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 REPLY BRIEF IN SUPPORT OF MOTION FOR ACCELERATED DECISION ON LIABILITY AND TO STRIKE AFFIRMATIVE DEFENSES

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INTRODUCTION

The Director of the Region 9 Enforcement and Compliance Assurance Division of the U.S. Environmental Protection Agency ("Complainant") files this Reply Brief in Support of its Motion for Accelerated Decision on Liability and to Strike Affirmative Defenses (the "Reply Brief") 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").

At the heart of the dispute concerning liability in this matter are the parties' differing interpretation of the law concerning the prohibition under the Clean Air Act ("CAA" or the "Act") against the manufacture and sale of defeat devices under section 203(a)(3)(B) (referred to in this brief as the "Defeat Device Prohibition"). Respondent's defense against liability is built entirely on its insistence that the Act excludes from its prohibition any manufacturer or seller who invokes a claim of, "I intended the defeat device to be used on a competition vehicle." If Respondent's interpretation of the law, as set forth in its Opposition Brief, is wrong, then its whole defense fails, and accelerated decision is warranted.

Respondent asserts there are genuine issues of material fact concerning the elements of Complainant's claim of liability under section 203(a)(3)(B) of the Act, but that assertion is premised on Respondent completely rewriting the elements of a section 203(a)(3)(B) claim to mirror its view that the statute provides an expansive "competition use" exclusion. But, again, if Respondent's interpretation of

the Act is wrong, then its assertion that Complainant has failed to factually support the elements of a section 203(a)(3) claim falls apart, and accelerated decision on liability should be granted.

ARGUMENT

I. COMPLAINANT HAS ESTABLISHED THAT THERE ARE NO MATERIAL FACTS IN DISPUTE REGARDING THE ELEMENTS OF LIABILITY UNDER SECTION 203(a)(3)(B) OF THE ACT.

There is no genuine dispute as to the facts that support a finding of liability against Respondent, as the key facts relied upon by Complainant in its Motion for Accelerated Decision have not been challenged by Respondent:

Element One: Respondent is a "Person" Within the Meaning the CAA.

- There is no dispute that Respondent is a person within the meaning of the CAA.

Element Two: The Subject Products (Respondent's Products at Issue in this Proceeding) Were Intended for Use With, or as Part of, Motor Vehicles or Motor Vehicle Engines.

- There is no dispute that Respondent has published in its instruction manuals for each of the 57 types of Subject Products that they are "designed for" one or more specific makes and models of vehicles ("Subject Vehicles"). *See* Complainant's Motion for Accelerated Decision on Liability and to Strike Affirmative Defenses ("Motion"), Attachment D, ¶ 1; *see also* CX 007.[1]
- There is no dispute that the Original Equipment Manufacturers ("OEMs") of each of the Subject Vehicles sought and obtained a Certificate of Conformity ("COC") to manufacture and sell such vehicles for use on United States public roads in accord with the CAA and EPA

[1] Examples of such vehicles are the Jeep Wrangler equipped with a 3.8 L V6 engine, automatic or manual transmissions (CX 103); Chevrolet Corvette equipped with a 5.7L V-8 engine, automatic or manual transmissions (CX 118); and the Ford Focus RS equipped with a 2.3L Eco-Boost Turbo engine, manual transmission (CX 271). A full compiled list can be found in the Motion, Attachment D ¶ 1.

motor vehicle emission regulatory standards. Motion at 3-4, *see also* Motion, Attachment D at ¶ 2.

- There is no dispute that the COCs the OEMs obtained for the Subject Vehicles establish that the Subject Vehicles were manufactured to conform with the OEMs' 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); Motion, Attachment D ¶ 2. *See generally* Motion, Attachment A.
- There is no dispute that, in building the Subject Vehicles for which the OEMs sought COCs to demonstrate compliance with motor vehicle emission standards, the OEMs, as established through their certification applications, designed the Subject Vehicles to transport persons or property on a street or highway. Motion, Attachment D. *See generally* Certification Applications.[2]
- There is further no dispute that the Subject Vehicles are self-propelled. There is therefore no dispute that the Subject Vehicles meet the definition of "motor vehicle," as defined under section 7550(2).

Element Three: A Principal Effect of Respondent's Subject Products is to Bypass, Defeat, or Render Inoperative a Device or Element of Design Installed on or in a Motor Vehicle or in Compliance with CAA Title II Regulations.

- There is no dispute that, in accord with their COC applications and to meet EPA emission standards, OEMs installed one or more Three-Way Catalytic Converters ("TWCCs") in the makes and models of vehicles that Respondent's Subject Products are designed to fit. Motion

[2] Examples of such applications for motor vehicles are Porsche Cayman Boxster, model years 2005-2008 (CX 046); Chevrolet Corvette, model years 2014-2018 (CX 081); and the Ford Mustang 2.3L, model years 2015-2016 (CX 294). A full compiled list can be found in the Motion, Attachment D ¶ 2.

at 14-15, *see also* Motion, Attachment B: Declaration of Jason Gumbs in Support of Complainant's Statement of Material Facts Concerning Liability Not in Reasonable Dispute ("Gumbs Declaration") ¶ ¶ 12, 13, 24, and 25. There is no dispute that TWCCs installed by the OEMs in the Subject Vehicles are "elements of design" installed to meet CAA Title II regulations. Motion at 7, *see also* Gumbs Declaration ¶ 24.

