UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

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

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

TABLE OF CONTENTS

INTRODUCTION 1

I. PROCEDURAL HISTORY 1

II. STATUTORY AND REGULATORY BACKGROUND 2

A. Regulation and Certification of Motor Vehicles Under Title II of the Clean Air Act 2

B. The Clean Air Act's Definition of a Motor Vehicle is Based Upon the Vehicle's Design 4

C. The Clean Air Act's Prohibition Against Defeat Devices 5

III. FACTUAL BACKGROUND 6

A. The Emissions-Related Element of Design Primarily Impacted by Respondent's Subject Products – Catalytic Converters 6

B. Respondent's Business and its Subject Products That Eliminate Catalytic Converters 7

IV. STANDARD OF REVIEW FOR ACCELERATED DECISION 7

V. NO GENUINE ISSUE OF MATERIAL FACT EXISTS CONCERNING RESPONDENT'S LIABILITY FOR THE VIOLATIONS ALLEGED 10

A. Respondent is a "Person" Within the Meaning of the Clean Air Act, 42 U.S.C. § 7522(a)(3)(B) 12

B. The Subject Products Respondent Manufactured and Sold Were Intended for Use With, or As Part of, Motor Vehicles or Motor Vehicle Engines 12

C. A Principal Effect of the Use of Respondent's Subject Products Was the Removal of Catalytic Converters Installed by OEMs 13

D. The Catalytic Converters Removed Through Use of Respondent's Subject Products Were Devices or Elements of Design Installed by OEMs Pursuant to a COC 15

E. Respondent Knew or Should Have Known That Use of Its Subject Products Would Result in the Removal Of Catalytic Converters Installed by OEMs Pursuant to a COC 16

F. Respondent's Sales Invoices and Information Provided to EPA by Respondent Regarding Those Sales Invoices Establish 5,338 Violations of the CAA Prohibition Regarding Defeat Devices 18

VI. RESPONDENT'S COMPETITION USE DEFENSE FAILS AS A MATTER OF FACT AND LAW 20

A. Respondent Has Produced No Evidence That Any of its Subject Products Were Actually Used On a Vehicle Used Solely for Competition.....24

B. The Competition Use Defense is Contrary to the Plain Language of the CAA 25

C. The Competition Use Defense is Not Listed Under the Express Exemptions to the Defeat Device Prohibition Set Forth By the CAA.....27

D. The 1990 Nonroad Vehicle and Engine Provisions Added to the CAA Confirm that No Competition Use Exemption for Motor Vehicles Exists Under the CAA 28

E. The Plain Reading of the Motor Vehicle Definition Fits Within the Structure and Purpose of the CAA.....30

F. EPA's Regulations and Guidance Accord with the Plain Reading of the Definition of Motor Vehicle under the CAA 32

G. Respondent's Reading of the CAA is Illogical as it Eviscerates Enforceability of the Defeat Device Prohibition in Contravention of Congressional Intent 35

VII. ARGUMENT IN SUPPORT OF MOTION TO STRIKE AFFIRMATIVE DEFENSES 38

A. Standards for Motions to Strike 38

B. Motion to Strike Respondent's Fourth Defense – "EPA's Actions in Pursuing Enforcement Against Respondent Are Inconsistent with its own Guidance for Pursuing Administrative Enforcement" 39

C. Motion to Strike Respondent's Fifth Defense: "Statute of Limitations".....41

D. Motion to Strike Respondent's Sixth Defense: Violation of Separation of Powers 42

E. Motion to Strike Respondent's Seventh Defense: Lack of Fair Notice.....43

F. Motion to Strike Respondent's Eighth Defense:
Violation of Due Process and Sixth Amendment Rights.....45

G. Motion to Strike Ninth Defense:
Violation of the Ex Post Facto Clause 46

H. Motion to Strike Respondent's Tenth Defense: The Rule of Lenity 47

I. Motion to Strike Respondent's Eleventh Defense:
Violation of Due Process and of the Seventh
Amendment Right to a Jury Trial 49

J. Motion to Strike Twelfth Defense:
Violation of the Excessive Fines Clause.....51

K. Motion to Strike Respondent's Fourteenth Defense: Estoppel.....53

L. Motion to Strike Nineteenth Defense: EPA's Adjudicatory
Structure and Procedures Violate the Appointments Clause
And the Separation of Powers.....56

CONCLUSION.....58

TABLE OF AUTHORITIES

CASES

Aguakem Caribe, Inc.,
2010 EPA ALJ LEXIS 9 (June 2, 2010).....39

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1985) 8, 9

Andrus v. Glover Const. Co.,
446 U.S. 608 (1980).....27

Atlas Roofing Co. v. Occupational Safety and Health Rev. Comm'n.,
430 U.S. 442 (1977).....50

Austin v. United States.,
509 U.S. 602 (1993).....52

B & B Hardware, Inc. v. Hargis Indust., Inc.,
575 U.S. 138 (2015).....50

BP Am. Prod. Co. v. Burton,
549 U.S. 84 (2006).....25

BP Expl. & Prod. Inc. v. United States,
2015 WL 1731421 (2015).....48

BWX Techs., Inc.,
9 E.A.D. 61 (EAB 2000).....9, 10

Beazell v. Ohio,
26 U.S. 167 (1925).....46

Bostock v. Clayton Cty.,
140 S. Ct. 1731 (2020).....25

Cf United States v. Volvo Powertrain Corp.,
854 F. Supp. 2d 60 (D.D.C. 2012).....38

Celotex Corp. v. Catrett,
477 U.S. 317 (1986).....8

City of Marlborough,
2005 WL 627643 (EAB 2005).....46

Clarksburg Casket Co.,
8 E.A.D. 496 (EAB 1999).....8, 10

Conn. Nat. Bank v. Germain,
503 U.S. 249 (1992).....26

Consumers Scrap Recycling, Inc.,
11 E.A.D. 269 (EAB 2004) 8

Duncan v. Walker,
533 U.S. 167 (2001).....28

FDA v. Brown & Williamson Tobacco Corp.,
529 U.S. 120 (2000).....30

Federal Trade Commission v. Morton Salt Co.,
334 U.S. 37 (1948).....24

First Nat'l Bank of Arizona v. Cities Service Co.,
391 U.S 253 (1968) 9

Fredericks v. CIR,
126 F.3d 433 (3rd Cir. 1997) 54

Free Enterprise Fund v. Pub. Co. Acct. Oversight Bd.,
561 U.S. 477 (2010).....57

Fulman v. United States,
434 U.S. 528 (1978).....48

General Electric Co. v. EPA
53 F.3d 1324 (D.C. Cir. 1995).....44

Granfinanciera, S.A. v. Nordberg,
492 U.S. 33 (1989).....49

Griffin v. Oceanic Contractors, Inc.,
458 U.S. 564 (1982).....26, 38

Heckler v. Cmty. Health Serv.,
467 U.S. 51 (1984).....53

Hernandez v. Williams, Zinman & Parham PC,
829 F.3d 1068 (9th Cir. 2016) 37

In re Avenal Power Ctr., LLC,
15 E.A.D. 384 (EAB 2011).....41

In re Carbon Injection Sys., LLC.,
32102 EPA ALJ Lexis 6 (February 12, 2012).....39

In re D'Amato,
2011 WL 3274057 (May 27, 2011).....45, 46, 47

In re Env't Prot. Serv.,
13 E.A.D. 506 (EAB 2008).....54

In re Gabey,
1983 WL 234706 (EAB 1983).....40

In re Harpoon,
2003 EPA ALJ LEXIS 52 (August 4, 2003).....10

In re Harpoon Partnership,
12 E.A.D. 182 (EAB 2005).....31, 44

In re Kimberly-Clark Corp.,
1988 WL 429706 (April 8, 1988).....40

In re Lazarus, Inc.,
7 E.A.D. 365 (EAB 1997).....48

In re Martex Farms, Inc.,
2006 WL 1582510 (Feb. 23, 2006).....45, 47

In re Mayaguez Reg'l Sewage Treatment Plant,
4 E.A.D. 772 (EAB 1993).....10

In re Tenn. Valley Auth.,
9 E.A.D. 357, 412 (EAB 2000).....44

In re V-1 Oil Co.,
8 E.A.D. 729 (EAB 2000).....44, 53

In re Wego Chem. & Mineral Corp.,
4 E.A.D. 513 (EAB 1993).....39, 54, 55

In re Woodcrest Manufacturing, Inc.,
7 E.A.D. 757 (EAB 1998).....52

In the Matter of Eagle Brass Co.
2016 WL 748188 (OALJ Dec. 21, 2016) 39, 54

In the Matter of Strong Steel Products
2002 EPA ALJ LEXIS 57 (September 9, 2002) 10

J.W. Hampton, Jr., & Co. v. United States,
276 U.S. 394 (1928) 43

Johnson v. Robinson,
415 U.S. 361 (1974) 46

K Mart Corp. v. Cartier, Inc.,
486 U.S. 281 (1988) 30

Kenna v. U.S. Dist. Court for C.D. Cal.,
435 F.3d 1011 (9th Cir. 2006) 37

Kucana v. Holder,
558 U.S. 233 (2010) 30

Linkous v. United States,
142 F.3d 271 (5th Cir. 1998) 53, 54

Lucia v. SEC,
138 S.Ct. 2044 (2018) 56

Mac's Shell Serv., Inc. v. Shell Oil Prod. Co. LLC,
559 U.S. 175 (2010) 37

Marine Shale Processors, Inc. v. EPA,
81 F.3d 1371 (5th Cir. 1996) 51

Meyer v. Bush,
981 F.2d 1288 (D.C. Cir. 1993) 40

Michigan v. Thomas,
805 F.2d 176 (6th Cir. 1986) 40

Miffinburg Tel. Inc. v. Criswell
80 F. Supp. 3. 566 (M.D. Pa. 2015) 39

Mistretta v. U.S.,
488 U.S. 361 (1989) 43

Morrison v. Olson,
487 U.S. 654 (1988).....57

Muscarello v. United States,
524 U.S. 125 (1998).....49

Nat'l Bank of Oregon v. Indep. Ins. Agents of America,
508 U.S. 439 (1993).....31

New York v. EPA,
443 F.3d 880 (D.C. Cir. 2006).....27

Newell Recycling Co. v. EPA,
231 F.3d 204 (5th Cir. 2000).....53

P.R. Aqueduct & Sewer Auth. v. EPA,
35 F.3d 600 (1st Cir.1994).....8

Pepperell Assoc. v. EPA,
246 F.3d 15 (1st Cir. 2001).....51

Pharaon. v. Board of Governors of Federal Reserve System,
135 F. 3d. 148, 155-57 (D.C. Cir. 1998).....53

Richards v. United States,
369 U.S. 1 (1962).....25

Robers v. United States,
572 U.S. 639 (2014).....37

Shular v. United States,
140 S. Ct. 779 (2020).....49

Stern v. Marshall,
564 U.S. 462 (2011).....51

TRW Inc. v. Andrews,
534 U.S. 19 (2001).....28

Thomas v. Union Carbide Agricultural Prods. Co.,
473 U.S. 568 (1985).....51

Tull v. United States,
481 U.S. 412 (1987).....50, 51

United States v. Bajakajian,
524 U.S. 321 (1998).....52

United States v. Bass,
404 U.S. 336 (1971).....48

United States v. Cleveland Indians Baseball Co.,
532 U.S. 200 (2001).....37

United States v. D.K.G. Appaloosas, Inc.,
829 F.2d 532 (5th Cir. 1987) 46

United States v. Gardner,
860 F.2d 139 (7th Cir. 1988) 17

United States v. Gearbox Z Incorporated,
No. CV-20-08003-PCT-JJT (D. Ariz. Mar. 18, 2021).....23

United States v. J.B. Williams Co.,
498 F.2d 414 (2d Cir. 1974).....45, 47

United States v. McDuffy,
890 F.3d 796 (9th Cir. 2018) 30

United States v. One Assortment of 89 Firearms,
465 U.S. 354 (1984).....47

United States v. Wells,
519 U.S. 482 (1997).....48

Varnadore v. Sec'y of Labor,
141 F.3d 625 (6th Cir. 1998) 57

Wagner v. Director, Federal Emergency Management Agency,
847 F.2d 515 (9th Cir. 1988) 55

Watkins v. U.S. Army,
875 F.2d 699 (9th Cir. 1989) 54, 55

Whitman v. American Trucking Assoc.,
531 U.S. 457 (2001)..... 43, 50

Wilder v. Va. Hosp. Ass'n,
496 U.S. 498, 515 (1990).....37

Willy v. Admin. Rev. Bd.,
423 F.3d 483 (5th Cir. 2005) 57

STATUTES

28 U.S.C. § 2462 42

42 U.S.C. § 7401(a) 31

42 U.S.C. §§ 7521−7590 ..... *passim*

42 U.S.C. § 7521(a) ..... *passim*

42 U.S.C. § 7522(a) ..... *passim*

42 U.S.C. § 7524(c) ..... *passim*

42 U.S.C. § 7525(a)(1) ..... *passim*

42 U.S.C § 7542 12

42 U.S.C. § 7547(a) 2, 3

42 U.S.C. § 7550 ..... *passim*

42 U.S.C. § 7587(d) 26

42 U.S.C. § 7602(e) 12

REGULATIONS

40 C.F.R. § 22.1(a)(2) 1

40 C.F.R. § 22.15(b) 39, 49

40 C.F.R. § 22.20 .....1, 8, 11

40 C.F.R. § 22.24 .....10, 39

40 C.F.R. § 22.27(b) 56

40 C.F.R. § 22.5 1

40 C.F.R. § 22.13-14 1

40 C.F.R. § 85.1701(a)(1) 27, 32

40 C.F.R. § 85.1703 .....32, 35

40 C.F.R. § 86.007-30(a)(1)(i) 3

40 C.F.R. § 86.094-2 3

40 C.F.R. § 86.094-21(b)(1) 4
40 C.F.R. § 86.1803-01 3
40 C.F.R. § 86.1838-01(a)(1) 3
40 C.F.R. § 86.1844-01(d)–(e) 4
40 C.F.R. § 86.1848-01(c)(6) 4
40 C.F.R. § 86.2843-01 4
40 C.F.R. § 86.416-80 4
40 C.F.R. § 86.417-78(a) 4
40 C.F.R. § 86.437-78(a)(2) 4
40 C.F.R. § 1051.201 4
40 C.F.R. § 1051.255(a) 4
40 C.F.R. § 1068.235 27

OTHER AUTHORITIES

5 Fed. Reg. at 31,355 42
39 Fed. Reg. 32,609 (Sept. 10, 1974) 33
57 Fed. Reg. 5320 (Feb. 13, 1992) 57
79 Fed. Reg. 23,416 (Apr. 28, 2014) 3
80 Fed. Reg. 40,138, 40,527 (July 13, 2015) 22
85 Fed. Reg. 31,353 (May 19, 2020) 40, 41
85 Fed. Reg. 31,356 (May 19, 2020) 41
86 Fed. Reg. 11,855 (Feb. 24, 2021) 40
"Clean Air Act Amendments of 1989,"
U.S. Senate, 101st Congress, S. Rpt. 101-228, p. 124 (December 20, 1989) 16
Exec. Order 13,924, *Executive Order on Regulatory Relief to Support Economic Recovery* 40
Fed. R. Civ. P. 56(c)(1) 8
Fed. R. Civ. P. 56(e) 9
Pub. L. No. 101-549, § 288 (Nov. 15, 1990) 5

S. Rep. No. 101-228, at 103 (1989) 28, 36
Memorandum re Implementation of Executive Order 13924 (Nov. 25, 2020).....54

INTRODUCTION

The Director of the Region 9 Enforcement and Compliance Assurance Division of the U.S. Environmental Protection Agency ("Complainant") files this Motion for Accelerated Decision on Liability and to Strike Affirmative Defenses (the "Motion") concerning Borla Performance Industries, Inc. ("Borla" or "Respondent"), consistent with section 22.20 of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (the "Consolidated Rules").

