UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTATOR

In the Matter of:	)	Docket No.: CAA-03-2021-0058
	)	
Keystone Automotive Operations, Inc.	)	COMPLAINANT'S REBUTTAL
	)	PREHEARING EXCHANGE
Respondent.	)	

INFORMATION CLAIMED CONFIDENTIAL HAS BEEN DELETED
CONFIDENTIAL BUSINESS INFORMATION ("CBI") REDACTED VERSION[1]

COMPLAINANT'S REBUTTAL PREHEARING EXCHANGE

In accordance with Chief Administrative Law Judge Susan L. Biro's March 31, 2021 Prehearing Order ("Prehearing Order"), Complainant hereby sets forth its Rebuttal Prehearing Exchange. Complainant respectfully reserves the right to supplement its initial and rebuttal prehearing exchanges in accordance with Section 22.19(f) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Consolidated Rules of Practice"), 40 C.F.R. Part 22, and with the Prehearing Order.

I. RESPONSE TO RESPONDENT'S PREHEARING EXCHANGE

Complainant makes the following statement in response to Respondent's Prehearing Exchange. This statement is a summary of the responses Complainant intends to provide in this proceeding and is not intended to be a complete response. Complainant further reserves the right to amend or supplement its response.

A. Witnesses

Respondent indicates that Amy Faulk, Chief Executive Officer at Hypertech, Inc. may be called to testify, in either a fact and/or expert capacity, about her understanding of and experience with certain parts at issue in racing, and the racing industry generally. Respondent further indicates that Thomas Deery, independent consultant focused on the motorsports business and event management, may be called to testify as an expert regarding the "size and scope of the racing industry and the relationship with the associated market for aftermarket racing parts," specifically "the multiple types of racing conducted across the United States, the various metrics, including the number of race tracks, sanctioning bodies, races, racing participants, and the vehicles involved in racing and the associated financial and economic impact." Respondent also indicates that Chuck Wannamaker, III, owner and technician at Waldwick Auto Service Center

[1] Pursuant to 40 C.F.R. §22.5(d) of the Consolidated Rules of Practice, a complete copy of this Rebuttal Prehearing Exchange containing the information claimed confidential has been filed with the Office of Administrative Law Judges.

and Franklin Auto Care automotive service centers may be called to testify as a fact or expert witness regarding the use of parts at issue in the classic and antique cars and racing vehicles.

Witness testimony concerning the racing industry has no bearing on the determination of Respondent's liability for the sale of defeat devices in this proceeding. With respect to the violative parts at issue, in its Prehearing Exchange, Respondent has stated that it "has no insight into the design or intended purpose of the products it distributes," nor "insight into or control over how the products are ultimately used by customers." Respondent's PHE at 25, Eleventh Affirmative Defense: Violation of the Excessive Fines Clause. Respondent has not provided a single piece of evidence that any of the 15,621 violative parts sold were solely and expressly designed and intended for racing use only, or that any of those parts were used on a motor vehicle permanently converted for competition use only and never used on public roads. As Respondent's arguments concerning "competition-use" for any of the parts at issue are purely speculative and hypothetical, Complainant has concerns about the relevance and probative value of the anticipated testimonies of these witnesses. Complainant anticipates filing a motion seeking relief to address these concerns in accordance with 40 C.F.R. § 22.16 and the Prehearing Order.

B. Affirmative Defenses

Introduction

Section 203(a)(3)(B) of the CAA, 42 U.S.C. § 7522(a)(3)(B), prohibits any person from manufacturing, selling, offering to sell, or installing any part or component intended for use with, or as part of, any motor vehicle or motor vehicle engine, where a principal effect of the part or component is to bypass, defeat, or render inoperative any device or element of design installed on or in a motor vehicle or motor vehicle engine in compliance with 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. Respondent asserts that Complainant cannot satisfy its burden to demonstrate violations of Section 203(a)(3)(B) of the CAA, 42 U.S.C. § 7522(a)(3)(B), for the parts at issue in this matter. Complainant disagrees.

In its Prehearing Exchange, Complainant has identified Respondent's own ads, part manufacturer information, and other seller advertisements, that together clearly show each of the parts at issue are intended for use with or as part of a "motor vehicle" or "motor vehicle engine" *See* Cx22-Cx62, Cx143, Cx148, Cx150, Cx201-Cx210. Respondent's own exhibits support this element of the statutory violation. *See e.g.* Rx102, Rx119, Rx170. Complainant's Prehearing Exchange also identifies Respondent's own ads, part manufacturer information, other seller advertisements, publicly accessible official government certification information, and secondary technical materials that together show that each of the parts at issue have a principle effect of bypassing, defeating, or rendering inoperative devices or elements of design installed on motor vehicles in compliance with Title II of the CAA. *See* Cx22-Cx139, Cx143, Cx148, Cx150, Cx178-185, Cx201-Cx210.

Respondent argues that, in its "unique role" as a distributor, it neither knew nor should have known that the automotive aftermarket parts at issue were being sold to bypass, defeat, or

render inoperative devices or elements of design installed on motor vehicles in compliance with Title II of the CAA. Complainant finds this contention somewhat disingenuous in that the aftermarket automotive equipment business is Respondent's business. In fact, Respondent holds itself out as the "leading distributor and marketer of aftermarket automotive equipment" and the "largest warehouse distributor in our industry" with whom its customers can depend on for both "marketing support and technical assistance." Cx186 and Cx175 at 9. According to Respondent, its e-Keystone website and app are "[g]uaranteed to have the most accurate fitments & specs" with access to "all the proprietary data in Keystone's B2B system …20k videos, 40k installation instructions, and more." *See* Cx156 and Cx187. Respondent's position is also inapposite given that it also owns a chain of "A&A Auto" retail stores and service centers that provide customers with "knowledgeable advice" and whose online presence evidence a clear understanding of the delete capabilities and fitments of the parts sold. *See* Cx152, Cx153 and Cx154. All this taken together belies Respondent's contention that it is a mere "intermediary."

Respondent contends that its use and reliance on manufacturers for the content of its advertisements, as well as its failure to draft, review or approve the instruction sheets or manuals it uses to market and sell its aftermarket performance products, sufficiently establishes a lack of knowledge of the parts at issue. However, Complainant's Prehearing Exchange provides evidence that demonstrates that based on the very names of the parts themselves, as well as information provided to Respondent by the part manufacturer and statements and pictorials in publicly accessible online advertising by the manufacturer and other sellers, Respondent knew or clearly should have known of each part's delete capabilities and motor vehicle fitment specifications. Given this, it is reasonable to conclude that Respondent had imputed, or at least constructive knowledge, of the content of the information it shared with its customers for the parts at issue, irrespective of who created the content, and regardless of whether Respondent elected to review it.

To avoid liability, Respondent further argues that given the large number of manufactures/suppliers and SKUs involved with its business operations, it acted reasonably and exercised due diligence by including a provision in its purchase agreements with its suppliers to [redacted] Complainant notes that the purchase agreements identify [redacted] demonstrating that at the time it negotiated contractual terms with suppliers concerning the violative parts at issue, Respondent clearly understood, and was fully aware of the potential legal risks associated with the products it sold as early as 2011. *See* Rx70-Rx84. Neither Respondent nor any other seller ought to be able to contract its liability away by shifting the onus onto suppliers to identify and communicate the illegality of the parts, particularly when the seller has access to, possession and/or use of, part-specific information about delete capabilities and motor vehicle fitment specifications as is the case here.

Respondent also contends that liability cannot attach because the parts at issue in this matter are not inherently illegal, providing "legal, sanctioned racing/competition motorsports", "vintage/classic vehicles", and "farm vehicles" as examples of legal uses that exist for the parts. For reasons discussed *infra.,* Complainant does not agree with Respondent's contention as a legal matter. Factually, Complainant's Initial Prehearing Exchange includes information

showing that each of the parts at issue were intended for use on or in motor vehicles or motor vehicle engines. Respondent's own data shows that it sold the parts at issue indiscriminately, without regard to the purported other legal uses it now identifies. *See* Cx150. Significantly, Respondent admits that "[i]t did not know the end use or user of the products." Respondent's PHE at 9. Moreover, Respondent has failed to provide any evidence showing that any of the 15,621 violative parts sold were actually used on a vehicle used solely for competition, a vintage/classic vehicle, or farm vehicle.

