



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

**In the Matter of:** )  
 )  
**Freedom Performance, LLC,** ) **Docket No. CAA-HQ-2019-8362**  
 )  
**Respondent.** )

**ORDER ON COMPLAINANT’S MOTION FOR DEFAULT JUDGMENT AND  
ORDER**

**A. PROCEDURAL HISTORY**

This proceeding was commenced on March 18, 2019 with the filing of a Complaint<sup>1</sup> by the Complainant, the Director of the Air Enforcement Division, Office of Enforcement and Compliance Assurance, United States Environmental Protection Agency (EPA), against Respondent, Freedom Performance, LLC. The Complaint charges Respondent in three counts with 13,928 violations of Section 203(a)(3)(B) of the Clean Air Act (CAA), 42 U.S.C. § 7522(a)(3)(B). The violations arise from Respondent’s sale or offers to sell, parts or components intended to bypass, defeat, or render inoperative devices or design elements installed on or in a motor vehicle in compliance with CAA regulations, between May 1, 2015 and November 1, 2016. As sanction for the violations, the Complaint seeks imposition of an administrative penalty assessed pursuant to Section 205(a) of the Clean Air Act (CAA), 42 U.S.C. § 7524(a)

On April 3, 2019, EPA submitted Proof of Service of the Complaint upon the Respondent in accordance with 40 C.F.R. § 22.5(b)(1) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties (Rules), which are applicable to this proceeding. In support thereof, Complainant attached an e-mail dated April 3, 2019, from Respondent’s counsel, George Gramling, Esq., accepting service of the Complaint on behalf of Respondent and waiving the requirement for service by any other method as provided in Rule 22.5(b)(1) (40 C.F.R. § 22.5(b)(1)).

A Joint Motion for Extension of Time for Respondent to Answer Complaint was filed on April 15, 2019. As good cause for seeking the extension, the parties represented that they were actively engaged in settlement discussions to amicably resolve this matter. On April 19, 2019, the undersigned was designated to preside over this matter and on that day issued an order granting the parties’ extension request. The deadline for Respondent to answer the Complaint was extended to June 11, 2019. Prior to that deadline arriving, specifically on May 17, 2019, Mr. Gramling filed a Notice of Withdrawal as Counsel of Record for Respondent.

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<sup>1</sup> EPA identified the Complaint as including material claimed to be confidential business information (CBI) pursuant to 40 C.F.R. § 2.203. Therefore, Complainant filed a redacted copy of the Complaint for inclusion in the public record and an unredacted copy, identified as CBI-protected, with the Tribunal.

No answer to the Complaint, or additional request for extension of time, on behalf of the Respondent was filed on or before the June 11, 2019 deadline. However, the following day, on June 12, 2019, a Suggestion of Bankruptcy on behalf of Respondent was submitted by James D. Jackman, Esq., attorney for the debtor. That document advised that on June 4, 2019, Respondent had filed a petition for relief under Title 11, Chapter 7, of the United States Code, in the United States Bankruptcy Court for the Middle District of Florida, Tampa Division, case number 8:19-bk-05338-RCT. The Suggestion of Bankruptcy further stated that “[t]he automatic stay imposed by operation of 11 U.S.C. Section 362 of the Bankruptcy Code is applicable until a ruling herein.”<sup>2</sup>

On August 15, 2019, EPA filed a Motion for Default Judgment and Order (“Motion”) supported by 14 attachments.<sup>3</sup> The Motion asserts that the pendency of this matter is not stayed by virtue of 11 U.S.C. § 362, that Respondent is in default, and that EPA is entitled to entry of judgment. To date, no response to the Motion on Respondent’s behalf has been received.

## **B. INAPPLICABILITY OF THE BANKRUPTCY STAY**

In the Motion, Complainant argues that this proceeding is exempt from the automatic stay provided in 11 U.S.C. § 362 of the Bankruptcy Code because, here, the EPA is enforcing “a governmental unit’s regulatory power,” citing in support *Munce’s Superior Petroleum Products Inc.*, 15 E.A.D. 746, 2012 WL 6213748 (EAB 2012). Mot. at 28–29.

Section 362 of Title 11 reads in pertinent part:

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title<sup>4</sup> . . . operates as a stay, applicable to all entities, of--

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title . . .

\* \* \*

(b) The filing of a petition under section 301, 302, or 303 of this title . . . does not operate as a stay--

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<sup>2</sup> Since that filing, this Tribunal has received courtesy copies of various other documents issued by the Florida Bankruptcy Court, including a proof of claim form, an order authorizing employment of counsel for the bankruptcy trustee, and a notice of intent to sell the property of the bankruptcy estate by public auction on August 7, 2019.

<sup>3</sup> EPA identified the Motion as including material claimed to be CBI pursuant to 40 C.F.R. § 2.203(b) or similar such information. Mot. at 1. Such material mostly consists of sales and expenses figures as stated in Respondent’s tax returns. Mot. at 1. Therefore, it filed a redacted copy of the Motion for inclusion in the public record and an unredacted copy, identified as CBI-protected, with the Tribunal. EPA notified Mr. Jackman, Respondent/Debtor’s attorney and Lisa A. Castellano, Esq., General Counsel to the Chapter 7 Trustee of its intent to file the Motion on August 13, 2019. Mot., Exs. 13, 14.

<sup>4</sup> Sections 301, 302, and 303 of Title 11 of the United States Code set forth the three types of petitions for bankruptcy (voluntary, joint and involuntary) which maybe filed under Title 11. See 11 U.S.C. §§ 301–303.

(4) . . . of the commencement or continuation of an action or proceeding by a governmental unit . . . to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power.

11 U.S.C. § 362(a)(1), (b)(4).

In *Munce's*, the Environmental Appeals Board (EAB) reviewed a case factually analogous to that here — EPA had filed a motion for default based upon the respondent's failure to answer a complaint in an enforcement action and the respondent had filed a suggestion of bankruptcy under Title 11, arguing that the automatic stay provision provided thereunder applied. *Munce's*, 15 E.A.D. at 747–488. Upon review, the EAB held that “the automatic stay provision of section 362(a) of the Bankruptcy Code, 11 U.S.C. § 362(a), does not apply to stay the EPA's [administrative penalty] assessment,” because the proceeding falls under 11 U.S.C. § 362(b)(4), the “express exception for actions or proceedings for the ‘enforcement of a governmental unit's police and regulatory power.’” *Id.* at 750—51, 755. The Board explained that “[i]n crafting the ‘police and regulatory power’ exception of section 362(b)(4), Congress intended to allow government agencies to exercise their regulatory powers, particularly their enforcement authority, outside the confines of a bankruptcy proceeding.” *Id.* at 752 (citing, *inter alia*, *In re Commerce Oil Co.*, 847 F.2d 291, 295–97 (6th Cir. 1988) (holding that section 362(b)(4) exception applied to assessing civil penalties and damages in state Water Quality Control Act administrative enforcement proceedings); Senate Judiciary Committee Report on the Bankruptcy Reform Act of 1978, S. Rep. No. 95-989, at 52 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5838 (“Where a governmental unit is suing a debtor to prevent or stop violation of . . . environmental protection, . . . safety, or similar police or regulatory laws, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay.”)).

To determine whether the exception of section 362(b)(4) applies to a specific government action, the EAB explained, the courts “‘distinguish[] between situations in which the state acts pursuant to its ‘police and regulatory power’ and situations in which the state acts merely to protect its status as a creditor,’” examining whether deterrence is the primary purpose of the law that the government is attempting to enforce. *Id.* at 752 (quoting *Safety-Kleen, Inc., v. Wyche*, 274 F.3d 846, 865 (4th Cir. 2001)). In that *Munce's* was an enforcement proceeding brought under 33 U.S.C. § 1319(g)(1) to assess administrative penalties for Clean Water Act (CWA) violations in order “to effectuate deterrence,” the Board determined that EPA was acting pursuant to its “police and regulatory power.” *Id.* at 751, 753 (citing Senate Conference Report on the Federal Water Pollution Control Act Amendments of 1972, S. Rep. No. 92-414 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3730-31 (“[S]anctions under existing law have not been sufficient to encourage compliance with the [Clean Water Act]. Therefore, the Committee [on Public Works] proposes to increase significantly the penalties.”)); EPA's General Enforcement Policy # GM-21, *Policy on Civil Penalties* 3 (Feb. 16, 1984) (“The first goal of penalty assessment is to deter people from violating the law.”); and *United States v. LTV Steel Co.*, 269

B.R. 576, 583 n.8 (Bankr. W.D. Pa. 2001) (“Any pecuniary benefit accruing to the government [from this CAA penalty action] is of secondary importance to [deterrence].”).<sup>5</sup>

Additionally, in its decision the EAB distinguished between entry and enforcement of judgment stating that while the Title 11 stay in no way bars the government from seeking *entry* of a civil penalty judgment for violations of environmental laws, “[c]ourts have construed the police and regulatory power exception in section 362(b)(4) as limiting only the government’s power to *enforce* a money judgment outside of the bankruptcy proceeding.” *Id.* at 754 (citing, *inter alia*, *LTV Steel Co.*, 269 B.R. at 582). Thus, although EPA may obtain a judgment outside of the bankruptcy proceeding for administrative violations, it is limited to enforcing it within that proceeding.

Turning now to the case at bar, the Complaint here seeks entry of a judgment assessing administrative penalties under CAA section 205(c)(1) (42 U.S.C. § 7524(c)) for violations of section 203(a)(3)(B) of that Act (42 U.S.C. § 7522(a)(3)(B)). Like the CWA, the primary purpose of the CAA is to protect and enhance public health and welfare. 42 U.S.C. § 7401(b)(1). And, as the EAB noted in *Munce’s* with regard to the CWA, deterrence of violations is the main purpose for the imposition of penalties for CAA violations. In connection with increasing civil penalties under the Act, Congress stated –

The penalty increases made in this portion of the bill confirm title II penalty provisions to the penalty provisions of title I and of other environmental statutes, such as RCRA and the Clean Water Act. The increased penalty amounts should provide a stronger deterrent against violations of the relevant provisions, especially with regard to more expensive vehicles.

Senate Report on Clear Air Act Amendments, S. Rep. No. 101-228, 1990 U.S.C.C.A.N. 3385, 3510, 1989 WL 236970 (1989).

The Courts have similarly recognized the deterrent purpose of CAA civil penalties. For example, in *United States v. Mac’s Muffler Shop, Inc.*, No. CIV.A. C85-138R, 1986 WL 15443, at \*8 (N.D. Ga. Nov. 4, 1986), a civil penalty action also brought for CAA violations under section 203(a)(3)(B), the Court stated that:

Vindication of the government’s efforts in enforcing the Clean Air Act is an aspect of general deterrence. If the regulated community perceives that violations of the law are treated lightly, the government’s regulatory program is subverted. This is important here, where defendants’ willful violations threaten a regulatory program designed to protect public health.

*Mac’s Muffler Shop, Inc.*, 1986 WL 15443, at \*10.

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<sup>5</sup> In *LTV Steel*, the Court explained the rationale behind the exception to the stay for governmental police and regulatory, stating “Congress recognized . . . that the stay provision was particularly vulnerable to abuse by debtors improperly seeking refuge under the stay in an effort to frustrate necessary governmental functions. To combat the risk that the bankruptcy court would become a sanctuary for environmental wrongdoers . . . Congress enacted the police and regulatory power exception to the automatic stay [at Section 362(b)(4)].” *LTV Steel Co.*, 269 B.R. at 581 (quoting *United States v. Nicolet, Inc.*, 857 F.2d 202, 207 (3d Cir.1988)).

Further –

Assessment of the amount of a civil penalty is committed to the informed discretion of the court. [] In exercising this discretion, the court should give effect to the major purpose of a civil penalty: deterrence. Civil penalties are imposed “first, to discourage the offender himself from repeating his transgression; and second, to deter others from doing likewise.” [] They “should be large enough to hurt, and to deter anyone in the future from showing as little concern as [the defendant] did for the need to [comply].”

*Mac’s Muffler Shop, Inc.*, 1986 WL 15443, at \*8 (citations omitted) (citing, *inter alia*, *United States v. Phelps Dodge Industries, Inc.*, 589 F.Supp. 1340, 1358 (S.D.N.Y. 1984); *United States v. Swingline, Inc.*, 371 F.Supp. 37, 47 (E.D.N.Y. 1974); *States, ex rel. Brown v. Dayton Malleable, Inc.*, 1 Ohio St.3d 151, 438 N.E.2d 120, 125 (1982); *United States v. Velsicol Chemical Corp.*, 12 E.R.C. 1417, 1421 (W.D. Tenn. 1978); *Collins v. Brown*, 268 F.Supp. 198, 201 (D.D.C. 1967)) (alterations in original).