The Consolidated Rules allow the Presiding Officer to render an accelerated decision at any time "as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as [s]he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law." 40 C.F.R. § 22.20(a). With the Respondent's Answer to the Second Amended Complaint filed, Complainant contends there are no genuine issues of material fact in dispute with regard to Respondent's liability for any of the violations of Title II the Clean Air Act ("CAA" or the "Act"), 42 U.S.C. §§ 7521−7590, alleged in the Second Amended Complaint. Complainant therefore requests the Presiding Officer find that Respondent is liable as a matter of law. In the alternative, Complainant requests that the Presiding Officer narrow the issues for hearing by determining what material facts remain controverted, and by ruling on those claims and defenses for which no material facts are in dispute. Respondent's counsel has indicated that they intend to oppose this Motion.

I. PROCEDURAL HISTORY

On June 30, 2020, Complainant initiated this action under section 205(c)(1) of the Act, 42 U.S.C. § 7524(c)(1), by filing its Complaint against Respondent with the EPA's Region 9 Hearing Clerk as required by 40 C.F.R. §§ 22.5 and 22.13-14. *See* 40 C.F.R. § 22.1(a)(2)

(applying Consolidated Rules to proceedings brought under CAA § 205(c), 42 U.S.C. § 7524(c)). On August 6, 2020, and prior to Respondent having filed an Answer regarding the Complaint, Complainant filed an Amended Complaint. Respondent filed its Answer to the Amended Complaint on September 28, 2020.By leave of this Tribunal, Complainant filed a Second Amended Complaint on March 12, 2021 (cited as "Sec. Am. Compl."). Among other things, the Second Amended Complaint alleges in one count that Respondent is liable for a total of 5,338 violations of section 203(a)(3)(B) of the Act, 42 U.S.C. § 7522(a)(3)(B) arising from Respondent's manufacture and sale of 5,338 exhaust system parts or components between January 15, 2015, and September 26, 2018, that bypass, defeat, or render inoperative pollution control equipment on motor vehicles (hereinafter referred to as the "Subject Products").[1] Respondent filed its Answer to the Second Amended Complaint on March 29, 2021. (cited as "Ans. Sec. Am. Compl.")

II. STATUTORY AND REGULATORY BACKGROUND

A. Regulation and Certification of Motor Vehicles Under Title II of the Clean Air Act

Title II of the Act directs the EPA to administer a nationwide program to control the emission of air pollution from motor vehicles and engines, which includes oxides of nitrogen ("NOx"), carbon monoxide ("CO"), and non-methane hydrocarbons ("NMHC"). 42 U.S.C. §§ 7521(a), 7525(a)(1), 7547(a). For new motor vehicles, the Administrator promulgates

[1] There are 57 types of Subject Products in this Proceeding; each type of Subject Product is designed to fit one or more model years of particular makes and models of motor vehicles. The 57 types of Subject Products are identified and described in a table included in Appendix A of the Second Amended Complaint.

emissions standards for any pollutant that causes or contributes to air pollution that may reasonably be anticipated to endanger public health or welfare. 42 U.S.C. §§ 7521(a)(1), 7547(a).

To reduce air pollution and achieve long-term goals of improved air quality, the EPA has set emission standards for different classes of motor vehicles. *See* 79 Fed. Reg. 23,416 (Apr. 28, 2014). To meet increasingly stringent emissions standards, automakers, also known as original equipment manufacturers ("OEMs") have designed and installed highly sophisticated and efficient emission control devices, software, and other elements of design.[2] *See* 40 C.F.R. § 86.094-2. EPA regulations do not require use of specific elements of design. Rather, the OEM designs and installs a configuration of hardware and software that works together to control emissions of regulated pollutants to meet the emission standards for NOx, NMHCs, CO, and other air pollutants under a broad range of environmental conditions and throughout the useful life of the motor vehicle. 42 U.S.C. § 7525(a)(2); *see* 40 C.F.R. §§ 86.007-30(a)(1)(i), 86.1848-01(a)(1); Declaration of Jason Gumbs, Attachment B to this Motion ("Gumbs Dec.") ¶¶ 9-10, Figure 1. 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). The COC establishes that the OEM has demonstrated that the respective engine or vehicle conforms to all of the applicable emission requirements. Section 205(a) of the CAA, 42 U.S.C. § 7525(a). The COC covers engines and vehicles belonging to a specific engine family or, in the case of light-duty vehicles, a

[2] Under the EPA's regulations, an "element of design" is "any control system (i.e., computer software, electronic control system, computer logic), and/or hardware items on a motor vehicle or motor vehicle engine." 40 C.F.R. § 86.1803-01.

specific test group for each manufacturer. 42 U.S.C. § 7525(a)(1); 40 C.F.R. §§ 86.417-78(a), 86.437-78(a)(2), 1051.255(a).

To comply with the Act, OEMs submit an application to the EPA for a certificate of conformity ("COC application") for each model year of each engine family the manufacturer intends to introduce into commerce. 42 U.S.C. § 7525(a); 40 C.F.R. §§ 86.416-80, 1051.201. As part of the COC application, OEMs describe and document the vehicle emissions-related elements of design and supporting test data demonstrating that their vehicles have a mix of emissions controls that meet emissions standards. *See* 40 C.F.R. §§ 86.094-21(b)(1), 86.1844-01(d)–(e), and 86.2843-01. These emissions controls are the "device[s] or element[s] of design installed on or in a motor vehicle or motor vehicle engine in compliance with regulations" under the Act, as set forth in section 203(a)(3)(B), 42 U.S.C. § 7522(a)(3)(B).

If the EPA determines that the test group described in a COC application meets the Act's requirements, it will issue a COC covering motor vehicles belonging to that test group. 42 U.S.C. § 7525(a)(1); 40 C.F.R. §§ 86.417-78(a), 86.437-78(a)(2), 1051.255(a). A COC will cover only those motor vehicles that conform in all material respects to the motor vehicle specifications described in the COC application. *See* 40 C.F.R. §§ 86.437-78(a)(2)(iii); 40 C.F.R. § 86.1848-01(c)(6).

B. The Clean Air Act's Definition of a Motor Vehicle is Based Upon the Vehicle's Design

Section 216(2) of the Act establishes the following definition: "The term 'motor vehicle' means any self-propelled vehicle *designed* for transporting persons or property on a street or

highway." 42 U.S.C. § 7550 (emphasis added). The word "designed" refers to the manufacturer's designed capability of that vehicle as certified by the EPA.[3]

C. The Clean Air Act's Prohibition Against Defeat Devices

It is a violation of the Act:

> for any person to manufacture or sell, or offer to sell, or install, any part or component intended for use with, or as part of, any motor vehicle or motor vehicle engine, where a principal effect of the part or component is to bypass, defeat, or render inoperative any device or element of design installed on or in a motor vehicle or motor vehicle engine in compliance with regulations under this subchapter, and where the person knows or should know that such part or component is being offered for sale or installed for such use or put to such use . . .

Section 203(a)(3)(B) of the Act, 42 U.S.C. § 7522(a)(3)(B) (hereinafter the "Defeat Device Prohibition"). Congress created this prohibition in the CAA Amendments of 1990. Pub. L. No. 101-549, § 288 (Nov. 15, 1990).[4] Motor vehicle parts or components falling under the prohibition in section 203(a)(3)(B) are commonly known as "defeat devices."[5] The phrase "any device or element of design installed on or in a motor vehicle or motor vehicle engine in

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[3] This is addressed more fully in Section VI of this Brief, *infra*.

[4] Section 203(a)(3) has a companion prohibition regarding tampering with emission controls. Under section 203(a)(3)() it is prohibited:

> for any person to remove or render inoperative any device or element of design installed on or in a motor vehicle or motor vehicle engine in compliance with regulations under this subchapter prior to its sale and delivery to the ultimate purchaser, or for any person knowingly to remove or render inoperative any such device or element of design after such sale and delivery to the ultimate purchaser.

42 U.S.C. § 7522(a)(3)(A) ("hereinafter the "Tampering Prohibition"). Complainant has not alleged violations of section 203(a)(3)(A) against Respondent, but the Tampering Prohibition will be discussed in reference to Respondent's defenses based on competition use addressed in Section VI of this brief, *infra*.

[5] This prohibition also applies in the context of new vehicle certification, and the term "defeat device" has distinct meaning in that context as forth in 40 C.F.R. Part 86 ("Control of Emissions From New and In-Use Highway Vehicles and Engines"). In this Motion, the term "defeat device" refers to aftermarket parts prohibited by section 203(a)(3).

compliance with the regulations [promulgated under Title II of the CAA]" in section 203(a)(3)(B) includes the specific devices and elements of design that the OEM installs and discloses in its COC application to meet emissions standards.

III. FACTUAL BACKGROUND

A. The Emissions-Related Element of Design Primarily Impacted by Respondent's Subject Products—Catalytic Converters

The emissions-related element of design primarily impacted by Respondent's Subject Products are catalytic converters, particularly three-way catalytic converters ("TWCC"). Since the early 1990s, TWCCs have emerged as the dominant technology for controlling tailpipe emissions from gasoline-fueled vehicles. Gumbs Dec.¶ 9. TWCCs have been specifically formulated by OEMs to simultaneously control NMHC, CO, and NOx. The catalysts provide a site for oxidation and reduction reactions to convert NMHC, CO, and NOx into water (H_2O), carbon dioxide (CO_2), and nitrogen (N_2). *Id*. TWCCs are devices which are primarily installed as part of a vehicle's exhaust system. *Id*.

To operate effectively, OEMs have optimized their TWCCs for composition, location, and volume. *Id*. at ¶ 10. OEMs evaluate a range of design factors such as precious metal loading combinations, cell densities, wall thicknesses, and oxygen storage capacity. *Id*. TWCCs are positioned to ensure they are operating in the appropriate performance regime for the vehicle they are installed on. *Id*. The TWCCs installed in most gasoline-powered motor vehicles since the early 1990s typically control more than 90% of the regulated pollutants passing through them and typically account for more than 70% of all the pollution control achieved by the emissions control systems installed on these motor vehicles. *Id*. at ¶¶ 9-10. Precious metals are the catalytic components most commonly used for exhaust emission control. *Id*. at ¶ 9.

Certain motor vehicles are installed with multiple TWCCs based on the vehicle architecture. *Id*. ¶ 13, Figure 2. The TWCC closest to the exhaust manifold is often referred to as the close-coupled converter, while the TWCC further downstream is identified as the underfloor converter. *Id*. A major contributor of overall vehicle emissions come from when the vehicle is first started. *Id*. The close-coupled catalyst is an integral part of cold phase emission control. *Id*. The underfloor converter and the close-coupled converter work in concert to control emissions over the wide range of motor vehicle operation. *Id*.

Of particular relevance to this Proceeding, TWCCs are among the "devices and elements of design installed on or in a motor vehicle or motor vehicle engine in compliance with the regulations [promulgated under Title II of the CAA]", as that phrase is used in section 203(a)(3(B) of the CAA.

B. Respondent's Business and its Subject Products that Eliminate Catalytic Converters

Borla is a corporation organized under the laws of California. Sec. Am. Compl. ¶ 3. Ans. Sec. Am. Compl. ¶ 3. Respondent manufactures and sells engine exhaust system parts or components. Sec. Am. Compl. ¶¶ 50, 53, Appendix A; Ans. Sec. Am. Compl. ¶¶ 50, 53; CX 6 at 1-2. The Subject Products that Respondent has manufactured and sold, when installed, remove one or more TWCCs installed by the OEM CX 7 at 1-5, column F.

IV. STANDARD OF REVIEW FOR ACCELERATED DECISION

The Consolidated Rules of Practice provide that the Presiding Officer may at any time render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as she may require, if no genuine issue of material fact exists and a party is

entitled to judgment as a matter of law. 40 C.F.R. § 22.20(a). This parallels the standard for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, and jurisprudence relating to Rule 56 provides applicable guidance for motions for accelerated decision. *See P.R. Aqueduct & Sewer Auth. v. EPA*, 35 F.3d 600, 607 (1st Cir.1994), *cert. denied*, 513 U.S. 1148 (1995) ("Rule 56 is the prototype for administrative summary judgment procedures, and the jurisprudence that has grown up around Rule 56 is, therefore, the most fertile source of information about administrative summary judgment."). Accordingly, the Environmental Appeals Board ("EAB" or the "Board") has consistently relied upon Rule 56 and jurisprudence regarding summary judgment for guidance in adjudicating motions for accelerated decision under the Rules of Practice. *See, e.g.*, *Consumers Scrap Recycling, Inc*., 11 E.A.D. 269, 285 (EAB 2004); *BWX Techs., Inc*., 9 E.A.D. 61, 74-75 (EAB 2000); *Clarksburg Casket Co*., 8 E.A.D. 496, 501-02 (EAB 1999).