Complainant does not dispute that many of the parts at issue continue to be offered for sale by multiple entities, including by some of Respondent's own customers. *See* e.g., Rx98, Rx99, Rx100, Rx102, Rx119, Rx170. When specifically designed to defeat required emissions controls on motor vehicles or motor vehicle engines certified to meet EPA emission standards, these parts are not for legal use as Respondent suggests. EPA has made aftermarket defeat devices a national priority to address the significant contributions to air pollution that harm public health, and the impediments to federal, state, local and tribal efforts to plan for and attain air quality standards they cause, resulting in dozens of enforcement actions to date. *See* Cx188 and Cx189.

First and Second Affirmative Defenses (No Statutory Authority; Exemption)

Respondent asserts that EPA lacks statutory authority to pursue the alleged violations in this case because, purportedly, there are legal uses for the parts at issue, including legal competition use and/or other legal uses, and therefore Respondent could not have known that the "principal effect" was for an illegal use. Respondent further claims that EPA has no authority to enforce the provisions of the CAA because Congress expressly *exempted* competition vehicles from the CAA, including motor vehicles that are converted to competition vehicles, and because the CAA prohibitions found in section 203(a) do not apply to vehicles that are not used on streets or highways and are used solely for competition, including EPA-certified motor vehicles that are permanently converted to sanctioned competition-use only vehicles. According to Respondent, motor vehicles used solely for competition, or redesigned for such use, are not subject to the defeat device prohibitions contained in the CAA. Respondent's claims are without merit.

Legally, the CAA's tampering and defeat device prohibitions regarding motor vehicles do not have a "competition-conversion" or "competition use" exemption. Factually, the evidence clearly shows that Respondent's parts at issue are intended for use with, or as part of, a motor vehicle or motor vehicle engine, and that they have a principal effect to bypass, defeat, or render inoperative a device or element of design installed in such motor vehicle or motor vehicle engine in compliance with CAA Title II regulations. Moreover, the evidence is also clear that Respondent knew or should have known that such parts were being offered for sale or installed for such use or put to such use. Conversely, Respondent's claims are purely speculative regarding what, if any, "other legal uses" that these parts may be have been put to. Respondent provides anecdotal "examples," and nothing more - no specific evidence that the parts at issue were used for some other legal use. Respondent has not produced a single piece of evidence that any of the 15,621 products it sold have, in fact, been solely and expressly designed and intended for racing use only, or that the parts at issue were used on a motor vehicle permanently converted for competition use only and never used on public roads. Thus, Respondent's arguments

concerning "competition-conversion" are purely speculative, hypothetical, and legally irrelevant to these proceedings. The competition-conversion or competition use exemption claim made by Respondent to evade liability fails as a matter of law and fact.

Third Affirmative Defense (No Deference)

Respondent asserts that EPA's interpretation of certain statutory and regulatory definitions in the CAA are not entitled to deference. Specifically, Respondent claims that the Agency incorrectly interprets and applies critical statutory and regulatory provisions upon which it bases it allegations, including Section 203(a)(3)(B), the term "motor vehicle" and "other provisions of the CAA and its implementing regulations.

The plain language of the Agency's definition of "motor vehicle" relies on the design of the vehicle, not on its use. The CAA is clear on its face and there is no grievous ambiguity precluding deference. EPA's interpretation and application of key statutory and regulatory provisions under the CAA are now, and have been, in line with the statute and consistent for many years.

Fourth Affirmative Defense (No Violations)

See discussion *"Introduction" supra.* Respondent again takes the incredulous position that despite the fact a part's clear delete functionalities and motor vehicle fitment information was provided to it by the part's manufacturer, as well as the fact that the part's delete functionalities and motor vehicle fitment information are publicly available and evidently known by other sellers in the automotive aftermarket space, that it did not know and should not have known that the part would defeat emission controls on motor vehicles merely because the information was originally created by the part's manufacturer. Respondent cannot avoid liability by adopting a business practice of uploading manufacture content onto its website, without ever reviewing such information for compliance. Respondent possessed imputed or at least constructive knowledge of the information it shared with its customers for the parts at issue, regardless of who created it and regardless of whether Respondent, as part of its own business practices, chose to review it or not. Additionally, Respondent's defense of its business practices on the basis of the high volume of SKUs and suppliers has no merit; the legal prohibition is the same regardless of the volume of sales.

Respondent points to a November 27, 2017 email from its supplier Derive Systems, Inc. ("Derive"), which indicated that "[o]ur devices out of the box do not defeat any emissions equipment" as a basis for it not knowing that the Derive/SCT parts were defeat devices. Rx30. As the EGR delete and Rear O2 sensor delete capabilities of the Derive/SCT parts at issue are included as pre-loaded user adjustable tuning files (i.e., users can opt to delete EGR and rear O2 sensors based on tuning files that are included on the devices out of the box), Complainant finds both Derive's email and Respondent's perfunctory reliance thereon to be both misleading and self-serving. Respondent knew or should have known that the Derive/SCT parts had a principal effect of bypassing emission controls on motor vehicles as the parts' delete functionalities and motor vehicle fitment information were publicly available and evidently known by other sellers

and users in the automotive aftermarket space. *See* Cx60 at 12-13, Cx61 at 12-13 and 30-31, Cx62 at10, Cx204-Cx210. Moreover, it must be noted that Respondent only sought clarification from Derive about the legality of its devices after it had received EPA's Section 208 Request for Information, and thus cannot be found to have relied on Derive for the approximately 7,875 parts it sold prior to receiving the purported assurance letter[2]. *See* Cx14, Cx145 and Cx150.

As all of Respondent's 9,021 sales of Derive parts at issue in the matter occurred prior to the September 24, 2018 settlement between the United States and Derive (Civil Action No. 1:18-cv-2201), Respondent cannot credibly argue that either the Consent Decree or any subsequent communications with Derive in connection therewith had any bearing on its pre-settlement violative conduct.

Fifth Affirmative Defense (Lack of Fair Notice – Competition Use)

Respondent argues that EPA has established a practice of permitting conduct similar to that alleged in the Complaint, and by doing so, somehow "misled" Respondent and the public as to what constituted prohibited conduct with regard to aftermarket defeat devices. Respondent further claims that EPA failed to provide adequate notice that its actions were unlawful, in violation of due process as protected by the Fifth Amendment. Contrary to Respondent's claims, there was no lack of fair notice here.

The clear statutory language in Section 203(a)(3)(B) of the CAA regarding defeat devices precludes any legitimate assertion of a lack of fair notice in this proceeding. Complainant's interpretation of the statutory prohibition against defeat devices as it has put forth in its Complaint is clearly ascertainable form the plain language of the statute, and as such, due process is not offended.

Moreover, Respondent's assertion that EPA's statements concerning the defeat device prohibition and competition use have been confusing and inconsistent is factually incorrect. EPA has held a consistent public position regarding competition use and defeat devices for many years spanning the time before, during, and after Respondent's alleged violative conduct. *See* Rx3, Rx7, Cx190-Cx197. A May 26, 2017 article featured on Respondent's own website recognizes EPA's position as of 2015 that converting a motor vehicle into a race car is illegal if the emissions system failed to remain in its certified configuration. *See* Cx160 at 1. Thus, Respondent's claim of lack of fair notice has no merit.

Sixth Affirmative Defense (Lack of Fair Notice –Derive/SCT Parts)

Respondent claims that the government's handling of the Derive/SCT parts under the Consent Decree created confusion leading to a lack of fair notice. As all of Respondent's 9,021 sales of Derive/SCT parts occurred prior to the September 24, 2018 settlement between the United States and Derive, and therefore none of Respondent's violative sales of Derive/SCT parts alleged in the Complaint involved parts subsequently permitted to be sold by Derive

[2] Similarly, Respondent can't be found to have relied on MBRP for the approximately 2,864 parts it sold prior to receiving MBRP's November 28, 2017 assurance letter.

pursuant the phase out schedule set forth therein (i.e., Paragraph 21), Respondent cannot credibility claim it was confused and therefore did not have fair notice at the time of its pre-settlement violative conduct.

Complainant also takes issue with Respondent's suggestion that it did not have access to the same "internal product data, including product manuals, advertising materials, and other information" that was available to EPA sufficient for it to know what products and features were illegal. Complainant's evidence of the EGR delete and/or Rear O2 sensor delete functionalities of each of the Derive/SCT parts at issue is comprised solely of publicly available information. *See* Cx60 - Cx62, Cx204-Cx210. This evidence includes Derive/SCT's User Manuals that expressly state the EGR delete and/or Rear O2 sensor delete functionalities. *See* Cx60 at 13, Cx61at 13 and 31 and Cx62 at 10. Complainant's evidence also includes advertisements from other sellers and users of Derive/SCT parts – who also didn't have access to the same information available to EPA - that clearly show knowledge and awareness of each parts' delete functionalities. *See* Cx60 at 18, Cx61 at 38-40 and Cx62 at 15. Cx204-Cx210.

