).

Respondent suggests that the CAA administrative penalty EPA seeks here is punitive because: (1) "it involves an affirmative restraint—moving forward, Borla will no longer be able to sell the affected parts under fear of punishment"; (2) considering the "gravity of the violation," it promotes "one of the traditional aims of punishment—retribution—by requiring the EPA to increase the size of the fine's amount for more egregious violators"; and (3) "there is no nonpunitive purpose for imposing a fine as enormous and excessive as the fine the EPA previously had sought before this enforcement action was filed."[42] Opp'n at 67 (citing 42 U.S.C. § 7524(c)(2)).

Discussion

The Supreme Court has set forth the analytical approach for determining whether a penalty provision is essentially criminal:

> Our inquiry in this regard has traditionally proceeded on two levels. First, we have set out to determine whether Congress, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other. Second, where Congress has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect as to negate that intention.

United States v. One Assortment of 89 Firearms, 465 U.S. 354, 362–63 (1984) (citations omitted) (quoting *United States v. Ward*, 448 U.S. 242, 248–49 (1980)). The Court further indicated that if the first prong of the test yields a designation that the statute is civil, "'[o]nly the clearest proof' that the purpose and effect of the forfeiture are punitive will suffice to override Congress' manifest preference for a civil sanction." *Id.* at 365 (citations omitted).

There can be no question that Congress expressed its intent that the penalty in this action be a civil one. The CAA provides that "any person who violates section 7522(a)(3)(B) of this title shall be subject to a *civil penalty* of not more than $2,500" and that "[a]ny such violation

[42] It is the practice of this Tribunal to remain ignorant of what transpires between parties during negotiations before the filing of a complaint, and I will not consider the content of any discussions between the present parties, at this point in the proceeding or going forward.

with respect to section 7522(a)(3)(B) of this title shall constitute a separate offense with respect to each part or component." 42 U.S.C. § 7524(a) (emphasis added). Further, "in lieu of commencing a *civil action* . . . , the Administrator may assess any *civil penalty*" in the same amount through the on-the-record administrative adjudication process. *Id.* § 7524(c)(1) (emphasis added). The Act continues:

> In determining the amount of any *civil penalty* assessed under this subsection, the Administrator shall take into account 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.

Id. § 7524(c)(2) (emphasis added). Finally, the Act allows "[a]ny person against whom a *civil penalty* is assessed in accordance with this subsection [to] seek review of the assessment in" the appropriate district court. *Id.* § 7524(c)(5) (emphasis added).

As to the "statutory scheme" being punitive in purpose or effect, the "major purpose of a civil penalty [is] deterrence." *United States v. Ekco Housewares, Inc.*, 853 F. Supp. 975, 989 (N.D. Ohio 1994) (citations omitted), *aff'd in part & rev'd in part*, 62 F.3d 806 (6th Cir. 1995). "[T]he penalty fashioned must be significant enough to 'serve both a specific and general deterrent purpose, deterring future violations by these defendants and similar violations by others.'" *United States v. Gurley*, 235 F. Supp. 2d 797, 805–06 (W.D. Tenn. 2002) (citations omitted) (quoting *United States v. LeCarreaux*, Civ. No. 90-1672 (HLS), 1992 WL 108816, at *15 (D.N.J. Feb. 19, 1992)), *aff'd*, 384 F.3d 316 (6th Cir. 2004); *see also United States v. Phelps Dodge Indus., Inc.*, 589 F. Supp. 1340, 1367 (S.D.N.Y. 1984) ("[The civil penalty] should be large enough to hurt, and to deter anyone in the future from showing as little concern as [the defendants] did for the need to [comply]."). "Indeed, '[e]ven if the defendant[] in this case [is] not in a position to repeat the violations, a substantial penalty is warranted to deter others.'" *Gurley*, 235 F. Supp. 2d at 806 (quoting *LeCarreaux*, 1992 WL 108816, at *15).

In calculating the penalty here, Complainant and this Tribunal are required to take into account, in addition to the gravity of the violation, "the economic benefit or savings (if any) [to Respondent] 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." 42 U.S.C. § 7524(c)(2). These factors all work to assure the civil penalty imposed serves to deter but is not unduly punitive or penal. *La. Generating LLC v. Ill. Union Ins. Co.*, No. CV 10-516-JJB-SCR, 2014 WL 12769615, at *4 (M.D. La. Sept. 30, 2014) (finding that civil penalty assessed under the CAA is not punitive). The EAB has held that recovery of economic benefit is particularly important:

> The Region rightly claims that the "recapture of a violator's economic benefit from noncompliance is the cornerstone of the Agency's civil penalty program." . . .

> Assessing a penalty amount that reflects a violator's economic benefit of noncompliance serves two purposes vital to an effective enforcement program. First, it deters violations by taking away the economic incentive to violate the law. . . .
>
> Second, the economic benefit of noncompliance component of a penalty helps "ensure a level playing field by ensuring that violators do not obtain an economic advantage over their competitors who made the necessary investment in environmental compliance." In essence, the Agency's ability to recoup a violator's economic benefit "protects responsible companies from being undercut by their noncomplying competitors, thereby preserving a level playing field."

B.J. Carney Indus., Inc., 7 E.A.D. 171, 207–08 (EAB 1997) (citations omitted) (citing, inter alia, *Atl. States Legal Found., Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1141 (11th Cir. 1990) ("Insuring that violators do not reap economic benefit by failing to comply with the statutory mandate is of key importance if the penalties are [] successfully to deter violations."); *Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd.*, 611 F. Supp 1542, 1557 (E.D. Va. 1985) (finding that if a penalty does not include the economic benefit of noncompliance, "the violator and potential violators would perceive that it pays to violate the law, creating an obvious disincentive for compliance."), *aff'd*, 791 F.2d 304 (4th Cir. 1986), *rev'd on other grounds*, 484 U.S. 49 (1987); *A.Y. McDonald Indus., Inc.*, 2 E.A.D. 402, 423, 1987 WL 109674, at *12 (EAB 1987) ("The economic benefit component serves to remove any incentive to violate the [law] by requiring the violator to pay the expenses avoided or deferred through noncompliance.")).