Rule 56 requires a party asserting that a fact cannot be or is genuinely in dispute to support its assertion by: (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact. Fed. R. Civ. P. 56(c)(1). The party moving for summary judgment bears the initial responsibility of informing the tribunal of the basis for its motion, and identifying materials in the record demonstrating the absence of a genuine issue of material fact. *Celotex Corp*. *v. Catrett*, 477 U.S. 317, 323 (1986). The nonmoving party cannot defeat the motion without offering "any significant probative evidence tending to support" its pleadings. *Anderson v.*

Liberty Lobby, Inc., 477 U.S. 242, 256 (1985) (quoting *First Nat'l Bank of Arizona v. Cities Service Co.*,391 U.S 253, 290 (1968)). "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but must set forth specific facts showing there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

In applying these principles to motions for accelerated decision under section 22.20(a) of the Rules of Practice, the EAB has held that the moving party "assumes the initial burden of production on a claim, and must make out a case for presumptive entitlement to summary judgment in his favor." *BWX*, 9 E.A.D. at 76. Where the moving party bears the burden of persuasion on an issue, it is entitled to an accelerated decision only if it presents "evidence that is so strong and persuasive that no reasonable [fact finder] is free to disregard it." *Id.* Where the moving party does not bear the burden of persuasion, such as with affirmative defenses, it has the "lesser burden of 'showing' or 'pointing out' to the reviewing tribunal that there is an absence of evidence in the record to support the nonmoving party's case on that issue." *Id*. Once the moving party has discharged this burden, the burden of production shifts to the non-moving party bearing the burden of persuasion on the issue to identify specific facts from which a finder of fact could reasonably find in its favor on each element of the claim. *Id*. As noted by the EAB, "neither party can meet its burden of production by resting on mere allegations, assertions, or conclusions of evidence." *BWX*, 9 E.A.D. at 75. Likewise, a party opposing a properly supported motion for accelerated decision is required to "provide more than a scintilla of evidence on a disputed factual issue to show their entitlement to a[n] . . . evidentiary hearing: the evidence must be substantial and probative in light of the appropriate evidentiary standard of the case." *Id*. at 76.

Consistent with the jurisprudence of Rule 56, a tribunal adjudicating a motion for accelerated decision is required to consider whether the parties have met their respective burdens in the context of the applicable evidentiary standard. *BWX*, 9 E.A.D. at 75. The evidentiary standard that applies here is proof by a preponderance of the evidence. 40 C.F.R. § 22.24(b). The complainant bears the burdens of presentation and persuasion that a violation occurred as set forth in the complaint, and the respondent bears the burdens of presentation and persuasion for any affirmative defenses. 40 C.F.R. § 22.24(a). If "the evidence, viewed in a light most favorable to the non-moving party, is such that no reasonable decision maker could find for the nonmoving party, summary judgment is appropriate." *Clarksburg Casket*, 8 E.A.D. 8 at 501-502, quoting *In re Mayaguez Reg'l Sewage Treatment Plant*, 4 E.A.D. 772, 781 (EAB 1993).

Simply put, "a party responding to a motion for accelerated decision must produce some evidence which places the moving party's evidence in question and raises a question of fact for an adjudicatory hearing." *In re Harpoon,* Docket No. TSCA-05-2002-0004, 2003 EPA ALJ LEXIS 52 (Aug. 4, 2003) citing *In the Matter of Strong Steel Products,* Docket Nos. RCRA-05-2001-0016, CAA-05-2001-0020, and MM-05-2001- 0006, at 22 - 23, 2002 EPA ALJ LEXIS 57 (Sept. 9, 2002).

V. NO GENUINE ISSUE OF MATERIAL FACT EXISTS CONCERNING RESPONDENT'S LIABILITY FOR THE VIOLATIONS ALLEGED

As described in section II.C of this Motion, section 203(a)(3)(B) of the Act prohibits defeat devices. 42 U.S.C. § 7522(a)(3)(B). To establish liability under section 203(a)(3)(B), Complainant must establish that: (1) Respondent is a "person"; 2) who manufactured, sold, or offered to sell (or caused such acts) a "part or component intended for use with or as part of, any

motor vehicle or motor vehicle engine"; (3) where a "principal effect" of the part of 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 the regulations promulgated under Title II of the CAA; and (5) "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).

The facts show that: Respondent is a person; Respondent manufactured or sold the Subject Products; a principal effect of the Subject Products is to bypass, defeat, or render inoperative one or more TWCCs; such TWCCs were installed on or by the OEM in motor vehicles to meet EPA emissions certification requirements, specifically to conform with the OEM's motor vehicle design as certified by the EPA; and Respondent knew or should have known that its Subject Products would be installed for such use or put to such use.

The material facts supporting the finding of Respondent's liability are set forth in Attachment A to this Motion are not in genuine dispute and show that all the elements of section 203(a)(3)(B) violation are met with respect to Respondent's manufacture and sale of the Subject Products, which are defeat devices. Respondent committed 5,338 violations of section 203(a)(3)(B) the Act, 42 U.S.C. § 7522(a)(3)(B), by manufacturing and selling those defeat devices.

Complainant contends there are no genuine issues of material fact in dispute with regard to Respondent's liability for the 5,338 violations of section 203(a)(3)(B) and Complainant therefore requests the Presiding Officer find that Respondent is liable for the violations alleged. In the alternative, Complainant requests that the Presiding Officer narrow the issues for hearing by making findings of fact and by ruling on those claims and defenses for which no material facts are in dispute. *See* 40 C.F.R. § 22.20(b)(2) (partial accelerated decision).

The remainder of this section summarizes the evidence supporting an accelerated decision on liability in this case based upon a proper reading and application of the CAA's Defeat Device Prohibition. Note that in Section VI of this Brief, *infra*, Complainant addresses Respondent's argument that Complainant has misinterpreted and misapplied the CAA in this Proceeding based upon the notion that the CAA includes an exemption for defeat devices intended for motor vehicles used solely for competition.

A. Respondent is a "Person" Within the Meaning of the Clean Air Act, 42U.S.C. § 7522(a)(3)(B)

The Act defines a person to include any "corporation, partnership, [or] association." 42 U.S.C. § 7602(e). Borla has admitted that it is a corporation organized under the laws of California. Sec. Am. Compl. ¶ 3; Ans. Sec. Am. Comp at ¶ 3. Respondent therefore meets the Act's legal definition of a "person."

B. The Subject Products Respondent Manufactured and Sold Were Intended for Use With, or as Part of, Motor Vehicles or Motor Vehicle Engines

In a letter dated August 16, 2018, the EPA issued to Respondent an information request pursuant to section 208 of the Act, 42 U.S.C § 7542 ("August 2018 Information Request"). CX 4. In a letter dated October 29, 2018, Respondent submitted its response to the EPA's August 2018 Information Request ("October 2018 Response"). CX 5. Documents and information provided in its October 2018 Response and its Answer to the Second Amended Complaint filed in this case establish that Respondent is in the business of manufacturing and selling vehicle exhaust parts or components. Sec. Am. Compl. ¶¶ 50, 52; Ans. Sec. Am. Compl. ¶¶ 50, 53; CX 6; CX 7; Attachment D ¶ 1. These documents and information include 57 of Respondent's

instruction sheets and installation manuals ("installation manuals")[6] for the Subject Products manufactured and sold by Respondent. Attachment D, ¶ 1. Each of the 57 types of Subject Products are described on the first page of each of these installation manuals as being "designed for" use on one or more specific makes and models of motor vehicles. *Id*. The vehicles identified in the installation manuals are "motor vehicles" as demonstrated by the fact that these vehicles are covered by a COC demonstrating they were manufactured by their OEM to conform with the OEM's motor vehicle design as certified by the EPA to meet emission standards. 42 U.S.C. § 7525(a)(1); 40 C.F.R. §§ 86.417-78(a), 86.437-78(a)(2), 1051.255(a); Attachment D ¶ 2. In addition, these vehicles are "motor vehicles" because they are self-propelled and "designed for transporting persons or property on a street or highway." Section 216(2) of the Act, 42 U.S.C § 7550(2).

Documents and information provided in its October 2018 Response to the EPA's August 2018 Information Request establish that Respondent manufactured and sold all the Subject Products at issue in this Proceeding. These documents and information include the 57 installation manuals, a comprehensive spreadsheet,[7] and sales invoices provided by Respondent in response to EPA's August 2018 Information Request (CX 7; CX 8; Attachment D ¶ 1), as well as public advertisements for such Subject Products previously published by Respondent on its website (CX 353).

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[6] Borla's October 2018 Response included 65 installation manuals for different exhaust parts and components, 57 of which cover the 57 types of Subject Products. Complainant chose not to include in its complaint the remaining 8 parts or components for which Respondent provided installation manuals.

[7] This spreadsheet, included in the record as CX 7, covers 65 types of exhaust parts and components, and, as discussed in Footnote 6, the Complaint includes only 57 part and component types (the Subject Products).

C. A Principal Effect of the of the Use of Respondent's Subject Products Was the Removal of Catalytic Converters Installed by OEMs

Two separate sources of evidence prove that a principal effect of the Subject Products is the removal of one or more TWCCs installed in the motor vehicles by the OEMs, which constitute devices or elements of design installed to comply with EPA certification requirements. Either of the below sources of evidence would be sufficient, by itself, to demonstrate there is no material issue of fact regarding this element of Complainant's case.

The first source of evidence is Respondent's October 2018 Response. Borla's response included, among other things, an Excel spreadsheet. The spreadsheet included a column entitled "Function" that provided a response to request 2.b in the EPA's August 2018 Information Request. In request 2.b, the EPA asked for the following information: "Describe the function of the component in an exhaust system and, based upon the component's design, explain how it could enable the customer or end-user to bypass, defeat, or otherwise render inoperative an Emission Related Part." In its response to request 2.b, Borla made similar statements for all 57 types of Subject Products. A typical example of these statements is, "Only if the original exhaust system is still in place, has not been modified, and retains the original catalytic converters, an end-user could decide to install this part to remove or replace the original catalytic converters." Borla's full responses to request 2.b are set forth in Attachment D to this Motion. Attachment D ¶ 3.

Second, in addition to these admissions, Complainant performed a series of analyses comparing each type of Subject Product with the OEM design of one or more of the motor vehicle(s) in which the Subject Product was designed to be used. These analyses consisted of a side-by-side comparison of one or more schematics for each type of Subject Product with a

schematic of the OEM vehicle exhaust system or a portion of that system. In addition to the schematics, EPA engineer Jason Gumbs provides a narrative explaining how use of each Subject Product would require the removal of one or more of the TWCCs installed by the OEM. Gumbs Dec. ¶¶ 26-82; Attachment D ¶ 5.

D. The Catalytic Converters Removed Through Use of Respondent's Subject Products Were Devices or Elements of Design Installed by OEMs Pursuant to a COC

As described in the installation manuals Respondent provided pursuant to the EPA's August 2018 Information Request, each type of Subject Product was designed to fit one or more specific EPA-certified motor vehicle. The makes, models, and years of these vehicles are set forth in the first page of each of the 57 installation manuals and in the column "Vehicle Application" of the spreadsheet provided by Respondent in its October 2018 Response. CX 7; Attachment D ¶ 1.

Each of the specific types of motor vehicles listed in the installation manuals and the spreadsheet provided by Respondent in its October 2018 Response was manufactured by the OEM pursuant to a COC issued by EPA. Attachment D ¶ 2. The EPA issued each of those COCs based upon the Agency's evaluation of a COC application submitted to the EPA by the OEM. Each application included, among other things, a summary of the full application. With a few exceptions for which we lack both a COC application and application summary,[8] each and every COC application and application summary for each and every test group of motor vehicles at

[8] While Applications for Certification and applications summaries are missing in a few instances, COCs were issued for these test group vehicles and OEM diagrams showed that the configuration of the exhaust systems were consistent throughout the relevant MYs. Under these circumstances, our expert witness, Jason Gumbs, has opined that the missing Applications for Certification and application summaries would have included and relied upon the installation of TWCCs. Gumbs Dec. ¶¶ 83-85.

issue in this case stated that the motor vehicles contained one or more TWCCs to serve as pollution control devices or elements of design. *Id*.; Gumbs Dec. ¶¶ 83-85. Based upon each application, the EPA subsequently issued a COC for each test group vehicle, and the OEM-installed TWCCs in the motor vehicles in conformity with the applicable COC and in compliance with the Act. 42 U.S.C. § 7525(a)(1); 40 C.F.R. §§ 86.417-78(a), 86.437-78(a)(2), 1051.255(a); Attachment D ¶ 2.

E. Respondent Knew or Should Have Known That Use of Its Subject Products Would Result in the Removal of Catalytic Converters Installed by OEMs Pursuant to a COC

In addition to showing a person manufactured or sold a part or component that were intended to be installed on a motor vehicle or motor vehicle engine and used to bypass, defeat, or render inoperative emissions control devices, the government must show that "the person knows or should have known that such part or component is being . . . put to such use . . . ." 42 U.S.C. § 7522(a)(3)(B).

One purpose of section 203(a)(3)(B) as crafted by Congress in the 1990 CAA Amendments was to eliminate the requirement for the government to prove that a particular part or component had been used for tampering to show that the manufacture or sale of that part or component was a violation. "Clean Air Act Amendments of 1989," U.S. Senate, 101st Congress, S. Rpt. 101-228, p. 124 (December 20, 1989), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3509.[9] According to the plain language of the statute and this legislative history, the knowledge element here does not require Complainant to prove the Respondent knew the Subject Products were actually installed or to prove how the modified motor vehicles were used.

[9] This legislative history is discussed in more detail in Section VII.F of this Brief, *infra*.

As described earlier in this Motion, Respondent has: 1) stated on the first page of each of its installation manuals that the Subject Products are "designed for" use on specific types of motor vehicles (Attachment D ¶ 1); and 2) admitted that use of the Subject Products would result in removal of OEM-installed TWCCs (CX 7 at 1-5, "Function" column).

Moreover, Respondent specifically advertised to the public on its website that its Subject Products were intended for use on specified makes and models of motor vehicles, which are EPA-certified vehicles built by OEMs to conform with EPA emission standards. CX 353.