Similarly, in another case seeking penalties for violations of CAA section 203(a)(3)(B), it was stated: “The Court has assessed civil penalties with deterrence as a principal objective.” *United States v. Shaffer Muffler Shops, Inc.*, No. CIV. A. C-86-240, 1989 WL 200887, at \*2 (S.D. Tex. Feb. 28, 1989) (citing *United States v. Phelps Dodge Industries, Inc.*, 589 F.Supp. 1340, 1362 (S.D.N.Y.1984)).

Based upon the foregoing, and following the EAB’s analysis in *Munce’s*, it is hereby found that this CAA enforcement proceeding to assess administrative penalties is being brought “to effectuate deterrence.” As such, EPA is acting pursuant to its “policy and regulatory power” and, thus, the automatic stay provision of section 362(a) of the Bankruptcy Code, 11 U.S.C. § 362(a), does not apply to stay the EPA’s penalty assessment, because the proceeding falls under 11 U.S.C. § 362(b)(4). Such holding is consistent with and follows the relevant caselaw set forth in *United States v. LTV Steel Co.*, 269 B.R. 576 (W.D. Pa. 2001), wherein the bankruptcy court held the automatic stay did not apply to the government’s action seeking “calculation of a penalty” for CAA violations and “entry of a judgment for such amount.” *LTV Steel Co.*, 269 B.R. at 580, 584 (“[W]e find that based on a plain reading of Section 362(b), the instant action is exempted from the bankruptcy automatic stay.”).

### **C. PROCEDURAL VIOLATION AND GROUNDS FOR DEFAULT**

EPA asserts in its Motion that Respondent is in default. Mot. at 24. It notes that by Order of this Tribunal an answer was due no later than June 11, 2019. Mot. at 25. As Respondent has filed no answer to date, EPA states it is “entitled to an Order of Default against Respondent in accord with 40 C.F.R. § 22.17.” Mot. at 25.

Rule 22.17 provides in pertinent part that –

- (a) Default. A party may be found to be in default: after motion, upon failure to file a timely answer to the complaint; upon failure to comply with . . . an order of the

Presiding Officer; . . . Default by respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the complaint and a waiver of respondent's right to contest such factual allegations. . . .

- (b) Motion for default. A motion for default may seek resolution of all or part of the proceeding. Where the motion requests the assessment of a penalty or the imposition of other relief against a defaulting party, the movant must specify the penalty or other relief sought and state the legal and factual grounds for the relief requested.
- (c) Default order. When the Presiding Officer finds that default has occurred, he shall issue a default order against the defaulting party as to any or all parts of the proceeding unless the record shows good cause why a default order should not be issued. If the order resolves all outstanding issues and claims in the proceeding, it shall constitute the initial decision under these Consolidated Rules of Practice. The relief proposed in the complaint or the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act. For good cause shown, the Presiding Officer may set aside a default order.
- (d) Payment of penalty; . . . Any penalty assessed in the default order shall become due and payable by respondent without further proceedings 30 days after the default order becomes final under § 22.27(c).

40 C.F.R. § 22.17.

Default is a harsh and disfavored sanction, reserved only for the most egregious behavior. “Default judgment is appropriate where the party against whom the judgment is sought has engaged in ‘willful violations of court rules, contumacious conduct, or intentional delays.’” *Forsythe v. Hales*, 255 F. 3d 487, 490 (8th Cir. 2001) (quoting *Ackra Direct Mktg. Corp. v Fingerhut Corp.*, 86 F. 3d 852, 856 (8th Cir. 1996)). Default judgment is not an appropriate sanction for a marginal failure to comply with the time requirements and “should be distinguished from dismissals or other sanctions imposed for willful violations of court rules, contumacious conduct, or intentional delays.” *United States ex rel. Time Equip. Rental & Sales, Inc. v. Harre*, 983 F. 2d 128, 130 (8th Cir. 1993) (twelve-day delay in filing answer did not warrant entry of default). Moreover, Administrative Law Judges have broad discretion in ruling upon motions for default. Issuance of such an order is not a matter of right, even where a party is technically in default. *Lewis v. Lynn*, 236 F. 3d 766, 767 (5th Cir. 2001). This broad discretion is informed by the “type and the extent of any violations and by the degree of actual prejudice to the Complainant.” *Lyon County Landfill*, EPA Docket No. 5-CAA-96-011, 1997 WL 821131, at \*4 (ALJ, Sept. 11, 1997) (Order Denying Complainant’s Motion to Strike Answer and for Default Order).

In this case, this Tribunal indulged the parties’ request and, by Order dated April 19, 2019, granted Respondent an extension of time to Answer the Complaint, setting a deadline of June 11, 2019. Such deadline provided Respondent almost two additional months to file an

answer, motion, or request an additional extension of time. However, to date, Respondent has filed no answer or motion in response to the Complaint.<sup>6</sup>

Moreover, to date, Respondent has also not submitted any response to the Complainant's Motion for Default. Such response was due within 15 days of service of the Motion. 40 C.F.R. § 22.16 ("A party's response to any written motion must be filed within 15 days after service of such motion. . . . Any party who fails to respond within the designated period waives any objection to the granting of the motion.").

Respondent has been given ample opportunity to actively participate in this matter but has willfully failed to do so. It has not filed an answer, abided by this Tribunal's Order, nor responded to the Complainant's Default Motion. As such, it is hereby found in default under 40 C.F.R. § 22.17(a). The default by Respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the Complaint and a waiver of Respondent's right to contest such factual allegations. 40 C.F.R. § 22.17(a).

#### **D. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. This action was instituted by Phillip A. Brooks, Director, Air Enforcement Division, Office of Civil Enforcement, Office of Enforcement and Compliance Assurance, U.S. Environmental Protection Agency ("EPA") ("Complainant"), as an administrative penalty assessment proceeding under section 205(c)(1) of the Clean Air Act ("CAA"), 42 U.S.C. § 7524(c)(1), and EPA's "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits," 40 C.F.R. Part 22 ("Consolidated Rules"). 40 C.F.R. § 22.13(a)-(c). Compl. ¶¶ 1, 2, 7.
2. Phillip A. Brooks, Director, Air Enforcement Division, Office of Civil Enforcement, Office of Enforcement and Compliance Assurance, is authorized by lawful delegation from the Administrator of the EPA to institute civil administrative penalty assessment proceedings under section 205(c)(1) of the CAA, 42 U.S.C. § 7524(c)(1). Compl. ¶ 2.
3. The Administrator and the Attorney General jointly determined that this matter, although it potentially involves a penalty amount greater than \$378,852, is appropriate for administrative penalty assessment for violations of section 203(a)(3)(B) of the CAA. CAA § 205(c)(1), 42 U.S.C. § 7524(c)(1); 40 C.F.R. § 19.4 Table 1. Compl. ¶¶ 7, 8, 9, 10.
4. Respondent is Freedom Performance, LLC. Compl. ¶ 3.
5. Respondent is a closely-held, limited liability company organized under the laws of Florida and has or had a principal office, registered office, and registered mailing address at 3910 Goodrich Avenue, Unit 1, Sarasota, Florida 34234. Compl. ¶ 4.

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<sup>6</sup> In response to notice of Respondent's counsel's withdrawal, on May 21, 2019, EPA emailed Respondent (Mr. Kemper) inquiring as to substitute counsel and interest in continuing settlement discussions as well as reminding Respondent of the June 11, 2019 deadline for filing the answer and the possibility of default for failing to answer. Mot., Ex. 11.

6. Respondent's managing members are Geoffrey Kemper and Alice Boomer, and Geoffrey Kemper is the registered agent. Compl. ¶ 4.
7. Respondent is a "person" as defined under section 302(e) of the CAA, 42 U.S.C. § 7602(e). Compl. ¶ 5.
8. In creating the CAA, Congress found that "the increasing use of motor vehicles has resulted in mounting dangers to the public health and welfare." CAA § 101(a)(2); 42 U.S.C. § 7401(a)(2). Congress' purposes in creating the CAA were "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population" and "to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution." CAA § 101(b)(1)-(2); 42 U.S.C. § 7401(b)(1)-(2).
9. "Motor vehicle" is defined as "any self-propelled vehicle designed for transporting persons or property on a street or highway." CAA § 216(2), 42 U.S.C. § 7550(2).
10. Motor vehicles are defined by their attributes and not by how they are used. CAA § 216(2), 42 U.S.C. § 7550(2); 40 C.F.R. § 85.1703.
11. Title II of the CAA and the regulations promulgated thereunder establish stringent standards for the emissions of air pollutants from motor vehicles and motor vehicle engines that "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." CAA § 202(a), 42 U.S.C. § 7521(a). These pollutants include nitrogen oxides ("NOx"), particulate matter ("PM"), non-methane hydrocarbons ("NMHCs"), and carbon monoxide ("CO"). CAA § 202(a)(3)(A), 42 U.S.C. § 7521(a)(3)(A).
12. NOx and NMHCs are reactive gasses that contribute to the formation of PM and ozone. Compl. ¶ 16.
13. PM is a form of air pollution composed of microscopic solids and liquids suspended in air. PM is emitted directly from motor vehicles and is also formed in the atmosphere from the emission of other pollutants, including NOx and NMHCs emitted from motor vehicles. Compl. ¶ 17.
14. Ozone is a highly reactive gas that is formed in the atmosphere, in part, from emissions of pollutants from motor vehicles. Compl. ¶ 18.
15. Exposure to ozone and PM is linked to a number of health effects as well as premature death. Children, older adults, people who are active outdoors (including outdoor workers), and people with heart or lung disease are particularly at risk for health effects related to ozone or PM exposure. Compl. ¶ 19.
16. CO is a toxic gas emitted from motor vehicles that can cause headaches, dizziness, vomiting, nausea, loss of consciousness, and death. Long-term exposure to CO has been associated with an increased risk of heart disease. Compl. ¶ 20.



17. Under section 202 of the CAA, 42 U.S.C. § 7521, the EPA promulgated emission standards for PM, NO<sub>x</sub>, CO, and NMHC and other pollutants applicable to motor vehicles and motor vehicle engines, including heavy-duty diesel (“HDD”) trucks and truck engines. *See generally* 40 C.F.R. Part 86.
18. Manufacturers of new motor vehicles or motor vehicle engines must apply for and obtain a certificate of conformity (“COC”) from the EPA to sell, offer to sell, or introduce or deliver for introduction into commerce any new motor vehicle or motor vehicle engine in the United States. CAA§ 203(a)(1), 42 U.S.C. § 7522(a)(1).
19. To obtain a COC, the original equipment manufacturer (“OEM”) must demonstrate that each motor vehicle or motor vehicle engine will conform to established emissions standards for NO<sub>x</sub>, PM, NMHC, CO, and other pollutants during the motor vehicle or motor vehicle engine’s useful life. CAA § 206(a)(2), 42 U.S.C. § 7525(a)(2); 40 C.F.R. §§ 86.004-21, 86.007-30(a)(1)(i), 86.1844-01, 86-1846-01(a)(1).
20. The COC application must describe, among other things, the emissions-related elements of design of the motor vehicle or motor vehicle engine. 40 C.F.R. § 86.094-21(b)(1) (“The application . . . shall include the following: . . . a description of [the vehicle’s] ... emission control system and fuel system components.”); 40 C.F.R. § 86.1844-01(d)-(e).
21. The EPA issues COCs to OEMs under section 206(a) of the CAA, 42 U.S.C. § 7525(a), to certify that a particular group of motor vehicles conforms to applicable EPA requirements governing motor vehicle emissions.
22. An “element of design” is “any control system (i.e., computer software, electronic control system, emission control system, computer logic), and/or control system calibrations, and/or the results of systems interactions, and/or hardware items on a motor vehicle or motor vehicle engine.” 40 C.F.R. §§ 86.094-2, 86.1803-01.
23. An “emissions control system” is defined as “a unique group of emission control devices, auxiliary emission control devices [‘AECDS’], engine modifications and strategies, and other elements of design designated by the Administrator of the EPA, used to control exhaust emissions of a vehicle.” 40 C.F.R. § 86.1803-01.
24. AECDS are “any element of design which senses temperature, vehicle speed, engine RPM, transmission gear, manifold vacuum, or any other parameter for the purpose of activating, modulating, delaying, or deactivating the operation of any part of the emissions control system” of a motor vehicle or motor vehicle engine. 40 C.F.R. §§ 86.1803-01, 86.1844-01(d)(11).
25. Under section 202(m) of the CAA, 42 U.S.C. § 7521(m), the EPA promulgated regulations for motor vehicles manufactured after 2007 that require HDD trucks to have numerous devices or elements of design that, working together, can detect problems, such as malfunction or deterioration, with the vehicle’s emissions control systems and elements of design that could cause a vehicle to fail to comply with the CAA emission

standards, alert drivers to these problems, and store electronically-generated malfunction information. Control of Emissions of Air Pollution from 2004 and Later Model Year Heavy-Duty Highway Engines and Vehicles; Revision of Light-Duty On-Board Diagnostics Requirements, 65 Fed. Reg. 59896-01 (Oct. 6, 2000) (codified at 40 C.F.R. pt. 86). These devices or elements of design are referred to as “onboard diagnostic systems” or “OBD” systems. Compl. ¶ 29.