- There is no dispute that, when the Subject Parts are installed on the Subject Vehicles, the Subject Parts fit in the area of the exhaust system where the OEM had installed one or more TWCCs to meet CAA emission standards. *See* Gumbs Declaration.
- There is no dispute that, when the Subject Parts are installed on the Subject Vehicles, the installation results in an exhaust system that lacks one or more TWCCs that the OEMs

installed on such vehicles to meet CAA emission standards. CX 007 at 1-5, Function column. *See also* Motion, Gumbs Declaration at ¶ 12.[3]

- There is no dispute that the Subject Parts, when installed on the Subject Vehicles, have a principal effect of bypassing, defeating, or rendering inoperative an element of design installed by the OEMs of the Subject Vehicles to meet CAA emission standards. *Id*.

Element Four: Respondent Knew or Should Have Known that Its Subject Parts Were Offered for Sale or Installed for Such Use or Put to Such Use.

- There is no dispute that Respondent knew or should have known that its Subject Products were designed to fit the Subject Vehicles identified in its instruction manuals. Motion, Attachment D, ¶ 1; *see also* CX 007.
- There is no dispute that Respondent knew or should have known that its Subject Products, when installed on the Subject Vehicles, have a principal effect of defeating, bypassing, or rendering inoperative one or more TWCCs installed by the OEMs. *Id*.

II. RESPONDENT HAS FAILED TO LEGALLY SUPPORT ITS ASSERTION OF A COMPETITION DEFENSE AND HAS NOT PUT FORTH GENUINE FACTS IN DISPUTE THAT WOULD JUSTIFY AN EVIDENTIARY HEARING.

Respondent does not challenge any of the above facts. Instead it somehow reads into the Defeat Device Prohibition of section 203(a)(3)(B) an unqualified exclusion—not found in the actual language

[3] See also 12651 (CX 42), Gumbs Dec ¶ 26; 12653 (CX 47), Gumbs Dec ¶ 27; 12654 (CX 47), Gumbs Dec ¶ 28; 12656 (CX 52), Gumbs Dec ¶ 29; 12657 (CX 57), Gumbs Dec ¶ 30; 17253 (CX 57), Gumbs Dec ¶ 31; 12658 (CX 62), Gumbs Dec ¶ 32; 60515 (CX 62), Gumbs Dec ¶ 33; 60516 (CX 62), Gumbs Dec ¶ 34; 12659 (CX 67), Gumbs Dec ¶ 35; 12663 (CX 67), Gumbs Dec ¶ 36; 12662 (CX 72), Gumbs Dec ¶ 37; 12667 (CX 75), Gumbs Dec ¶ 38; 12669 (CX 82), Gumbs Dec ¶ 39; 60547 (CX 82), Gumbs Dec ¶ 40; 60550 (CX 82), Gumbs Dec ¶ 41; 12671 (CX 87), Gumbs Dec ¶ 42; 17237 (CX 92), Gumbs Dec ¶ 43; 17249 (CX 97), Gumbs Dec ¶ 44; 17250 (CX 102), Gumbs Dec ¶ 45; 17251 (CX 107), Gumbs Dec ¶ 46; 17256 (CX 117), Gumbs Dec ¶ 47; 17259 (CX 120), Gumbs Dec ¶ 48; 17260 (CX 125), Gumbs Dec ¶ 49; 17261 (CX 130), Gumbs Dec ¶ 50; 17263 (CX 135), Gumbs Dec ¶ 51; 17272 (CX 140), Gumbs Dec ¶ 52; 17276 (CX 145), Gumbs Dec ¶ 53; 17286 (CX 150), Gumbs Dec ¶ 54; 17288 (CX 155), Gumbs Dec ¶ 55; 17290 (CX 160), Gumbs Dec ¶ 56; 17292 (CX 165), Gumbs Dec ¶ 57; 17293 (CX 170), Gumbs Dec ¶ 58; 60606 (CX 170), Gumbs Dec ¶ 59; 60609 (CX 170), Gumbs Dec ¶ 60; 60626 (CX 170), Gumbs Dec ¶ 61; 60503 (CX 175), Gumbs Dec ¶ 62; 60506 (CX 180), Gumbs Dec ¶ 63; 60533 (CX 185), Gumbs Dec ¶ 64; 60541 (CX 190), Gumbs Dec ¶ 65; 60553 (CX 205), Gumbs Dec ¶ 66; 60555 (CX 210), Gumbs Dec ¶ 67;

of the statute–for motor vehicles that are later "converted" to nonroad vehicles used solely for competition. It argues that "motor vehicles" that are later "converted" for off-road use for competition are not "motor vehicles," and therefore defeat devices installed on such vehicles are not subject to section 203(a)(3)(B). On the basis of this faulty claim, Respondent would require that, to prove a violation of section 203(a)(3)(B), the EPA must provide proof that (1) the respondent intended a defeat device to be installed in a motor vehicle other than a motor vehicle "converted" to a nonroad vehicle used solely for competition; and (2) the respondent knew or should of known that the defeat device would be installed in a motor vehicle that has not otherwise been converted to a nonroad vehicle used solely for competition and that the motor vehicle still has its emission-related elements of design still installed. As discussed further in this brief, Respondent's conception of its competition exclusion and the elements of proof necessary to prove a section 203(a)(3)(B) violation has no basis in law, and hence Respondent fails to establish any genuine issue of material fact to counter a finding of liability in this case.