Further evidence of the knowledge element is found in Respondent's October 2018 Response, particularly with the 57 installation manuals for the Subject Products. All but one of these installation manuals contained a statement warning that the exhaust part or component covered by the installation manual could not legally be installed on a motor vehicle. The most common example of these statements is, "LEGAL ONLY FOR RACING VEHICLES THAT MAY NEVER BE USED, OR REGISTERED, OR LICENSED FOR USE, UPON A HIGHWAY."[10] The full range of these statements is set forth in Attachment D to this Motion. Attachment D ¶ 4. Complainant cites these manuals as evidence showing that Respondent knew or should have known that the vehicles identified in its own installation manuals were "motor vehicles" because they fall within the CAA definition of "motor vehicle" and they were manufactured pursuant to publicly-available COCs that described these vehicles as both light-duty motor vehicles and passenger cars, and that use of the Subject Products on such vehicles could violate the CAA. *See, e.g., United States v. Gardner*, 860 F.2d 1391 (7th Cir. 1988) (a disclaimer does not negate a defendant's guilt; rather, the disclaimer establishes the fact that the

[10] Respondent also published such disclaimers in advertisements for the Subject Products previously published on its website. CX 353.

defendant is well aware that his or her actions are unlawful). This is clear evidence that Respondent knew or should have known that the Subject Products would be put to the use for which they were designed, and this use would require the removal of TWCCs installed by OEMs in motor vehicles.

F. Respondent's Sales Invoices and Information Provided to EPA by Respondent Regarding Those Sales Invoices Establish 5,338 Violations of the CAA Prohibition Regarding Defeat Devices

In its October 2018 Response, Respondent provided both sales invoices and a spreadsheet for all the Subject Products. CX 7; CX 8. The spreadsheet provided by Respondent listed each of the 57 types of Subject Products separately and provided sales numbers by calendar year for each product. According to the spreadsheet, the total number of Subject Products sold between January 15, 2015, and September 26, 2018 was 5,338. This number was calculated by subtracting the sales of the Subject Products which occurred between January 1, 2015 and January 14, 2015, inclusive, from the number of sales of Subject Products in calendar year 2015, (CX 7, column "Quantity Sold to XX in 2015") and adding this figure to the sales of Subject Products during calendar years 2016 through 2018 (CX 7, columns "Quantity Sold to XX in 2016," "Quantity Sold to XX in 2017," and "Quantity Sold to XX in 2018"). EPA Engineer, Andrew Chew, fully explains these calculations in his declaration. Chew Decl. ¶¶ 13-80. Removing these sales corresponds with the tolling agreement signed by the parties. CX 303. In addition to selling the Subject Products, Respondent also manufactured all of them. CX 6 at 1-2; CX 7; Attachment D ¶ 1; RX 7.

In its prehearing exchange, Respondent claims to have recalculated the number of Subject Products it sold during the relevant time period. Respondent's recalculated number is 4,787. Respondent's Initial Prehearing Exchange ("R's PHE") at 26-28; RX 7 at 2. Thus, the

difference between Respondent's recalculated number of sales and Complainant's alleged number of sales based on the spreadsheet provided by Respondent is 551 (5,338 minus 4,787). *Id*.

Respondent does not provide evidentiary support for the difference between its recalculated sales figures and the sales information it originally provided to Complainant. Respondent claims that 102 sales it had reported as sales to domestic customers were, ultimately provided by the recipient located in the United States to some ultimate foreign entity. R's PHE at 27-28. Respondent's attempts to exclude these sales as violations should be rejected because it remains undisputed that Respondent manufactured the Subject Products in the United States and sold these parts to a customer located in the United States. Each of these acts is an independent and sufficient basis of liability, regardless of the ultimate recipient of the product. It is further established by the sales invoices cited by Respondent to support its claim that each Subject Product was shipped to an addressee within the United States. RX 3 (submitted by Respondent as CBI). It should also be noted that this new information from Respondent comes more than 2 years and 4 months after Respondent provided its October 2018 Response which characterized these sales as being domestic.

The remaining difference between Respondent's recalculated number of sales and Complainant's alleged number of sales based on the spreadsheet provided by Respondent is 449 sales (551 minus 102). Respondent characterizes this difference as resulting from EPA narrowing the parts at issue in this case. *Id*. at 26-27. However, Complainant's violation count is properly based on the information Respondent submitted in its October 2018 Response regarding the 57 types of Subject Products, within the period of January 15, 2015 and September 26, 2018. Without any references to specific information showing why its October 2018 Response

may have been in error, Respondent attempts to contradict the information it previously reported to the EPA. Since it lacks any evidentiary basis, Respondent's attempt to recalculate the number of sales at issue in this case should be rejected.

VI. RESPONDENT'S COMPETITION USE DEFENSE FAILS AS A MATTER OF FACT AND LAW

In its challenge to liability to the violations alleged, Respondent chiefly asserts that Respondent's actions in this case are outside the purview of the Act by claiming the Subject Products only affect vehicles that are used solely for competition. Respondent's first two asserted defenses in its Answer to the Second Amended Complaint, which are relevant to this defense, are stated as follows:

> **First Defense: EPA lacks statutory authority to enforce the Clean Air Act against Borla.**
> Borla's products were designed and intended to be used, and sold for restricted use, only in vehicles designed, intended, and used solely for competition, which vehicles were not included by Congress in the portions of the Clean Air Act under which EPA brings its claims. Accordingly, neither the Clean Air Act nor its valid implementing regulations give the EPA enforcement power over Borla's conduct.
>
> **Second Defense: EPA's interpretation of the statutory provisions on which it bases its allegations is incorrect as a matter of law and is not entitled to any deference.**
> EPA's interpretation and application of Section 203(a)(3)(B) and other provisions of the Clean Air Act, including the term "motor vehicle," is not consistent with the statutory language or involves ambiguous language, and is not entitled to deference.

Ans. Sec. Am. Compl. at 7. These two asserted defenses are collectively referred to in this Memorandum as the Respondent's "Competition Use Defense."

The artifice that Respondent's Competition Defense leans upon is the notion that motor vehicles can be converted or "redesigned" to be "vehicles used solely for competition" and

thereby, somehow disappear from the jurisdiction of the CAA. R's PHE at 7. According to Respondent, Complainant lacks statutory authority to enforce section 203(a)(3)(B) of the Act because, as Respondent says, the Subject Products were not intended for use with, or as part of, any motor vehicle, but rather "vehicles used solely for competition." R's PHE at 8. To make this defense, Respondent takes a convoluted path to avoid the fact that every Subject Product at issue in the Proceeding is designed to fit a vehicle for which a COC has been issued to meet motor vehicle emission standards, as well as specifically advertised for use on EPA-certified motor vehicles. Respondent asserts that the vehicles for which the Subject Products were designed are not "motor vehicles" as that term is defined under the CAA. Rather, Respondent argues that these vehicles are vehicles "used solely for competition" and cite the definitions regarding nonroad vehicles used solely for competition under section 216 of the Act. 42 U.S.C. § 7550 (10)-(11). R's PHE at 8. Respondent says the Act and related implementing regulations allows a vehicle that was originally a "motor vehicle" under the Act to be converted to a vehicle used solely for competition and thereby lose its "motor vehicle" designation. *Id*. 8-11. Respondent states that whether a vehicle is a motor vehicle turns on how the vehicle is used, not by its original attributes or design as set forth in an EPA-issued COC. *Id.* at 8-9. Respondent claims that whether or not the vehicle is covered by an EPA-issued COC is irrelevant, as Respondent claims the COC is just a condition precedent for introducing a motor vehicle into commerce and has no legal effect as to whether that vehicle can be converted out of its certified emissions control configuration after the OEM sells the vehicle. *Id*. As Respondent states, "…a vehicle could originally be *designed* in such a manner as to make it a motor vehicle, but when subsequently used solely for competition, it is no longer a motor vehicle." *Id*. at 8. Respondent further claims that the Subject Products sold by Respondent "were expressly designed and

intended for racing use only, were so labeled, and accordingly were not intended for "motor vehicles" but instead for vehicles "used solely for competition." *Id*. at 7.

As explained further in this Section of the Brief, the plain language of the CAA shows that Respondent's Competition Defense fails as a matter of law, as the defense hinges upon an illusory exemption without statutory basis. The CAA's definition of motor vehicle turns on the motor vehicle's design capabilities as built by the OEM and certified by the EPA. A vehicle is a "motor vehicle" if it is designed for transportation of persons or things on a street. 42 U.S.C. § 7550(2). The CAA is clear that a certified motor vehicle remains a motor vehicle even if it is modified for competition motorsports or is not used on public roads. The definition of "motor vehicle" includes EPA-certified motor vehicles, such as the vehicles at issue in this case, and provides no exclusion for EPA-certified motor vehicles used in competition motorsports. The structure and purpose of the CAA confirm this statutory construction. In this case, other relevant CAA provisions as well as the overall purpose of the CAA show that the word "designed" in the Act's definition of "motor vehicle" refers to the manufacturer's designed capability of that vehicle as certified by EPA and is not mutable by its later use or alterations.

Furthermore, there is no exemption from the prohibition in section 203(a)(3)(B) of the CAA for parts or components on the basis that they are used with, or as part of, motor vehicles used in competition motorsports. 42 U.S.C. § 7522; *see also* 80 Fed. Reg. 40,138, 40,527 (July 13, 2015) ("[I]f a motor vehicle is covered by a certificate of conformity at any point, there is no exemption from the tampering and defeat-device prohibitions that would allow for converting the engine or vehicle for competition use.") *See* 42 U.S.C. § 7550(2). The CAA expressly lists exemptions to the Defeat Device Prohibition in section 203(b) and nowhere mentions competition use. 42 U.S.C. § 7522(b).

All of Respondent's Subject Products are advertised and designed for use on vehicles that manufacturers built and obtained EPA certification to meet emission standards for motor vehicles. Therefore, even if Respondent claimed (which it does not) and could prove that its products are used exclusively on competition-only vehicles (which it has not), those vehicles remain "motor vehicles" subject the CAA Defeat Device Prohibition because they were designed for on-road use and EPA certified them as "motor vehicles."

The Tribunal need not, however, decide the purely legal issue of the existence (or not) of a racing exclusion to the definition of "motor vehicle" or the existence (or not) of an exemption to the Defeat Device Prohibition. That is because Respondent has failed to provide any evidence showing that any of the Subject Products at issue in this Proceeding were indeed installed or used on a vehicle used solely for competition. *See United States v. Gearbox Z Incorporated*, No. CV-20-08003-PCT-JJT (D. Ariz. Mar. 18, 2021) at 6-7 (in an order granting preliminary injunction against defeat device manufacturer, the Court found manufacturer's claim of a motor sports exception to the Defeat Device Prohibition moot as "Defendant has not produced a single piece of evidence that a single one of its products has been used on a motor sports vehicle"). Rather, the facts show that Respondent sold the Subject Products indiscriminately to the public, mainly to wholesalers and advertised the Subject Products to the public without taking any affirmative act to insure or confirm its Subject Products were only used on vehicles solely for competition. Further, Respondent provides no information to show its various disclaimers about "competition only" had any effect at all on keeping the defeat devices off public roads. Thus, Respondent's Competition Use Defense with respect to the Subject Products at issue in this Proceeding stands in the realm of pure speculation and therefore fails.

Further explanation of and support for Complainant's argument against Respondent's Competition Use Defense follows.

A. Respondent Has Produced No Evidence Showing That Any of Its Subject Products Were Actually Used on a Vehicle Used Solely for Competition

It is well-established that the party seeking the exemption bears the burden of proving such an exemption exists and is applicable. *See, e.g.*, *Federal Trade Commission v. Morton Salt Co*., 334 U.S. 37, 44-45 (1948) ("[T]he burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits."). Respondent has failed to put forth any evidence that any of the Subject Products involved in the violations alleged were ever used on vehicles used solely for competition. Rather, the evidence in the record indicates that Respondent really made no legitimate effort to ensure its products were only being used on vehicles used solely for competition. Respondent offered for sale the vast majority of the 57 categories of Subject Products at issue in this Proceeding indiscriminately to the public on its website. CX 353. More important, of the 5,338 Subject Products Respondent sold that are alleged as violations, over 94% were sold to wholesalers. Chew Dec. ¶ 78. Several of these wholesalers are large automotive part distributors and one is one of the largest e-commerce companies in the world. *See*, *e.g*., CX 8 at 873-76, 878, 886. Respondent's claim that it intended its Subject Products to be installed only on vehicles used solely for competition when actually it sold nearly all of its Subject Products to wholesalers defies belief. Certainly, Respondent has not carried its burden in proving that an exception based on the consumer's use of their motor vehicle should be read into the Act or that its parts were exclusively purchased for and used with, or as part of, competition vehicles. Beyond the inclusion of disclaimer language on its website and product literature, which appears disingenuous in light of no actual effort by Respondent to keep its products off public roads, Respondent has not put forth any genuine fact

to back its claim that its products are used exclusively with, or as part of, vehicles used solely in competition. As Respondent's Competition Use Defense has no foundation in fact, it fails to support any genuine issue of material fact regarding Respondent's manufacture and sale of Subject Products in contravention of the Defeat Device Prohibition in this Proceeding

B. The Competition Use Defense is Contrary to the Plain Language of the CAA

Respondent's Competition Use Defense has no legal basis and flies in the face of the plain language of the CAA. Section 216 of the CAA defines "motor vehicle" as "any self-propelled vehicle *designed* for transporting persons or property on a street or highway 42 U.S.C. § 7550(2). Because the CAA does not define the term "designed," this Tribunal should look at its ordinary meaning. *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 91 (2006); *Bostock v. Clayton Cty*., 140 S. Ct. 1731, 1738, 207 L. Ed. 2d 218 (2020) (Courts normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment); *Richards v. United States*, 369 U.S. 1, 9 (1962) ("we … assum[e] that the legislative purpose is expressed by the ordinary meaning of the words used").

The dictionary definition of "designed" is "to create, fashion, execute, or construct according to plan." https://www.merriamwebster.com. Taking the plain definition of "designed," there is no way to read "designed" as encompassing "to use." As read in light of the term's ordinary meaning, the plain language of the CAA forecloses Respondent's argument that a motor vehicle's design can be changed by physical alterations so that it is essentially "redesigned" into something else. *See* R's PHE at 8-11.