For the 5,338 violations alleged in the Second Amended Complaint, Complainant proposed a penalty of $1,272,126, or approximately $240 per violation. Compl't Rebut. PHE at 1. That proposed sum falls well below the statutory maximum of $2,500 allowed for each violation of section 203(a)(3)(B)—a statutory limitation that does not reflect recent inflation adjustments. 42 U.S.C. § 7524(a); *see also* 40 C.F.R. § 19.4. Further, some portion of that proposed amount likely reflects Respondent's economic benefit, which the EAB decisions cited above suggest should generally be used to set the floor for the penalty amount. Respondent is entitled to contest the Agency's penalty calculations and introduce evidence in regard thereto, which Mr. Stoner's Declaration indicates it is preparing to do. Opp'n Attach. 5 (Stoner Decl.) ¶¶ 4, 6 (noting his involvement in "developing and presenting analyses whether and to what extent Borla obtained an economic benefit from the production and sale of racing parts identified by EPA in its claims against Borla"). As such, there is no evidence that the "statutory scheme" here is either punitive in purpose or effect.

Moreover, it has been repeatedly held, in all sorts of contexts, some with much more punitive penalties than those permitted under the CAA, that the Sixth Amendment protections generally do not apply to administrative penalty proceedings. *See, e.g.*, *D'Amato*, 2011 WL 3274057, at *2 n.3 ("[T]he Confrontation Clause is limited by its own language to criminal

prosecutions and not administrative proceedings." (citing *Malave v. Holder*, 610 F.3d 483, 487 (7th Cir. 2010))); *J.B. Williams Co.*, 498 F.2d at 421 (rejecting application of Sixth Amendment provisions to an action to recover penalties under § 5(*l*) of the Federal Trade Commission Act, stating "[i]n the face of a long line of contrary authority, appellants have not directed our attention to any civil penalty provision that has been held sufficiently 'criminal' in nature to invoke the protections of the Sixth Amendment"); *Castaneda-Suarez v. Immigr. & Naturalization Serv.*, 993 F.2d 142, 144 (7th Cir. 1993) ("Deportation hearings are deemed civil proceedings and thus aliens have no constitutional right to counsel under the Sixth Amendment."); *Camp v. United States*, 413 F.2d 419, 421–22 (5th Cir. 1969) (finding no Sixth Amendment right to counsel in non-criminal administrative proceedings before the Selective Service Board); *United States v. Campos-Asencio*, 822 F.2d 506, 509 (5th Cir. 1987) (holding that parties in civil administrative proceedings like deportation hearings "have no sixth amendment right to counsel"); *Perez v. United States*, 850 F. Supp. 1354, 1366–67 (N.D. Ill. 1994) (finding Sixth Amendment right to counsel only applies to criminal proceedings, not non-criminal proceedings); *Schultz v. Wellman*, 717 F.2d 301, 307 (6th Cir. 1983) (holding that Sixth Amendment rights to confront witnesses or to compulsory process were not applicable to administrative discharge proceedings of National Guard member because proceedings were not criminal in nature); *Thomas v. Ill. Dep't of Ins.*, No. 93 C 4216, 1993 WL 528109, at *2 (N.D. Ill. Dec. 16, 1993) (holding the Sixth Amendment right to confront and cross-examine adverse witnesses does not apply in administrative proceedings); *Savina Home Indus., Inc. v. Sec'y of Labor*, 594 F.2d 1358 (10th Cir. 1979) (rejecting that Sixth Amendment jury trial protections apply in civil penalty assessment proceedings of Occupational Safety and Health Administration). This holding has applied even when the same conduct could be the subject of criminal proceedings. *Argiz v. U.S. Immigr.*, 704 F.2d 384, 387 n.3 (7th Cir. 1983). *See generally L.A. Police Protective League v. Gates*, 579 F. Supp. 36, 41 (C.D. Cal. 1984) ("Plaintiffs have presented no support for the proposition that the Sixth Amendment applies to non-criminal administrative proceedings involving no loss of liberty. In fact, the courts have held that it does not so apply.").

Based upon the foregoing, Respondent has not shown that the penalties sought here for violations of CAA section 203(a)(3)(B) are "penal" and/or based thereon, that it is entitled to the protections provided under the Sixth Amendment in this administrative proceeding. Therefore, Respondent's Eighth Defense is legally insufficient and is hereby **STRICKEN**.

F. Ninth Defense – Ex Post Facto Clause

As its Ninth Defense, Respondent states as follows:

> Because the penalties proposed by EPA under the Second Amended Complaint are essentially penal in character, imposing them on Borla for conduct that was legal or otherwise permitted before the EPA's new interpretation and enforcement policy violates the Ex Post Facto Clause.

Answer at 9.

Complainant argues in support of striking this defense that it fails for three reasons:

> First, Complainant's enforcement of the Defeat Device Prohibition does not represent an ex post facto law or interpretation of the law. Complainant's application of the Defeat Device Prohibition is grounded in the text of the CAA, the current codification of which has been in effect since 1990. Second, this proceeding is properly viewed as a civil enforcement matter and not, as Respondent would have this Tribunal believe, a criminal matter, meaning the Ex Post Facto Clause is of no relevance. *United States v. D.K.G. Appaloosas, Inc*., 829 F.2d 532, 540 (5th Cir. 1987) ("It is beyond dispute that the *ex post facto* clause applies only to criminal cases.") (internal citations omitted). Third, section 205(a) of the Act imposes civil penalties, not criminal penalties, on violators, further demonstrating that the prohibition on ex post facto laws does not apply.