26. Section 203(a)(3)(B) of the CAA, prohibits “any person to sell, offer to sell, or install, any part or component intended for use with, or as part of, any motor vehicle engine, where a principle 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 engine in compliance with regulations under [Title II of the CAA], and where the person knows or should know that such part or component is being offered for sale or installed for such use or put to such use.” 42 U.S.C. § 7522(a)(3)(B). This is generally known as the defeat device prohibition. Compl. ¶ 31.
27. It is also a violation for any person to cause any of the prohibited acts set forth in CAA section 203(a), 42 U.S.C. § 7522(a).
28. Any person violating sections 203(a)(3)(B) of the CAA, 42 U.S.C. § 7522(a)(3)(B), is subject to a civil penalty of up to \$3,750 for each for each violation that occurred after January 12, 2009 through November 2, 2015, and up to \$4,735 for each violation that occurred after November 2, 2015, where penalties are assessed on or after February 6, 2019. CAA§ 205(a), 42 U.S.C. § 7524(a); 40 C.F.R. § 19.4; Civil Monetary Penalty Inflation Adjustment Rule, 84 Fed. Reg. 2056, 2057, 2059 (Feb. 6, 2019).
29. Any such violation with respect to section 203(a)(3)(B) of the CAA, 42 U.S.C. § 7522(a)(3)(B) shall constitute a separate offense with respect to each part or component. CAA§ 205(a), 42 U.S.C. § 7524(a).
30. OEMs install a variety of hardware and software elements of design in motor vehicles and motor vehicle engines to control emissions of pollutants to comply with the CAA and regulations promulgated thereunder and obtain certification, hereinafter referred to as “Emissions-Related Elements of Design.” Compl. ¶ 35.
31. Motor vehicles are equipped with “electronic control units” or “ECUs” (also known as “engine control modules” or “ECMs”), which are computers that monitor and control vehicle operations, including the operation of emission control devices and elements of design. Compl. ¶ 36.
32. OEMs employ certain hardware devices as emissions control systems to manage and treat exhaust to reduce levels of regulated pollutants from being created or emitted into the ambient air. Such devices include exhaust gas recirculation (“EGR”), diesel particulate filters (“DPFs”), diesel oxidation catalysts (“DOC”), nitrogen oxide adsorption catalysts (“NAC”), and selective catalytic reduction (“SCR”). Compl. ¶ 37.

33. Exhaust Gas Recirculation System: EGR is an Emissions-Related Element of Design in diesel-fueled motor vehicles that reduces NO<sub>x</sub> emissions, which are formed at the high temperatures caused during fuel combustion. By recirculating a portion of engine exhaust gas into the cylinders of the engine, EGR reduces engine temperature and the formation of NO<sub>x</sub>. As part of this system, the EGR valve and the throttle valve open and close to adjust the addition of fresh intake air to recirculated exhaust gases. The EGR system consists of all hardware, parts, sensors, subassemblies, software, AECDs, calibrations, and other components that collectively constitute the system for implementing the strategy for adjusting the volume of exhaust gas in the engine cylinders. The EGR system's EGR valve, EGR cooler, and associated throttle valve are each an Emissions-Related Element of Design. HDD OEMs generally design and build motor vehicles and motor vehicle engines using EGR systems to meet NO<sub>x</sub> standards. Compl. ¶ 38.
34. "Aftertreatment" refers collectively to the Emissions-Related Elements of Design mounted downstream of the exhaust valve whose design function is to reduce emissions in the engine exhaust before it is emitted to the environment. DPFs, DOCs, NACs, and SCRs are all part of Aftertreatment. Compl. ¶ 39.
35. Aftertreatment Emissions-Related Elements of Design are contained in OEM-installed stock exhaust pipes. Compl. ¶ 40.
36. Diesel Particulate Filter: DPF is an Emissions-Related Element of Design in diesel-fueled motor vehicles that controls PM emissions by trapping engine exhaust gas particulates in a filter and periodically oxidizing them through thermal regeneration of the filter. Proper operation of the DPF requires periodic regeneration of the filter to prevent accumulated PM from clogging the filter. The DPF system includes all hardware, parts, sensors, subassemblies, software, AECDs, calibrations, and other components that collectively implement this emissions reduction strategy. HDD OEMs began designing and building motor vehicles and motor vehicle engines using DPFs in 2007 to meet more stringent PM emission standards. Compl. ¶ 41.
37. Diesel Oxidation Catalyst: DOC is an Emissions-Related Element of Design that reduces CO and NMHC emissions by promoting the conversion of those pollutants into less harmful gases in diesel-fueled motor vehicles. A DOC system consists of a precious-metal coated, flow-through honeycomb structure contained in a stainless-steel housing. As hot diesel exhaust flows through the honeycomb structure, the coating of precious metal causes a catalytic reaction that breaks down pollutants into less harmful components. The DOC includes all hardware, parts, sensors, subassemblies, software and is used to promote reactions that change exhaust pollutants. HDD OEMs generally employ DOC systems to meet current emission standards for PM, NMHCs, and CO. Compl. ¶ 42.
38. NO<sub>x</sub> Adsorption Catalysts: NAC is an Emissions-Related Element of Design for controlling No<sub>x</sub> emissions by means of a periodic chemical adsorption of NO<sub>x</sub> from exhaust gas. The NAC includes all hardware, parts, sensors, subassemblies, software,

AECDs, calibrations, and other components that collectively constitute the system for implementing this strategy. Compl. ¶ 43.

39. Selective Catalytic Reduction: SCR is an Emissions-Related Element of Design that controls Nox emissions through catalytic reduction using an ammonia-based diesel exhaust fluid (“DEF”), typically containing urea, as the reducing agent that chemically converts exhaust gas into nitrogen and water. The SCR includes all hardware, parts, sensors, subassemblies, software, AECDs, calibrations, and other components that collectively constitute the system for implementing this strategy. DEF must be periodically refilled, which requires sensors in the DEF tank to communicate with the OBD to ensure that SCR is properly controlling NOx emissions. HDD manufacturers generally design and build motor vehicles and motor vehicle engines using SCR systems to meet applicable NOx standards. Compl. ¶ 44.
40. In addition to emissions control hardware, fuel mass, fuel injection pressure, and fuel injection timing are among the Emissions-Related Elements of Design incorporated in diesel-fueled motor vehicles and motor vehicle engines that can affect the quantity of regulated pollutants that are created by the diesel engine. As an example, HDD manufacturers generally employ retarded fuel injection timing as an emission control method for NOx. Compl. ¶ 45.
41. OEMs set software parameters, also known as calibrations, that control, among other things, engine combustion and Aftertreatment performance (hereinafter referred to as “Certified Stock Calibrations”). *See, e.g.*, 40 C.F.R. § 86.1803-01 (“Proven emission control system”). OEMs disclose Certified Stock Calibrations to the EPA on their application for a COC for each vehicle model because they are part of a motor vehicle’s overall emissions control strategy. Certified Stock Calibrations that must be included on the COC application include “fuel pump flow rate, . . . regulated fuel pressure, . . . EGR exhaust gas flow rate at specified vacuum levels, . . . and . . . basic engine timing.” 40 C.F.R. § 86.1844-01(e)(2); 40 C.F.R. pt. 85 App. VIII (listing vehicle and engine parameters and specifications); 40 C.F.R. pt. 86 App. VI (listing vehicle and engine components). Certified Stock Calibrations are Emissions-Related Elements of Design. Compl. ¶ 46.
42. The emission control devices of an HDD motor vehicle and motor vehicle engine, such as the DPF, EGR, DOC, NAC, and SCR, work in conjunction with the motor vehicle’s OBD system, which monitors emissions-related systems or components that could cause the vehicle to fail to comply with the CAA’s emission standards. The OBD must detect and report malfunctions of EGRs, oxygen sensors, DPFs, DOCs, NACs, and SCRs and other emissions-related elements of design in motor vehicles by illuminating the malfunction indicator light (“MIL”) on the dashboard and recording a diagnostic trouble code (“DTC”). 40 C.F.R. § 86.1806-05(b)-(e). The OBD stores DTCs that service personnel can read to diagnose and repair a vehicle and government inspectors can download to verify compliance with emission standards. The OBD System is an Emissions Related Element of Design. Compl. ¶ 47.

43. The OBD and ECU may also prompt a driver to correct a problem by alerting vehicle performance, such as putting the engine into “limp-home” mode. 40 C.F.R. § 86.010-2. In limp-home mode, the ECU commands the engine to downgrade in performance so that the driver is aware that there is a problem with the emission control system, while permitting the vehicle to be driven (albeit slowly) to a service station. *See, e.g.*, 40 C.F.R. § 86.004-25(b)(6)(ii) (requiring the vehicle performance to deteriorate to a point unacceptable for typical driving when DEF replenishment is required). Compl. ¶ 48.
44. Motor vehicles have a network of sensors that detect information relating to the functioning of emissions-related elements of design and feed such information to the ECU to provide feedback to the engine calibration to enable proper operation and the OBD so that malfunctions can be identified, including, but not limited to the following sensors: oxygen sensors that detect/monitor the oxygen concentration of exhaust gas or stoichiometry of combustion, oxygen sensors that monitor catalyst efficiency, EGR temperature and pressure sensors, exhaust gas temperature sensors, air flow sensors, soot/PM sensors, and NOx sensors. These sensors are Emissions-Related Elements of Design. Compl. ¶ 49.
45. Ford Motor Company (“Ford”) is the OEM of Model Years 2003-2007 F250-F350 6.0L Powerstroke, Model Years 2008-2010 Ford F250-F350 6.4L Powerstroke, and Model Years 2011–2017 6.7L Powerstroke HDD Trucks and Ford Excursion Diesel Vehicles and their engines. Compl. ¶ 50.
46. General Motors Company is the OEM of GMC and Chevy (collectively “GMC/Chevy”) Model Years 2004–2017 2500/3500 Sierra and Silverado 6.6L Duramax Model Year HDD Trucks and their engines. Compl. ¶ 51.
47. FCA US LLC (and its predecessors) (“Dodge”) is the OEM of Dodge Ram Model Year 2004–2005 2500/3500 5.9L Cummins and Model Years 2006–2017 6.7L Cummins HDD Trucks. Cummins, Inc. is the OEM for the engines for such HDD Trucks. Compl. ¶ 52.
48. The HDD Trucks identified in Paragraphs 45–47 above are each a “motor vehicle,” as that term is defined under section 216(2) of the CAA, 42 U.S.C. § 7550(2), with a “motor vehicle engine.” Compl. ¶ 53.
49. Ford, Chevy/GMC, Dodge, or Cummins obtained COCs from the EPA for each motor vehicle or motor vehicle engine identified in Paragraphs 45–47. Compl. ¶ 54.
50. The HDD Trucks and their engines identified in Paragraphs 45–47 above have Emissions-Related Elements of Design in compliance with Title II of the CAA, and in compliance with the relevant EPA-issued COC, including one or more of the following: EGR, DOC, NAC, SCR, DPF, OBD, or fueling strategies. Compl. ¶ 55.
51. The following HDD Trucks and their engines have the following OEM-installed (“stock”) emission control devices consistent with the COCs for the vehicles:

Motor Vehicle/Engine Model Group	Certified/Stock Emissions Control System
MY 2004–2005 Dodge 2500/3500	DOC and/or EGR

5.9L Cummins	
MY 2006 Dodge 2500/3500 6.7L Cummins	EGR, DOC, and DPF
MY 2007–2012 Dodge 2500/3500 6.7L Cummins	EGR, DOC, DPF, and NAC
MY 2013–2017 Dodge 2500/3500 6.7L Cummins	EGR, DOC, DPF, and SCR
MY 2004–2007 Chevy/GMC Silverado 6.6L LLY/LBZ Duramax	EGR and DOC
MY 2008–2010 Chevy/GMC Silverado/Sierra LMM 6.6L Duramax	EGR, DOC, and DPF
MY 2011–2017 Chevy/GMC Sierra LML 6.6L Duramax	EGR, DOC, DPF, and SCR
MY 2003–2007 Ford F250/F350 6.0L Powerstroke	EGR and DOC
MY 2008–2010 Ford F250/F350 6.4L Powerstroke	EGR, DOC, and DPF
MY 2011–2017 Ford F250/F350 6.7L Powerstroke	EGR, DOC, DPF, and SCR

Compl. ¶ 56.