If Congress had wanted a "motor vehicle" to be mutable based on its post-certification use or physical alterations, it could have easily written the provision to reflect that. It could have,

for example, defined motor vehicle as something "that is used for transporting persons or property on a street or highway." Or, it could have stated that a motor vehicle is one "designed for transporting persons or property on a street or highway, unless redesigned for other use." These options would have expressly built consumer electability and temporal fluidity into a vehicle's identity, but such options were not enacted by Congress. *See Conn. Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.")

In addition to the Act's motor vehicle definition, the plain language of the Tampering Prohibition in section 203(a)(3)(A) precludes Respondent's theory that motor vehicles can be redesigned to no longer be subject to the Act. Section 203(a)(3)(A) prohibits the knowing removal or rendering inoperative any emission controls on a motor vehicle or motor vehicle engine after the sale and delivery to the purchaser. 42 U.S.C. § 7522(a)(3)(A). There is no provision in section 203(a)(3)(A) that states that removal or rendering inoperative emission controls on a motor vehicle or motor vehicle engine is fine as long as the vehicle is used solely for competition. Respondent's interpretation of the statute is simply untenable with the plain language of section 203(a)(3)(A). *See Griffin v. Oceanic Contractors, Inc.,* 458 U.S. 564, 575 (1982) ("[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.")

Moreover, both the CAA Tampering and Defeat Device Prohibitions prohibit the removing or rendering inoperative of an "element of design" installed in a motor vehicle in compliance with the CAA. *See* 42 U.S.C. § 7522(a)(3). The references to "design" in these

provisions speak to the configuration of the vehicle when certified and not something its users can change.[11]

C. The Competition Use Defense is Not Listed Under the Express Exemptions to the Defeat Device Prohibition Set Forth By the CAA

Tellingly, the CAA expressly lists exemptions to the Tampering and Defeat Device Prohibitions and nowhere is competition use mentioned. CAA § 203(a)(5), 42 U.S.C. § 7522(a)(5). Moreover, the CAA exempts certain motor vehicles from certification requirements based on national security, demonstrations, training, research, investigations, and export. *See* 42 U.S.C. § 7522(b). The CAA further has a specific allowance for conversion of a motor vehicle from its EPA-certified configuration, but only with respect to conversion of gasoline or diesel fuel vehicles to clean-fuel vehicles in accordance with promulgated standards for such conversions. *See* 42 U.S.C. § 7587(d).

But Congress did not create an exemption for motor vehicles used exclusively as, or physically converted into, competition vehicles. Congress clearly thought about what types of uses and modifications should be exempted and chose not to include modification of a motor vehicle for competition use only. Where Congress provides one or more express exceptions to a statutory prohibition, this Tribunal must presume Congress acted "intentionally and purposely" and did not intend for other exceptions to be read into the statute. *See Andrus v. Glover Const. Co.*, 446 U.S. 608, 617 (1980) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent."); *New York v. EPA*, 443 F.3d 880, 887 (D.C. Cir. 2006) (rejecting EPA-claimed exception from New Source Review provisions of the Act where statute expressly

[11] The EPA's regulatory definition of "element of design" is consistent with this reading of the Act. *See* Footnote 2, *supra*.

stated limits). Also, if a "motor vehicle" could morph into something else, and thereby escape the purview of section 203(a)(3)(B), these exemptions would be superfluous. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is 'a cardinal principle of statutory construction' that 'a statute ought . . . to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'") (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)).

D. The 1990 Nonroad Vehicle and Engine Provisions Added to the CAA Confirm that No Competition Use Exemption for Motor Vehicles Exists Under the CAA

The nonroad provisions of the CAA further support finding that no competition use exemption exists for motor vehicles. In 1990, Congress amended the CAA to extend its provisions to nonroad vehicles and nonroad engines (snowmobiles, ATVs, off-highway motorcycles, locomotives, agricultural equipment, and the like). The 1990 Amendments define a "nonroad engine" as an "internal combustion engine . . . that is not used in a motor vehicle or a vehicle used solely for competition." Similarly, a "nonroad vehicle" is defined as a "vehicle that is powered by a nonroad engine and that is not a motor vehicle or a vehicle used solely for competition." 42 U.S.C. § 7550 (10)-(11). These definitions make it clear that "motor vehicles" and "nonroad vehicles" are mutually exclusive categories.[12] Moreover the nonroad vehicle definition explicitly carves out motor vehicles as a category separate from vehicles used solely for competition. Notably, Congress did not touch the definition of motor vehicle while adding a "vehicle used solely for competition" exception to the new nonroad vehicle definition—meaning Congress did not intend to create a "used solely for competition" exemption for motor vehicles.

[12] The EPA's certification regulations are consistent with the Act in that, in setting forth an exemption for nonroad engines/equipment used solely for competition, the regulations state that such exemptions do not apply for motor vehicles. 40 C.F.R. §§ 85.1701(a)(1) and 1068.235.

The legislative history of the 1990 Amendments is consistent with this reading of the nonroad provisions. The Senate Report from the 1990 Amendments states that the phrase "a vehicle used solely for competition" in the nonroad definition "means racing vehicles not capable of safe and practical use on streets and highways." S. Rep. No. 101-228, at 103 (1989) (emphasis added). The report further confirmed that a vehicle's permanent capability is the determining factor, stating that the phrase "does not include those vehicles that are capable of being modified for safe and practical use on streets and highways." *Id*. (emphasis added). Congress' emphasis on capability in the context of the definition of "nonroad" informs the reading of "designed" in the definition of "motor vehicle" as similarly hinging on a vehicle's static designed capability. Moreover, the import of Congress' explanation here is that a vehicle capable of being modified for safe and practical use on streets and highways cannot be "a vehicle used solely for competition," and so it must be a "motor vehicle." Clearly, Congress did not want to exempt vehicles that had even the potential for use on streets and highways from coverage under the CAA.

The 1990 Amendments did not alter the definition of "motor vehicle," and the "used solely for competition" language is an exclusion only to the definitions of "nonroad vehicle" and "nonroad engine." Congress knew how to construct a definition that excluded competition vehicles, and it did so in the "nonroad" definitions. Purpose-built, dedicated race vehicles, such as vehicles raced in the NASCAR Sprint Series and IndyCar Series are examples of such vehicles excluded under the Act. Congress could have expressly excluded from the definition of "motor vehicle" EPA-certified motor vehicles converted to only competition use, but did not. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely

in the disparate inclusion or exclusion." *United States v. McDuffy*, 890 F.3d 796, 800 (9th Cir. 2018) (quoting *Kucana v. Holder*, 558 U.S. 233, 249 (2010)). As noted earlier, Respondent specifically relies upon the Act's "used solely for competition" exclusion in the Act's definition of nonroad engines and vehicles to support its assertion of a competition use exemption applicable to motor vehicles. But, as shown above, Respondent's attempt to fabricate such an exemption applicable to the Act's motor vehicle provisions simply doesn't hold under the weight of the plain language of the statute as well as legislative history.

E. The Plain Reading of the Motor Vehicle Definition Fits Within the Structure and Purpose of the CAA

In ascertaining the plain meaning of [a] statute, this Tribunal must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988); *see also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("the meaning—or ambiguity—of certain words or phrases may only become evident when placed into context"). Our analysis of the plain meaning of the statute is confirmed by examining the statutory context of the definition of "motor vehicle" as well as the purposes of the CAA and its Defeat Device Prohibition. First, it is important to read the definition of "motor vehicle" in the context of the CAA's certification scheme. Reading the word "designed" as occurring at the beginning of a vehicle's life aligns with the CAA's mandate that EPA administer a certification program for new motor vehicles, in which manufacturers must first demonstrate through emissions testing of a prototype vehicle, that their design will satisfy

emissions standards.[13] *See* 42 U.S.C. § 7521(a)-(b), 7525. Emission standards apply not only at the time of the vehicle's creation but throughout the motor vehicle's useful life. 42 U.S.C. § 7521(a)(1) ("[S]tandards shall be applicable to such vehicles and engines for their useful life…whether such vehicles and engines are designed as complete systems or incorporate devices to prevent or control such pollution."). The CAA's scheme for ensuring that motor vehicles actually meet emissions standards depends heavily on the understanding that every motor vehicle will operate with the certified design demonstrated to meet such emissions standards. Thus, it makes sense that Congress' use of the word "designed" in defining "motor vehicle" speaks to the vehicle when certified and not something its users can change.

In addition, the Tribunal should consider the overall policies and objectives of the CAA in discerning the meaning of "motor vehicle." *See Nat'l Bank of Oregon v. Indep. Ins. Agents of America*, 508 U.S. 439, 455 (1993) ("in expounding a statute, we are not guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy."), cited by *In re Harpoon Partnership*, 12 E.A.D. 182, 191-92 (EAB 2005). Reading the definition of "motor vehicle" as based on the designed capability, and not use or later physical alterations, is consistent with the objectives of the CAA. Congress enacted the CAA to combat increasing air pollution due to a variety of factors including motor vehicles. 42 U.S.C. § 7401(a). It sought to "to protect and enhance the quality of the Nation's air resources so as to

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[13] The CAA instructs EPA to regulate sources that "contribute[] to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7521(a). The EPA does so by establishing standards for the emissions of harmful air pollutants from motor vehicles and motor vehicle engines, which include nitrogen oxides, particulate matter, carbon monoxide, and non-methane hydrocarbons. 42 U.S.C. § 7521(a)(3)(A).

promote the public health and welfare and the productive capacity of its population" *Id.* § 7401(b). In Title II of the CAA, Congress instructed EPA to address mobile sources of air pollution by establishing emission standards. Those objectives are well served by the CAA's plain language which sets forth a static definition of motor vehicle that establishes certainty, facilitates compliance, makes the EPA's regulatory authority clear, and enables the EPA to enforce the Tampering and Defeat Device Prohibitions. It is wholly consistent with the objectives of the Act to understand the purpose of the Tampering and Defeat Device Prohibitions is to ensure emission controls on motor vehicles introduced into commerce remain functional. Reading a competition use exemption into the Act would thwart such purpose, undermine the Act's objectives, and therefore cannot logically coexist with the Act's purpose and objectives within the fabric of the statute.

F. EPA's Regulations and Guidance Accord with the Plain Reading of the Definition of Motor Vehicle under the CAA

In its Prehearing Exchange, Respondent takes pains to argue its interpretation of the CAA is consistent with the EPA's regulatory definition of motor vehicle. R's PHE at 8-9. The regulatory definition is at 40 C.F.R. § 85.1703 and reads as follows:

> (a) For the purpose of determining the applicability of section 216(2), a vehicle which is self-propelled and capable of transporting a person or persons or any material or any permanently or temporarily affixed apparatus shall be deemed a motor vehicle, unless any one or more of the criteria set forth below are met, in which case the vehicle shall be deemed not a motor vehicle:
> (1) The vehicle cannot exceed a maximum speed of 25 miles per hour over level, paved surfaces; or
> (2) The vehicle lacks features customarily associated with safe and practical street or highway use, such features including, but not being limited to, a reverse gear (except in the case of motorcycles), a differential, or safety features required by state and/or federal law; or
> (3) The vehicle exhibits features which render its use on a street or highway unsafe, impractical, or highly unlikely, such features including, but not being limited to,

> tracked road contact means, an inordinate size, or features ordinarily associated with military combat or tactical vehicles such as armor and/or weaponry.
>
> (b) Note that, in applying the criterion in paragraph (a)(2) of this section, vehicles that are clearly intended for operation on highways are motor vehicles. Absence of a particular safety feature is relevant only when absence of that feature would prevent operation on highways.

None of these exemptions turn on vehicle use, and the EPA did not set forth an exemption for motor vehicles used for competition.[14] Nonetheless, Respondent reads 40 C.F.R. § 85.1703 as allowing a user of a motor vehicle to convert it to a vehicle exempted from the CAA by changing the vehicle's features to fit the exemption criteria set forth in the regulations. R's PHE at 9-10. However, the regulatory history clearly indicates that this regulation incorporates capability of the vehicle's design and not its use to establish what vehicles are subject to motor vehicle emission standards. In March 1974, EPA notified the public of a proposed rulemaking aimed at creating exemptions and exclusions for motor vehicles and motor vehicle engines. *See* 39 Fed. Reg. 32,609 (Sept. 10, 1974). As part of that rulemaking, the EPA promulgated a regulatory definition of "motor vehicle" based on its interpretation of the CAA. During the public comment period, EPA received at least two comments suggesting that EPA should make some exclusions to the regulatory definition based on how an owner intended to use a vehicle. Notably, the Specialty Equipment Manufacturer Association ("SEMA"), a trade group for aftermarket auto parts manufacturers, asked the EPA to exempt from the definition of "motor vehicle" certain vehicles that were intended for "show or hobby use." *Id*. The EPA specifically rejected these

[14] The definition of motor vehicle under 40 C.F.R. § 85.1703 falls within 40 C.F.R Part 85, Subpart R – Exclusion and Exemption of Motor Vehicles and Motor Vehicle Engines, under which the regulations provide exemptions for motor vehicles from emission certification requirements for reasons of export, national security, certain pre-certification uses, and testing. This subpart explicitly states that nonroad competition exemption do not apply for motor vehicle engines. 40 C.F.R. § 85.1701(a)(1). Moreover, under the regulations, the only motor vehicle conversion exemption from the Tampering Prohibition set forth in 40 C.F.R. Part 85 is under Subpart F, which provides criteria for exemption of clean alternative fuel conversions.

suggestions, choosing instead to base its regulatory definition on design capability rather than use. In rejecting SEMA's suggestion, the EPA explained:

> The recommendation of SEMA . . . was not accepted because such exclusion would be based upon the intended use by the purchaser rather than the capability of the vehicles. **The Agency views a policy of exclusion based upon owner intent to be virtually unmanageable and inconsistent with the Act because vehicles with on-road, off-road capabilities are typically operated in both situations** . . . In lieu of the "designed primarily for" test, we have adopted the "capable of" test which is consonant with the literal language and the apparent intent of the Act. A vehicle's capability is a more workable, objective standard than its intended or designed for use, which is dependent upon the manufacturer's subjective determination of the ultimate use to which the vehicle will be put. . . .The Agency believes that it is not feasible to regulate a vehicle based on the use it is primarily designed for. In lieu of the "designed primarily for" test, we have adopted the "capable of" test which is consonant with the literal language and the apparent intent of the Act.