Seventh Affirmative Defense (Equitable Estoppel)

Although Respondent cites no case in support of this asserted defense, Complainant denies that it has retroactively applied a new interpretation of the CAA provisions. Rather, EPA has consistently exercised its enforcement authority in the application of Section 203(a) of the CAA, including those instances where the Agency seeks to enforce against distributors whose parts or components are installed on motor vehicles used on public streets, roads and highways, but falsely claimed to be used solely for competition. Those cases fall squarely within the ambit of Section 203(a)'s prohibition. A claim of estoppel against the United States government faces a very high threshold. None of the criteria which might justify estoppel are present in this case, and Respondent has not provided indicia of any.

Eighth Affirmative Defense (Ratification)

Complainant claims that EPA "effectively ratified the industry-wide sale of parts manufactured by Derive when it allowed Derive to continue marketing and selling such parts to its customers as part of the Derive Consent Decree."

The Derive settlement, like every settlement the federal government enters into, was uniquely limited to the "Parties" of that settlement, and under the particular circumstances presented by that enforcement action. The terms and conditions under which the United States agreed to resolve the CAA violations in Derive were set forth in a framework specific to facts and circumstances of that Defendant's violative conduct, including Defendant's financial condition. *See* Rx32 at 13-14, ¶17. Moreover, Respondent's asserted defense of ratification is ineffective because the Derive Consent Decree does not limit or affect the rights of the United States against any third parties not a party to the Derive Consent Decree. *See* Rx32 at 45-46, ¶ 85. Importantly, the Derive Consent Decree specifically provides that it " . . . shall not be construed to create rights in, or grant any cause of action to, any third party not a party to this Consent Decree". *Id.* at 46, ¶86. The fact that Respondent's violative sales period may have coincided with Derive's violative sales period is no bar to enforcement. The federal government

sought penalties against Derive for its illegal sales, and is appropriately doing the same against Respondent for its Section 203(a)(3)(B) violative conduct during the same time period.

Ninth Affirmative Defense (Inappropriate Administrative Proceeding)

Complainant is providing proof of both the determination made by the Administrator and Attorney General that the penalties sought are appropriate for administrative assessment, and the Presiding Officer' appointment by the EPA Administrator. *See* Cx166 and Cx211. *See also* 57 Fed. Reg. 5320 (Feb. 13, 1992)

Tenth Affirmative Defense (Violation of Due Process and Sixth Amendment Rights)

Respondent asserts that to the extent the penalties sought in this action are penal in character, this proceeding violates due process (including the burden of proof and obligations to disclose adverse evidence), as well as Respondent's Sixth Amendment rights to confrontation, compulsory process and a trial by jury.

Complainant agrees with the well-settled legal authority holding that the Sixth Amendment does not apply to an administrative penalty action characterized by Congress as "civil" and that does not impose any form of criminal punishment such as this one. Further, this administrative proceeding is not the appropriate forum for Respondent to make constitutional due process challenges to the procedures set forth by Congress for assessing penalties by the EPA Administrator under Section 205(c)(1) of the CAA.

Eleventh Affirmative Defense (Violation of the Excessive Fines Clause)

Respondent claims that because the violations are de minimis in nature, because it had no insight into the design or intended purpose of the parts at issue, their impact on emissions or control over how the products are used, because Complainant has recovered penalties from the manufacturers of the parts at issue, and because the penalties sought are anticipated to be grossly disproportionate to nature of the offenses and injury, that Complainant is in violation of the Eighth Amendment's Excessive Fines Clause.

Respondent's alleged violations are not de minimis in nature. Recent investigations have revealed evidence showing that hundreds of thousands of diesel pickup trucks have had their emissions controls completely removed due to the sale of parts like the parts at issue, resulting in air pollution that harms public health and impedes federal, state, local and tribal efforts to plan for and attain air quality standards. *See* Cx187 and Cx188.

Respondent's assertion of 'no insight into the design or intended purpose of the products it distributes' is at odds with admissions made in connection with this proceeding. For example, in its Answer to the Complaint, Respondent admits that it holds itself out as the "leading distributor and marketer of aftermarket automotive equipment and accessories in North America . . . [emphasizing that its] . . . customers . . . depend on us to provide a *broad range of . . . marketing support and technical assistance . . .*" Respondent's Answer at ¶ 40 (emphasis added). Respondent also admits that it owns and operates a chain of stores, A&A Auto Stores, which

Respondent claims "continues to be a leader in the aftermarket auto parts industry. . . [and whose] . . . longevity and passion has allowed [it] to provide customers with *knowledgeable advice* . . ." Respondent's Answer at ¶ 41 (emphasis added). It strains credulity to assert that, in providing marketing support and technical assistance relative to the products that it sells, Respondent offers this kind of expertise without any knowledge or information as to the effect the alleged violative parts have in bypassing, defeating, or rendering inoperative a vehicle's emission controls. Complainant further notes that Respondent's assertions of 'no insight into or control over how the products are ultimately used by customers' runs counter to its various competition-use-related arguments and defenses. Respondent's assertions of 'no insight', if taken as true, are based upon its business practice of uploading manufacture content onto its website, without ever reviewing such information for compliance, instead relying solely on risk shifting provisions in its purchase agreements [redacted] Acceptance of such willful blindness as a shield from liability would make the defeat device prohibition completely ineffectual—an absurd result that runs counter to the purpose and intent of the CAA.

Section 205(a) of the CAA states that "any person" who violates section 203(a)(3)(B) shall be subject to a civil penalty. Each of Respondent's 15,621 sales of defeat devices alleged in the Complaint constitute a violation of Section 203(a)(3)(B) and subject to civil penalties irrespective of the violative conduct of other "persons" including manufacturers involving the same part.

For the reasons above and because the civil penalty sought by Complainant set forth in Section II. below is both within statutory limits (less than 6% of statutory limits, actually) and proportionate to the gravity of Respondent's violations, the Excessive Fines Clause does not provide a defense in this smatter.

Twelfth Affirmative Defense (Arbitrary and Capricious Penalties)

Respondent asserts that to the extent Complainant's penalty is "inconsistent with the nature of the alleged violations, it would be unreasonable, arbitrary, and capricious, contrary to the ultimate standards set forth in 5 U.S.C. § 706(2)(A)."

The framework articulated by Respondent is misguided. Complainant bears the burdens of proof and persuasion that its proposed penalty is appropriate. 40 C.F.R. § 22.24. Following Complainant's establishment of a prima facie case, Respondent has the burden of presenting any response or evidence with respect to the appropriate relief. *Id.* Each matter in controversy shall be decided by the Presiding Officer by the preponderance of the evidence. *Id.* To make its prima facie case, Complainant must show that it considered and properly applied the applicable statutory factors. *In re New Waterbury, Ltd.,* 5 E.A.D. 529, 538-39 (EAB 1994). The burden then shifts to Respondent to demonstrate through evidence that Complainant failed to consider the statutory factors or that EPA's proposed penalty is not otherwise supported. *Id.*

As described in Section II. *infra*, Complainant took into account the statutory factors set forth in Section 205(c)(2) of the CAA, 42 U.S.C. § 7524(c)(2), and applied EPA's January

2021[3] Clean Air Act Title II Vehicle & Engine Civil Penalty Policy ("Penalty Policy") to the particular facts and circumstances of this case, yielding a proposed calculated penalty that it argues is both appropriate and consistent with the evidence and the CAA. EPA's Environmental Appeals Board ("EAB") has repeatedly noted that while not rules guidelines such as the Penalty Policy facilitate the application of statutory penalty criteria to the facts of a case and thus "offer a useful mechanism for ensuring consistency in civil penalty assessments." In FRM Chem, Inc., 12 E.A.D. 739, 752-53 (EAB 2006), *citing* In re William E. Comley, Inc., 11 E.A.D. 247, 262 (EAB 2004); accord In re CDT Landfill Corp., 11 E.A.D. 88, 117 (EAB 2003); In re Chempace Corp., 9 E.A.D. 119, 131 (EAB 2000). To rebut Complainant's prima facie case, Respondent must introduce evidence that the penalty is not appropriate because Complainant had, in fact, failed to consider all of the statutory factors or, that despite consideration of all the factors, Complainant's propose penalty is not supported and thus not appropriate. *In re New Waterbury, Ltd.* at 538-39 (EAB 1994).