52. Third-party manufacturers and distributors, including Respondent, manufacture, sell, and/or offer to sell products that are designed to alter a motor vehicle’s power or fuel economy, or reduce the costs related to maintaining a motor vehicle’s Emissions-Related Elements of Design (hereinafter “Aftermarket Performance Products”). Compl. ¶ 57.
53. Aftermarket Performance Products enhance a motor vehicle’s power, performance, or fuel economy by altering, bypassing, replacing, or disabling OEM-installed Emissions-Related Elements of Design. The Aftermarket Performance Products relevant to the Complaint fall into two broad categories: Hardware Products and Software Products. Compl. ¶ 58.
54. Some Aftermarket Performance Products are hardware products that physically interfere with or remove Emissions-Related Elements of Design (hereinafter, “Hardware Products”). Compl. ¶ 59.
55. Some Hardware Products interfere with or remove the EGR System (e.g., “blocker plates,” “EGR valve deletes,” or “EGR cooler deletes”). On certain vehicles, there are also products that force the throttle valve for fresh air to remain fully open, which inhibits EGR flow. These Hardware Products are hereinafter referred to as “EGR Delete Hardware Products.” Compl. ¶ 60.
56. Some Hardware Products physically alter and/or remove all or part of a motor vehicle’s Aftertreatment System by changing, removing, and/or replacing essential physical elements of DOCs, DPFs, NACs, and SCRs (e.g., “straight pipes” or “race pipes”). These Hardware Products are hereinafter referred to as “Aftertreatment Delete Hardware Products.” Compl. ¶ 61.
57. Other Aftermarket Performance Products consist of electronic software products commonly referred to as “tunes” that are uploaded into a motor vehicle’s ECU and alter

or overwrite a motor vehicle's Certified Stock Calibrations. The tunes may be uploaded from the internet or sold on a handheld device called a "tuner." Compl. ¶ 62.

58. The following types of Certified Stock Calibration are changed or overwritten by tunes, which are relevant to this action:
- a. Certified Stock Calibrations relating to EGR and Aftertreatment systems. For example, a tune can delete or change calibrations affecting operation of the EGR, DPF, DOC, SCR, or NAC, and/or sensors, signals, or records related to these systems. Such tunes also are designed to reprogram the ECU to prevent malfunction of the motor vehicle or motor vehicle engine when the EGR or Aftertreatment systems are disabled, removed, or rendered inoperative.
  - b. Certified Stock Calibrations related to engine combustion, performance, and operations. For example, a tune can modify calibrations governing fuel pump flow rate, fuel pressure, EGR exhaust gas flow rate, and basic engine timing and therefore bypass, defeat, or render inoperative engine operation calibrations that are key to a motor vehicle or motor vehicle engine's emission control strategy.
  - c. Certified Stock Calibrations related to the OBD system functions for the purpose of preventing the illumination of MILs, the recording of DTCs, and preventing the OBD system from derating the engine/vehicle due to changes in other Certified Stock Calibrations or removal of EGR/Aftertreatment hardware (e.g., preventing the OBD from limiting vehicle speed to 25 miles per hour because the DPF has been removed).

Compl. ¶ 63.

59. A single tune can change or overwrite multiple Certified Stock Calibrations and types of Certified Stock Calibrations. For example, a tune that deletes EGR functions also typically interferes with OBD functions so that the EGR deletion will not be detected. Compl. ¶ 64.
60. Multiple tunes and types of tunes are often sold together as a single product. Compl. ¶ 65.
61. The tunes and tuners relevant to the Complaint are referred to hereinafter as "Subject Tuning Products." Compl. ¶ 66.
62. Respondent has sold and offered to sell products intended for use in "motor vehicles" as that term is defined by the Act, 42 U.S.C. § 7550(2), and regulations promulgated thereunder at 40 C.F.R. § 85.1703. Compl. ¶ 67.
63. Many of the products that Respondent has sold and/or offered for sale are Aftermarket Performance Products that have been represented to enhance a motor vehicle's power or performance, modify a motor vehicle's fuel economy, or reduce the costs associated with maintaining a motor vehicle's emission control system. Compl. ¶ 68.

64. Respondent has sold and offered for sale its Aftermarket Performance Products over the internet through its website, <https://freedomdieselperformance.com/>. Compl. ¶ 69.
65. Respondent sold and offered for sale what it has referred to on its website variously as “Delete Packages,” “Delete Pipe Packages,” “EGR Delete Packages,” or “DPF Delete Packages,” which consist of a combination of a Subject Tuning Product and an EGR Delete Hardware Product, an Aftertreatment Delete Hardware Product, or both (hereinafter referred to as “Performance Packages”). Respondent continued to offer for sale these Performance Packages, but sometime after receiving, in January 2017, a Notice of Violation by the EPA, Respondent changed its website to refer to these Performance Packages as “Competition Racing Packages.” Compl. ¶ 70.
66. On November 2, 2016, the EPA and its contractor Eastern Research Group, Inc. (“ERG”) inspected the Respondent’s business facility located at 409 Cortez Road West, Bradenton, Florida, 34207, with Respondent’s permission. The inspection included observing the inventory in store, its product list and sales database. During the inspection, the EPA and ERG received a copy of sales records from Respondent’s sales database. The EPA and ERG took photographs, conducted interviews, and obtained tuners sold by Respondent as samples. Compl. ¶ 71; Mot. Ex. 1.
67. On January 6, 2017, EPA issued a Notice of Violation (“NOV”) to Freedom Performance setting forth its determination that Freedom Performance had committed 13,995 violations of the Section 203(a)(3)(B) of the CAA by selling “parts or components for motor vehicles and engines that bypass, defeat, or render inoperative elements of design of those engines that were installed by the original equipment manufacturer in order to comply with the CAA emission standards.” Compl. ¶ 72; Mot. Ex. 2.
68. In response to the NOV, counsel for Respondent contacted the EPA to discuss resolution of the matter. As part of that discussion, Respondent’s counsel indicated that Respondent would be financially unable to pay a substantial penalty for the violations alleged in the NOV. In an email dated February 16, 2017, counsel for the EPA requested that Respondent provide certain financial information to support its claim of inability to pay a substantial penalty. After receipt of that email, Respondent through its counsel provided EPA with certain corporate and financial records and data, but failed to provide all the information and documents requested by EPA. Compl. ¶ 73; Mot Exs. 3, 4, 7–11.
69. Respondent has sold and offered for sale a Performance Package it has called “EGR Delete Package for Powerstroke 6.0L 2003-07 | EGR Delete Tuner and EGR Delete Kit with Up Pipe, with Gaskets.” Respondent advertised the following statements regarding this Performance Package on its website:

Let Your 6.0L Powerstroke Take a Breather

Think your Ford Powerstroke comes from the factory with the best possible tuning? It doesn't. With the Tuner you will be able to see what your truck is truly capable of. The tuner arrives with pre-loaded, dyno-proven tunes to suit your needs. Whether you want more power, better towing or improved mileage,



the tuner for Ford Powerstroke has it covered. The EGR Delete Kit is designed to completely replace the Exhaust Gas Recirculation system (EGR). By eliminating the EGR system your engine will run cleaner and cooler while increasing overall reliability...

The tuner arrives Pre-Loaded with DYNO Proven tune files that INCREASE HORSEPOWER and TORQUE! Programming your vehicle with a pre-loaded tune files (sic) is easy as 1-2-3. Simply plug the OBDII connector into your vehicles's (sic) OBDII connector into your vehicle's OBDII port, select the pre-loaded tune file using the simple to navigate menu and within minutes the tuner programs your vehicle ....

Easy to install, Easy to Return to Stock ... The device backs up your factory PCM program during installation should you ever need to return your vehicle to the stock PCM program. Restoring your vehicle to the stock PCM program is as easy as selecting Return to Stock from the device menu. Once returned to stock, there is no footprint or trace of the tune in the vehicle's PCM ...

Compl. ¶ 74.

70. Respondent has sold and offered for sale a Performance Package it has called "XRT Pro DPF, CAT, EGR Delete Tuner With EGR Delete Kit with Up Pipe, with Gaskets for Powerstroke 6.0L 2003-07." Respondent has advertised the following statements regarding this Performance Package on its website:

Legendary Tuning for the Modern Diesel.

The XRT Pro is the diesel truck programming solution that can meet almost anyone's budget and needs. This product comes with all of the tuning capability for either off-road or on-road applications. Features ...

On-Road and Off-Road (DPF, DEF, CAT and EGR Delete) Tuning ... Levels from Stock to +250HP (depending on Model) ... Clear Trouble Codes ... Enable and Disable many factory features ... Updateable via Internet ...

Features ... Comes preloaded with DPF Present and DPF Removed capable tuning. Allows removal of the DPF system and ALL related sensors (nothing needs to go into the race exhaust or even be plugged in). Precisely tune engine with HP increases of 0-250HP ... Read / Clear Trouble Codes ... Custom Tunes are FREE to download. Internet updateable w/included Micro SD Memory Card and USB Adapter.

Made in the USA, Engine Saving EGR Delete ... This EGR Delete Kit is designed to completely replace the Exhaust Gas Recirculation system (EGR) found on your 6.0L Powerstroke equipped Ford Super Duty. The factory EGR system is prone to many issues such as stuck EGR valves to leaking EGR coolers and even pressurization of the cooling system. By eliminating the EGR system

your engine will run cleaner and cooler while increasing overall reliability. Manufactured in the USA from CNC machined billet aluminum and stainless steel for a lifetime of use ... NOTE: This part requires the use of a delete capable tuner.

Compl. ¶ 75.

71. Respondent has sold and offered for sale Subject Tuning Products it has called “GearboxZ Performance Economy DPF Delete Tuner for Ford Powerstroke 6.4L 2008-10,” and “DPF Delete Performance Fuel Economy Tuner for Ford Powerstroke 6.4L 2008-10.” Respondent has advertised the following statements regarding these products on its website:

More Power, More Mileage ... GearboxZ Performance Economy Delete Tuner ... Deletes CAT, DPF, & EGR Without Trouble Codes ... Included +70 HP Tune Offers Power and Increased Mileage ... Reads & Clear Trouble Codes ... Simple ODB2 Port, Voice Guided Installation ... Completely Reversible ... NOTE: Intended for use with the DPF Removed. Use with a DPF in place will cause soot build-up, high EGTs, and possibly fire...

Compl. ¶ 76.

72. Respondent has sold and offered for sale a Subject Tuning Product it has called “PIP DPF/EGR Delete Tuner Powerstroke 6.4L 2008-10 Ford F250 to F550.” Respondent has advertised the following statements regarding this product on its website:

Competition PIP Tuner for Ford 6.4L 2008-10 ... If you would like to delete the emissions on your 6.4L powerstroke, with power level options, and without a huge cost, the PIP-64 is for you!. This handheld tuner provides you with the power levels up to an additional 240 horsepower, with street and towing levels in between. You have the option of deleting your Diesel Particulate Filter, Catalytic Converter, and EGR on your 6.4L Ford Powerstroke F250 to F550. You can also adjust other parameters to customize the tuner to your truck as well as read / clear trouble codes. Increases your vehicles (sic) Horsepower, Torque, Throttle Response.

Compl. ¶ 77.

73. Respondent has sold and offered for sale a Performance Package it has called “Performance / Fuel Economy DPF Delete Tuner + CAT/DPF Delete Pipes Package Ford Powerstroke 6.4L 2008-10.” Respondent has advertised the following statements regarding this Performance Package on its website:

Complete package to delete your DPF & CAT on Ford Powerstroke 6.4L trucks while adding fuel economy and power. The included DPF-R 4.0 plus module is an easy to use solution for disabling regen. It allows you to delete your DPF, CAT, and EGR without throwing any codes. This package also Includes Flo~Pro

4” CAT/DPF delete pipes designed to connect to the factory 3.5” exhaust and replace the DPF/CAT. Application includes F250, F350, F450, F550, and Cab & Chassis trucks. The race pipes provides (sic) maximum flow for increased horsepower, torque and throttle response. The increased air flow also lowers EGT’s and helps improve MPG.

Compl. ¶ 78

74. Respondent has sold and offered for sale a Subject Tuning Product it has called “5 Power Level DPF Delete Tuner Ford Powerstroke 6.4L 2008-10 | Gearbox Z Tachyon Plus.” Respondent has advertised the following statements regarding this product on its website:

The Tachyon plus is a simple module plugs in to your OBD2 port and reprograms your truck for a DPF delete and offers 5 power levels (below stock, stock, 50 horsepower, 100 horsepower, and 120 horsepower). For automatic transmission only. It will disable regen, and allow you to replace the Diesel Particulate Filter with a straight pipe or a full exhaust. The Tachyon plus tuner is extremely easy to use, and takes only about 5 minutes for installation. The EGR will also automatically be disabled, allowing you to block it off or delete it completely. After installing the DPF-R, your truck will not throw any codes related to the DPF, CAT, or EGR...