39 Fed. Reg. at 32,609 (emphasis added).

Thus, the EPA specifically determined that a motor vehicle's design cannot be changed by intended use. From the regulatory history it is clear the Agency crafted the regulatory definition of motor vehicle specifically to set forth its designation based upon the vehicle's design capability and took pains to avoid language that could be construed to allow a vehicle subject to emission standards to escape such emission standards by use. And most important, there is no provision anywhere in the EPA's regulations that provides that modifying a motor vehicle's features can abrogate the applicability of the vehicle to emission standards or the Tampering and Defeat Device Prohibitions.

Respondent additionally cites to certain EPA vehicle and engine importation guidance for the proposition that the Agency has allowed vehicles converted for racing to be imported without being certified. R's PHE at 10 (reference to EPA's *Overview of EPA Import Requirements for Vehicles and Engines* (March 2011) ("EPA Import Overview"), RX 73, accessible at https://19january2017snapshot.epa.gov/sites/production/files/2014-

02/documents/420b11015.pdf; and *Procedures for Importing Vehicles and Engines into the United States* (July 2010) ("EPA Import Procedures"), RX 74. These policies and statements have no relevance to tampering or defeat devices, but refer to compliance determinations by EPA at the point of importation. As defined by the CAA, at the point of importation, regardless of whether a vehicle has been used in the past, it is "new" and if it is a motor vehicle then it must be covered by an EPA-issued COC or subject to an exemption. 42 U.S.C. § 7550(3). These policies and statements merely confirm that at the point of importation, EPA will determine whether a vehicle must be EPA-certified, in part by applying the regulatory definition in 40 C.F.R. § 85.1703. If it is not a "motor vehicle" according to the objective design criteria in the definitions, then it need not be EPA-certified. In citing the EPA importation guidance, Respondent fails to note that the guidance explicitly provides that a vehicle originally manufactured as a U.S.-version vehicle that has since been modified or altered will not meet U.S. emission requirements, and cannot be imported unless on condition the importer shows within 120 days that the vehicle has been brought back to its original configuration or imported through an Independent Commercial Importer specially designated by EPA, which will convert the vehicle to meet EPA emission standards. EPA Import Overview at 2; EPA Import Procedures at 15, 36-37. Read as a whole, these guidance documents cannot be plausibly understood to endorse the view that the Agency recognizes an exemption from emission standards for motor vehicles used or converted for use solely for competition.

G. Respondent's Reading of the CAA is Illogical as it Eviscerates Enforceability of the Defeat Device Prohibition in Contravention of Congressional Intent.

To prove a section 203(a)(3)(B) violation, the government must show that the part was "intended for use with, or as part of, any motor vehicle or motor vehicle engine." To do this, it is

sufficient to show that the part was designed or advertised as compatible with an EPA-certified motor vehicle regardless of how that vehicle was actually used. However, if, as Respondent contends, a "motor vehicle" could lose that identity due to its use or by alteration, then that might not end the inquiry and enforcement could be much more difficult with defendants injecting issues about how each purchaser's vehicle was used into the case. And if, as Respondent suggests, the Government would bear the burden to prove that the part was put for use with a "motor vehicle" that had not been transformed into something else (*see* R's PHE at 13) this would impose a nearly impossible burden because many manufacturers and sellers sell to retailers and may not even know who the end users of these parts are.

Respondent's proposed evidentiary burden on the EPA contravenes Congress' purpose in amending the prohibitions of section 203(a)(3) of the CAA in 1990. Noticeably absent from Respondent's prehearing exchange is any mention of such changes of the Tampering and Defeat Device Prohibitions made through the 1990 amendments to the CAA. The CAA did not originally prohibit the manufacture and sale of defeat devices but only tampering with emissions controls. *See* 42 U.S.C. § 7522(a)(3) (1988). The 1990 Amendments sought to make enforcement easier by extending the defeat device provisions to manufacturers and sellers of parts that "bypass, defeat or render inoperative" emission controls and software. The change eliminated the need for EPA to prove each part was actually installed on a motor vehicle, requiring instead only that the defendant know or should know that the part was intended to be installed on a motor vehicle or motor vehicle engine. *See* 42 U.S.C. § 7522(a)(3)(B). A key reason for these changes, as expressed in the Senate Report, was to simplify EPA's method of proof which was "indirect and cumbersome." Specifically, the 1990 Amendments Senate Report states:

> Presently, EPA must show that the manufacture or sale of a defeat device is a violation of section 203(a) by proving that such an activity causes tampering by a regulated party. See, *e.g., Ced's Inc. v. U.S. E.P.A*., 745 F.2d 1092 (7th Cir. 1984). Rather than require such an indirect and cumbersome method of proof, a new section 203(a)(3)(B) has been added to the Act to clearly prohibit the manufacture, sale, or offering for sale of such devices where it is known or should be known that they will be used for tampering.

S. Rep. No. 101-228, at 124 (1989), reprinted in 1990 U.S.C.C.A.N. 3385, 3509. Reading the definition of "motor vehicle" as Respondent does, would be antithetical to Congress' goal of removing cumbersome methods of proof that burden EPA's ability to enforce against defeat devices.[15]

As written by Congress, the CAA's definition is unambiguous. But under Respondent's construction, ambiguities would abound resulting in an unworkable construction. This Tribunal should not embrace such an unworkable construction. *See Robers v. United States*, 572 U.S. 639, 642 (2014); *United States v. Cleveland Indians Baseball Co*., 532 U.S. 200, 213–14, 218 (2001); *Mac's Shell Serv., Inc. v. Shell Oil Prod. Co. LLC*, 559 U.S. 175, 187 (2010). Thus, Respondent's

[15] Rather than cite and discuss the very pertinent 1990 Amendments that Congress adopted to ease EPA's method of proof in defeat device cases, Respondent focuses on a verbal exchange between two members of Congress that occurred twenty years earlier. R's PHE at 11. In the 1970 dialogue that Respondent quotes, one member responds to a compound question by the other about racing vehicles both in the context of new vehicle certification and post-certification modifications. It is uncertain which part of the question was being answered. *See id*. Regardless, these statements have minimal weight in light of the plain language of the CAA and the Senate Report explaining Congress' 1990 changes to section 302(a)(3)(B). *See Kenna v. U.S. Dist. Court for C.D. Cal.*, 435 F.3d 1011, 1015 (9th Cir. 2006) ("Floor statements are not given the same weight as some other types of legislative history, such as committee reports, because they generally represent only the view of the speaker and not necessarily that of the entire body."); *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 515 (1990) (a Senate report is evidence of "the primary objective" of a statute); *Hernandez v. Williams, Zinman & Parham PC*, 829 F.3d 1068, 1080 (9th Cir. 2016) ("[W]e generally view an official committee report as a reliable indicator of congressional intent.")

construction of "motor vehicle" would, at the very best, substantially complicate enforcement, and under its argument that the Agency bears the burden of proof, could paralyze the EPA's ability to enforce the Defeat Device Prohibition. This would essentially enable removal of emission controls on potentially millions of vehicles that use our public roads with little risk of consequence. The statutory purpose of protecting air quality by ensuring emissions control stay functional is thus not served by an interpretation that renders the Defeat Device Prohibition exceedingly difficult to enforce. *Cf United States v. Volvo Powertrain Corp*., 854 F. Supp. 2d 60, 70 (D.D.C. 2012), rehearing en banc denied 758 F.3d 330 (D.C. Cir. 2014) ("an interpretation 'which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable,' . . . [or] unreasonably difficult to enforce.") (quoting Restatement (Second) of Contracts § 203(a)). Accordingly, Respondent's proposed construction clearly undermines the purpose of the CAA's mobile source provisions to protect our air quality by ensuring that vehicles adhere to emissions limits. Such a construction cannot stand. *Griffin*, 458 U.S. at 571 (statutory construction must be consistent with legislative purpose).

VII. ARGUMENT IN SUPPORT OF MOTION TO STRIKE AFFIRMATIVE DEFENSES

A. Standards for Motions to Strike

The Rules of Practice require that an answer to a complaint contain "[t]he circumstances or arguments which are alleged to constitute the grounds of any defense." 40 C.F.R. § 22.15(b). With regard to affirmative defenses, the Rules of Practice further provide that "[t]he respondent has the burdens of presentation and persuasion for any affirmative defenses." 40 C.F.R. § 22.24(a).

While the Consolidated Rules do not expressly address motions to strike, the Federal Rules of Civil Procedure are used as guidance where the Consolidated Rules are silent. *In re Carbon Injection Sys., LLC.*, EPA Docket No. RCRA-05-2011-009, 32102 EPA ALJ Lexis 6, at *2 (February 12, 2012) (citing *In re Wego Chem. & Mineral Corp.*, 4 E.A.D. 513, 524 (EAB 1993)); *Aguakem Caribe, Inc*., 2010 EPA ALJ LEXIS 9, *20 (June 2, 2010). Rule 12(f) of the Federal Rules of the Civil Procedure provides that a court "may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). "[A] mere rote recitation of generally available affirmative defenses without citation to any other fact or premise from which an inference may arise that the stated defense is logically related to the case in any way," is appropriately struck upon a motion to strike made pursuant to Rule 12(f). *In the Matter of Eagle Brass Co.*, 2016 WL 748188 at *17 (OALJ Dec. 21, 2016), citing *Mifflinburg Tel, Inc. v. Criswell*, 80 F. Supp. 3d 566, 574 (M.D. Pa. 2015).

Motions to strike are viewed with disfavor and such motions will be granted "only if the insufficiency of the defense is clearly apparent." *Carbon Injection Sys.*, *supra* at 3. A motion to strike will be granted if the "affirmative defense as pleaded is invalid as a matter of law." *Id.* at 9. It is respectfully submitted that all of Respondent's affirmative defenses fail as a matter of law and should be struck.

B. Motion to Strike Respondent's Fourth Defense - "EPA's actions in pursuing enforcement against Respondent are inconsistent with its own guidance for pursuing administrative enforcement."

Respondent claims Complainant should be barred from pursuing enforcement in this case on the basis that such enforcement is inconsistent with Executive Order 13,924 and related EPA implementing guidance. Exec. Order 13,924, *Executive Order on Regulatory Relief to Support*

Economic Recovery, 85 Fed. Reg. 31,353 (May 19, 2020); *see also* Susan Bodine, *Memorandum re Implementation of Executive Order 13924* (Nov. 25, 2020). This defense should be dismissed on the basis that President Biden revoked Executive Order 13,924 on February 24, 2021, and directed agency heads to promptly rescind any orders, rules, regulations, guidelines, or policies implementing or enforcing Executive Order 13,924. Executive Order 14,018, 86 Fed. Reg. 11,855 (Feb. 24, 2021). Should this Tribunal choose to look beyond this revocation, the EPA's motion to strike the Fourth Defense should still be granted for two reasons: Executive Order 13,924 does not support a cause of action or defense to challenge the EPA's compliance with the Order; and the Order gives the EPA broad discretion to determine how to comply with the Order.

The Respondent does not have legal grounds to challenge the EPA's enforcement action under Executive Order 13,924 because the Order pertains to the internal management of executive agencies and explicitly disclaims any such private right. An entity does not have a legal basis to raise a defense to an agency's compliance with an Executive Order when the Order expresses "clear and unequivocal intent that agency compliance with [the Order] not be subject to judicial review" and is "devoted solely to the internal management of the executive branch." *See Michigan v. Thomas*, 805 F.2d 176, 187 (6th Cir. 1986); *Meyer v. Bush*, 981 F.2d 1288, 1297 (D.C. Cir. 1993); *see also In re Kimberly-Clark Corp.*, EPA Docket No. RCRA-88-04-R, 1988 WL 429706, at *2 (April 8, 1988). Subsection 9(d) of Executive Order 13,924 expressly provides that the Order does not create a cause of action by stating that the "order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person." Exec. Order No. 13,924, 85 Fed. Reg. 31,353, 31,356 (May 19, 2020). The Order is also primarily focused on the internal management of the executive branch

because the provisions direct the "heads of all agencies" to follow specified procedures. *Id.* at 31,354-55.

Further, Executive Order 13,924 gives EPA broad discretion regarding how to implement the Order. An Executive Order provides federal agencies with "considerable leeway … in determining how to comply with the spirit and letter of the Executive Order" when it uses language such as "to the greatest extent practicable and permitted by law" and "as appropriate." *In re Avenal Power Ctr., LLC*, 15 E.A.D. 384, 401 (EAB 2011). Executive Order 13,924 instructs federal agencies to take specified actions, but repeatedly asserts that the agencies' actions must be taken in accordance with applicable law and at their discretion. *See* Exec. Order No. 13,924. For example, Section 6, which covers "Fairness in Administrative Enforcement and Adjudication" states that agencies "shall consider the principles of fairness … and revise their procedures" to the extent that such actions are "*consistent with applicable law* and *as they deem appropriate* in the context of particular statutory and regulatory programs and policy considerations identified in … this order." 5 Fed. Reg. at 31,355 (emphasis added). As such, it is within EPA's discretion to determine how to exercise its enforcement discretion in accordance with the Executive Order. Therefore, Respondent's Fourth Defense must fail as a matter of law and should be struck.

C. Motion to Strike Respondent's Fifth Defense: "Statute of Limitations"

Respondent claims the statute of limitations bars the prosecution of activities occurring more than five years (plus any extension provided by the parties' tolling agreement) before the valid initiation of these proceedings. R's PHE at 13; 28 U.S.C. § 2462.

Complainant alleges Respondent violated the CAA by manufacturing, selling, and offering for sale at least 5,338 exhaust system defeat devices between January 15, 2015, and September 26, 2018. Sec. Am. Compl. at 11. The parties have executed a Tolling Agreement which establishes that the period commencing January 15, 2020, and ending on July 1, 2020 (inclusive), will not be included in computing the running of any statute of limitations that might be applicable to this action. CX 303. The original Complaint in this Proceeding was filed on June 30, 2020. Thus, the first and subsequent violations alleged by Complainant are within the statute of limitations as tolled by the Tolling Agreement. Respondent's Fifth Defense should be struck.

D. Motion to Strike Respondent's Sixth Defense: Violation of Separation of Powers

Respondent's Sixth Defense must fail because (1) its non-delegation challenge is refuted by the Act's plain language; and (2) its constitutional challenge to the non-delegation doctrine contravenes settled jurisprudence.

First, Respondent argues the EPA's interpretation of "motor vehicle" is far too expansive to have been guided by an intelligible principle. R's PHE at 14. In reality, Respondent, not Complainant, has asked this Tribunal to adopt a definition of "motor vehicle" which impermissibly deviates from the clear statutory language, as discussed in Section VII, *supra*.