Mot. at 46.

In opposition to the Motion, Respondent states: "To the extent this case is viewed as a criminal enforcement matter depending on the penalty sought, it would also violate the *Ex Post Facto* Clause." Opp'n at 68. And, Respondent contends "[t]o the extent that EPA's interpretation of 'motor vehicle' to encompass converted racing-only vehicles constituted a permissible change in the law, applying that change retroactively to Borla's past conduct violates the *Ex Post Facto* Clause." Opp'n at 68.

Discussion

The *Ex Post Facto* Clause of the Constitution prohibits "any law which makes *criminal* an action which was innocent when done, or which inflicts greater punishment than the original law annexed to the crime when committed." *In re Martin Gabey*, EPA Case No. 83-0040-02, 1983 WL 234706, at *2 (Off. of Grants & Debarments, Dec. 16, 1983) (emphasis added); U.S. Const. art. I, § 9, cl. 3. Penalties imposed pursuant to federal rules and regulations similarly come within the scope of this prohibition if they are *criminal in nature*. *Gabey*, 1983 WL 234706, at *2–3 (citing *Rodriguez v. U.S. Parole Comm'n*, 594 F.2d 170 (7th Cir. 1979); *Hayward v. U.S. Parole Comm'n*, 502 F. Supp. 1007 (D. Minn. 1980), *rev'd on other grounds*, 659 F.2d 857 (8th Cir. 1981)) (holding that debarment from procurement activities for conspiracy to defraud the United States is "neither criminal nor penal in nature, even though as a natural consequence the debarred person's economic opportunities with the debarring agency may be adversely affected thereby").

As discussed in detail above regarding Respondent's defense based upon the Sixth Amendment, the penalties for violations of section 203(a)(3)(B) are "civil," and Complainant's Second Amended Complaint does not attempt to impose any form of criminal punishment on Respondent. Thus, the *Ex Post Facto* Clause is unavailable to Respondent as a defense. *Petroleum Mgmt., Inc.*, 2 E.A.D. 641, 1988 WL 249373, at *1 n.5 (EAB 1988) (finding *Ex Post*

Facto Clause not applicable to denial of permit as it "only applies to penal legislation that imposes or increases criminal punishments" (citing, inter alia, *United States v. Healy Tibbitts Constr. Co.*, 713 F.2d 1469, 1476 (9th Cir. 1983) (civil penalty assessed under Clean Water Act for prior violation did not violate *Ex Post Facto* Clause))). Therefore, Respondent's Ninth Defense is insufficient as a matter of law and is hereby **STRICKEN**.

G. Tenth Defense – Rule of Lenity

Respondent's Tenth Defense, entitled "Rule of Lenity," is as follows:

> The Clean Air Act and regulations promulgated under its authority are ambiguous, particularly as applied to this case. Because the penalties proposed by EPA under the Second Amended Complaint are essentially penal in character, and because the terms of the statute and regulations can also determine application of criminal penalties under other provisions of the Act, those ambiguities should be resolved in Borla's favor.

Answer at 9.

In its Opposition, Respondent explains that the rule of lenity is a statutory "interpretive rule that resolves ambiguity in favor of potential defendants and is part of the traditional toolkit for determining the meaning of statutory language." Opp'n at 70–71. The rule of lenity trumps deference given to agency interpretations under *Chevron* in case of ambiguous "[s]tatutes that involve criminal penalties or that have mixed civil and criminal applications[.]" Opp'n at 69 (citing *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 140 S. Ct. 789 (2020) (Statement of Gorsuch, J.); *Gun Owners of Am., Inc. v. Garland*, 992 F.3d 446, 454–68 (6th Cir. 2021), *vacated*, 2 F.4th 576 (6th Cir. 2021)). The rule is applicable here, Respondent suggests, first because criminal actions have been brought under the CAA. Opp'n at 73 (citing *United States v. Rockwater N.E. LLC*, No. 4:20-cr-00230-MWB (M.D. Pa. filed Sept. 24, 2020)[43]). And second, Respondent asserts that the Act "plainly does *not* apply to vehicles not designed or used on the streets or highways"; however, if the Agency has plausibly interpreted it to apply to such vehicles, such interpretation evidences a "gross ambiguity" in the statute. Opp'n at 69. According to Respondent, the existence of such ambiguity is buttressed by the fact that "so many members of Congress and the industry understood for decades that modified racecars and their parts were legal[.]" Opp'n at 69.

As to this defense, Complainant states that the rule of lenity is a "canon of criminal statutory construction" inapplicable to this is civil action. Mot. at 47–48 (citing 42 U.S.C. § 7524; *United States v. Bass*, 404 U.S. 336, 347 (1971); *Lazarus, Inc.*, 7 E.A.D. 318, 365 (EAB 1997)). Further, Complainant insists that the rule only applies where "'after consulting traditional canons of statutory construction' there is a 'grievous ambiguity' where the court 'can make no more than a guess as to what Congress intended.'" Mot. at 49 (citing *Shular v. United*

[43] *See* U.S. Dep't of Just., *Water Management Companies Enter Resolutions to Pay $4.3 Million In Monetary Penalties For Clean Air Act Violations* (Sept. 28, 2020), https://www.justice.gov/usao-mdpa/pr/water-management-companies-enter-resolutions-pay-43-million-monetary-penalties-clean.