A. Legal Standard for Accelerated Decision.

As noted in Complainant's Motion, an accelerated decision may be granted on liability 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) (emphasis added). The standard is similar to the summary judgment standard set forth in Rule 56 of the Federal Rules of Civil Procedure. *In re Clarksburg Casket Company*, 8 E.A.D. 496, 501-502

60557 (CX 215), Gumbs Dec ¶ 68; 60559 (CX 220), Gumbs Dec ¶ 69; 60562 (CX 225), Gumbs Dec ¶ 70; 60563 (CX 230), Gumbs Dec ¶ 71; 60565 (CX 235), Gumbs Dec ¶ 72; 60594 (CX 240), Gumbs Dec ¶ 73; 60611 (CX 250), Gumbs Dec ¶ 74; 60623 (CX 255), Gumbs Dec ¶ 75; 60627 (CX 265), Gumbs Dec ¶ 76; 60629 (CX 270), Gumbs Dec ¶ 77; 60631 (CX 275), Gumbs Dec ¶ 78; 60642 (CX 278), Gumbs Dec ¶ 79; 60663 (CX 285), Gumbs Dec ¶ 80; 140364 (CX 290), Gumbs Dec ¶ 81; 251010 (CX 295) Gumbs Dec ¶ 82.

(EAB 1999) (citing *In re Green Thumb Nursery, Inc*., 6 E.A.D. 782, 793 (EAB 1997)). The Environmental Appeals Board ("EAB" or "the Board") has defined the standard as follows:

> A factual dispute is material, where, under the governing law, it might affect the outcome of the proceeding. ***
>
> A factual dispute is genuine if the evidence is such that a reasonable finder of fact could return a verdict in either party's favor *** If so, summary judgment is inappropriate and the issue must be resolved by a finder of fact. If, on the other hand, the evidence, viewed in a light most favorable to the non[]moving party, is such that no reasonable decisionmaker could find for the nonmoving party, summary judgment is appropriate.

Id. (quoting *In re Mayaguez Reg'l Sewage Treatment Plant*, 4 E.A.D. 772, 781 (EAB 1993) (citations omitted), *aff'd sub nom. Puerto Rico Aqueduct & Sewer Auth. v. EPA*, 35 F.3d 600 (1st Cir. 1994), *cert. denied*, 513 U.S. 1148 (1995). In accord with these precepts, a "party opposing summary disposition must 'raise an issue of material fact' and demonstrate that the issue is 'genuine by referencing probative evidence in the record, or by producing such evidence.'" *Id*. (quoting *Green Thumb*, 6 E.A.D. at 793).

"The mere allegation of a factual dispute will not defeat a properly supported motion for summary judgment." *In the Matter of: Strong Steel Products, LLC*, Docket Nos. RCRA-05-2001-0016, CAA-05-2001-0020, and MM-05-2001-0006, 2002 WL 31264261, at * 7 (OALJ Sept. 9, 2002) (citing *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 256 (1986)). "Similarly, a simple denial of liability is inadequate to demonstrate that an issue of fact does exist in a matter." *Id*. 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. *Id*. "'Bare assertions, conclusory allegations or suspicions'" are insufficient to raise a genuine issue of material fact precluding summary judgment. *Id*. (quoting *Jones v. Chieffo*, 833 F. Supp. 498, 503 (E.D. Pa. 1993), *aff'd*, 22 F.3d 301 (3rd Cir. 1994) (mem.)).

In considering a motion for accelerated decision, the Presiding Officer must "'draw any permissible inference from the underlying facts in the light most favorable to the party opposing the motion.'" *In re Clarksburg Casket Co.*, 8 E.A.D. 496, 1999 WL 504709, at *8 (EAB 1999) (quoting *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 817-18 (4th Cir. 1995)). However, "for an inference to be permissible it must be reasonable." *Id*. (emphasis omitted) (citing *Sylvia*, 48 F.3d at 818). "'Whether an inference is reasonable cannot be decided in a vacuum; it must be considered in light of the competing inferences to the contrary.'" *Id*. (quoting *Sylvia*, 48 F.3d at 818).

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. *In re BWX Tech., Inc.*, 9 E.A.D. 61, 75 (EAB 2000). The evidentiary standard that applies 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. at 501-502 (quoting *In re Mayaguez Reg'l Sewage Treatment Plant*, 4 E.A.D. 772, 781 (EAB 1993)).

B. Respondent's Competition Exclusion Lacks Legal Basis.

1) "Redesign" of a Motor Vehicle into a Vehicle That is Unregulated is Not Contemplated Under the Act**.**

As stated in Respondent's Opposition Brief:

> The principal dispute between Respondent and EPA thus is whether a vehicle imported or sold as a "new motor vehicle" pursuant to a COC remains forever after a "motor vehicle" regardless of any redesign eliminating the required characteristics of a motor vehicle and dedicating the vehicle solely to non-street competition use, *i.e.*, not on the streets or highways.

Opposition Brief at 12. Respondent thus acknowledges that the CAA defines a motor vehicle as any self-propelled vehicle "designed" (the Act does not say "used") for transporting persons or property on a street or highway. 42 U.S.C. § 7550, Opposition Brief at 13. How a motor vehicle is "used" has no relevance to the applicability to the Defeat Device Prohibition.