Compl. ¶ 79.

75. Respondent has sold and offered for sale a Performance Package it has called “DPF/CAT Delete Performance Economy Tuner and Stainless Pipes Package for Powerstroke 6.4L 2008-10.” Respondent has advertised the following statements regarding this Performance Package on its website:

More Power, More Mileage ... Performance Economy Delete Tuner & 4” Stainless Delete Pipes ... Tuner Deletes CAT, DPF, & EGR Without Trouble Codes ... Included +70 HP Tune ... Offers Power and Increased Mileage ... Read & Clear Trouble Codes & Completely Reversible ... 4 Inch T-409 Stainless Pipe Replaces CAT & DPF ... Uses Factory Mounts and Hangers for Simple Installation...

Compl. ¶ 80.

76. Respondent has sold and offered for sale an EGR Delete Hardware Product it has called “EGR Delete Kit with High Flow Intake Elbow Powerstroke 6.4L 2008-10.” Respondent has advertised the following statements regarding this product on its website:

Quiting [sic] EGR Now Reduces Serious Risks to Your Health For Your Powerstroke 6.4L

The road to hell is often paved with good intentions and while Exhaust Gas Recirculation is certainly noble in its intent, in reality it is putting your engine

through hell. Whether it's reduced power and fuel efficiency, oil fouled with soot and unburned fuel or gummed up sensors and manifolds, the EGR is driving your truck to an early grave. The best solution is deletion. This EGR kit has all the required parts to get the job done ...

Use of this kit requires a delete capable tuner...

Compl. ¶ 81.

77. Respondent has sold and offered for sale a Performance Package called "Performance Economy DPF Delete Tuner, Flo~Pro Cat and DPF Delete without Bungs, and EGR Valve & Cooler Delete Kit for Powerstroke 6.4L." Respondent has advertised the following statements regarding this Performance Package on its website:

This complete delete package includes everything you need to delete your DPF and EGR and is designed to maximize your MPG but not break your budget. It includes a reliable, easy to use GearboxZ Performance Economy Tuner, a high performance Flo~Pro CAT and DPF Delete without Bungs and an EGR Valve and Cooler Delete kit from Flo~Pro.

An Upgraded Stainless DPF Delete pipe and a stylish Sinister EGR Delete kit are also available with this package for a small additional cost.

Compl. ¶ 82.

78. Respondent has sold and offered for sale a Performance Package called "Spartan 64 Phalanx Tuner + Sinister Delete w/ Intake Elbow + aFe 5" Atlas Downpipe Back Exhaust System for Powerstroke 6.4L 2008-10." Respondent has advertised the following statements regarding this product package on its public website:

A Performance Package for your Ford Powerstroke 6.4L 2008-2010

The Spartan 64 Phalanx Tuner with stock tuning and options from 40-350RWHF offers the unequalled capability to manage power and fuel efficiency. The Sinister EGR Valve and Cooler Delete with Intake Elbow brings quicker turbo spool and lower EGTs while also eliminating exhaust recirculating through your intake manifold for reduced carbon deposits and increased reliability. Finally the monster 5" Atlas Downpipe Back Racing Exhaust allows for low turbulence, increasing horsepower, torque and lowering EGTs while it's (sic) muffler delete-pipe brings an aggressive racing sound.... Note: For racing use only."

Compl. ¶ 83.

79. Respondent has sold and offered for sale a Performance Package called "Performance / Fuel Economy DPF Delete Tuner + aFe Stainless CAT/DPF Delete Pipes w/Bungs Package Ford Powerstroke 6.4L 2008-10." Respondent has advertised the following statements regarding this Performance Package on its website:

Complete package to delete your DPF & CAT on Ford Powerstroke 6.4L trucks while keeping stock power settings. The included DPF-R 4.0 module is an easy to use solution for disabling regen. It allows you to delete your DPF, CAT, and EGR without throwing any codes. This package also Includes Flo~Pro 4” CAT/DPF delete pipes designed to connect to the factory 3.5” exhaust and replace the DPF/CAT. Application includes F250, F350, F450, F550, and Cab & Chassis trucks. The race pipes provides maximum flow for increased horsepower, torque and throttle response. The increased air flow also lowers EGT’s and helps improve MPG.

Compl. ¶ 84.

80. Respondent has sold and offered for sale an Aftertreatment Delete Hardware Product it has called “4” DPF/CAT Delete Pipe for Cummins 6.7L 2007.5-10 Cab & Chassis.” Respondent has advertised the following statements regarding this product on its website:

Your Cummins Cab & Chassis Works Hard. Let it Breathe.

The Flo~Pro DPF/CAT Delete Pipe for Cummins 6.7 2007.5-10 replaces the DPF & CAT portion of the exhaust with a wide open 4” Pipe. This results in improved exhaust flow, which leads to better mileage, more horsepower, and more torque. When paired with an appropriate tuning module, you will no longer have regen cycles which mean less unburned gas flowing through your engine and longer intervals between oil changes.

IMPORTANT: Use of this pipe requires a tuning module, to clear codes and disable regen. To view our Tuner and Delete Pipe Package Deals click here: [http://freedomperformance.com/delete-packages/delete-pieppackages/shopby/cummins\\_6\\_7l\\_2007\\_5\\_2009-cummins\\_6\\_7l\\_2010\\_2012.html](http://freedomperformance.com/delete-packages/delete-pieppackages/shopby/cummins_6_7l_2007_5_2009-cummins_6_7l_2010_2012.html).

Compl. ¶ 85.

81. Respondent has sold and offered for sale an EGR Delete Hardware Product it has called “EGR/Cooler Delete Kit with Hose for Powerstroke 6.7L 2011-14.” Respondent has advertised the following statements regarding this product on its website:

Prolong the Life of your Engine, Gain MPG

This EGR Delete kit for the Powerstroke 6.7L 2011-14 engine provides the necessary parts to physically remove the EGR Cooler and Valve from your diesel truck. The included hose will ensure that coolant continues to circulate over the cylinder head. This results in less wasted fuel, less soot in your engine and lower overall engine temperatures all of which means you and your truck will be happier.

IMPORTANT: Use of this kit requires a delete capable tuner. To view our tuners for the Ford 6.7L Powerstroke click here: [http://freedomdieselpowerperformance.com/dpf-delete-tuners/shopby/powerstroke\\_6.7l\\_2011\\_15.html](http://freedomdieselpowerperformance.com/dpf-delete-tuners/shopby/powerstroke_6.7l_2011_15.html)

Compl. ¶ 86.

82. Respondent has sold and offered for sale an Aftertreatment Delete Hardware Product it has called “DPF/SCR/CAT Delete Pipe for Cummins 6.7L 2013-2015 | 4” Cat & DPF/SCR Delete Pipes, No Bungs.” Respondent has advertised the following statements regarding this product on its website:

Eliminate Your DPF and DEF Headaches

If you are tired of poor mileage, constant regen cycles and refilling the DEF tank, then this delete pipe system from Flo~Pro will help you delete all of it.

Compl. ¶ 87.

83. Respondent has sold and offered for sale an EGR Delete Hardware Product it has called “EGR/Cooler Delete Kit with Hose for Powerstroke 6.7L 2015-16.” Respondent has advertised the following statements regarding this product on its website:

Prolonged Engine Life, Better Performance (sic) and Fuel Economy

This EGR kit is designed to remove the EGR Assembly from your 2015-2016 6.7L Powerstroke. This will remove the EGR Cooler, manifold pipes, coolant lines, and all EGR related electronics from your truck. Comes with all necessary block off plates, plugs, claims, etc.

NOTE: This part requires the use of a delete capable tuner. To view our Tuners, click here: [http://freedomdieselpowerperformance.com/dpf-delete-tuners/shopby/powerstroke\\_6-7l\\_2011\\_15.html](http://freedomdieselpowerperformance.com/dpf-delete-tuners/shopby/powerstroke_6-7l_2011_15.html)

Compl. ¶ 88.

84. Respondent has sold and offered for sale a Performance Package it has called “Mini Maxx DPF/CAT/EGR Delete 4” Exhaust Package for Powerstroke 6.4L 2008-10.” Respondent has advertised the following statements regarding this performance package on its website:

Complete Emissions Delete Package For Your Powerstroke 6.4L.

Shift On the Fly Up To An Additional 250 Horsepower! If you are looking for the legendary Mini Maxx Race Tuner, look no further! We have them for immediate shipment. The Mini Maxx will allow you to delete your DPF, CAT, and EGR on the Ford Powerstroke 6.4L trucks. In addition to the deletes, the Mini Maxx will provide you with impressive shift on the fly power levels, gauges, and

full monitoring capabilities. This package includes aluminized delete exhaust, the Mini Maxx Tuner, and a physical EGR delete...

#### Features for Mini Maxx Tuner

Comes preloaded with DPF Present and DPF Removed capable tuning  
Allows removal of the DPF system and ALL related sensors (nothing needs to go into the race exhaust or even be plugged in)...  
Allows removal of the entire EGR system including cooler with no trouble codes  
Turn off the EGR system without removing ANY parts  
Read / Clear Diagnostic Trouble Codes...

Compl. ¶ 89.

85. Respondent has sold and offered for sale a Performance Package it has called “Performance Economy DPF Delete Tuner, aFe 4” Down-Pipe Back Exhaust System, and Sinister EGR Valve/Cooler Delete Kit for Powerstroke 6.4L 2008-10.” Respondent has advertised the following statements regarding this Performance Package on its website:

This package is designed to eliminate the DPF, CAT and EGR, while added (sic) a small power boost and enhance fuel (sic) economy. Featuring a Performance Economy tuner from Gearboxz which gives +70rwhp and extra MPG. The aFe Downpipe back exhaust system eliminate (sic) the CAT and DPF filter and open design for free-flowing air. Finally the EGR Valve/Cooler delete Kit from Sinister allows you to remove the EGR which improve (sic) performance and will prolong engine life.

Compl. ¶ 90.

86. Respondent has sold and offered for sale a Performance Package it has called “5 Power Level DPF Delete Tuner + CAT/DPF Delete Pipes Package Ford Powerstroke 6.4L 2008-10.” Respondent has advertised the following statements regarding this Performance Package on its website:

Complete package to delete your DPF on Ford Powerstroke 6.4L trucks while adding 5 power levels. The power levels are below stock, stock, 50 horsepower, 100 horsepower, and 120 horsepower. The Tachyon plus module is an easy to use solution for disabling regen. It allows you to delete your DPF, CAT, and EGR without throwing any codes. This package also includes the Flo~Pro 4” DPF delete pipe designed to connect to the factory 3.5” exhaust and replace the DPF. Application includes the F250, F350, F450, F550, and Cab&Chassis trucks. The race pipes provides (sic) maximum flow for increased horsepower, torque and throttle response. The increased air flow also lowers EGT’s and helps improve MPG.

About the Gearbox Z Tachyon Plus 5 Power Level DPF Delete Module (Powerstroke Only)...

Used as a temporary or permanent solution for deleting the DPF, CAT & EGR...

Read and clears Diagnostic Trouble Codes  
Plugs in to the OBD2 Port, Quick Installation  
Disables Regen / Disable EGR system...

Compl. ¶ 91.

87. Respondent has sold and offered for sale an Aftertreatment Delete Hardware Product it has called “CAT/DPF Delete Stainless Exhaust for Powerstroke 6.4L 2008-10 | aFe MACH Force XP 4” Stainless Steel Exhaust, No Muffler w/Polished Tip.” Respondent advertised the following statements regarding this product on its public website:

Take a Stand in the Fight for Diesel Power.

If you're like me you're fed up with Reduced Power Modes and Regen cycles that send your engine temps through the roof. And if you've ever had to replace a DPF Filter you probably fell over when you heard (sic) much it was going to cost. Join the fight for Diesel Power today by purchasing a wide open 4” CAT/DPF Delete exhaust and enjoy the freedom of increased “pull away” type horsepower and torque that will have you pulling loads better than ever. When paired with one of our Delete Capable Tuners to add even more horses, you will have proudly declared your Diesel Independence.

IMPORTANT: Installation and use of this exhaust requires a Delete Capable Tuning Module. To view our Tuner/Delete Exhaust Packages click [http://freedomdieselpower.com/delete-packages/full-exhaust-packages/shopby/powerstroke\\_6\\_4l.html](http://freedomdieselpower.com/delete-packages/full-exhaust-packages/shopby/powerstroke_6_4l.html)

Compl. ¶ 92.