States, 140 S. Ct. 779, 787 (2020) (Kavanaugh, J., concurring); *Muscarello v. United States*, 524 U.S. 125, 138–39 (1998)). The Agency avers that the rule of lenity does not apply, in that Respondent has not identified a "grievous ambiguity in CAA provisions at issue incapable of being resolved by a reviewing court's recourse to text, purpose, and history[.]" Mot. at 47.

Discussion

> The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them. This venerable rule not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed.

United States v. Santos, 553 U.S. 507, 514 (2008) (citing, inter alia, *United States v. Gradwell*, 243 U.S. 476, 485 (1917)); *Harmon Elecs., Inc.*, 7 E.A.D. 1, 25 n.32 (EAB 1977) ("The 'rule of lenity' is a principle of statutory construction which provides that criminal statutes must be strictly construed, and any ambiguity resolved in favor of lenity." (citing *Tanner v. United States*, 483 U.S. 107, 131 (1987) ("If the legislative history fail[ed] to clarify the statutory language . . . our rule of lenity would compel us to construe the statute in favor of petitioners, as criminal defendants in these cases.")).

Respondent's citation to one instance where criminal charges were brought after defendants tampered with emissions control systems in diesel vehicles and then arranged for third parties to certify that the vehicles met state inspection standards notwithstanding, as repeatedly indicated above, violations of section 203(a)(3)(B), 42 U.S.C. § 7522(a)(3)(B), are civil or administrative and subject only to the civil penalties as set forth in section 205, 42 U.S.C. § 7524(a). As such, the rule of lenity is not applicable. *Harmon Elecs.*, 7 E.A.D. at 25 ("[I]n the criminal context, statutory interpretation is governed by the rule of lenity. By definition, this rule is inapplicable in the civil context. . . . [I]nstead of applying the rule of lenity, we apply the rules of interpretation applicable to civil cases involving a remedial statute such as RCRA [Resource Conservation and Recovery Act]." (footnote omitted)); *Lazarus*, 7 E.A.D. at 365 (noting there is a difference in the treatment of civil and criminal statutes and stating that "[i]n civil cases, courts may take into consideration the purpose of an underlying remedial statute").

Even if the rule were applicable, as the Complainant notes, it "applies only when, after consulting traditional canons of statutory construction, we are left with an ambiguous statute." *Shular*, 140 S. Ct. at 787 (quoting *United States v. Shabani*, 513 U.S. 10, 17 (1994)). Here, as discussed in detail above, we are left with no ambiguity for the rule of lenity to resolve. Section 203(a)(3)(B)'s text and context leave no doubt as to its meaning encompassing the manufacture or sale of defeat devices which can be installed in vehicles primarily designed to be driven on the street. Therefore, Respondent's Tenth Defense is insufficient as a matter of law and is **STRICKEN**.

H. Eleventh Defense – Seventh Amendment Right to Jury Trial

Respondent's Eleventh Defense is:

> Even if the penalties in this case are deemed "civil," this proceeding violates Borla's Seventh Amendment right to a jury determination of disputed issues of fact. That an executive officer part of the same agency seeking to impose fines is permitted near conclusive authority to resolve disputed issues of fact also constitutes a due process violation, notwithstanding the limited judicial review provided by the Administrative Procedure Act.

Answer at 9.

Complainant strongly challenges the validity of this defense and Respondent's Opposition itself acknowledges the extreme weakness of this defense. Mot. at 49–51; Opp'n at 74–75. Specifically, Respondent admits that "[u]nder current doctrine, enforcement actions such as this one might be viewed as involving public rights and thus not subject to the Seventh Amendment." Opp'n at 74 (citing *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1379 (2018) ("[W]hen Congress properly assigns a matter to adjudication in a non-Article III tribunal, 'the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder.'"); *Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n*, 430 U.S. 442, 461 (1977) ("The Seventh Amendment is no bar to the creation of new [public] rights or to their enforcement outside the regular courts of law.")). Nevertheless, Respondent justifies raising the defense here, stating that it wishes to "preserve its objection and to make a record suitable for review" because, in its opinion, "[s]everal justices on the current [Supreme] Court . . . have expressed some willingness to reconsider or potentially narrow the public-rights doctrine." Opp'n at 74–75 (citing *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 171 (2015) (Thomas, J., dissenting) ("To the extent that administrative agencies could, consistent with the Constitution, function as courts, they *might* only be able to do so with respect to claims involving public or quasi-private rights." (emphasis added in Opp'n)); *Stern v. Marshall*, 564 U.S. 462, 504–05 (2011) (Scalia, J., concurring) ("[I]n my view an Article III judge is required in *all* federal adjudications . . . [except for] territorial courts, courts-martial, or true 'public rights' cases.")).

Discussion

Protection of air quality via government action brought under the Clean Air Act is enforcing a true "public right." *United States v. Thirty-Six (36) 300CC on Rd. Scooters Model WF300-SP*, No. 2:11-CV-130, 2012 WL 4483281, at *7 (S.D. Ohio Sept. 27, 2012) ("Requiring that imported goods comply with the Clean Air Act and/or the National Highway Traffic Safety Act involves important public rights."); *In re Paulsboro Derailment Cases*, No. 13-784 (RBK/KMW), 2013 WL 5530050, at *4 (D.N.J. Oct. 4, 2013) ("[T]he right to clean air and water are public rights[.]"); *Reg'l Airport Auth. of Louisville & Jefferson Cnty. v. LFG, LLC.*, 255 F. Supp. 2d 688, 692 (W.D. Ky. 2003) ("It is uncontroverted by the parties that the release or threat of release of hazardous waste, including asbestos, into the environment unreasonably

infringes upon a public right—the right to clean air[.]"), *aff'd*, 460 F.3d 697 (6th Cir. 2006); *Celanese Corp. v. Coastal Water Auth.*, 475 F. Supp. 2d 623, 639 (S.D. Tex. 2007) (observing that public rights include enjoyment of clean air or water); *Kilty v. Weyerhaeuser Co.*, No. 16-CV-515-WMC, 2018 WL 1832324, at *4 (W.D. Wis. Apr. 17, 2018) (acknowledging "the public right to clean air"); *City of New York v. BP P.L.C.*, 325 F. Supp. 3d 466, 474 (S.D.N.Y. 2018) (finding City's claims in regard to defendants' contributions to greenhouse gas emissions constituting "a substantial and unreasonable interference with public rights" displaced by the CAA), *aff'd sub nom. City of New York v. Chevron Corp.*, 993 F.3d 81 (2d Cir. 2021).