Respondent attempts to rescue its asserted competition exclusion by reading the term "designed" to exclude those motor vehicles designed and built to meet motor vehicle certification and emission standards that are at some point subsequently *redesigned* into a converted competition vehicle. Opposition Brief at 13. Respondent thereby claims that a motor vehicle can lose its status as a motor vehicle under the Act via a "process" of "conversion" that "strips the vehicle of the defining characteristics of a motor vehicle such that it is no longer designed for or even suitable or practical for use on the streets and highways."[4] *Id*.

However, there is no language in the Act authorizing removal or disabling emission-related elements of design installed to meet emission standards by "redesigning" a motor vehicle. Recognizing there is no such authorization stated in the Act, Respondent interprets "designed" as implicitly authorizing "redesign" to a vehicle that is no longer regulated. But, when one reads the definition of motor vehicle within the context of the Act's statutory scheme for vehicle emissions control as a whole, the most natural reading of the word "designed" encompasses the configuration of the vehicle as conceived and built by the manufacturer, as the Act's focus on vehicle design is the fulcrum upon which the Act's control strategy stands. The Act: (1) provides that EPA is to establish emission standards

[4] Since Respondent focuses its discussion of its competition exclusion exclusively on either purpose-built nonroad racing vehicles or motor vehicles converted to nonroad competition vehicles, it appears that Respondent is not challenging the applicability of the Act to motor vehicles that are tampered, used sometimes for competition, but also used on the public roads, or motor vehicles that are not converted such that the vehicle loses the features that would allow the vehicle to be capable of use on streets or highways. This puts into question the relevance of Respondent's claim that the prevalence of vehicle competition sports supports its case, as Respondent does not put forth any evidence as to how many of the vehicles that are used for competition really fit the criteria that Respondent puts forth in its Opposition Brief for exclusion from regulation under the Act.

applicable to motor vehicles not only at the time they are built but throughout its operation thereafter ("[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.") (42 U.S.C. § 7521(a)(1)); (2) mandates EPA to promulgate a certification program under which OEMs demonstrate through a detailed application and through emissions testing of a prototype vehicle that the design of their motor vehicles "conform" to such emission standards (42 U.S.C. § 7521(a)-(b)); (3) prohibits the introduction into commerce of motor vehicles that are not covered by a certificate of conformity assuring that the vehicle is designed to meet emission standards (42 U.S.C. § 7522(a)(1)); and (4) and prohibits the emissions-related elements of the motor vehicle's design from being tampered or defeated after the vehicle has left the manufacturer (42 U.S.C. § 7522(a)(3)). The CAA's scheme for ensuring that motor vehicles actually meet emissions standards depends heavily on motor vehicles continuing to operate in accord with its certified design throughout their useful life. As such, it becomes clear, when reading the definition of "motor vehicle" within the context of Title II of the Act as a whole, that one cannot reasonably find a competition vehicle exception buried within its text. *See King v. Burwell*, 576 U.S. 473, 492 (2015) (The "fundamental canon of statutory construction" is "words of a statute must be read in their context and with a view to their place in the overall statutory scheme.") (internal quotations omitted) (quoting *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 320 (2014)).

In addition to the prohibitions of section 203(a)(3), there are a whole host of other provisions of the Act established by Congress to ensure emission standards are achieved post-sale of the vehicle. *See* CAA section 202(d), 42 U.S.C. § 7521(d) (useful life of vehicles); section 202(m), 42 U.S.C. § 7521(m) (emissions control diagnostics); section 206(b), 42 U.S.C. § 7525(b) (confirmatory testing and certificate voiding procedures); and section 207, 42 U.S.C. § 7541 (compliance by vehicles and engines in actual

use: emission control warranties; testing of vehicles in actual use; requiring plan for remedying nonconformity of vehicles in actual use; instructions for maintenance and use, and requiring vehicle or engine certification label or tag). Allowing the undoing of a motor vehicle's certified emission control configuration flies in the face of not just section 203(a)(3), 42 U.S.C. § 7522(a)(3), but all of the above measures established by Congress to achieve requisite emission control throughout the life of the vehicle. Congress could not have possibly wanted such an outcome as it would undo the objective that all of the above measures were designed to achieve. "It is a cardinal canon of statutory construction that statutes should be interpreted harmoniously with their dominant legislative purpose." *United States v. Nader*, 542 F.3d 713, 720 (9th Cir. 2008) (quoting *Spilker v. Shayne Labs*., Inc., 520 F.2d 523, 525 (9th Cir. 1975)); *United States v. Barry*, 888 F.2d 1092, 1096 (6th Cir. 1989) (quoting *Spilker*, 520 F.2d at 525).

The CAA's scheme for ensuring that vehicles actually meet emissions standards on the road, every day, throughout their useful life, depends heavily on the understanding that every motor vehicle will operate with the certified design as it travels on the nation's roads. It thus makes sense that Congress' use of the word "designed" in defining "motor vehicle" speaks to the time at or before the vehicle was introduced into commerce, and does not incorporate changes made to the vehicle thereafter. Both, the CAA Defeat Device Prohibition and its companion tampering prohibition, prohibit the removing or rendering inoperative of an "element of design" installed in a motor vehicle in compliance with the CAA and further support this reading. *See* 42 U.S.C. § 7522(a)(3). The references to "design" in these provisions speak to the capability of the vehicle when certified and not something its users can change. For the statutory framework of Title II of the Act to make sense and be effective, Congress had to have meant in its definition of motor vehicle that a vehicle's "design" means its original, certified design. *See King*, 576 U.S. at 492 (quoting *United Sav. Assn. of Tex. v. Timbers of Inwood Forest*

Associates, Ltd., 484 U.S. 365, 371 (1988) ("A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme…because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.")).