Ultimately, the Presiding Officer will "determine the amount of the recommended civil penalty based on the evidence in the record and in accordance with any penalty criteria set forth in the Act." 40 C.F.R. § 22.27(b). The Presiding Officer must also "consider any civil penalty guidelines issued under the Act," and, if she "decides to assess a penalty different in amount from the penalty proposed by the Complainant, . . . set forth in the initial decision the specific reasons for the increase or decrease." *Id.*

Thirteenth Affirmative Defense (No Damages or Injury)

Respondent claims that "to the extent Complainant has alleged violations stemming from the sale of parts that were ultimately returned by the customer, such allegations are inappropriate because no alleged damage or injury could result." The plain language of Section 203(a)(3)(B) of the CAA prohibits any person from *inter alia* "selling" defeat devices intended for use with, or as part of, any motor vehicle or motor vehicle engine. Each of Respondent's 15,621 sales of defeat devices alleged in the Complaint constitute a violation of Section 203(a)(3)(B) of CAA. If some of the parts were subsequently returned by Respondent's customers, those actions do not cure Respondent's violative conduct, nor does the return of those parts mitigate the harm to the regulatory scheme established by Congress to address this type of violations.

While not relevant to liability, Complainant is taking the returned parts into consideration in its penalty calculation. For the sales of violative parts that were subsequently returned, Complainant is classifying each such sale as a less egregious "Tier 1" violation and is not assessing an economic benefit component. *See* discussion Section II, *infra*. Respondent does not, however, qualify for any discount that might otherwise apply for having taken "remedial action" with respect to these violative parts as it has provided no evidence that it solicited the return of these parts from its customers, or that it has destroyed any of the returned parts preventing them from being resold. *Id.*

[3] Complainant notes that its previous calculation based on the January 2009 Clean Air Act Mobile Source Civil Penalty Policy yielded a penalty greater than the penalty calculated under the January 2021 version.

Respondent also contends that to the extent Complainant has recovered penalties from the manufacturers of the parts at issue, seeking penalties sought against Respondent is inappropriate. Section 205(a) of the CAA states that "any person" who violates section 203(a)(3)(B) shall be subject to a civil penalty. Each of Respondent's 15,621 sales of defeat devices alleged in the Complaint constitute a violation of Section 203(a)(3)(B) and subject to civil penalties irrespective of the violative conduct of other "persons" involving the same part.

Fourteenth Affirmative Defense (No Legal or Equitable Basis for Penalties)

Respondent asserts that civil penalties are not appropriate or should be substantially mitigated because EPA cannot demonstrate "meaningful impacts associated with the alleged violations", or an "equitable basis" for imposing a civil penalty, including harm to human health or the environment, economic benefit to Respondent, or a history of noncompliance by Respondent." Complainant's Prehearing Exchange includes evidence speaking to the impacts of illegal automotive aftermarket parts on human health and the environment, the equitable bases for imposing penalties, and the economic benefit to Respondent justifying the appropriateness of the penalty being sought. *See* Cx150, Cx162-Cx165, Cx169-Cx176, Cx197-Cx200, Cx212, and Section II. below.

Fifteenth Affirmative Defense (Additional Defenses)

Respondent reserves the right to assert additional defenses, claims, counterclaims, and third-parties to this action, as EPA's investigation and evaluation in this matter continues. Similarly, Complainant reserves its right to rebut any additional defenses Respondent may assert in connection with the Agency's continuing investigation and evaluation in this matter.

II. PENALTY DISCUSSION

A. Penalty Calculation

As allowed by 40 C.F.R § 22.14(a)(4)(ii), Complainant did not propose a specific penalty in the Complaint. In accordance with 40 C.F.R. § 22.19(a)(4) of the Consolidated Rules of Practice and the Prehearing Order, this statement specifies the dollar amount of the penalty Complainant is proposing for the violations alleged in the Complaint, and includes a detailed explanation of the factors and policies considered and methodology utilized in calculating the proposed penalty. In calculating the proposed penalty, Complainant has taken into account the particular facts and circumstances of this case as known and understood at the time of this filing. To the extent that facts or circumstances unknown to Complainant at the time of this filing become known at a later time, such facts and circumstances may also be considered as a basis for adjusting the civil penalty proposed herein.

Section 205(a) of the CAA, 42 U.S U.S.C. § 7524(a), provides that any person who violates Section 203(a)(3)(B) of the CAA, 42 U.S.C § 7522(a)(3)(B), shall be subject to a civil penalty of not more than $2,500 per offense. Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act

of 1996 ("DCIA"), and the subsequent Civil Monetary Penalty Inflation Adjustment Rule, 40 C.F.R. Part 19 ("Penalty Inflation Rule"), violations of the CAA which occur on or before November 2, 2015 are subject to statutory maximum penalty of $3,750 per offense, and violations of the CAA which occur subsequent to November 2, 2015 are subject to a statutory maximum penalty of $4,876 per offense. *See* 85 Fed. Reg. 83818, 83821 (December 23, 2020) and 78 Fed. Reg. 66643, 66648 (November 6, 2013)

As required by Section 205(c)(2) of the CAA, 42 U.S.C. § 7524(c)(2), Complainant has taken 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 ("CAA statutory factors") in its determination of the amount of the proposed penalty. Complainant has also taken into account the particular facts and circumstances of this case with specific reference to EPA's January 2021 Clean Air Act Title II Vehicle & Engine Civil Penalty Policy ("Penalty Policy"). The purpose of the Penalty Policy is to ensure that: (1) civil administrative penalties are assessed in accordance with the CAA in a fair and consistent manner; (2) penalties are appropriate for the gravity of the violation; (3) penalties are sufficient to deter both individual violators and the regulated community as a whole from committing violations; (4) economic incentives for noncompliance are eliminated; and (5) compliance is expeditiously achieved or maintained. Cx169 at 5.

Complainant calculated an initial penalty in accordance with the methodology set forth on page 4 of the Penalty Policy (i.e., Cx169 at 8). Described in greater detail below, this methodology generally involved (1) calculating the economic benefit penalty component as described in pages 5-8 of the Penalty Policy (i.e., Cx169 at 9-12), (2) calculating the gravity penalty component for each violation as described in pages 8-17 and 28-32 (Appendix C) of the Penalty Policy (i.e. Cx169 at 12-21 and 32-36), and (3) applying the adjustment factors described in pages 17-20 of the Penalty Policy (i.e., Cx169 at 21-24), as applicable.

A. Economic Benefit Component.

The economic benefit component is understood to mean the extent to which a violator is financially better off because of its noncompliance. Cx169 at 9. Consistent with the Penalty Policy, Complainant calculated Respondent's economic benefit based on the wrongful profits it derived from its illegal sales of the parts alleged in the Complaint, referred to under the Penalty Policy as "beyond BEN benefits." Cx169 at 9-12. Complainant's economic benefit assessment is based on the opinions of its financial expert which are described in the June 15, 2021 Expert Report: Keystone Automotive Operations, Inc., Gail Coad, Industrial Economics, Incorporated ("Expert Report"). *See* Cx198.

Complainant's financial expert relied on the following sources of information:

- LKQ Corporation's Form 10-K annual reports for 2015 to 2020 (Cx171-Cx176)
- Keystone's spreadsheets of transaction-level data, as provided by Keystone and subsequently filtered by EPA to identify the subsets of violative products:

    - **Attachment C** - KAO EPA Wholesale Transactions Data File (Group 1a - 32 SKUs) 8-24-2018 -- Contains CBI.xlsx (Cx150, pages 6-49)
    - **Attachment E** - KAO EPA Wholesale Transactions Data File (Group 2 - 12 SKUs) 8-24-2018 -- Contains CBI.xlsx (Cx150, pages 164-345)
    - **Attachment M** - KAO EPA Wholesale Transactions Data File (Group 3 - 11 SKUs) 8-24-2018 -- Contains CBI.xlsx (Cx150, pages 374-408)

- D&B Hoovers OneStop Report for Keystone, dated September 4, 2020 (Cx170)
- U.S. EPA's BEN Model Version 2021.0.0. Available at: https://www.epa.gov/enforcement/penalty-and-financial-models. Cx198 at 4 and 10 (Appendix 1).