As such, while at some point in the future the Supreme Court may reconsider its prior holdings and require jury trials in cases adjudicating public rights generally, including those brought by the government administratively to impose civil penalties for violation of the CAA, *under the law as it currently stands*, Respondent has no viable defense based upon the Seventh Amendment right to a jury trial. Therefore, its Eleventh Defense is legally insufficient and is hereby **STRICKEN**.

I. Twelfth Defense – Eighth Amendment Excessive Fines Clause

Respondent's Twelfth Defense is—

> The penalties EPA seeks against Borla are grossly disproportionate to the nature of the alleged offense and injury and thereby violate the Eighth Amendment's Excessive Fines Clause.

Answer at 9.

In its Opposition, Respondent notes in support of this defense that the Eighth Amendment forbids the government from imposing "excessive fines" and that EPA has proposed an "excessive fine" against it of $1,272,126. Opp'n at 75. It suggests the fine is unlawfully excessive because it is "grossly disproportional" to the alleged offense: (a) "EPA had a decades-long practice of allowing the very conduct for which it now seeks to fine Borla"; (b) "Borla[] lack[ed] notice that it was doing anything wrong"; and (c) "upon learning of the EPA's change in policy, Borla immediately stopped the conduct it is now accused of." Opp'n at 75–76 (citing *United States v. Bajakajian*, 524 U.S. 321, 334 (1998) ("The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish. . . . We now hold that a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense.")).

In its Motion, the Agency observes that "[n]o matter how excessive (in lay terms) an administrative fine may appear, if the fine does not exceed the limits prescribed by the statute authorizing it, the fine does not violate the Eighth Amendment." Mot. at 53 (quoting *Newell Recycling Co. v. EPA*, 231 F.3d 204, 210 (5th Cir. 2000) (upholding EPA assessment of $1.345 million administrative penalty), and citing *Pharaon v. Bd. of Governors of the Fed. Rsrv. Sys.*, 135 F. 3d. 148, 155–57 (D.C. Cir. 1998) (finding no Eighth Amendment violation when the penalty was below the statutory maximum)). Complainant notes that the proposed aggregate

penalty in this case of $1,272,126 for the 5,338 alleged violations of section 203(a)(3)(B) falls "well below" the statutory maximum set by section 205 of the Act. Mot. at 53.

Concerning Complainant's point about the statutory limits of penalties, Respondent retorts that "suffice it to say that is simply wrong[,]" but cites no specific caselaw in response. Opp'n at 76. However, it concedes that if this Tribunal should be persuaded by Complainant's argument, it "would respectfully disagree and simply preserve the point for later review." Opp'n at 76.

Discussion

The Eighth Amendment provides that "excessive fines [shall not be] imposed[.]" U.S. Const. amend. VIII. This Tribunal is persuaded by the holding in *Newell Recycling* and notes that courts continue to affirm that decision more than 20 years later. *See, e.g.*, *Hignell v. City of New Orleans*, 476 F. Supp. 3d 369, 380 (E.D. La. 2020) ("[A]n administrative agency's fine does not violate the Eighth Amendment—no matter how excessive the fine may appear—if it does not exceed the limits prescribed by the statute authorizing it." (quoting *Cripps v. La. Dep't of Agric. & Forestry*, 819 F.3d 221, 234 (5th Cir. 2016))). Further, as detailed above with regard to Respondent's Eighth Defense, the CAA provides a multitude of factors to be taken into account in determining the appropriate penalty to assure that the fine imposed is proportional and not excessive under the circumstances. 42 U.S.C. § 7524(c)(2). Therefore, Respondent's Twelfth Defense based upon the Eighth Amendment's Excessive Fines Clause is hereby found legally insufficient and is **STRICKEN**.

J. Fourteenth Defense – Estoppel

Respondent states as its Fourteenth Defense that—

> Because the EPA has not consistently enforced these provisions of the Clean Air Act against parties engaged in the same or more egregious conduct than Borla, it is estopped from applying its new interpretation of the Clean Air Act retroactively.

Answer at 10.

Respondent claims Complainant should be estopped from "retroactively" pursuing any violation against Respondent for parts sold prior to the date of the Notice of Violation. Opp'n at 76–77 (citing, inter alia, *Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc.*, 467 U.S. 51, 60 n.12 (1984); *Lehman v. Burnley*, 866 F.2d 33, 38 (2d Cir. 1989)). Respondent implies that its reasonable reliance on a prior agency interpretation of the statute should estop the Agency from pursuing enforcement activities for past conduct, noting that this defense protects the same interests as those raised in its due process and fair notice defenses previously discussed. Opp'n at 77.