Moreover, Respondent's Brief does not satisfactorily explain away Congress' deliberate inclusion of a used solely for competition exception in its nonroad vehicle provisions, while leaving the definition of motor vehicle untouched. By doing so, Congress signified its intent to not enact such an exclusion for motor vehicles. Respondent's rejoinder simply is its assertion that it was commonly understood that Act had always excluded motor vehicles converted for competition from regulation, so insertion of competition use exclusion for motor vehicles into the 1990 Act Amendments was unnecessary. See Opposition Brief, Section IV.A. However, this argument lies in the realm of pure speculation, while the conscious act of Congress to adopt a competition use exclusion for nonroad vehicles, but not for motor vehicles, provides substantial support for rejecting Respondent's contention that the so-called competition exclusion saves Respondent from liability. *See In Re Consumers Scrap Recycling, Inc*., 11 E.A.D. 269 (EAB) (2004) (in used oil management penalty action under Resource Conservation and Recovery Act ("RCRA"), the EAB applied cannons of statutory construction to find that a used oil processor could not claim actions were subject to a "draining" activity exemption under the applicable regulations, as that exemption was only stated in the regulations as applicable to an on-site generator, and the definition of "processor" did not specify a draining activity exemption) (citing *Rusello v. United States*, 464 U.S. 16, 23 (1983) ("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); *Comm'r. v Clark*, 489 U.S. 726, 739 (1989) (statutory exceptions are to be construed narrowly in order to preserve the primary operation of the general rule); *Nat'l Bank of Oregon v. Indep. Ins. Agents of Am*., 508 U.S. 439 (1993) ("statutory

construction…must account for a statute's full text, language as well as punctuation, structure, and subject matter); and *United States v. Menasche*, 348 U.S. 528, 538-39 (1995) (referencing the court's duty to give effect, where possible, to every word of a statute).

Finally, Complainant notes that Respondent's attempt to include the concept of "redesign" in the phrase "designed for" used by Congress is contrary to the Board's reading of the plain-reading meaning of the word "designed." In *Consumers Scrap* cited above, one of the issues at appeal was what did the term "designed" encompass in the regulatory definition of "processing," which defines "processing" as "chemical or physical operations designed to produce from used oil, or to make used oil more amenable for production of, fuel oils, lubricants, or other used oil-derived products…." Consumers Scrap, 11 E.A.D. at 295-96. In construing the meaning of the term "designed" as used in the regulatory text, the Board noted that the dictionary definition of the verb "design" means "to devise for a specific function or end" or "to have a purpose." *Id*. at 296 (citing Merriam-Webster's Collegiate Dictionary 313 (10th ed. 1999). The Board then noted that the notion of "purposefulness" is embodied in the dictionary definition, and therefore, when determining whether an outcome is part of the design of an undertaking, one must consider whether the outcome was part of the undertaking's *purpose*. *Id*. Similarly, when one considers the phrase "designed for" in the CAA's definition of motor vehicle in its most natural reading and in line with the plain meaning of the text, Congress's use of "designed" focuses on the *purpose* of the vehicle as conceived by the OEM, and the user's redesign of such vehicle for another purpose has no purchase in such reading of the definition.

2) Respondent Has No Basis to Assert that a Certificate of Conformity Has Temporary Status and Effect.

A main tenet of Respondent's argument is its contention that the "COC is nothing more than a condition precedent for the introduction and sale of a 'new motor vehicle' and a measuring standard as

to whether a 'motor vehicle' complies with the relevant regulatory requirements." Opposition Brief at 17. If this breathtaking assertion were true, this would make the Defeat Device Prohibition mere surplusage with no consequence, as the very purpose of the Defeat Device Prohibition is to make sure that the vehicle's configuration, designed and manufactured to achieve the emission control necessary to receive a COC remains in place and functioning after the vehicle is sold by the manufacturer. The COC is a lynchpin of the Act's strategy for assuring emission standards for motor vehicles are achieved for the life of the vehicle. The COC for a motor vehicle manufactured and introduced into commerce obviously does not expire or disappear once the motor vehicle is released from the manufacturer, and Respondent can point to no language in the statute that even hints that this made-for-litigation conception is true.

3) Respondent Misstates EPA's Importation Regulations and Policy Concerning Racing Vehicles**.**

Respondent claims that the Agency's importation regulations under 40 C.F.R. § 85.1511(e) accord with its interpretation of "motor vehicle" under the Act, because the regulation "defines racing vehicle as a vehicle meeting one or more of the exclusion criteria described in 40 C.F.R. § 85.1703." Respondent asserts that since the text of 40 C.F.R. § 85.1511(e) does not have the word "designed" in it, somehow the regulation legalizes the conversion of a certified motor vehicle, for the purpose of racing, to a configuration that eliminates the OEM-installed emissions-related elements of design. Such a reading is wholly incongruent with other regulations that specifically prohibit such conduct. *See* 40 C.F.R. § 1068.101(b) (prohibiting tampering of and manufacture/sale of defeat devices for certified vehicles and engines). Respondent further quotes portions of the Agency's vehicle importation guidance and policy out of context in an attempt to show that the Agency acknowledges that certified motor vehicles can become unregulated if they are converted to a competition vehicle. But nowhere does the cited policy and guidance address the application of section 203(a)(3) to certified motor vehicles, nor

does this policy and guidance anywhere imply at all that certified motor vehicles converted for racing are excluded from section 203(a)(3). Therefore, this importation guidance and policy provides no support for Respondent's competition defense.