Complainant's expert calculated Respondent's wrongful profit by subtracting all direct costs of the part's sale from the sale price, reducing that amount by the estimated income taxes paid by Respondent, and then adjusting the amount to present value terms by applying an appropriate discount rate. Cx198 at 4. With the assistance of EPA, Complainant's expert first identified the violative parts at issue from the spreadsheets of transaction-level data provided to EPA by Respondent on August 29, 2018. *See* Cx198 at 4-5 and 249-454 (Appendix 2 – "Transaction Data for Violative Parts" spreadsheet workbook page). She determined that Respondent sold a total of 15,621 individual parts from January 1, 2015 through August 28, 2018 and, if "returns" are taken into account, that Respondent sold 14,759 net parts. *See* Cx198 at 4-5 and 16-235 (Appendix 2 – "Analysis by Transaction" spreadsheet workbook page). Relying on the information on the sale price and the cost of the part sold provided by Respondent, Complainant's expert calculated the gross profits generated for each transaction. *Id.* Complainant's expert chose not to incorporate any allocation of costs other than the direct costs based on the fact that Respondent's annual sales of the violative parts represented a minor part of the company's overall business activity, falling between approximately 0.1 and 0.2 percent of its annual sales. *Id.*

Complainant's expert next reduced the gross profit values to after-tax terms, using the annual effective tax rates for Keystone's parent company, LKQ, from 2015 to 2018. *See* Cx198 at 4-5 and 16-248 (Appendix 2 – "Analysis by Transaction," "Reference Data for Analysis," and "Financial Data for LKQ Corporation" spreadsheet workbook pages.) In applying the annual effective tax rates for LKQ, she assumed that LKQ reported consolidated financial results across all subsidiaries when paying income taxes so that any profits generated by Keystone would have been ultimately taxed at the level of LKQ. *See* Cx198 at 4. Lastly, Complainant's expert applied year-by-year discount rates from the U.S. EPA's BEN Model Version 2021.0.0 to determine the present value of the illegal profits as of June 30, 2021. *See* Cx198 at 4-5 and 16-247 (Appendix 2 – "Analysis by Transaction" and "Reference Data for Analysis" spreadsheet workbook pages).

Based on the methodology described above, Complainant's expert opines that Respondent gained wrongful profits of [redacted] for the 14,759 net individual parts it sold from January 1, 2015 through August 28, 2018 (i.e., Approach #1), and [redacted] for the 15,621 individual parts it sold from January 1, 2015 through August 28, 2018 (i.e., Approach #2). *See* Cx169 at 2 and 5. The details and results of her analysis on summary by year level, summary by part level, and individual transaction level bases are included in Appendix 2 of her Export Report

in the "Summary by Year," "Summary by Part", and "Analysis by Transaction" spreadsheet workbook pages, respectively. Cx198 at 14-247.

Complainant is assessing an economic benefit component in the amount of [redacted], based on the wrongful profits obtained by Respondent as a direct result of its sale of 14,759 illegal parts, during the period from January 1, 2015 through August 28, 2018. Complainant has determined that none of those parts were subsequently returned

B. Gravity Component

The gravity component accounts for the potential harm the violation poses, the likelihood of harm or extent of harm that occurred, the effectiveness of efforts to correct the violation, the size of the violator, the violator's culpability, the violator's degree of cooperation, and the violator's compliance history. Cx169 at 13. As stated in the Penalty Policy:

> Violations of the Act undercut Title II's comprehensive program for emissions control and reduction, increasing the risk to human health and the environment. Harm is thus inherent in each violation, though the precise nature and degree of harm may vary depending upon the circumstances of the case. Proof that violation resulted in actual harm to human health is not necessary; it is sufficient to demonstrate the potential for harm. *Id.*

Complainant followed the following three-step process set forth in the Penalty Policy is calculating the gravity component.

- Step 1: Calculate the initial gravity penalty amount by using the violation-specific method set forth in the appropriate Appendix.
- Step 2: Modify the amount calculated in Step 1 to account for remedial action, inflation, and the size of the violator.
- Step 3: Adjust the amount calculated in Step 2 for the violator's degree of culpability, degree of cooperation, and history of noncompliance. Cx169 at 15.

Step 1: As this case involves alleged defeat device violations under Section 203(a)(3) of the Act, 42 U.S.C. § 7522(a)(3), Complainant calculated the initial gravity penalty amount pursuant to "Appendix C". Cx169 at 16, 32-34. Pursuant to Appendix C, the first part of the gravity component assessed was the egregiousness of each violation. Cx169 at 32. The egregiousness of the violation generally refers to the likelihood that the violation will result in harm to the regulatory scheme, harm to human health and the environment in the form of excess emissions, or both. The most egregious violations include those where the EPA's ability to administer the regulatory program is significantly impaired, excess emissions are likely to occur, or where there is no reliable information about vehicle or engine emissions. Cx169 at 14. For defeat device violations, a significant concern in determining the egregiousness is the likely increase in vehicle emissions that may result from the violation. Cx169 at 32. As the Penalty Policy states:

> Tampering and defeat device violations create the potential for harm by changing or

removing a vehicle or engine's emission-related devices or elements of design so they no longer match the configuration certified by the original manufacturer. These violations undermine the certification program and are likely to result in emissions increases *Id.*

In this matter, all the violative parts identified in the Complaint remove emission-related elements of design in motor vehicles. Specifically, the violative parts at issue in COUNT ONE bypass, defeat, or render inoperative ("delete") motor vehicles' or motor vehicle engines' exhaust gas recirculation ("EGR") systems, emission controls that reduce NOx emissions. The violative parts at issue in COUNT TWO delete motor vehicles' or motor vehicle engines' selective catalytic reduction ("SCR"), diesel oxidation catalyst ("DOC"), NOx adsorption catalyst ("NAC"), diesel particulate filter ("DPF") and/or catalytic converter systems. SCRs and NACs are aftertreatment emission controls that reduce NO_x emissions from vehicle exhaust systems. DOCs are aftertreatment emission controls that reduce CO and NMHC emissions from vehicle exhaust systems. DPFs are aftertreatment emission controls that reduce PM emissions from vehicle exhaust systems. Catalytic converters are aftertreatment emissions controls in gasoline-fueled motors that reduce CO, HC and, in some cases, NOx emissions from vehicle exhaust systems. The violative parts at issue in COUNT THREE delete motor vehicles' or motor vehicle engines' air injection reactor ("AIR") systems or air pumps, emission controls that reduce HC and CO emissions. The violative parts at issue in COUNT FOUR delete motor vehicles' or motor vehicle engines' EGR systems, rear oxygen sensors, and/or on-board diagnostic ("OBD") functions associated with EGRs and rear oxygen sensors. Oxygen sensors help to ensure that emissions of NO_x or HCs are appropriately controlled. When malfunctions of emission-related systems or components such as EGRs, catalytic converters, or oxygen sensors are detected, the OBD illuminates a 'check engine light'("CEL") or 'malfunction indicator light' on the vehicle dashboard to alert the driver, and/or records diagnostic trouble codes ("DTCs") to inform service personnel/government regulators of needed repairs and compliance with emission standards.

EGRs, SCRs, DOCs, NACs, DPFs, catalytic converters, AIR systems/air pumps, oxygen sensors and OBDs are emissions-related element of design installed by original manufacturers of motor vehicles and motor vehicle engines to meet emission standards in order to obtain a certificate of conformity in compliance with Title II of the CAA. Accordingly, Complainant initially assigned all of Respondent's sales of the violative parts as "Tier 2" egregiousness violations. Cx169 at 32 (violations that remove aftertreatment systems are Tier 2 violations unless reliable emissions testing shows that the violations do not increase tailpipe emissions). Recognizing the likelihood that excess emissions may not have occurred for the 862 sales of violative parts that were subsequently returned by Respondent's customers, Complainant reassigned these sales as "Tier 1" egregiousness violations. Cx169 at 32.

After the egregiousness tiers were assigned, Complainant determined the size category of the affected vehicles based on the type of motor vehicles or motor vehicle engines for which the parts are intended to be installed. Cx169 at 33. As directed by Penalty Policy, for parts intended to be installed on motor vehicles or motor vehicle engines involving multiple size categories, Complainant calculated the penalty based on the largest motor vehicle or motor vehicle engine application advertised for each part. *Id.* In this matter, Complainant determined that 13,463 of the sales involved violative parts that were intended to be installed on diesel light-duty trucks

and assigned them as "Size Category C" under Table C1. Cx169 at 34. Of the 13,463 of Respondent's sales, 784 were subsequently returned by Respondent customers (i.e., egregiousness Tier 1). Complainant further determined that 2,158 of the sales involved violative parts that were intended to be installed on light-duty vehicles or non-diesel light-duty trucks and assigned them as "Size Category B" under Table C1. Cx169 at 34. Of the 2,158 of Respondent's sales, 78 were subsequently returned by Respondent customers (i.e., egregiousness Tier 1). A summary of Complainant's size category determinations can be found in Cx199. In accordance with Table C1, Complainant determined the "per violation" amounts as follows:

Size Category B, Tier 1 (78 violations):	$750
Size Category B, Tier 2 (2,080 violations):	$1,500
Size Category C, Tier 1 (784 violations):	$1,500
Size Category C, Tier 2 (12,679 violations):	$3,000

Under the Penalty Policy, Complainant has discretion when calculating the total gravity penalty to apply scaling equations which incrementally reduce the per-violation penalty starting with the 51st violation for each 'penalty group" (i.e., unique Size Category/egregiousness Tier combination). Cx169 at 35. Complainant has chosen to do so in this case and has employed the following equation from the Penalty Policy for each penalty group to calculate the gravity portion of the penalty.