The Agency advises that "[i]t is well settled that the government may not be estopped on the same terms as any other litigant." Mot. at 53 (quoting *Heckler*, 467 U.S. at 60). Complainant declares that "[i]n addition to the three traditional elements (misrepresentation,

reasonable reliance, and detriment), a finding of estoppel against the government requires the presence of a fourth, affirmative misconduct." Mot. at 53. The Agency explains that this additional element requires "an affirmative misrepresentation or affirmative concealment of a material fact by the government." Mot. at 53 (quoting *V-1 Oil*, 8 E.A.D. at 749 (citing *Linkous v. United States*, 142 F.3d 271, 278 (5th Cir. 1998))). Further, Complainant argues that "[c]ourts are less likely to find affirmative misconduct where the misrepresentation involved a question of law within the agency's discretion." Mot. at 54 (citing *Fredericks v. Comm'r of Internal Revenue*, 126 F.3d 433, 444 (3d Cir. 1997)). The Agency notes the Respondent has not alleged any "affirmative misconduct" on its part. Mot. at 54.

Moreover, as to Respondent's claim that Complainant engaged in inconsistent enforcement, the Agency makes the following points: enforcement decisions fall within its prosecutorial discretion; Respondent made no effort to clarify its statutory obligations with EPA; and courts will not estop the government where doing so "would conflict with a statutory mandate." Mot. at 54 (citing *Env't Prot. Servs., Inc.*, 13 E.A.D. 506, 541 (EAB 2008); *Wego Chem. & Min. Corp.*, 4 E.A.D. 513, 523 (EAB 1993)).

Discussion

"Equitable estoppel is an equitable doctrine that precludes a party from asserting a right that the party would otherwise enjoy if that party takes actions upon which its adversary reasonably relies to its detriment." *BWX Techs.*, 9 E.A.D. at 80 (citing *Heckler*, 467 U.S. at 59). "For the reliance to be reasonable, the party claiming the estoppel defense must show that at the time it acted to its detriment, it did not have knowledge of the truth nor could such knowledge have been obtained with reasonable diligence." *Firestone Pac. Foods, Inc.*, EPA Docket No. EPCRA-10-2007-0204, 2008 WL 2066621, at *9 (ALJ, May 1, 2008) (Order on Complainant's Motion for Partial Accelerated Decision on Liability) (citing *Heckler*, 467 U.S. at 59 & n.10). As Complainant notes, when equitable estoppel is asserted against the government, a party bears an especially "heavy burden," in that "not only must [it] prove the traditional elements of estoppel—that it reasonably relied upon its adversary's actions to its detriment—but [it] must also show that the government 'engaged in some affirmative misconduct.'" *BWX Techs.*, 9 E.A.D. at 80 (citing *United States v. Hemmen*, 51 F.3d 883, 892 (9th Cir. 1995)). This is because when "the Government is unable to enforce the law because [] the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined." *Id.* (quoting *Heckler*, 467 U.S. at 60). "Affirmative misconduct has been defined to mean a 'deliberate lie' or 'a pattern of false promises[.]'" *Firestone Pac. Foods*, 2008 WL 2066621, at *9 (citing *Socop-Gonzalez v. Immigr. & Naturalization Serv.*, 272 F.3d 1176, 1184 (9th Cir. 2001), *overruled by Smith v. Davis*, 953 F.3d 582 (9th Cir. 2020)). "[A]t minimum the [government] official must intentionally or recklessly mislead the estoppel claimant." *United States v. Marine Shale Processors*, 81 F.3d 1329, 1350 (5th Cir. 1996). "Courts have routinely held that '[m]ere negligence, delay, inaction, or failure to follow agency guidelines does not constitute affirmative misconduct sufficient to estop the government.'" *BWX Techs.*, 9 E.A.D. at 80–81 (quoting *Bd. of Cnty. Comm'rs v. Isaac*, 18 F.3d 1492, 1499 (10th Cir. 1994)). Thus, "[t]he defense of estoppel is rarely valid against the Federal Government acting in its sovereign capacity." *Firestone Pac. Foods*, 2008 WL 2066621, at * 9 (citing *Heckler*, 467 U.S. at 60–63;

Off. of Pers. Mgmt. v. Richmond, 496 U.S. 414, 422 (1990) (noting that the Supreme Court has reversed every finding of estoppel against the government by lower courts it has reviewed)).

In this case, Respondent has not offered evidence showing that EPA intentionally or recklessly mislead it. To the contrary, as discussed above in regard to its defense of fair notice, for many years the Agency has pretty clearly expressed its position as to the illegality of the sale of defeat devices designed to fit motor vehicles—even those sold ostensibly to be used to convert motor vehicles to race cars. It has previously engaged in enforcement activities regarding the sales of defeat devices as well. There is no evidence of Respondent seeking any clarification as to the legality of its sales of such devices under the CAA when labeled with a disclaimer stating the parts are for use "on competition vehicles only." As such, there is no factual basis supporting Respondent's equitable estoppel defense against liability. Therefore, its Fourteenth Defense is legal insufficient and is hereby **STRICKEN**.

K. <u>Nineteenth Defense – Appointments Clause</u>

As its Nineteenth Defense, Respondent states:

> By permitting adjudication and internal appellate review by persons who constitute officers of the United States but who have not been properly appointed, and/or by restricting the removal and replacement of some or all of those officers, the process by which enforcement actions are adjudicated and appealed within the EPA violates the Appointments Clause and the separation of powers.

Answer at 11.