Respondent next argues the EPA's Penalty Policy[16] is similarly without a Congressional north star because it punishes violations "with little or no demonstrated harm." First, the Penalty Policy is grounded upon the statutory penalty factors under section 205(c)(2), 42 U.S.C. § 7524(c)(2) (Penalty Policy at 5), so to claim it is not guided by any intelligible principle set forth by Congress is simply not true. Respondent's argument is belied by its own admissions that

[16] Clean Air Act Title II Vehicle & Engine Civil Penalty Policy January 2021.

its exhaust parts necessitate the removal of catalytic converters for successful installation. Attachment D ¶ 3. As discussed in Section III.A, *supra*, TWCCs are essential emission control elements of design that protect the public from harmful pollutants such as CO, NOx, and VOC. Thus, Respondent's claim that the sale of its 5,338 Subject Products have resulted in little or no harm to public health or the environment defies common sense.

Finally, Respondent argues, in the event this Tribunal finds the CAA to provide a sufficiently intelligible principle to guide the EPA's hand, the "entire nondelegation framework deviates from the Constitution's structure and should be rejected." R's PHE at 14. In making such a broad attack on the non-delegation doctrine and intelligible principle standard, Respondent challenges almost one hundred years of settled jurisprudence. *See J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928) ("If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power."); *Mistretta v. U.S.*, 488 U.S. 361, 416 (1989) ("[W]e have almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law."); *Whitman v. American Trucking Assoc.*, 531 U.S. 457, 474 (2001) ("In the history of the Court we have found the requisite intelligible principle lacking in only two statutes.") Therefore, Respondent's Sixth Affirmative Defense must fail as a matter of law and should be struck.

E. Motion to Strike Respondent's Seventh Defense: Lack of Fair Notice

Respondent claims Complainant should be barred from taking this enforcement action based on lack of fair notice, a component of due process afforded under the Fifth Amendment of the Constitution, wherein liability may not be imposed where a law or regulation is not

sufficiently clear to warn a party about what is expected of it. R's PHE at 14, citing *General Electric Co. v. EPA*, 53 F.3d 1324, 1328 (D.C. Cir. 1995).

Fair notice does not require that a statute be subject to a single interpretation; rather, it requires that the interpretation set forth by the agency could be ascertained by regulated entities through a plain reading of the statute. *In re Tenn. Valley Auth.*, 9 E.A.D. 357, 412 (EAB 2000), *appeal dismissed*, 336 F.3d 1236 (11th Cir. 2003), *cert. denied*, 541 U.S. 1030 (2004); *In re Harpoon Partnership*, 12 E.A.D. 182, 191-92 (EAB 2005); *In re V-1 Oil Co.*, 8 E.A.D. 729, 751-53 (EAB 2000). As explained in Section VII, supra, the EPA's interpretation of the Act as prohibiting the Respondent's conduct is ascertainable from a plain reading of the statute, and the Respondent was thus given fair notice.

Respondent argues that it interpreted certain Agency statements and past practices to mislead it into thinking its conduct alleged to be violative by Complainant was allowed under the CAA. R's PHE at 14-16. However, the EPA statements cited by the Respondent refer to the exercise of the Agency's enforcement discretion and in no way constitutes Agency interpretation of the Act's Defeat Device Prohibition. With respect to enforcement practice, there is nothing inconsistent about the EPA viewing certain conduct as a violations of the law while also making the same conduct a low priority for the commitment of enforcement resources.

Moreover, even if the Agency's views on and implementation of Section 203(a)(3)(B) were found to be inconsistent, the prohibition on defeat devices is clearly ascertainable from the text of the statute, and as such, does not offend due process. *United States v. Navistar International Corp*., 240 F. Supp. 3d 789, 799 (N.D. Ill. 2017) (in enforcement action against heavy-duty engine manufacturer, the Government's application of what is a "produced" engine could be ascertained from the text of the EPA's regulations, and thus constituted fair notice

notwithstanding the manufacturer's claim the Agency has inconsistently applied the regulation in the past). For these reasons, Respondent's Seventh Defense must fail as a matter of law and should be struck.

F. Motion to Strike Respondent's Eighth Defense: Violation of Due Process and Sixth Amendment Rights

Respondent claims Complainant violates its Sixth Amendment procedural rights by virtue of the alleged penal character of this proceeding. R's PHE at17-18. Respondent's Eighth Defense fails because civil administrative proceedings are not subject to Sixth Amendment constitutional requirements, and Respondent has provided insufficient support for its assertion that the civil penalties assessed in this action are "penal in character." Administrative penalties that are characterized by Congress as "civil" and do not impose any form of criminal punishment are not subject to Sixth Amendment constitutional requirements. *See United States v. J.B. Williams Co.*, 498 F.2d 414, 421 (2d Cir. 1974) (penalty characterized by Congress as civil is not criminal in absence of other sanctions); *In re D'Amato*, EPA Docket No. CWA-10-2010-0132, 2011 WL 3274057, at *2 n.3 (May 27, 2011) (Sixth Amendment challenge available only in criminal proceedings); *In re Martex Farms, Inc.*, EPA Docket No. FIFRA-02-2005-5301, 2006 WL 1582510, at *9 (Feb. 23, 2006) (constitutional protection for criminal proceedings not applicable in civil administrative enforcement). Congress characterized penalties assessed pursuant to CAA section 205(a) as "civil" and authorized the EPA to bring a "civil action" to recover such a "civil penalty." 42 U.S.C. § 7524(a)-(b).

Further, section 205(c)(1) of the Act establishes procedures that the EPA Administrator must follow when assessing a civil penalty. *See* 42 U.S.C. § 2524(c)(1). To the extent that the Respondent finds the procedures set forth in section 205(c)(1) to violate constitutional due

process, an administrative proceeding is not the forum in which to bring forth constitutional challenges to Congressional enactments. *See Johnson v. Robinson*, 415 U.S. 361 (1974); *City of Irving*, 10 E.A.D. at 118; *City of Marlborough*, NPDES Appeal No. 04-12, 2005 WL 627643, at *6 & n.19 (EAB 2005); *In re D'Amato*, No. CWA-10-2010-0132, 2011 WL 3274057, at *2 n.3.

Therefore, Respondent's Eighth Defense fails as a matter of law and should be struck.

G. Motion to Strike Ninth Defense: Violation of the Ex Post Facto Clause

Respondent seeks to avoid this Proceeding by alleging that Complainant violates the Ex Post Facto Clause by imposing criminal penalties on Respondent's behavior, "which was innocent when done." *Beazell v. Ohio*, 26 U.S. 167, 169 (1925); Art. I § 9. Respondent's Ninth Defense fails for three reasons. First, Complainant's enforcement of the Defeat Device Prohibition does not represent an ex post facto law or interpretation of the law. Complainant's application of the Defeat Device Prohibition is grounded in the text of the CAA, the current codification of which has been in effect since 1990. Second, this proceeding is properly viewed as a civil enforcement matter and not, as Respondent would have this Tribunal believe, a criminal matter, meaning the Ex Post Facto Clause is of no relevance. *United States v. D.K.G. Appaloosas, Inc*., 829 F.2d 532, 540 (5th Cir. 1987) ("It is beyond dispute that the ex post facto clause applies only to criminal cases.") (internal citations omitted). Third, section 205(a) of the Act imposes civil penalties, not criminal penalties, on violators, further demonstrating that the prohibition on ex post facto laws does not apply.

Only criminal laws or laws that are "penal in nature" are subject to the constitutional prohibition against ex post facto laws. *In re Gabey*, No. 83-0040-02, 1983 WL 234706, at * 2 (EAB 1983). To be considered penal in nature, the civil law must be "essentially criminal." *United States v. D.K.G. Appaloosas, Inc.*, 829 F.2d at 540. To determine whether a civil

provision is essentially criminal, the Court undergoes a two-step statutory analysis. First, the Court considers both the text and legislative history of the statute to determine whether Congress indicated a preference for either the civil or criminal "label." *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 362 (1984). If the Court finds Congress indicated the provision to be civil, "only the clearest proof that the purpose and effect of the forfeiture are punitive will suffice to override Congress' manifest preference for a civil sanction." *Id.* at 365 (citations omitted). The penalties assessed by EPA in this action have been characterized by Congress as "civil," and Complainant's Second Amended Complaint does not impose any form of criminal punishment on the Respondent. *See J.B. Williams Co.*, 498 F.2d at 421; *D'Amato*, No. CWA-10-2010-0132, 2011 WL 3274057, at *2 n.3 (EAB 2011); *Martex Farms, Inc.*, No. FIFRA-02-2005-5301, 2006 WL 1582510, at *9 (EAB 2006). Absent "the clearest proof" that this proceeding is intended to be criminally punitive, the Tribunal should take Congressional intent as indicated. *United States v. One Assortment of 89 Firearms*, 465 U.S. at 365. As this is a civil proceeding, the Ex Post Facto Clause is unavailable as a defense. Respondent's Ninth Defense thus fails as a matter of law and should be struck.

H. Motion to Strike Respondent's Tenth Defense: The Rule of Lenity

Respondent again raises the specter of penal sanctions, this time asking this Tribunal to apply the Rule of Lenity, a canon of criminal statutory construction. As this is a civil proceeding (section 205 of the Act, 42 U.S.C. § 7524, sets forth civil enforcement provisions), and Respondent is unable to identify a grievous ambiguity in CAA provisions at issue incapable of being resolved by a reviewing court's recourse to text, purpose, and history, the rule of lenity does not apply.

The rule of lenity compels a reviewing court to resolve ambiguous criminal statutes in favor of the defendant. *United States v. Bass*, 404 U.S. 336, 347 (1971). The ambiguity must be grievous for the rule to apply. After reviewing "everything from which aid can be derived," the ambiguity must be so severe as to render an interpretation "no more than a guess." *United States v. Wells*, 519 U.S. 482, 499 (1997) (internal citations omitted).

EAB precedent is consistent with the rule's exclusive application to criminal proceedings. *In re Lazarus, Inc.*, 7 E.A.D. 365 (EAB 1997). Complainant seeks civil penalty assessment undersection 205(a) of the CAA, 42 U.S.C. § 7524(a), rendering the rule inapplicable.

The rule has been advanced as the "penal canon" in cases involving civil penalties deemed sufficiently punitive to rise to the level of criminal penalty but this view is not persuasive. *Fulman v. United States*, 434 U.S. 528, 533 n.8 (1978) (holding the rule unavailable when the penalty at issue was easily avoided by following statutory guidelines); *BP Expl. & Prod. Inc. v. United States*, No. 14-1217, 2015 WL 1731421, at *14 (2015), *cert. denied*, 576 U.S. 1055 (2015). The civil penalty assessed in this case fails to rise to the level of criminal penalty, as it is within statutory limits and easily may have been avoided by following statutory guidelines. 42 U.S.C. § 7524(a).

Respondent argues that, notwithstanding this is a Proceeding to assess civil, rather than criminal, penalties, the rule of lenity should nonetheless apply to this Proceeding given, as Respondent contends, "the anti-tampering provisions can be used in criminal, as well as enforcement proceedings." R's PHE at 11. However, section 203(a)(3) is a civil compliance provision and there is no criminal prohibition specified in Title II of the CAA. Moreover, Respondent merely states a conclusory allegation, and fails to assert "[t]he circumstances or arguments which are alleged to constitute the grounds of any defense," required by the Rules of

Practice. 40 C.F.R. § 22.15(b). Thus, Respondent provides no grounds to support this defense, which justifies the defense to be struck.

Even if this Tribunal found the rule of lenity was applicable to this Proceeding, the rule of lenity applies only where "after consulting traditional canons of statutory construction" there is a "grievous ambiguity" where the court "can make no more than a guess as to what Congress intended." *Shular v. United States,* 140 S. Ct. 779, 787 (2020); *Muscarello v. United States*, 524 U.S. 125, 138-39 (1998). The CAA's definition of "motor vehicle," as discussed above, is not ambiguous at all, let alone "grievously ambiguous" leaving the Tribunal to guess what Congress intended. Thus, this Tribunal need not resort to the rule of lenity to resolve this case and this defense should be struck.

I. Motion to Strike Respondent's Eleventh Defense: Violation of Due Process and of the Seventh Amendment Right to a Jury Trial

Respondent claims this proceeding violates its Seventh Amendment right to a trial by jury. As this proceeding involves the adjudication of public rights, the administration and enforcement of which were permissibly delegated to the EPA by Congress, the Seventh Amendment does not apply. The Seventh Amendment provides, "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved…." U.S. Const. amend. VII. This right is available only in cases where the cause of action was accorded that right in 1791 or involves legal rights and remedies "analogous" to those historical rights. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989). The Court has identified two factors to be considered in a Seventh Amendment challenge involving statutory rights: (1) whether the statutory cause of action is comparable to those pursued in 18th century courts of law (as opposed to courts of equity); and (2) whether the remedy sought is legal or

equitable in nature. *Tull v. United States*, 481 U.S. 412, 417-18 (1987). However, even if both factors suggest the cause of action is analogous to a private right, the challenge fails if the cause of action has been permissibly delegated by Congress to an executive department. *Id.* at 418 n.4 (holding the Seventh Amendment not applicable to administrative proceedings). The administration and enforcement of the Act was permissibly delegated by Congress to EPA. *See Whitman,* 531 U.S. at 472-76. Furthermore, the public rights doctrine provides that Congress may permissibly delegate factfinding and initial adjudication of statutorily created public rights to an executive or administrative body without violating a defendant's Seventh Amendment's rights. *Atlas Roofing Co. v. Occupational Safety and Health Rev. Comm'n.*, 430 U.S. 442, 455 (1977).