$(49*P_1) + [(\#\text{ of Violations} - 49)^{0.7} * P_1] = \text{Gravity Penalty}$

- P_1 = "per violation" amounts from Table C1 identified above

Inserting the appropriate number of alleged violations and "per violation" amounts for each penalty group as shown below, Complainant calculated a gravity penalty of $3,029,954.

$(49 * \$750) + [(78 - 49)^{0.7} * \$750] =$	$44,670
$(49 * \$1,500) + [(2,080 - 49)^{0.7} * \$1,500] =$	$383,590
$(49 * \$1,500) + [(784 - 49)^{0.7} * \$1,500] =$	$225,727
$(49 * \$1,500) + [(12,679 - 49)^{0.7} * \$1,500] =$	$2,375,967
	$3,029,954

Step 2: The next step in calculating the gravity penalty component is to account for the remediation of the alleged violations, inflation and the size of the violator. Cx169 at 16-18. Complainant did not reduce the penalty for remediation since Respondent has not provided any information or evidence of remedial actions taken, such as soliciting the return of the violative parts from its customers, or destroying any of the returned parts preventing them from being resold. As the Penalty Policy was issued subsequent to the most recent Civil Monetary Penalty Inflation Adjustment Rule, issued on December 23, 2020 (85 *Fed. Reg*. 83818) no inflation adjustments to the gravity component have been made.

Complainant did adjust the penalty to reflect the size of Respondent's business. Under the Penalty Policy, the size of the violator should be assessed on the best information available regarding the prior year at the time penalty is calculated. Cx169, at 17-18. Respondent failed to

provide information requested of it about its net worth, net assets, annual sales or revenues in its various responses to EPA's July 11, 2017 Section 208 RFI [4], or otherwise. For reasons more fully explained in her Expert Report, Complainant's financial expert opined that the information in the SEC 10-K filings of Respondent's international publicly traded parent entity, LKQ Corporation, did not appropriately address the size of Respondent's business. Cx198 at 9. Consequently, she researched and identified a publicly available D&B Hoovers OneStop Report for "Keystone Automotive Operations, Inc." which reflects a modelled estimate of Respondent's annual sales for 2020 of $635.8 million. *See* Cx170 at page 31 and Cx198 at 9. Per the Penalty Policy, if a violator's most recently complete year of revenue is $30 million or more, the gravity should be increased by an amount equal to 0.15 percent of the violator's annual revenue. Cx169 at 17-18. Complainant increased the penalty in the amount of $953,700 (i.e. $635,800,000 x 0.15%) due to the size of Respondent's business.

Step 3: The final step in calculating the gravity penalty component is to adjust the amount calculated in Step 2 for the violator's degree of culpability, degree of cooperation, and history of noncompliance. These additional adjustment factors may be applied to the gravity penalty amount to promote flexibility and consistency in the gravity penalty policy component. Cx169 at 18-21. Despite evidence showing Respondent to be an experienced, informed and sophisticated seller in the aftermarket automotive equipment industry (indeed, Respondent itself, characterizes itself as a leader in the industry) who knew or should have known of the excess emissions resulting from, and compliance issues associated with, selling the parts at issue in this matter without taking any apparent precautions, Complainant did not increase the gravity amount for culpability. With respect to cooperation, Complainant considered Respondent's statements that it has stopped the sale of the violative parts at issue in this matter, as well as Respondent's conduct in responding to the EPA's Section 208 Request for Information letter. In light of these factors, EPA exercised its enforcement discretion by applying a discount to the gravity component in the amount of 10%, the maximum amount permitted by the Penalty Policy. Complainant possesses no evidence of prior violations and therefore made no adjustment based on this factor.

The combined economic benefit component of [redacted] and gravity component of $3,585,289 yields a penalty amount of $4,237,549, corresponding to approximately $271 for each of Respondent's illegal sales. Cx169 at 21. Complainant is proposing a penalty of $4,237,549 which it believes reflects the gravity of the violations, given the quantity and type of parts sold and the resulting risk of harm to human health, the environment and the CAA regulatory motor vehicle/engine certification program; is of a sufficient and necessary magnitude to serve as a deterrent to Respondent, as a leading distributor of aftermarket automotive equipment with a vast portfolio grossing over $635 *million* dollars in sales annually, as well as to other members of the regulated community of aftermarket automotive equipment companies; and appropriate given totality of circumstances in this case, particularly as it represents under 6% of the statutory maximum penalty authorized under the CAA.

[4] *See* Cx141, page 14

B. Responses to Respondent's Arguments Related to Penalty

Factual Information Relevant to Penalty Assessment

Respondent asserts that a reduced penalty is indicated because its violative sales occurred during a period of time where "Complainant created vast confusion in the market" accusing EPA of doing an 'about-face' "[d]espite decades of reassuring the general public that a legal market existed in which legal race parts could be sold." Complainant does not believe Respondent has provided credible evidence to support this assertion to justify a penalty reduction. As illustrated in the examples below, EPA has held a consistent public position regarding competition-use and defeat devices both before and during the timeframe of Respondent's violative conduct:

2008 *Claims of "off-road use" or "racing only" do not protect the seller from liability under the CAA*. Cx189 at 8

2010 *Q1: Am I protected from selling a defeat device or tampering as long as I inform my customers that they can only use my parts "off-road" or "for racing use only" or that the parts are "not for installation on emission-controlled vehicles"? A: No, if the parts are designed for and intended to be installed on certified motor vehicles, EPA considers you to still be liable under the CAA prohibited acts.* Cx190 at 9.

2015 *Under the CAA there is no "competition only" exemption for motor vehicles or motor vehicle engines. If it's an EPA-certified motor vehicle, the CAA prohibits parts or service that increase emissions.* Cx191 at 9.

2016 *For motor vehicles certified for use on public roads, the Clean Air Act has always prohibited tampering with or defeating those vehicles' emission control system.* Rx3 at 1.

The U.S. Environmental Protection Agency is committed to protecting public health by ensuring that cars driven on public roads meet pollution standards under the Clean Air Act. . . .EPA's focus is not in 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. Rx17 at 1.

Respondent asserts that a reduced penalty is also indicated because of the large number of SKUs and suppliers it handles, because it is merely a seller of the parts at issue, because race parts are only a small portion of its sales and not a product segment that it actively pursed, and because it "relied in good faith on information and representations from manufacturers and suppliers regarding their own product compliance" citing language from its purchase agreements with its suppliers. As the language in Respondent's purchase agreements demonstrates an understanding and awareness by Respondent of the potential legal risks associated with the specific types of parts at issue, Complainant finds no compelling reason to reduce the penalty on the basis of good faith, or the other stated grounds which are not unique to Respondent but

common to large wholesale distributors.

Lastly, Respondent asserts that a reduced penalty is indicated because other legal markets, beyond racing, exists for the parts at issue, and because it stopped future sales of the parts at issue (and others) and undertook other measures after receiving EPA's RFI. In the absence of evidence that any of the 15,621 illegal parts sold by Respondent were installed for legal use, Complainant finds no basis to reduce the penalty. Due to Respondent's conduct after receiving EPA's RFI, however, Complainant is applying a discount to the gravity component for cooperation in the amount of 10%, the maximum amount permitted by the Penalty Policy.