In its Opposition, Respondent indicates that this defense arises from the Supreme Court's decision in *Lucia v. Securities and Exchange Commission*, 138 S. Ct. 2044 (2018), which held that administrative law judges (ALJs) were "Officers of the United States" under the Appointments Clause who are required to be appointed by the head of an agency. Opp'n at 77–78; *see also* U.S. Const. art. II, § 2, cl. 2. Respondent acknowledges that Complainant has advised it that, in fact, the then-EPA Administrator, Carol Browner, selected and appointed the undersigned as an Administrative Law Judge (in 1996) and then as Chief Administrative Law Judge (in 1997), as evidenced by dated and signed official certificates of such appointments. Opp'n at 78. Still, Respondent claims it "has not been able to ascertain whether, in the wake of the *Lucia* ruling, EPA's ALJs have been properly reappointed in compliance with that decision," and suggests the evidence proffered by the Agency "ignores the many factual issues regarding whether such piece of paper was merely a formality, whether the actual decision was delegated to others and, if so, done properly, and even whether EPA ALJ's [sic] ought to be viewed as principal, rather than inferior, officers." Opp'n at 78 (citing *Lucia*, 138 S. Ct. at 2053–55). Furthermore, Respondent argues that even if the appointments issue is "cured," "existing limits on the ability of the Executive Branch to remove such ALJs" would violate the Constitution's provision on separation of powers. Opp'n at 78–79 (citing *Lucia*, 138 S. Ct. at 2059–62 (Breyer, J., concurring in the judgment in part and dissenting in part)).

In addition to challenging the status of ALJs, Respondent asserts that the Environmental Appeals Board raises Appointments Clause concerns as well. Opp'n at 79. Respondent opines that the members of the EAB are "principal, rather than 'inferior,' Officers of the United States who, unlike ALJs, must be nominated by the President and confirmed by the Senate." Opp'n at 79 (citing Michael Poon, *EPA appeals board is unconstitutional without reform*, The Hill (Jan. 13, 2020, 7:00 AM EST), https://thehill.com/opinion/energy-environment/477788-epa-appeals-board-is-unconstitutional-without-reform). Further, Respondent suggests that the EAB faces the same constitutional dilemmas regarding removal and due process as the ALJ structure. Opp'n at 79.

In its Motion, Complainant notes that the ALJs employed by the Securities and Exchange Commission ("SEC") in *Lucia* failed to survive the Court's constitutional or statutory analysis because they had "neither been appointed by the Commission itself or by published rule as required by the SEC's enabling statute." Mot. at 56 (citing *Lucia*, 138 S. Ct. at 2058 (Breyer, J., concurring in the judgment in part and dissenting in part)). In contrast, Complainant points out that the Presiding Officer here was appointed by the EPA Administrator and that there is no statutory provision requiring such an appointment to be established by published rule. Mot. at 56 (citing CX 345). Moreover, Complainant pronounces that the EAB's Judges are also appointed by the EPA Administrator. Mot. at 56 (citing Changes to Regulations to Reflect the Role of the New Environmental Appeals Board in Agency Adjudications, 57 Fed. Reg. 5320, 5320 (Feb. 13, 1992)). As to the removal challenges, Complainant states they fail "because for cause removal of EPA ALJs does not constitute an impediment to the President's ability to take care that the laws are faithfully executed" and "Respondent's due process rights are sufficiently protected beyond this Proceeding by availing itself of the opportunity for seeking judicial review of a final penalty order." Mot. at 56–57 (citing *Morrison v. Olson*, 487 U.S. 654, 691 (1988); 42 U.S.C. § 7524(c)(5)).

Discussion

In *Lucia*, the Supreme Court held that under the Appointments Clause, ALJs, as inferior officers of the government, were required to be appointed to their positions by the "Heads of Departments." *Lucia*, 138 S. Ct. at 2049, 2051 n.3, 2055. Complainant's Exhibit, signed Certificates of Appointment, evidence that approximately 25 years ago, the undersigned ALJ was directly appointed by the EPA Administrator, the "Head of Department." CX 345; *see also* 5 U.S.C. § 3105. Respondent has cited no authority in support of the need for "reappointment" where the initial appointment was valid under *Lucia*, nor for its right to look behind official documentation to challenge such appointment. Opp'n at 78. Further, with regard to removal, the Ninth Circuit recently held in *Decker Coal Company* that the existing provisions in 5 U.S.C. § 7521 regarding ALJ removal are compatible with Article II of the Constitution. *Decker Coal Co. v. Pehringer*, 8 F.4th 1123, 1129–36 (9th Cir. 2021). As such, under the law as it now stands, adjudication of this case by the undersigned is consistent with current Supreme Court rulings including *Lucia*. It is beyond the authority of this Tribunal to address Respondent's constitutional challenges to EAB appointments. Therefore, Respondent's Nineteenth Defense is found to be insufficient and is hereby **STRICKEN**.

X. NUMBER OF VIOLATIONS

The Second Amended Complaint alleges 5,338 violations of CAA section 203(a)(3)(B), asserting that between January 15, 2015, and September 26, 2018, Respondent "manufactured, sold, and offered for sale at least 5,338 Exhaust System Defeat Devices" including the Subject Products identified in Appendix A to the Complaint. Sec. Am. Compl. ¶¶ 56, 63. In its Reply, Complainant asserts it drew such number directly from the Excel spreadsheet Respondent provided to the Agency as part of its 2018 RFI Response. Reply at 30 (citing CX 7).

In its Opposition, Respondent acknowledges that it provided information to the Agency that served as the basis for the "5,338" figure, but nevertheless asserts there is a genuine dispute regarding the "total number of parts potentially subject to liability." Opp'n at 40. In support, it explains that after the spreadsheet was submitted, it reviewed its submission and found "discrepancies . . . that resulted in an overstatement" as to the number of parts fitting within the parameters of the violations alleged. Opp'n at 40. Respondent declares that the correct number of units is 4,787, citing the Declaration of Mr. Stoner (Opp'n Attach. 5), the list of parts and units (RX 7), and its invoices (RX 2). Opp'n at 41. To the extent EPA disagrees with its calculations, Respondent declares this creates a genuine issue of fact requiring a hearing. Opp'n at 41.