88. Respondent has sold and offered for sale an EGR Delete Hardware Product it has called “Sinister Basic EGR Delete Kit for Powerstroke 6.0L 2003-07.” Respondent has advertised the following statements regarding this product on its website:

Add Years to Your Engine Life

Sinister Basic EGR Delete Kit for Powerstroke 6.0L  
Superior, Made in the USA, Quality Compared to Foreign Made Deletes.  
Blue Powder-Coat & Logo on Visible Parts for an Aggressive Look.  
EGR Deletes Lower EGTs & Allow For Faster Turbo Spool which increases performance and extends engine life.



IMPORTANT: Use of this part requires a delete capable tuner. To view our Discounted Tuner & EGR Delete Packages click here: [http://freedomdieselpower.com/egr-deletes/egr-delete-packages/shopby/powerstroke\\_6\\_0l\\_2003\\_07.html](http://freedomdieselpower.com/egr-deletes/egr-delete-packages/shopby/powerstroke_6_0l_2003_07.html)".

Compl. ¶ 93.

89. Respondent has sold and offered for sale a Performance Package it has called "RaceMe DPF/DEF/CAT Delete Full Exhaust Package for Cummins 6.7L 2013-15 | RaceME Ultra Tuner, aFe 5" Aluminized Exhaust & EGR Delete Kit." Respondent advertised the following statements regarding this Performance Package on its public website:

#### How Do You Like Me Now

Have you ever spent a bunch of money on something and then it didn't perform like you expected? If you've bought a diesel truck in the last decade, then we know you have. This package for your Cummins 6.7L 2013-15 pick-up will give that performance back to your truck. The DPF/DEF/CAT delete exhaust allows for the removal of performance stealing emissions parts and replaced it with a high flow, wide open 5" stainless steel pipe. The included EGR Delete kit allows for the removal of the coolers and valve and the blocking of all inlets. Further, the included hose ensures that coolant can continue to flow over the cylinder head. Finally, the newly released tuner from RaceMe, besides clearing the codes related to the deletes, offers multiple tuning levels that will not only provide increases in power, but significant savings in fuel economy. It is loaded with many other options and monitoring capabilities as well. Click "Add To Cart" and "Add the Life" back to your truck.

Compl. ¶ 94.

90. Respondent has sold and offered for sale a Performance Package called "Reaper CAT/DPF Delete 4" Exhaust Package for Duramax LMM 6.6L 2007.5-10." Respondent has advertised the following statements regarding this Performance Package on its public website:

#### EFI Live Delete Tuning On-The-Fly & 4" Exhaust Package

#### Reaper Autocal with DSP5 Switch & 4" Delete Exhaust

With this full exhaust and tuner package, you will have suffered through your last regen cycle. No longer will your oil be diluted with diesel fuel. You will not need to head on the highway to get the DPF clean. The Reaper Programmer from Punisher Performance deletes your DPF, CAT and EGR. Includes Punisher DSP5 tuning for any engine and transmission combo, and 1 DSP5 switch for changing tunes on the fly. But that's not all, these tuners go beyond. Replacing your existing exhaust with this system from Flo~Pro will have your truck running and

sounding like you always imagined it would. Your engine will thank you for the free flowing air by giving back increased horsepower, torque, and mileage...

Compl. ¶ 95.

91. Respondent has sold and offered for sale a Performance Package it has called “DPF & CAT Delete Package for Duramax LMM 6.6L 2007.5-10 Pick-Ups | Reaper Autocal w DSP5, CAT and DPF Delete pipes.” Respondent advertised the following statements regarding this Performance Package on its public website:

Duramax LMM Owners Be Freed of Your CAT and DPF.

Freedom Diesel presents and a fully featured CAT and DPF Delete tuning package for your Duramax LMM Diesel truck. Featuring an EFILive platform tuner from Punisher Performance that will allow you to safely and effectively delete your CAT and DPF, while also offering stock and performance level tunes. The CAT and DPF delete pipes from aFe are some of the best on the market and will squeeze even more performance and fuel economy out of your truck.

With the Reaper Autocal from Punisher, you can safely delete your DPF, CAT and EGR without throwing codes or putting your truck into limp mode...

Compl. ¶ 96.

92. Respondent has sold and offered for sale an Aftermarket Delete Hardware Product it has called “Premium DPF,DEF,CAT Delete 4” Stainless Steel Exhaust System for Duramax LML 6.6L 2011-15.” Respondent has made the following statements regarding this product on its website:

The MACH Force XP DPF-Delete race down-pipe back exhaust system eliminates the use of the restrictive diesel particulate filter (DPF) for maximum performance and extreme mileage gains. This free flowing exhaust system outflows the factory exhaust by 67% and is constructed out of durable 4" mandrel bent 409 stainless steel and uses bayonet style hangers and band clamps for a clean installation.

Compl. ¶ 97.

93. Respondent has sold and offered for sale a Performance Package it has called “CAT, DPF Delete Package for Cummins 6.7L 2010-12 | Anarchy Diesel Mercenary Autocal and 4” CAT/DPF Delete Pipes.” Respondent has advertised the following statements regarding this performance package on its public website:

Unleash the True Potential of Your Dodge Diesel

Not only does the DPF and Regeneration system on your Cummins 6.7L rob the engine of available horsepower, it shortens the life of vital engine components

and increases the frequency of oil changes. Add an EGR Delete and you can maximize performance while adding tens of thousands of miles to your engine's and it's (sic) components (sic) lifespan.

Compl. ¶ 98.

94. Respondent has sold and offered for sale an Aftertreatment Delete Hardware Product it has called "CAT/DPF Delete Stainless Exhaust for Cummins 6.7L 2007.5-12 | aFe MACH Force XP 4" Turbo-Back Stainless Steel Exhaust System." Respondent has advertised the following statements regarding this product on its public website:

#### A Race Inspired Solution to Your DPF Nightmares

If you've decided to finally rid your Cummins 6.7 of the DPF, then why not replace the entire exhaust and add years of driveable life to your truck. The MACH Force XP exhaust is engineered to perform in the most extreme environments. This system is constructed from mandrel bent 4" 409 stainless steel tubing for maximum flow, increased horsepower, increased torque and lower EGTs.

Compl. ¶ 99.

95. Respondent has sold and offered for sale a Performance Package it has called "CAT/DPF/EGR Delete 4" Exhaust Package for Duramax 6.6L LMM 2007.5-10 | Reaper Autocal tuner + aFe 4" Mach FORCE XP Stainless Exhaust, Muffler, Tip." Respondent has advertised the following statements regarding this Performance Package on its public website:

#### You Know You Want The Sound

Some call it "Diesel Thunder", that deep roar that comes from a well tuned diesel truck when the accelerator is pressed. This package from Freedom Diesel is designed to bring you not only performance and better mileage, but a sound that will send shivers down the spine of any vehicle you decide to pass. The Reaper Autocal provides customizable tuning and 5 pre-loaded power levels. It also promises troubles free deletion of the CAT, DPF and EGR. The 4" exhaust from aFe comes with a muffler that removes the "high notes" and only leaves the sound of the "thunder." And whether you choose the polished or the black powder coated tip, you know your Duramax rig is going to look as good as it sounds.

Compl. ¶ 100.

96. Respondent has sold and offered for sale a Performance Package it has called "CAT/DPF/DEF Delete Exhaust Package for Cummins 6.7L 2013-14 | PPEI Tuning Module & 4" Aluminized Steel Delete Exhaust." Respondent has advertised the following statements regarding this Performance Package on its public website:

The best part is that it's painless.

In fact your truck won't feel a thing...except faster, tougher, and more efficient. This tuner and 4" delete exhaust has the advantage of allowing the hot gases to flow quickly away from your engine. Not only is the 4" pipe slightly larger than the stock exhaust pipes, but without a CAT/DPF and SCR in place your truck no longer has to exhale through a straw. Imagine trying to carry a heavy load and breathing out through a straw. That wouldn't feel very efficient would it? This exhaust opens up that all important airway. You will notice better fuel economy, a boost in horsepower and torque, and fewer oil changes. Your trucks (sic) in pain already, buy this exhaust today and let the healing begin.

Compl. ¶ 101.

97. Respondent sold and offered for sale a Performance Package called "Complete Stainless DPF/CAT Delete Performance Package for Duramax LLM 6.6L 2007.5-10 | Tuner, 4" Stainless Exhaust, Air Intake & EGR Delete Kit. Respondent has advertised the following statements regarding this performance package on its public website:

All That and a T-Shirt Too

This complete delete and performance package for the Duramax LMM 2007.5-10 will bring your trucks (sic) horsepower to new heights and its fuel economy enormous increases. The DPF and EGR starve your truck of precious air flow causing decreased power and loss of mileage, not to mention shortening the life of vital engine parts. On the intake side, the free flow air intake from aFe offers a 70% increase in air flow over the stock intake. Deleting the EGR ensure (sic) that the fresh cool air is not mixed with sooty exhaust. Once the truck engine enjoys this big, cool breath, the tuner from Punisher make each stroke of the piston provide the desired results. Finally, the 4" straight pipe exhaust ushers the spent air quickly away from the engine so the cycle can start again.

For a Limited Time, A free t-shirt from Punisher Performance is included with the purchase of this package.

Compl. ¶ 102.

98. Respondent has sold and offered for sale a Performance Package called "DPF, CAT, EGR Delete Ultimate Performance Package for Cummins 6.7L 2010-12 | RaceMe Ultra Tuner, 5" Stainless Exhaust, EGR Delete Kit, Cold Air Intake." Respondent has advertised the following statements regarding this performance package on its website:

Truly Inspired Performance and Style

This package features only the most premium delete parts we carry. With the RaceMe Ultra Tuner your Cummins will go from stock to track ready in a weekend. Even if you don't plan on racing, the power and mileage gains will

bring the pleasure back into your driving. Additionally, the extra air flow and engine cooling achieved will help your engine last years longer than leaving it stock.

Compl. ¶ 103.

99. Respondent has sold and offered for sale a Performance Package it has called “DPF/DEF/EGR Delete Tuner for Cummins 2013-15 6.7L | PPEI Power Performance Autocal.” Respondent has advertised the following statements regarding this Performance Package on its website:

Finally, Delete Tuning for Cummins 2013-15 6.7L

This packages (sic) provides everything you would need to safely and easily delete the DPF/CAT/DEF from your Dodge Cummins 6.7L 2013-15 truck. In addition, the included tuner offers multiple power levels, increased fuel economy and optional transmission tuning (68RFE automatics only).

IMPORTANT Due to firewalls in the factory ECM, you will be REQUIRED to first unlock the ECM. At the present time, the only way to do this is using a Bully Dog GT tuner and the Bully Dog Unlock Cable offered in this package. In doing so, you will merely need to unlock the ECM, but not actually install any tuning from the Bully Dog. Once this is complete, you will be able to use the Bully Dog in a different vehicle, but you can only unlock one vehicle with each tuner. Another option is to use the Bully Dog for digital gauges in the vehicle that the EFILive will be installed into. At the present time, the Bully Dog is NOT COMPATIBLE with 2015 Cummins but there will be a step for you to flash your 2015.

Compl. ¶ 104.

100. Respondent has sold and offered for sale a Performance Package it has called “Performance / Fuel Economy DPF Delete Tuner + DPF Delete Pipes Package Duramax LMM 07-10 Extended Cab Long Box.” Respondent has advertised the following statements regarding this Performance Package on its website:

Complete package to delete your DPF on Duramax LMM 07-10 trucks while adding 70 horsepower and increased fuel economy. The included Duramax DPF-R 4.0 module is an easy to use solution for disabling regen. It allows you to delete your DPF, CAT, and EGR without throwing any codes. This package also Includes Flo~Pro 4” DPF delete pipe (available in aluminized or stainless steel) designed to connect to the factory exhaust and replace the DPF. Application includes Chevrolet Silverado 2500 / 3500 and GMC Sierra 2500 / 3500 Extended Cab Long Box trucks with the Duramax LMM 6.6L engine. The race pipes provides (sic) maximum flow for increased horsepower, torque and throttle response. The increased air flow also lowers EGT’s and helps improve MPG.

Compl. ¶ 105.