Statutory Penalty Factors

a. Number of Parts at Issue – Respondent argues that Complainant should exclude from its penalty calculation the parts it sold that were returned by its customers. The plain language of Section 203(a)(3)(B) of the CAA prohibits any person from *inter alia* "selling" defeat devices intended for use with, or as part of, any motor vehicle or motor vehicle engine. Each of Respondent's 15,621 sales of defeat devices alleged in the Complaint constitute a violation of Section 203(a)(3)(B) of CAA. If some of the parts were subsequently returned by Respondent's customers, those actions do not cure Respondent's violative conduct, nor does the return of those parts mitigate the harm to the regulatory scheme established by Congress to address this type of violations. For these reasons, Complainant disagrees that that these parts should be excluded from the penalty calculation. However, Complainant is appropriately taking the returned parts into consideration in its penalty calculation. For the violative sales of parts that were subsequently returned, Complainant is classifying each such sale as a less egregious "Tier 1" violation and is not assessing an economic benefit component.

   Respondent also argues that its 9,021 sales of Derive/SCT parts should be excluded from Complainant's penalty calculation because of the Derive Consent Decree, and because Derive "represented on multiple occasions to Keystone that these parts were compliant with the CAA and legal for sale" asserting that, for these reason, it did not have requisite knowledge or fair notice. All of Respondent's 9,021 sales of Derive/SCT parts occurred prior to the September 24, 2018 settlement between the United States and Derive, and none involved parts subsequently permitted to be sold by Derive pursuant the phase out schedule set forth therein (i.e., Paragraph 21). Respondent has not demonstrated any credible fair notice or ratification claims based on Derive Consent Decree in connection with its 9,021 sales of Derive/SCT parts and Complainant find no reason to exclude them from its penalty calculation.

   Complainant's takes issue with Respondent's assertion that Derive represented that its parts were compliant with the CAA and legal for sale "on multiple occasions." During the timeframe of Respondent's violative sales, Respondent identifies *a single email* from Derive dated November 27, 2017 stating that its "devices *out of the box* do not defeat any emissions equipment" (emphasis added). As discussed in Complainant's response to Respondent's Fourth Affirmative Defense *supa.*, publicly

available information at the time of Respondent's sales of the Derive/SCT parts at issue show that the EGR delete and Rear O2 sensor delete capabilities are included as pre-loaded user adjustable tuning files (i.e., users can opt to delete EGR and rear O2 sensors based on tuning files that are included on the devices out of the box). Consequently, Complainant finds both Derive's email and Respondent's perfunctory reliance thereon to be both misleading self-serving. Complainant finds no compelling reason to exclude Respondent's sales of Derive/SCT parts from its penalty calculation, particularly for the approximately 7,875 parts sold prior to receiving the purported assurance letter.

b. Economic Benefit- Informed by the opinions of its expert Jonathan Shefftz, Respondent argues for an economic benefit based on the after-tax present value of Respondent's earnings before interest, depreciation, and amortization ("EBITDA"), netting out the parts returned by Respondent's customers and excluding Derive/SCT parts. Comparatively, Complainant, informed by the opinions of its expert Gail Coad, concludes a more appropriate approach to economic benefit is one that is based on the after-tax present value of Respondent's gross profit, adjusting for the parts that were returned by Respondent's customers. *See* Cx198[5] Complainant finds no compelling reason to exclude the illegal profits Respondent gained from its 9,021 sales of Derive/SCT parts from its economic benefit analysis. As more fully explained in her expert report, Ms. Coad rejects the application of EBITDA based on: a lack of evidence identifying any specific relationship between Keystone's illegal sales and its indirect costs, the fact that Respondent's violative product sales represent only a very small percentage of either its estimated sales or the overall sales of its parent company's LKQ Specialty segment during the relevant time period, and the use of an overall Specialty segment's EBITDA metric for the Keystone-specific analysis.

c. Gravity- Respondent argues for a minimal or reduced penalty based on its role as a distributor (versus a manufacturer) and the steps it took to ensure its suppliers provided compliant parts; on legal uses for the parts at issue; and on the Derive Consent Decree. Even as a Distributor, Respondent had access to, possession and/or use of, part-specific information about delete capabilities and motor vehicle fitment specifications at the time of the violative sales. Respondent's purchase agreements with its suppliers demonstrate an understanding and awareness by Respondent of the potential legal risks associated with the specific types of parts at issue. Respondent has not produced a single piece of evidence that any of the 15,621 products it sold have, in fact, been solely and expressly designed and intended for racing use only, or were used on a motor vehicle permanently converted for competition use only and never used on public roads, or any other 'legal use.' All of Respondent's 9,021 sales of Derive/SCT parts occurred prior to the September 24, 2018 settlement between the United States and Derive, and none involved parts subsequently permitted to be sold by Derive pursuant the phase out schedule set forth therein (i.e., Paragraph 21). Moreover, for all of its claims of good faith in complying with the law, Respondent acknowledges it understood that defeat devices were at the very least illegal when

[5] Additional documents relied by Ms. Coad can be found at Cx150, Cx170-Cx176.

used on vehicles driven on public roads, but yet took no affirmative effort to ensure that the defeat devices it sold would only be used on vehicles used solely for competition. Such failure to take responsibility for distributing numerous defeat devices throughout the United States without care whether or not they ended up on vehicles driven on the nation's roads can hardly be called a good-faith effort to comply with the CAA's defeat device prohibition. For these reasons discussed in greater detail *supra,* Complainant is not compelled to reduce or minimize the penalty on these grounds.

d. Size of Respondent's Business – Respondent argues against the addition of a size of business component based on the lack of need for additional (specific) deterrence, and the unfairness of doing so compared with under-capitalized manufactures and retailers. The Penalty Policy provides for an additional size of business component in cases where a violator's annual revenue is $30 million or more. According to publicly available information[6], Respondent's annual revenues are *more than an order of magnitude* above the penalty policy threshold. Complainant finds no compelling reason to exclude a size of business component, where: Respondent holds itself out as the "leading distributor and marketer of aftermarket automotive equipment" with the "largest warehouse distributor in our industry", such enhancement will effectuate EPA's goal in providing general deterrence to other similarly situated and capitalized entities in the regulated community, and where the size of business component represents approximately 20% of the entire penalty being sought.

e. History of Noncompliance – Respondent argues for a minimal or reduced penalty based on the fact this is its first alleged violations of the CAA. However, the purpose this factor is to enhance the penalty amount in instances where a previous enforcement for similar violations failed to achieve deterrence. Neither the CAA nor the Penalty Policy provide for a first-time violator's discount. After consideration of this statutory factor, Complainant has neither increased nor decreased the penalty based on its compliance history.

f. Actions to Remedy the Violation – Respondent argues for a minimal or reduced penalty because it promptly stopped future sales of the parts at issue (and others) and undertook other measures after receiving EPA's RFI. While Complainant does not view these efforts to ensure compliance with the CAA and level the playing field prospectively as remediating the violations at issue in this matter, it is applying a discount to the gravity component in the amount of 10% for cooperation, the maximum amount permitted by the Penalty Policy.

g. Other Such Matters as Justice Requires- Respondent sets forth six reasons for penalty mitigation. First, because it is a wholesale distributor due to its lack of knowledge; Second, because of a lack of fair notice of racing parts, Third, because EPA is seeking enforcement against manufacturers and other sellers of the same parts; Fourth,

[6] Complainant notes that Respondent failed to provide information about its net worth, net assets, annual sales or revenues requested in the July 11, 2017 Section 208 RFI. *See* Cx141, page 14.

because the parts are still actively being sold by other entities; Fifth, because EPA has settled cases in amounts far less than what it anticipates Complainant will seek, and Sixth, because of Respondent cooperated with EPA's investigators up through the present proceeding.

First, the statutory prohibition in Section 203(a)(3)(B) of the CAA, applies equally to manufacturers, sellers, and installers of defeat devices. In Section 205(a) of the CAA, Congress made no distinction between the maximum statutory penalty that can be sought against manufacturers and installers, and the maximum statutory penalty that can be sought against sellers such as wholesale distributors. For the parts at issue, Respondent had access to, possession and/or use of, part-specific information about delete capabilities and motor vehicle fitment specifications sufficient to establish liability. In addition to being a wholesale distributor, Respondent owns and operates a chain of retail stores and service centers and as such, is presumed to have enhanced knowledge or information as to the intended purpose or the parts it sells and its customers intended use of those parts

Second, EPA has held a consistent public position regarding competition-use and defeat devices both before and during the timeframe of Respondent's violative conduct. Respondent's own data shows that it sold the parts at issue indiscriminately, and Respondent has not provided any evidence that any of the 15,621 illegal parts sold by Respondent were installed solely for vehicles used solely for competition.

Third, Section 205(a) of the CAA states that "any person" who violates section 203(a)(3)(B) shall be subject to a civil penalty. Each of Respondent's 15,621 sales of defeat devices alleged in the Complaint constitute a violation of Section 203(a)(3)(B) and subject to civil penalties irrespective of the violative conduct of other "persons" including manufacturers and other sellers of the same part.