Respondent acknowledges this precedent before challenging the constitutionality of the public rights doctrine as a whole. Respondent directs this Tribunal to two Supreme Court opinions suggesting "some willingness to reconsider" settled public rights doctrine. These cases are unpersuasive in this context. The first, involving a trademark dispute under the Lanham Act, raises the question of whether administrative agencies may properly resolve "quasi-private" rights or statutory entitlements akin to "privileges or franchises that are bestowed by the government on individuals." *B & B Hardware, Inc. v. Hargis Indust., Inc.*, 575 U.S. 138, 171 (2015) (Thomas, J. and Scalia, J., dissenting) (internal quotations omitted). There has been no quasi-private right conferred upon Respondent to undermine the EPA's enforcement against the indiscriminate sale of defeat devices or to violate a critical statutory prohibition of the CAA. Even if this Tribunal found Respondents activities to represent underlying quasi-private rights, Congress may delegate the adjudication of statutory quasi-private rights to a non-Article III court where the right "serves a public purpose as an integral part of a program safeguarding the public

health." *Thomas v. Union Carbide Agricultural Prods. Co.*, 473 U.S. 568, 589 (1985) (rejecting constitutional challenge to data-consideration provisions of pesticide registration under the Federal Insecticide, Fungicide, and Rodenticide Act). Complainant can suggest few programs more directed towards safeguarding the public health than their enforcement of the CAA. Finally, Respondent fails to explain how the right to clean air is not a true public right. Its second case therefore only serves to weaken its argument. *Stern v. Marshall*, 564 U.S. 462, 504-05 (2011) (Scalia, J. concurring) ("I agree that Article III judges are not required in the context of…true public rights cases.") (internal quotations omitted).

Respondent accuses Complainant of wielding "crushing penalties," "oppressive laws," and "punitive proceedings." R's PHE at 19. Administrative assessment of civil penalties has consistently been upheld. *See Tull*, 481 U.S. at 417-18 ("Since Congress itself may fix the civil penalties, it may delegate that determination.") *See also Marine Shale Processors, Inc. v. EPA*, 81 F.3d 1371, 1376 (5th Cir. 1996) (rejecting a Seventh Amendment challenge as arriving "decades, perhaps centuries, too late"); *Pepperell Assoc. v. EPA*, 246 F.3d 15, 29 (1st Cir. 2001) (holding penalty assessment as within EAB's discretion). As discussed *infra*, penalties assessed will be proportionate to Respondent's violations and well within statutory limits and thus give this Tribunal no reason to question whether the adjudication of public rights under section 203(a)(3)(B) are unconstitutionally oppressive to Respondent.

For these reasons, Respondent's Eleventh Affirmative Defense fails as a matter of law and should be struck.

J. Motion to Strike Twelfth Defense: Violation of the Excessive Fines Clause

Respondent alleges penalties sought by Complainant are grossly disproportionate to the nature of the underlying offense in violation of the Eighth Amendment's Excessive Fines Clause.

As the civil penalties sought by Complainant are both within statutory limits and proportionate to Respondent's violations, the Excessive Fines Clause does not provide a defense in this matter.

The Excessive Fines Clause of the Eighth Amendment states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. Proportionality is the "touchstone" of an Excessive Fines inquiry. *Austin v. United States.*, 509 U.S. 602, 627 (1993) (Scalia, J., concurring in part). A party seeking to challenge a penalty on the grounds that the penalty allegedly violates the excessive fines provision of the Eighth Amendment to the U.S. Constitution has the burden of establishing that the penalty is grossly disproportionate to the violation at issue. *United States v. Bajakajian*, 524 U.S. 321, 322 (1998)*; In re Woodcrest Manufacturing, Inc.*, 7 E.A.D. 757, 782 (EAB 1998) (*citing Bajakajian*).

Respondent claims penalties sought by Complainant, though not yet determined, will inevitably be disproportionate to Respondent's alleged offense for three reasons raised under other alternative defenses: (1) Complainant's enforcement against Respondent reflects a reversal of policy; (2) Complainant failed to provide Respondent notice that its activity was unlawful; and (3) Respondent took immediate action to put a stop to its alleged unlawful activity upon the commencement of Complainant's enforcement. R's PHE at 19-20. To the contrary, Complainant's enforcement action is grounded in the clear, unambiguous language of the Defeat Device Prohibition reflects longstanding EPA practice and Respondent was the subject of sufficient notice that its activities were indeed unlawful. Policy reversal and lack of notice arguments are more fully discussed *supra* and do not support a finding that Complainant's penalties are a violation of the Excessive Fines Clause. Respondent's third argument, if

supported by the record, may be relevant to penalty determination but does not support a finding of a constitutional violation.

Moreover, where the civil penalty is within statutory limits, there is no violation of the Eighth Amendment. "No matter how excessive (in lay terms) an administrative fine may appear, if the fine does not exceed the limits prescribed by the statute authorizing it, the fine does not violate the Eighth Amendment." *Newell Recycling Co. v. EPA*, 231 F.3d 204, 210 (5th Cir. 2000) (upholding EPA assessment of administrative penalty); *see also Pharaon. v. Board of Governors of Federal Reserve System*, 135 F. 3d. 148, 155-57 (D.C. Cir. 1998) (finding no Eighth Amendment violation because the penalty was within the limits established by the applicable statute). Complainant's proposed penalty for the 5,338 violations of section 203(a)(3)(B) alleged falls well below the statutory maximum set for by section 205 of the Act.

For these reasons, Respondent's Twelfth Defense fails as a matter of law and should be struck.

K. Motion to Strike Respondent's Fourteenth Defense: Estoppel

Respondent claims Complainant should be estopped from enforcing the CAA provisions at issue in this proceeding based on inconsistent enforcement. Estopping the federal government has the effect of undermining the rule of law. *Heckler v. Cmty. Health Serv.*, 467 U.S. 51, 60 (1984). As such, "[i]t is well settled that the government may not be estopped on the same terms as any other litigant." *Id.* In addition to the three traditional elements (misrepresentation, reasonable reliance, and detriment), a finding of estoppel against the government requires the presence of a fourth, affirmative misconduct. *Id.* This additional element requires "an affirmative misrepresentation or affirmative concealment of a material fact by the government." *In re V-1 Oil Co.*, 8 E.A.D. 729, 749 (EAB 2000) (citing *Linkous v. United States*, 142 F.3d 271, 278 (5th

Cir. 1998)); *see also Wego Chem. & Mineral Corp*., 4 E.A.D. at 522 ("a party asserting equitable estoppel against the United States must demonstrate that there was affirmative misconduct upon which the party reasonably relied to its detriment") (citing *Hackler v. Community Health Servs.*, 467 U.S. 51, 61 (1984)). Courts are less likely to find affirmative misconduct where the misrepresentation involved a question of law within the agency's discretion. *Fredericks v. CIR*, 126 F.3d 433, 444 (3rd Cir. 1997). Respondent leaves to the very last sentence of their defense to mention the element of "affirmative misconduct." R's PHE at 21. Respondent makes no effort to claim or support a finding of such affirmative misconduct on the part of Complainant. As Respondent is unable to demonstrate EPA has engaged in affirmative misconduct, the defense of estoppel is not sufficiently supported in this matter. *Eagle Brass Company*, at 20-21 (motion to strike estoppel defense granted where Respondent insufficiently pleaded what affirmative misconduct of the Agency supported making the defense).

Should this Tribunal look beyond Respondent's failure to allege affirmative misconduct, Respondent's fourteenth argument still must fail as a matter of law. Respondent claims prior inconsistent enforcement of the provisions at issue supports a finding of estoppel. However, decisions to enforce are within EPA's prosecutorial discretion and do not constitute affirmative misconduct. *In re Env't Prot. Serv.*, 13 E.A.D. 506, 541 (EAB 2008). Second, reasonable reliance requires the Respondent to demonstrate efforts to clarify their statutory obligations, and Respondent has not alleged they engaged in any effort to seek clarification from the EPA. *Wego Chem. & Mineral Corp.*, 4 E.A.D. at 523. Finally, courts will refuse to estop the government when doing so would conflict with a statutory mandate. *Id.*

Respondent also raises *Watkins v. U.S. Army*, 875 F.2d 699 (9th Cir. 1989) which established that the government may be estopped upon a showing that "(1) the government

engaged in 'affirmative misconduct' causing a 'serious injustice,' and (2) 'the public's interest will not suffer undue damage.'" 875 F.2d 699, 707 (9th Cir. 1989). Respondent undercuts its own defense. First, *Watkins* establishes that affirmative misconduct is a threshold matter in an estoppel case against the government, meaning it must be demonstrated as an initial matter before this Tribunal even considers whether the government's actions impose a serious injustice that outweighs the public interest. *Id.* (quoting *Wagner v. Director, Federal Emergency Management Agency*, 847 F.2d 515, 519 (9th Cir. 1988). As discussed above, Respondent has failed to allege or demonstrate affirmative misconduct on the part of Complainant and thus fails to clear the high bar required to estop the government. Second, Respondent has told this Tribunal it acted in good faith in relying on its understanding of the legality of its actions but has not explained how Complainant's enforcement proceedings constitute a serious injustice. The "serious injustice" at issue in *Watkins* was the deprivation of an outstanding military career based on subject's sexuality, balanced against "nonexistent' harm to the public interest. *Watkins* is "a case where equity cries out." *Id.* at 711. Complainant respectfully submits that this is no such case.

Because Respondent has failed to allege or demonstrate affirmative misconduct on the part of Complainant and is otherwise unable to support the elements of estoppel, Respondent's Fourteenth Affirmative Defense fails as a matter of law, and should be struck.

L. Motion to Strike Nineteenth Defense: EPA's adjudicatory structure and procedures violate the appointments clause and the separation of powers

Respondent claims the structure and procedures of EPA's adjudication process violate the Appointments Clause and separation of powers principles. Respondent states this claim on three bases: (1) EPA ALJs are unconstitutional in that they are officers of the United States subject to

Appointments Clause procedures under *Lucia v. SEC*, 138 S. Ct. 2044 (2018); (2) For cause removal of EAB ALJs violates separation of powers principles, or if, in the alternative, removal provisions are read narrowly, they violate Respondent's due process rights by depriving them of an independent decisionmaker; (3) EPA ALJs are principal rather than inferior Officers who are subject to the Appointments Clause based on the nature of their offices. Complainant strongly believes this nineteenth defense must fail as a matter of law and will address each claim in turn.

First, Respondent urges this Tribunal to find its presiding ALJs unconstitutional under *Lucia v. SEC*. Despite the seemingly broad shadow *Lucia* cast across administrative adjudication, Respondent is unable to reasonably transpose its holding onto EPA's ALJs or the EAB itself. In *Lucia*, the SEC ALJs failed to survive the Court's constitutional or statutory analysis, as the judges had neither been appointed by the Commission itself or by published rule as required by the SEC's enabling statute. 138 S. Ct.. at 2058 (Breyer., J., concurring in judgment). In contrast, the Presiding Officer in this case, Chief Judge Biro, was appointed by the EPA Administrator. CX 345. There is no statutory provision requiring the appointment to be established by published rule. Moreover, the EAB Environmental Appeals Judges are appointed by the EPA Administrator. 57 Fed. Reg. 5320 (Feb. 13, 1992) ("[The Board] will be composed of three Environmental Appeals Judges designated by the Administrator.")

Second, Respondent makes two removal challenges to the constitutionality of EPA ALJs. Respondent first argues that for cause removal limitations violate separation of powers principles. R's PHE at 22. In the alternative, Respondent argues its due process rights would be endangered if the independence of EAB ALJs is not safeguarded from arbitrary removal. *Id.* Thus Respondent claims the EPA is in the grip of a dilemma as it either adopts arbitrary removal to separation of powers or retain ALJ independence to safeguard due process, but it cannot do

both. *Id.* Respondent's first removal argument fails because for cause removal of EPA ALJs does not constitute an impediment to the President's ability to take care that the laws are faithfully executed. *Morrison v. Olson*, 487 U.S. 654, 691 (1988). Respondent's second argument fails, first, because it is based on conjecture and, second, because Respondent's due process rights are sufficiently protected beyond this Proceeding by availing itself of the opportunity for seeking judicial review of a final penalty order. Section 205(c)(5), 42 U.S.C. § 7524(c)(5).

Third, Respondent claims that the appointment of EPA Environmental Appeals Judges violate the Appointments Clause as the Judges constitute principal rather than inferior officers of the United States. EPA Environmental Appeals Judges adjudicate Congressionally delegated public rights and operate within the complete discretion of the Administrator, who serves at the pleasure of the President. The EAB is constitutionally permissible under the Appointments Clause, as Environmental Appeals Judges are best characterized as "inferior officers whose appointment Congress may vest in a 'Hea[d] of Department[t].'" *Free Enterprise Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 510 (2010). EAB Environmental Appeals Judges are appointed by the Administrator pursuant to his authority under Reorganization Plan No. 3 of 1970, 84 Stat. 2086 (July 9, 1970), in which Congress delegated the authority to issue regulations and exercise all functions required to carry out EPA's statutory mandates. *Id.* The appointment of such officials by a department head pursuant to Reorganization Plan authority has been consistently upheld. *See, e.g., Morrison* 487 U.S. at 674; *Willy v. Admin. Rev. Bd.*, 423 F.3d 483, 491-92 (5th Cir. 2005); *Varnadore v. Sec'y of Labor*, 141 F.3d 625, 631 (6th Cir. 1998). The EAB was established by the Administrator, delegated authority to fact find and adjudicate by the Administrator, adheres to procedural rules promulgated by the Administrator, and may be

abolished by the Administrator, rendering the Board accountable to the EPA Administrator. For these reasons, Respondent's Nineteenth Affirmative Defense fails as a matter of law and should be struck.

CONCLUSION

Respondent manufactured and sold 5,338 Subject Products that it designed for use with, or as part of, a motor vehicle or motor vehicle engine. A principal effect of the use of these Subject Products was the removal of TWCCs installed by OEMs pursuant to a COC to control emissions of NOx, MNHC, and CO. Respondent knew or should have known that the Subject Products it manufactured and sold would be put to the use for which they were designed, and this use would require the removal of OEM-installed TWCCs.

For the reasons set forth herein, Complainant requests the Presiding Officer find that Respondent is liable for 5,338 violations of section 203(a)(3)(B) of the Act, 42 U.S.C. § 7522(a)(3)(B). If this Presiding Officer finds that Respondent has raised material issues of fact regarding the number of sales of Subject Products, Complainant requests that the Presiding Officer find that there is no genuine issue of material fact that at least 4,787 sales of Subject Products, the sales figure set forth by Respondent are violations of section 203(a)(3)(B) as a matter of law. If the Presiding Officer finds that Respondent has raised additional material issues of fact, Complainant requests that the Presiding Officer narrow the issues for hearing by determining what material facts remain controverted, and by ruling on those claims and defenses for which no material facts are in dispute. Complainant additionally requests the Presiding Officer strike Respondent's Fourth through Twelfth, Fourteenth, and Seventeenth Defenses as a matter of law.

Respectfully Submitted,

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