Complainant's Reply states that "in an effort to simplify the issues under consideration by the Tribunal[,]" and "for the purpose of its Motion only, [it] revises its request for accelerated decision for liability from 5,338 violations of section 203(a)(3)(B) of the Act to 4,813 violations based upon invoices Respondents [sic] submitted along with its spreadsheet." Reply at 31. In support of its revised calculation, it cites the (Second) Declaration of Andrew Chew attached to the Reply. Reply at 31 (citing Reply Attach. A). Complainant represents that Mr. Chew reviewed and considered only Respondent's invoices (not its spreadsheets); Mr. Chew then calculated that those invoices evidenced that Respondent sold and shipped 4,813 units of the Subject Products within the United States between January 15, 2015, and September 26, 2018. Reply at 31. As an aside, it notes that, as there were no invoices for Subject Product no. 17288, sales of such product were not included in its calculation, bringing the total number of "Subject Products" at issue from 57 down to 56. Reply at 31.

Discussion

In his Declaration, Mr. Stoner states that in late 2020 or early 2021, for the purposes of updating an earlier economic benefit analysis, he conducted a review of the number of units of the 57 Subject Products Respondent sold and shipped to United States customers between January 15, 2015, and September 26, 2018, using "corporate accounting software and invoicing records." Opp'n Attach. 5 (Stoner Decl.) ¶¶ 6–8. Based upon his review, Mr. Stoner concluded that the total number of parts fitting all the requisite parameters was 4,787. Opp'n Attach. 5 ¶ 8. Mr. Stoner explained that as part of his review he compared the unit counts identified by Complainant in its spreadsheet (Exhibit CX 7) to those reflected by Respondent's invoices (Exhibit CX 8), characterizing potential discrepancies. Opp'n Attach. 5 at ¶¶ 13–15. After a selective evaluation process, he determined that the spreadsheet erroneously reflected numbers significantly higher than the invoices, and that the invoices "[are] a more accurate representation

of the units that are included within EPA's identified parameters[.]" Opp'n Attach. 5 ¶ 13–18. Mr. Stoner attributed most of the discrepancies to Exhibit CX 7's inclusion of sales made to international customers and those involving warranty or promotional units. Opp'n Attach. 5 ¶¶ 9–11, 13–18.

Mr. Chew's Declaration asserts that he looked at the number of sales identified within Respondent's invoice records (Exhibit CX 8) for each part number that was sold and shipped within the United States from January 15, 2015, through September 26, 2018. Reply Attach. A (Chew Decl.) ¶¶ 6, 9. Mr. Chew then listed in his Declaration each part by its number, the number of units of each part sold, and the invoice numbers he relied upon for his calculation. Reply Attach. A ¶¶ 10–65. He stated he found no invoices indicating Part 17288 had been "sold and shipped" in the United States during the relevant period. Reply Attach. A ¶ 66. Based upon his review, Mr. Chew calculated the total number of units of the Subject Products "sold and shipped" by Respondent during the relevant time as 4,813. Reply Attach. A ¶ 67.

A comparison of the Declarations of Mr. Stoner and Mr. Chew reflects a difference of only 26 units, in terms of the total number of units of the Subject Products Respondent sold and shipped within the United States from January 15, 2015, through September 26, 2018. It appears most likely that those units reflect the small number of warranty and promotional units which Mr. Stoner deducted from his tally, but which Mr. Chew did not.[44] Respondent has offered no argument in support of excluding warranty and promotional units, and Complainant has offered no argument in support of their inclusion.

At this point in the proceeding, it is deemed uncontroverted that Respondent manufactured, sold, or offered to sell 4,787 units of Subject Products from January 15, 2015, through September 26, 2018. This number, from Mr. Stoner's Declaration, will be used as the total number of violations found for the purposes of this Order. Nevertheless, this Tribunal will permit Complainant to seek liability for the additional 26 contested units/violations should it wish to do so in the future.

XI. CONCLUSION

This Tribunal finds that there are no genuine issues of material fact and Complainant is entitled to judgment as a matter of law as to Respondent's liability for 4,787 violations of section 203(a)(3)(B) of the Clean Air Act, 42 U.S.C. § 7522(a)(3)(B).[45]

[44] Mr. Stoner's Declaration contains inconsistent statements as to whether he actually deducted "promotional" units from his ultimate tally. *Compare* Opp'n Attach. 5 ¶ 11 ("[W]e identified promotional units which we did not remove thus remaining in the unit count."), *with* Opp'n Attach. 5 ¶ 16 ("Other reductions include 7 warranty and 12 promotional units."), ¶ 16(b) (for Part no. 60609: "1 unit reduction as promotional unit"), and ¶ 17(b) (for Part no. 17249: "[o]f the 7 unit decrease, . . . 1 unit is promotional").

[45] To the extent appropriate, Respondent is not precluded from re-raising the arguments addressed herein as defenses in connection with the penalty phase of this proceeding.

ORDER

Upon consideration of the foregoing, it is hereby **ORDERED** as follows:

a. Complainant's Motion for Accelerated Decision on Liability is hereby **GRANTED**;

b. Complainant's Motion to Strike Affirmative Defenses is hereby **GRANTED**, as indicated above; and

c. This matter shall be set for hearing to determine the appropriate penalty to be imposed for the violations found.

SO ORDERED.

Susan L. Biro
Chief Administrative Law Judge

Dated: March 15, 2022
Washington, D.C.

In the Matter of *Borla Performance Industries, Inc.*, Respondent.
Docket No. CAA-09-2020-0044

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **REDACTED** version of **Order Granting Complainant's Motion for Accelerated Decision on Liability and to Strike Affirmative Defenses**, dated March 15, 2022, and issued by Chief Administrative Law Judge Susan L. Biro, was sent this day to the following parties in the manner indicated below.

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Dated: March 16, 2022
Washington, D.C.