4) Respondent's Interpretation of EPA's Nonroad Regulations is Incorrect.

Respondent also attempts to find support for its defense in the nonroad engine regulations, but, again, Respondent misinterprets the Agency regulations and takes them out of context. Respondent focuses on the definition of "model year" under 40 C.F.R. § 1039.801, which references the use of a "motor vehicle engine" as a nonroad engine. Respondent cites this to support its argument that a motor vehicle can lose its regulated status as a motor vehicle under the Act. What this provision is really referring to, however, is that a motor vehicle engine can be used in non-motor vehicle purposes, such as when a car engine is marinized for use in boats. But in such instances, the engine, which is not certified, is removed from the motor vehicle, which is certified, and the motor vehicle essentially ceases to exist. The engine, used in the nonroad application, "becomes new" and must be covered by a nonroad certificate and must meet a host of certain other requirements. *See* 40 C.F.R.§§ 1039.605; 1048.605 ("What provisions apply to engines certified under the motor vehicle program?"); and § 1051.605 ("What provisions apply to engines already certified under the motor vehicle program or the Large Spark-ignition program?"). Under the regulations, certified motor vehicles can be converted to nonroad vehicles, but such vehicles must meet nonroad engine emission certification and a host of other conditions apply. *See* 40 C.F.R. §§ 1039.610 and 1048.610 ("What provisions apply to vehicles certified under the motor-vehicle program?") and § 1051.610 ("What provisions apply to vehicles already certified under the motor vehicle program?"). These regulations do not contemplate a conversion of a certified motor vehicle to an unregulated competition vehicle, as Respondent asserts.

In addition to the above, Respondent also cites to a regulatory preamble to an EPA final rule for nonroad spark-ignition engines and equipment and an EPA document concerning the importation of mini trucks and other used motor vehicles as nonroad vehicles. What is being discussed in the cited material is the issue of importation of foreign "mini trucks" and other vehicles that meet the criteria for being classified as "motor vehicles" under the Act but their manufacturers never sought a COC to demonstrate compliance with United States motor vehicle emission standards. In the instance of mini trucks, EPA has allowed these vehicles to be imported as newly certified nonroad vehicles, provided they are speed limited as required by the nonroad vehicle description in the rule. But nowhere in the cited material is there a reference to the conversion of a certified motor vehicle to an unregulated competition vehicle. With respect to exempting nonroad equipment used solely for competition from certification, the regulations for compression-ignition engines clearly indicate that equipment manufacturers may use *uncertified engines* if the vehicles or equipment in which they are installed will be used solely for competition (40 C.F.R. § 1039.620(a)) and EPA considers a vehicle or piece of equipment to be one that will be used solely for competition *if it has features that are not easily removed that would make its use other than in competition unsafe, impractical, or highly unlikely* (40 C.F.R. § 1039.620(c)), and certain other conditions concerning the exemption apply (40 C.F.R. §§ 1039.620(d) and (e). *See also* 40 C.F.R. § 1051.620 (specifying conditions for exemption from nonroad emission standards for recreation vehicles used solely for competition). These regulations do not speak to conversion of certified motor vehicles to unregulated competition vehicles, and to read these regulations as implying such would run counter to the statutory framework governing certified motor vehicles and the prohibition against tampering or defeating certified motor vehicle emission controls. Such reading therefore runs counter to the canons of statutory and regulatory construction. *See Consumers Scrap Recycling, Inc*., 11 E.A.D. at 292 (quoting *Secy' of Labor v. W. Fuels-Utah, Inc*., 900 F.2d 318, 320

(D.C. Cir. 1990) (stating a regulation must be "interpreted so as to harmonize with and further and not to conflict with the objective of the statute it implements.").

5) Respondent Incorrectly Asserts the 2016 Greenhouse Gas Rulemaking Preamble Supports Its Defense.

Respondent indicates that EPA's proposed rulemaking in 2015-2016 led Respondent to believe that its Subject Parts did not violate the CAA, based upon EPA's response to comments on the Phase 2 Greenhouse Gas Rule ("Phase 2 GHG Rule").[5] Respondent specifically focuses on the Agency's statement in that Preamble that its "focus is not (nor has it ever been) on vehicles built or used exclusively for racing." Opposition Brief at 60. However, the cited passage is being quoted out of context.

When reading the preamble's entire text concerning competition, it is clear the preamble language cited by Respondent simply discusses EPA's intent to exercise enforcement discretion concerning dedicated competition vehicles "used exclusively for racing." 81 Fed. Reg. at 73957. The preamble clearly states that the intent of the proposed rule was simply to provide "a clarification related to vehicles used for competition to ensure that the Clean Air Act requirements are followed for vehicles used on public roads." *Id.* The preamble further indicates that the "proposed [rule] language was not intended to represent a change in the law or in EPA's policies or practices towards dedicated competition vehicles," but to explain that since EPA's "attempt to clarify led to confusion, EPA has decided to eliminate the proposed language from the final rule." *Id*. Importantly, nowhere in the preamble does EPA endorse or even suggest that the CAA has a competition exemption from the Defeat Device Prohibition.

[5] See Preamble to Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium and Heavy-Duty Engines and Vehicles – Phase 2, 81 Fed. Reg. 73478, 73957 (Oct. 25, 2016)).