Fourth, Complainant does not dispute that many of the parts at issue continue to be offered for sale by multiple entities, including by some of Respondent's own customers. EPA has made aftermarket defeat devices a national priority to address the significant contributions to air pollution that harm public health, and the impediments to federal, state, local and tribal efforts to plan for and attain air quality standards they cause, resulting in dozens of enforcement actions to date.

Fifth, the Environmental Appeals Board ("EAB")has consistently held that "penalty assessments are sufficiently fact and circumstance dependent that the resolution of one case cannot determine the fate of another." *In re Chem Lab Products,* 10 E.A.D. 711, 728 (EAB 2002) *quoting In re Newell Recycling Co.,* 8 E.A.D. 598, 642 (EAB 1999). In as much as all the cases identified by Respondent are settlements, the EAB has further noted that "the inappropriateness of comparing settled versus litigated cases has also long been established. EPA administrative case law holds that penalties assessed in litigated cases cannot profitably be compared to penalties assessed via settlements." *In re Chem Lab Products* at 730. Complainant anticipates filing a Motion to seek relief to address this concern in accordance with 40 C.F.R. §

22.16 and the Prehearing Order.

Sixth, Complainant is applying a discount to the gravity component in the amount of 10% for cooperation, the maximum amount permitted by the Penalty Policy.

For the above-stated reasons, Complainant is not convinced there are compelling reasons 'as justice may require' to further mitigate its penalty calculation.

III. EXHIBITS

Complainant intends to introduce the following additional exhibits at hearing, copies of which are attached hereto:

Exhibit Number	Description of Exbibit	No. Pages
Cx186	https://www keystoneautomotive.com/About, printed 6/14/2021	1
Cx187	https://www keystoneautomotive.com/Products/e-commerce/eKeystone-app, printed 6/14/2021	1
Cx188	https://www.epa.gov/enforcement/national-compliance-initiative-stopping-aftermarket-defeat-devices-vehicles-and-engines, printed 6/14/2021	3
Cx189	https://www.epa.gov/newsreleases/epa-highlights-enforcement-actions-against-those-who-violate-defeat-device-and, printed 6/14/2021	1
Cx190	EPA SEMA Presentation Nov 2008	39
Cx191	EPA SEMA Presentation Nov 2010	17
Cx192	EPA SEMA Presentation Nov 2015	9
Cx193	May 13, 2016 letter from Cynthia Giles to Nicholas Craw, ACCUS, FIA, Inc.	2
Cx194	May 17, 2016 letter from Janet G. McCabe to Congressman John P. Sarbanes	1
Cx195	Undated letter from Susan P. Bodine to Senator Jack Reed	3
Cx196	September 11, 2020 letter from Susan P. Bodine to Congressman David P. Roe	3
Cx197	Enforcement Alert, EPA 300-F-20001, December 2020	5
Cx198	June 15, 2021 Expert Report: Keystone Automotive Operations, Inc., Gail Coad, Industrial Economics, Incorporated*	454
Cx199	Complainant's Size Category Determinations*	3
Cx200	Complainant's Penalty Calculation Worksheet*	1
Cx201	**Parts 9125BO and 9126BO:** Kooks Headers 1962 Exhaust Race/Street/Truck, Volume II catalog	28

Cx202	**Part S6212PLM:** https://rudysdiesel.com/product-p/S6212PLM html, printed 7/3/2018, S6212PLM/S6212SLM Manufacturer Installation Instructions, dated November 3, 2010, and S6212PLM/S6212SLM Manufacturer Installation Instructions, dated August 1, 2019.	4
Cx203	**Part S6126409:** S6126 Manufacturer Installation Instructions © 07/09, and www.extremediesel.com/MBRP4PerformanceSeriesTurboBackExhaustSystemS6212P.aspx.html	5
Cx204	**Parts 7015 and 3015:** https://www.youtube.com/watch?v=f42-0oMz7Ds "EGR delete by SCT" Gene Ouray, May 13, 2014** *Shows how the EGR system can be turned off when installing the SCT 7015 tuner on a 6.0 liter Powerstroke diesel engine. See marker 0:51 in the video, the tuner in the video contains no custom tunes such that the "EGR off" function must be created by SCT. A screenshot of the "EGR Off" options shown at marker 1:09 in the video. The narrator shows the 7015 side-by-side with the 3015 and how the 3015 has the same EGR feature.*	N/A
Cx205	**Part 7015:** https://www.youtube.com/watch?v=5qe2pDUoIDA "SCT X4 Power Flash Programmer Overview" by CJ Pony Parts, March 19, 2014** *Shows how the rear oxygen sensors can be turned off when installing the SCT 7015 tuner on a 5.0 liter Ford Mustang engine. Marker 2:27 in the video shows the tuner contains no custom tunes such that the "Rear O2" disable feature must be created by SCT. A screenshot of the "Rear O2" disable feature from the video is also provided at marker 2:50 in the video. The serial number of the tuner in this video is X44031014042FD, indicating that it was manufactured by SCT in March 2014. The narrator of the video states that "if you don't have catalytic converters then you can turn off the [rear oxygen] sensors off".*	N/A
Cx206	**Part 7015:** https://www.youtube.com/watch?v=kmpnRpAsm-g "SCTx4 Tuner/Monitor Review" by Joey Fish, December 27, 2016** *Shows an individual installing a tune onto his 6.0L Powerstroke using a 7015 SCT tuner. Marker 3:27 in the video shows the "EGR off" function. Marker 3:06 shows the tuner contains no custom tunes such that the "EGR off" function must be created by SCT.*	N/A
Cx207	**Part 7015:** https://www.youtube.com/watch?v=u8iPkQApNM0, "How to program 6.0 Powerstroke SCT X4" by ITS QDOG, August 20, 2017**Shows an individual installing a tune onto his 6.0L Powerstroke using a 7015 SCT tuner. Marker 3:29 in the video shows the "EGR off" function. Marker 2:35 shows the tuner contains no custom tunes such that the "EGR off" function must be created by SCT.*	N/A
Cx208	**Part 7015:** https://www.youtube.com/watch?v=9QCSpsCe8tA,"6.0 sct install" by spoolmonstertv, February 25, 2018**Shows an individual installing a tune onto his 2004 6.0L Powerstroke using a 7015 SCT tuner. The tuner is shown to allow for "EGR off" function (see marker 4:19 in the video). As shown in the video (see marker 2:59), the tuner in the video contains no custom tunes such that the "EGR off" function must be created by SCT*	N/A
Cx209	**Part 7015:** https://www.youtube.com/watch?v=l98e7kDcWPk, "How to use a sct x4 tuner" by DriftDreams 242, June 25, 2018** *Shows how the rear oxygen sensors can be turned off when installing the SCT 7015 tuner on a Ford Mercury Marauder engine. Marker 3:56 shows "Rear O2" is set to "OFF". Marker 3:33 shows the tuner contains no custom tunes such that the "Rear O2" disable feature must be created by SCT.*	N/A
Cx210	**Part 5015:** https://www.youtube.com/watch?v=C4cRTq3MGNk,"04 F250 Stacks and SCT Livewire TS Rolling Coal" by BigCountryCustomz, July 15, 2014**Shows an individual installing a tune onto his 6.0L Powerstroke using a 5015 SCT tuner. Marker 5:02 in the video shows the "EGR off" function. Marker 4:31 shows the tuner contains no custom tunes such that the "EGR off" function must be created by SCT*	N/A

Cx211	Susan L. Biro Appointment Certificates	2

**** In accordance with 40 C.F.R. § 22.5(d) and the Prehearing Order, Complainant is filing this exhibit (or part of exhibits) under seal as it contains information that has been claimed confidential business information (CBI) by Respondent or that may be personally identifiable information (PII).***

***** The native format of this exhibit is a WebM video file that cannot be reduced to a .pdf file. Since it cannot be uploaded into OALJ's electronic filing system in its native format, Complainant is filing this exhibit separately.***

Complainant reserves the right to introduce exhibits include by Respondent in its Prehearing Exchange.

Respectfully Submitted,

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Jennifer M. Abramson, Esq.
Dennis M. Abraham, Esq.
U.S. EPA, Region 3
1650 Arch Street
Philadelphia, PA 19103

Mark J. Palermo, Esq.
Air Enforcement Division
Office of Civil Enforcement
Office of Enforcement and Compliance Assurance

Counsel for Complainant