101. Respondent has sold and offered for sale a Performance Package it has called “RaceME Ultra DPF, CAT, EGR Delete Kit for Cummins 6.7L 2007.5-09 | RaceMe Ultra Tuner, 4” Aluminized Exhaust, No Muffler, No Tip + EGR Delete Kit.” Respondent has advertised the following statements regarding this product on its website:

The RaceMe Ultra features a touch screen, power levels from stock to over 200 horsepower, gauges and monitoring features. OTF (On The Fly) Programming allows you to program the truck on the road to every stage you want, with different adjustments in duration, timing, VGT and rail pressure. Simply by pressing the ““Program”” button the adjustments are instantly available and programmed. With the CAT/DPF delete exhaust system from Flo~Pro, you’re (sic) DPF worries are over. When combined with an appropriate tuning module this exhaust system will have your Cummins Diesel breathing freely and running smoothly. Expect increased mileage, longer intervals between oil changes and an engine that lasts longer. Finally, whether it’s reduced power and fuel efficiency, oil fouled with soot and unburned fuel or gummed up sensors and manifolds, the EGR is driving your truck to an early grave. The best solution is deletion. This EGR kit has all the required parts to get the job done.

Compl. ¶ 106.

### **COUNT ONE**

#### **Violation for the Sale and/or Offer to Sell EGR Delete Hardware Products**

102. Between May 1, 2015, and November 1, 2016, Respondent sold and/or offered for sale at least 3,429 EGR Delete Hardware Products, including, but not limited to, those products identified in Appendix A attached to the Complaint. Compl. ¶ 108.
103. Respondent’s product name for certain of the EGR Delete Hardware Products it sold and/or offered for sale includes the phrase “EGR Delete.” Compl. ¶ 109.
104. Respondent’s website has had an entire product category called “EGR Deletes & Related,” stating “Our EGR delete kits are the best approach for the EGR removal process.” Compl. ¶ 110.
105. The EGR Delete Hardware Products that Respondent sold and/or offered for sale were intended for use with the motor vehicles or motor vehicle engines identified in Appendix A to the Complaint. Compl. ¶ 111
106. Respondent’s actions that involved the sale and/or offer for sale of EGR Delete Hardware Products were recorded in the sales records it provided to the EPA during the November 2, 2016 inspection, as described and quoted in Appendix A to the Complaint. Compl. ¶ 112.

107. A principal effect of each EGR Delete Hardware Product that Respondent sold and/or offered for sale as identified in Appendix A to the Complaint is to bypass, defeat, or render inoperative a vehicle's EGR System. Compl. ¶ 113.
108. An EGR System is a "device or element of design installed on or in a motor vehicle or motor vehicle engine in compliance with [CAA] regulations" within the meaning of Section 203(a)(3)(B) of the CAA, 42 U.S.C. § 7522(a)(3)(B). Compl. ¶ 114.
109. Respondent knew or should have known that the EGR Delete Hardware Products were being offered for sale or installed for such use or put to such use. Compl. ¶ 115.
110. Respondent's sale or offering for sale (or causing thereof with respect to) each EGR Delete Hardware Product constitutes a separate violation of section 203(a)(3)(B) of the CAA, 42 U.S.C. § 7522(a)(3)(B). 42 U.S.C. § 7524(a).

## **COUNT TWO**

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

111. Between May 1, 2015, and November 1, 2016, Respondent sold and/or offered for sale at least 4,366 Aftertreatment Delete Hardware Products, including, but not limited to, those products identified in Appendix A to the Complaint. Compl. ¶ 118.
112. Respondent's product names for certain of the Aftertreatment Delete Hardware Products it sold and/or offered for sale include the phrases "DPF Delete," "DPF/CAT Delete," "DPF/SCR/CAT Delete," and "CAT/DPF/DEF Delete." Compl. ¶ 119.
113. Respondent's website has had an entire product category called "Delete Exhaust & Pipes." Compl. ¶ 120.
114. The Aftertreatment Delete Hardware Products that Respondent sold and/or offered for sale are intended for use with the motor vehicles or motor vehicle engines identified in Appendix A to the Complaint. Compl. ¶ 121.
115. Respondent's actions that involved the sale and/or offer for sale of Aftertreatment Delete Hardware Products were recorded in the sales records it provided to the EPA during the November 2, 2016 inspection, as described and quoted in Appendix A to the Complaint. Compl. ¶ 122.
116. A principal effect of each Aftertreatment Delete Hardware Product that Respondent sold and/or offered for sale as identified in Appendix A of the Complaint is to bypass, defeat, or render inoperative a motor vehicle's DOC, DPF, NAC, and/or SCR Systems. Compl. ¶ 123.
117. DOC, DPF, NAC and SCR Systems are "device[s] or element of design[s] installed on or in a motor vehicle or motor vehicle engine in compliance with [CAA] regulations"

within the meaning of Section 203(a)(3)(B) of the CAA, 42 U.S.C. § 7522(a)(3)(B). Compl. ¶ 124.

118. Respondent knew or should have known that the Aftertreatment Delete Hardware Products were being offered for sale or installed for such use or put to such use. Compl. ¶ 125.
119. Respondent's sale or offering for sale of (or causing thereof with respect to) each Aftertreatment Delete Hardware Product constitutes a separate violation of section 203(a)(3)(B) of the CAA, 42 U.S.C. § 7522(a)(3)(B). 42 U.S.C. § 7524(a).

### **COUNT THREE**

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

120. Between May 1, 2015, and November 1, 2016, Respondent sold and/or offered for sale at least 6,133 Subject Tuning Products, including but not limited to, those products identified in Appendix A to the Complaint. Compl. ¶ 128.
121. Respondent's website has offered for sale Subject Tuning Products on its website, calling the products "DPF Delete Tuners," and stating "DPF/EGR delete tuners will allow you to remove your Diesel Particulate Filter and Exhaust Gas Recirculation without throwing any codes. Depending upon the tuner, you can add horsepower and fuel economy. Gearbox Z, RaceMe, Spartan, and Reaper tuners are all plug and play, with installation taking usually less than 20 minutes." Compl. ¶ 129.
122. The Subject Tuning Products that Respondent sold and/or offered for sale are intended for use with the motor vehicles or motor vehicle engines identified in Appendix A to the Complaint. Compl. ¶ 130.
123. Respondent's actions that involved the sale and/or offer for sale of Subject Tuning Products were recorded in the sales records database it provided to the EPA during the November 2, 2016 inspection, as described and quoted in Appendix A to the Complaint. Compl. ¶ 131.
124. A principal effect of each Subject Tuning Product that Respondent sold and/or offered for sale as identified in Appendix A to the Complaint is to bypass, defeat, or render inoperative a motor vehicle's Certified Stock Calibration relating to EGR and/or Aftertreatment Systems. Compl. ¶ 132.
125. A Subject Tuning Product is a "device or element of design installed on or in a motor vehicle or motor vehicle engine in compliance with [CAA] regulations" within the meaning of Section 203(a)(3)(B) of the CAA, 42 U.S.C. § 7522(a)(3)(B). Compl. ¶ 133.
126. Respondent knew or should have known that the Subject Tuning Products were being offered for sale or installed for such use or put to such use. Compl. ¶ 134.



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

128. Respondent is hereby found liable for a total of 13,928 violations of section 203(a)(3)(B) of the CAA which all occurred between May 1, 2015, and November 1, 2016, as alleged in the Complaint Counts 1–3.

### **CIVIL PENALTY**

As to imposition of a civil penalty in the case of default, the Rule 22.17 provides, in pertinent part, that –

(b) . . . Where the motion [for a default order] requests the assessment of a penalty or the imposition of other relief against a defaulting party, the movant must specify the penalty or other relief sought and state the legal and factual grounds for the relief requested.

(c) . . . The relief proposed in the complaint or the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act.

40 C.F.R. § 22.17(b), (c).

Rule 22.27(b) further provides, in pertinent part, that –

(b) . . . If the respondent has defaulted, the Presiding Officer shall not assess a penalty greater than that proposed by the complainant in the complaint, the prehearing information exchange or the motion for default, whichever is less.

40 C.F.R. § 22.27(b).

In the Complaint, Complainant requested that an administrative penalty be assessed against Respondent for 13,928 violations of section 203(a)(3)(B) of the CAA that occurred between May 1, 2015, and November 1, 2016, as alleged in Counts 1–3 therein. Compl. ¶ 136. Complainant noted that, under the CAA, Respondent was subject to a civil penalty of up to \$3,750 for each violation that occurred on or before November 2, 2015, and up to \$4,735 for each violation that occurred after November 2, 2015, accounting for adjustments made for inflation. Compl. ¶ 138 (citing 42 U.S.C. § 7524(a); 40 C.F.R. § 19.4 tbl. 1; Civil Monetary Penalty Inflation Adjustment Rule, 84 Fed. Reg. 2056, 2059 (Feb. 6, 2019)). Further, that in determining the amount of the civil penalty, the CAA specifies penalty factors to be taken into account, namely “the gravity of the violation, the economic benefit or savings (if any) resulting from the violation, the size of [Respondent’s] business, [Respondent’s] history of compliance with [Title II of the CAA], action taken to remedy the violation, the effect of the penalty on [Respondent’s] ability to continue in business, and such other matters as justice may require.” Compl. ¶ 140 (citing CAA§ 205(c)(2), 42 U.S.C. § 7524(c)(2)). In addition, Complainant declared that “where applicable” he intends to account for the CAA’s penalty factors by using

the EPA's Clean Air Act Mobile Source Civil Penalty Policy - Vehicle and Engine Certification Requirements (2009) ("Penalty Policy"), which "calculates civil penalties based on the number of violative engines or products, their horsepower, the egregiousness of the violations, remedial action, and other legal and equitable factors." Compl. ¶ 141 (citing Penalty Policy available at [http://www2.epa.gov/sites/production/files/documents/vehicleengine-penalty-policy\\_0.pdf](http://www2.epa.gov/sites/production/files/documents/vehicleengine-penalty-policy_0.pdf)). However, Complainant made no specific penalty demand in the Complaint, reserving its right to "seek the maximum civil penalty authorized by the CAA for each violation." Compl. ¶¶ 137, 139 (citing 40 C.F.R. § 22.14(a)(4)(ii)).

Citing Rule 22.17(b), Complainant's Motion specifies the penalties he now seeks and the legal and factual grounds for those penalties. Mot. at 31–42. In sum, he seeks a total civil penalty of \$7,058,647 for the 13,928 violations of CAA section 203(a)(3)(B), alleging that such "amount is consistent with the record of the proceeding and the Act." Mot. at 5, 31, 33, 38, 44 (citing 40 C.F.R. § 22.17(c)).<sup>7</sup>

As to the legal grounds for its penalty calculations, Complainant specifies in his Motion that he relied on the Penalty Policy which incorporates the statutory factors, noting that such Policy is used by the EPA to calculate civil penalties for specific cases of violations of the prohibition against defeat devices. Mot. at 32 (citing Penalty Policy at 1-2). It explains that Penalty Policy methodology for calculating civil penalties as follows:

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

Mot. at 32.

Further detailing the calculations required by the Penalty Policy, Complainant states:

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

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<sup>7</sup> The final paragraph of the Motion states a slightly different monetary penalty figure of \$7,058,532. Mot. at 42. This appears to be a typographical error.

To determine the gravity component, a base gravity figure is calculated according to horsepower, then multiplied to reflect egregiousness (using a factor of 1 for minor violations, 3.25 for moderate violations, or 6.5 for major violations), further increased by 0 – 30% for failure to remediate, scaled down according to the number of vehicles, and adjusted to reflect business size. *Id.* at 11-15. . . . [T]he CAA also requires EPA to consider “the effect of the penalty on the violator’s ability to continue in business.” CAA §205(c)(2); 42 U.S.C. § 7524(c)(2). This statutory factor is often referred to as a violator’s “ability to pay.” Penalty Policy at 27.

Mot. at 32–33.

As to the factual grounds for the penalty calculations, the Complainant stated that he relied upon EPA’s November 2, 2016 inspection of Respondent’s business facility and the receipt of sales records from Freedom’s sales database for the allegations made in the Complaint that Respondent sold and/or offered to sell at least 13,928 Aftermarket Defeat Devices that disable, defeat or render inoperative devices or elements of design installed on or in heavy-duty diesel trucks, which devices or elements of design were installed in compliance with Title II of the CAA. Mot. at 33 (citing Compl. ¶¶ 107–136). EPA further notes that as default has occurred, all the facts alleged in the Complaint are deemed to be admitted by the Respondent. Mot. at 33 (citing 40 C.F.R. § 22.17(a)).