C. Respondent Mischaracterizes Section 203(a)(3)'s Knowledge Requirement.

Complainant has put forth evidence establishing that Respondent intended the Subject Parts to be installed on motor vehicles, as Respondent's own installation manuals for the Subject Products specifically identify makes and models of motor vehicles for which the Subject Products are designed to fit. Further, Respondent indiscriminately offered for sale the Subject Parts to a wide customer base not limited to the racing community. To counter these facts, Respondent claims that it manufactured and designed the Subject Parts for the sole purpose of "enhanced performance of racing/competition-use-only vehicles. Opposition Brief at 27 (quoting Ted Wofford Declaration, Att. 2, at paragraph 5). Respondent further asserts that the phrase "intended for use" in section 203(a)(3)(B) establishes a *mens rea* requirement by which Complainant needs to put forth evidence of the Respondent's subjective state of mind concerning where the Subject Parts were intended by Respondent to be installed. *Id*. at 32.

Respondent's attempt to inject a criminal law-level *mens rea* standard into section 203(a)(3)(B) lacks legal support. *Mens rea* means "guilty mind," and serves to distinguish guilty from innocent conduct in the criminal context. "Courts interpret *criminal* statutes to require that a defendant possess a *mens rea,* or guilty mind, as to every element of an offense." *Torres v. Lynch,* 136 S. Ct. 1619, 1630 (2016) (emphasis added). In the civil context, the CAA generally "imposes strict liability upon owners and operators who violate the Act." *Pound v. Airosol Co., Inc.,* 498 F.3d 1089, 1097 (10th Cir. 2007). Section 203(a)(3) is something of an anomaly because it requires that the person act with some level of knowledge. That this level does not rise to a criminal standard, however, is made clear from the legislative history of the statute. The

Senate Environmental and Public Works Committee Report, S. Rep. 100-231, at 143 (1987), [6] states:

> As another means of discouraging the knowing disabling of emissions controls, the bill also makes illegal the manufacture or sale of so-called "defeat devices" that render inoperative elements of a vehicle emission control system. The requirement that such use be within the specific knowledge of the manufacturer *is not intended to establish a standard of proof more appropriate to criminal actions,* since this is a civil enforcement action.

Emphasis added.

Further, Respondent's assertion that Congress intended section 203(a)(3) to have a *mens rea* element flies in the face of Congress' effort with the 1990 Amendments to make section 203(a)(3)'s prohibitions *easier* to enforce. *United States v. Middleton*, 231 F.3d 1207, 1210 (9th Cir. 2000) (quoting *Clinton v. City of New York*, 524 U.S. 417, 429 (1998)) (courts should avoid an interpretation that would produce "'an absurd and unjust result which Congress could not have intended'") .

Respondent's proposition to read the "intended for use" language as a requirement for Complainant to prove the subjective intent of Respondent in manufacturing or selling the Subject Products would subvert the objectives of the Act, as any target of an enforcement action can claim, "I didn't intend to sell a violative product." To preserve the objective of the Act's Defeat Device Prohibition, which is to deter tampering of or defeating emissions-related elements of design of certified motor vehicles, this Tribunal should view whether the Subject Products are "intended for use" on a motor vehicle through an objective, not subjective lens. This is the tack that courts have taken with unregistered pesticide prohibitions under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136 et. seq. Under FIFRA, a "pesticide" is defined, in part, as:

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[6] S. Rep. 100-231, at 143 (1987) [available at: https://1.next.westlaw.com/Link/Document/Blob/I453f5e00a20111dc8559010000000000.pdf?targetType=GAO&originationContext=document&transitionType=DocumentImage&uniqueId=9105bb46-47f7-4034-8dfd-5d4d66307906&contextData=(sc.Keycite)&firstPage=true].

> (1) any substance or mixture *intended for* preventing, destroying, repelling or mitigating any pest, and (2) any substance or mixture of substances *intended for* use as a plan regulator, defoliant, or desiccant…

7 U.S.C. § 136(u) (*emphasis added*). As part of an unregistered pesticide enforcement action, the Government necessarily has to prove the product at issue is a "pesticide" under FIFRA. In viewing "intended for," courts focus on what the product is intended for objectively—"the use which a reasonable consumer would undertake." *N. Jonas & Co., Inc. v. EPA*, 666 F.2d 829, 833 (3d Cir. 1981). An objective intent standard is applied because using a subjective intent standard would eviscerate FIFRA's enforceability. *Id*. As the Third Circuit stated:

> A manufacturer or distributor cannot avoid the reach of the Act by pointing to its own subjective intent that a product [has] a given use. Even if were possible to gauge this subjective intent, the public weal requires that even those who inadvertently produce goods which the public perceives as pesticidal be subject to the jurisdiction and regulations of the EPA.

Id. (citing Cf. *United States v. An Article of Drug…Bacto-Unidisk*, 394 U.S. 784, 792, 798 (1968) (definition of drug given liberal interpretation in light of remedial purpose of Federal Food, Drug and Cosmetics Act)). In determining intent objectively for purposes of determining whether a product is intended for a pesticidal purpose, labeling, industry representations, general public knowledge, advertising materials, effectiveness, and the "collectivity of all the circumstances" are relevant. *Id.* Similarly, "intended for use" under the Defeat Device Prohibition should be assessed objectively in light of all facts and circumstances. Given that the Respondent has represented to the public that the Subject Products are designed for specified makes and models of vehicles that are certified motor vehicles, then, under an objective intent standard, the Subject Products are clearly "intended for use" in a motor vehicle under section 203(a)(3)(B).