The Motion goes on to narratively describe the Complainant’s calculations made consistent with the Penalty, as indicated below:

#### Economic Benefit

Complainant indicates in his Motion that EPA calculated the economic benefit to Respondent from the violations by determining its estimated profit from the sale of the Defeat Devices that were the basis of the violations, explaining that “[u]se of profit to estimate economic benefit is merited because sale of violative products would not have occurred but for the illegal conduct.” Mot. at 33 (citing Penalty Policy at 7). Based upon sales data obtained during EPA’s inspection he tabulated the total gross sales revenue for 13,955 Defeat Devices Respondent sold between May 1, 2015 and November 1, 2016 and estimated rate of gross profit on those sales relying upon the total revenue and gross profit reported in Respondent’s tax returns for 2015 and 2016. Mot. at 33–34 (citing Mot. Att. 1 at CMD00012, Mot. Attach. 7A at Freedom-EPA 0014, 0038).<sup>8</sup> Applying this profit margin to the total revenue recorded in sales records for the 13,955 Aftermarket Defeat Devices yielded an average profit of \$109.38 per Aftermarket Defeat Device, Complainant determined. Multiplying \$109.38 to the number of Aftermarket Defeat Devices violations (13,928), and rounded to the nearest dollar, yielded a value of \$1,523,445, which Complainant proposed in his Motion that this Tribunal adopt as the economic benefit penalty for the violations found, arguing that it “is a reasonable and conservative representation of the economic benefit from the illegal sale of these Defeat Devices.” Mot at 34 (citing *Spartan Diesel Technologies*, Initial Decision and Order on Default,

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<sup>8</sup> EPA identified the exact numerical figures which went into this calculation as CBI and as such they are not restated herein. Mot. at 33–34.

2018 WL 5887550 at \*8, 13 (EPA OALJ Oct. 30, 2018) (sua sponte review declined, 2018 WL 6587054 (EAB Dec. 6, 2018)) (ALJ assessed economic benefit penalty calculation similarly based on estimate of illegal profits from the sale of Aftermarket Defeat Devices derived from revenue and profit margin data).

Gravity

According to the Motion, upon applying the Penalty Policy, Complainant calculated a gravity-based penalty of \$4,628,880 for the 13,928 violations. Mot. at 34. As explanation therefor, it stated as follows:

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

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

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

The base per-vehicle penalty is then adjusted to reflect the egregiousness of the violations. Under the Penalty Policy, the egregiousness is considered “Major,” which is the most egregiousness category of violations. Penalty Policy at 13. It applies to violations where excess emissions are likely to occur. *Id.* Most emission control devices, if missing or defective, are expected to result in increased emissions. *Id.* According to the Penalty Policy, violations are classified as “Major” if there is no information about the emissions from these vehicles or engines. *Id.* Thus, a 6.5-fold increase to the base per-vehicle amount for “major” violations is appropriate given the massive potential excess emissions that has occurred from the removal or deactivation of major emission controls for diesel trucks through

Respondent's thousands of Aftermarket Defeat Devices. This results in a base per-vehicle amount adjusted for gravity of  $\$3,850 \times 6.5 = \$25,025$ .

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

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

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

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

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

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

Pursuant to the Federal Civil Penalty Inflation Adjustment Act, 40 C.F.R Part 19, and EPA policy memoranda regarding penalty inflation adjustment, the gravity component of the penalty must be further adjusted to account for inflation.

The December 6, 2013, EPA memorandum, “Amendments to the U.S. Environmental Protection Agency’s Civil Penalty Policies to Account for Inflation (Effective December 6, 2013),”<sup>9</sup> at page 6, provides that, for penalties calculated under the Penalty Policy, gravity penalties for violations that occur after December 6, 2013 must be multiplied by the inflation factor of 1.0487. The July 27, 2016 EPA memorandum “Amendments to the U.S. Environmental Protection Agency’s Civil Penalty Policies to Account for Inflation (Effective August 1, 2016),”<sup>10</sup> at page 9, provides that, for penalties calculated under the Penalty Policy, gravity penalties for violations that occur after November 5, 2015 must be multiplied by the inflation factor of 1.10020, and, at page 2, the memorandum indicates that for violations that occur on or before November 2, 2015 the inflation factor under the 2013 policy (1.0487) is to be applied.

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

$\$5,091,768 \times 3,546/13,928 \times 1.0487 = \$1,359,470.76$   
 $\$5,091,768 \times 10,382/13,928 \times 1.1002 = \$4,175,731.24$   
 $\$1,359,470.76 + \$4,175,731.24 = \$5,535,202$  total gravity penalty including inflation  
 $\$5,532,202$  (gravity) +  $\$1,523,445$  (economic benefit) =  $\$7,058,647$  total penalty.

Mot. 34-38.

#### Consideration of Ability to Continue in Business

As noted above, under the CAA, determining the penalty requires “tak[ing] into account the . . . effect of the penalty on the violator’s ability to continue in business.” CAA §§ 205(a), 205(b), 42 U.S.C. §§ 7524(a), 7524(b). Complainant asserts in its Motion in that Respondent “apparently has ceased business given its Chapter 7 bankruptcy petition, the penalty assessed in this case will not affect its ability to continue in business” and that “given Respondent’s bankruptcy petition, the bankruptcy court is the appropriate forum to decide whether and how much Respondent can pay a claim arising from this Tribunal’s penalty decision in this matter.” Mot. at 38-39 (citing *Cf. Munce’s*, 15 E.A.D. at 754, 2012 WL 6213748 (EAB 2012) (“Determining the amount of the administrative penalties for [the respondent’s] violations in this administrative proceeding will not interfere in any way with the bankruptcy case pending.... To the contrary, establishing the amount of the EPA’s penalty claim in this proceeding, in accordance with applicable law, should assist and advance the Bankruptcy Court’s ability to discharge its duties efficiently.)).

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<sup>9</sup> This memorandum can be found at <https://www.epa.gov/sites/production/files/2014-01/documents/guidancetoamendepapenaltypolicyforinflation.pdf>. Mot. at 37.

<sup>10</sup> This memorandum can be found at <https://www.epa.gov/sites/production/files/2017-01/documents/finalpenaltyinflationguidance.pdf>. Mot. at 38.

Further, Complainant advises that consideration of “the ability to continue in business” in this case does not warrant any reduction of the proposed penalty as the EAB has consistently held a respondent’s ability to pay may be presumed until it is put at issue by a respondent, which has not occurred here. Mot. at 39 (citing *New Waterbury, Ltd.*, 5 E.A.D. 529, 541 (EAB 1994); *Spitzer Great Lakes, Ltd.*, 9 E.A.D. 302, 321 (EAB 2000); *JHNY, Inc. A/K/A Quin-T Technical Papers and Boards*, 12 E.A.D. 372, 397 (EAB 2005)). As Respondent has abandoned filing an answer and specifically making an issue of ability to pay in this Proceeding, Complainant urges this Tribunal to conclude that any objection Respondent may have to the penalty based upon ability to pay has been waived and no reduction of the proposed penalty based on this factor is warranted.

Nevertheless, in light of Respondent’s bankruptcy, Complaint goes on to state that “[e]ven if this Tribunal considered Respondent to have put ability to pay at issue in this Proceeding, Complainant has appropriately considered Respondent’s ability to pay in light of the totality of all the relevant statutory factors.” Mot. at 40. It notes that the EAB has held that, if a respondent puts ability to pay at issue in a penalty proceeding, the Agency “is required to present some evidence to show that it considered the respondent’s ability to pay a penalty as part of [the Agency’s] prima facie case that a proposed penalty is appropriate taking all penalty criteria into consideration.” Mot. at 40 (citing *JHNY*, 12 E.A.D. at 398). That is, there is no specific burden of proof with respect to an ability to pay factor; so long as the respondent’s ability to pay is considered and “touched upon[,] and the overall penalty is supported by the analysis[,] a prima facie case can be made.” Mot. at 40 (citing *CDT Landfill Corp.*, 11 E.A.D. 88, 121 (EAB 2003) and quoting *New Waterbury Ltd.*, 5 E.A.D. at 538). “The Agency need not present any specific evidence to show that the respondent can pay or obtain funds to pay the assessed penalty but can simply rely on some general financial information regarding the respondent’s financial status which can support the inference that the penalty assessment need not be reduced.” Mot. at 40 (citing *JHNY, Inc.*, 12 E.A.D. at 398 and quoting *New Waterbury Ltd.*, 5 E.A.D. at 542–43). Thus, in its prima facie case, Complainant need not establish that Respondent can pay the penalty Complainant proposes, but just show that Complainant considered the ability-to-pay penalty factor in conjunction with all the other penalty factors under the CAA, and that, in light of all of the penalty factors, the penalty proposed is appropriate. Mot. at 40 (citing *New Waterbury Ltd.*, 5 E.A.D. at 539–40 (“There is simply no basis for suggesting that “ability to pay” is a special factor which if not established (as opposed to not considered) precludes imposition of any penalty. Theoretically, a penalty that forces a respondent into bankruptcy is not precluded . . . the penalty is justified under the totality of the relevant statutory considerations.); *United Global Trading*, 2014 WL 983752 at \*19 (“Furthermore, bankruptcy by itself is not specific evidence that a respondent cannot pay any penalty.”))

EPA asserts that in this case it undertook took “extraordinary effort to consider Respondent’s ability to pay a penalty” by making “multiple efforts to request financial and other information needed to obtain a complete picture of Respondent’s financial and business activity to appropriately assess Respondent’s ability to pay claim.” Mot at 41. It alleges that Respondent’s Responses to Complainant’s requests were “incomplete, fragmented, and for several specific questions, Respondent failed to answer at all.” Mot. at 41. Specifically, it states that

Respondent failed to fully account for its substantial increase in sales revenue in 2018 and substantial expenditures on advertising; provide an explanation why

Respondent suddenly reported wages as a large portion of its expenditures in 2018 when no wages were reported in between 2015 through 2017; confirm whether Respondent's submitted financial documentation reflected all sales from a second website operated by Respondent devoted to gasoline-fueled vehicles; confirm whether any assets were transferred to Freedom's members or other business entities owned or operated by the members; and confirm whether or not there exists other business entities owned or operated by Freedom's members.

Mot. at 41.

Complainant's Motion concludes:

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

Mot. at 41–42.

#### Penalty Analysis

After a review of the Agency's detailed penalty analysis, I find the proposed civil penalty amount of \$7,058,647 to not be adequately supported by the present record of the proceeding such that it is appropriate that I order the requested relief. 42 U.S.C. § 7524(c)(2); 40 C.F.R. § 22.17(c). In particular, I note that the Complainant states he used an estimate of 350 horsepower rating for the motor vehicle parts at issue here, on the basis that doing so was "consistent with the horsepower rating used by the EPA to assess a section 203(a)(3)(B) penalty in *Spartan Diesel*." Mot. at 34 (citing *Spartan Diesel*, 2018 WL 5887550 at \*10). It is noted that in *Spartan Diesel* the evidentiary record indicated that the emission related components at issue were designed to be installed only in Ford diesel truck models F250, F350, F450, and F550 for model years 2008 through 2012. *Spartan Diesel Tech., LLC*, 2018 WL 5887550, at \*1. Further, based upon the record, the Tribunal was able to make a factual finding that the engines in those



particular Ford trucks had a horsepower of 350–400. *Id.*, 2018 WL 5887550, at \*5 (Finding of Fact 17). However, the record in this case does not contain any allegation of fact as to the specific horsepower of any of the Ford, Dodge, and Chevy/GMC vehicles in which the Respondent’s components were designed to be installed. Accordingly, it is appropriate at this point not to issue an order assessing a penalty, but to direct Complainant to supply additional explanations and supporting documentation for its penalty calculation. After Complainant has supplied them, a decision as to the penalty may be issued.

**ORDER**

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

1. Complainant’s Motion for Default is hereby **GRANTED, in part, as follows:**
  - (a) Respondent Freedom Performance, LLC is hereby found in DEFAULT; and
  - (b) Respondent Freedom Performance, LLC is found liable for 13,928 violations of section 203(a)(3)(B) of the Clean Air Act, as charged in the Complaint.
2. Complainant’s Motion for Default is **DENIED, in part**, with respect to the request to issue an order for Respondent to pay the proposed civil penalty.
3. Complainant is hereby **ORDERED** to file, **on or before January 16, 2020**, further explanation or documentation in support of the proposed penalty, including as to the horsepower of the vehicles in which Respondent’s violative devices were designed to be installed



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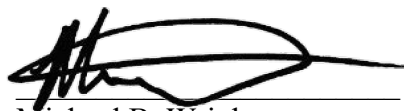
Susan L. Biro  
Chief Administrative Law Judge

Dated: December 16, 2019  
Washington, D.C.

In the Matter of *Freedom Performance, LLC*, Respondent.  
Docket No. CAA-HQ-2019-8362

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing **Order on Complainant's Motion for Default Judgment and Order**, dated December 16, 2019, and issued by Chief Administrative Law Judge Susan L. Biro, was sent this day to the following parties in the manner indicated below.



Michael B. Wright  
Senior Attorney-Advisor

Original and One Copy by Personal Delivery to:

Mary Angeles, Headquarters Hearing Clerk  
U.S. Environmental Protection Agency  
Office of Administrative Law Judges  
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Dated: December 16, 2019  
Washington, D.C.