Even if, for the sake of argument, the "intended for use" language in section 203(a)(3)(B) establishes a requirement to establish criminal *mens rea*, Respondent's claim that it mistakenly believed

that converted vehicles did not meet the legal definition of "motor vehicle" is a mistake of law, not fact. Even in a prosecution, such a mistake of law is no excuse to evade criminal liability. Defendants who argue the "mistake of law" defense essentially argue that the Government has to prove that the Defendant knew they were violating the law. In criminal environmental cases, courts have consistently held that under a "knowing" *mens rea* standard, all the government has to show is that the defendant knew factually what they were doing and were not acting out of mistake or accident. *See*, *e.g., United States v. Wilson*, 133 F.3d 251, 262 (4th Cir. 1997) (holding in a Clean Water Act wetlands criminal case, under which "knowingly violate" the discharge-without-a-permit prohibition is a felony, the government must prove the defendant's knowledge of the facts meet each essential element of the substantive offense, but need not prove the defendant knew his conduct to be illegal); *U.S. v. Weintraub*, 273 F.3d 139 (2d Cir. 2001) (holding in a CAA criminal asbestos work-practice standard case, the government need only prove that the defendant knew that the substance involved in the alleged violations was asbestos; it need not establish the defendant's knowledge that the conduct proscribed by the statute involved the kind and quantity of asbestos sufficient to trigger the work-practice standard); *U.S. v. Self*, 2 F.3d 1071, 1090-91 (10th Cir. 1993) (holding in a criminal case involving storage of hazardous waste under RCRA, the Government need not prove that the defendant knew that the material at issue was identified or listed as hazardous waste under RCRA regulations). Under this framework, the Government would not have to show that Respondent knew that motor vehicles converted to competition-only vehicles still meet the statutory definition of "motor vehicles." The Government would only need to show that Borla knew the devices would be installed on vehicles, regardless of their status. Assuming, for the sake of argument, Respondent mistakenly believed that these vehicles did not fall under the statutory definition, such mistake would not excuse its conduct even in a criminal context,

because of the longstanding principle that "ignorance of the law is not a defense." *Weintraub,* 273 F.3d at 147 (2d Cir. 2001) (citing *International Minerals & Chemical Corp*., 402 U.S. 558, 562-63 (1971).

Beyond the law supporting Complainant on this issue, the facts do too. Notwithstanding Respondent's arguments to the contrary, the documentary evidence in this Proceeding strongly supports a finding that the Subject Parts were intended to be installed in "motor vehicles." Respondent's instruction manuals categorically state that the Subject Parts were designed for particular makes and models of vehicles. These makes and models of vehicles are "motor vehicles." Nothing in contemporaneous documents at the time of the violations, either in the instruction manuals or otherwise, indicates Respondent really designed these Subject Parts for purpose-built or converted vehicles used solely for competition. Respondent points to the disclaimer it put on the Subject Products, "LEGAL ONLY FOR RACING VEHICLES THAT MAY NEVER BE USED, OR REGISTERED, OR LICENSED FOR USE, UPON A HIGHWAY," as evidence of its intent. Opposition Brief at 8, 30. However, such disclaimer expresses no intent that such products be installed only in a purpose-built or converted competition vehicles. Rather, it solely conveys a notification to customers concerning the Subject Products' legality.

Respondent also claims that its use of the disclaimer represents a good-faith intent to comply with the CAA, but states that the disclaimer was modelled upon a requirement incorporated in a California Air Resources Board ("CARB") settlement resolving CARB claims involving violations of California vehicle tampering law. Opposition Brief at 8. Respondent specifically acknowledges the CARB settlement condition was based upon "California's racing exemption" and the settlement document cited specifically indicates it addresses California tampering law, not the CAA. *Id. See also* Settlement in *State of California Air and Resource Board v. K&N Engineering*, 2015 (https://ww2.arb.ca.gov/sites/default/files/classic/enf/casesett/sa/kandn_sa.pdf). It is disingenuous for Respondent to claim that this settlement gave Respondent guidance concerning federal anti-tampering

law when it clearly pertains to California law, which is structured differently and specifically includes a racing exemption.[7] Opposition Brief at 64.

Finally, the only new item Respondent submits to support its contention of good-faith intent to comply is a declaration from a manager stating that the Subject Products were designed with the intent that they only be used on competition-only vehicles. Opposition Brief at 27, *see also* Opposition Brief, Att. 2 ¶ 5. However, such statement is self-serving and not reliable given Complainant's documentary evidence to the contrary. Just because Respondent puts forth some evidence in support of establishing a genuine issue of fact, that does not require this Tribunal to find a genuine dispute where such evidence is "not significantly probative." *BWX Tech.*, 9 E.A.D. at 76-77 (EAB 2000) (citing *Anderson*, 477 U.S. at 250 (stating that court may grant summary judgment where nonmovant's evidence is not significantly probative or is "one-sided" in favor of movant)). Respondent is asking this Tribunal to infer its intent through its proffered facts, but such inference is not "reasonably probable in the context of surrounding facts and circumstances. *Id.* (citing *Sylvia*, 48 F.3d at 818); *T.W. Elec. Service, Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 631-632 (9th Cir. 1987) ("Inferences from the nonmoving party's 'specific facts' as to other material facts…may be drawn only if they are reasonable in view of other undisputed background or contextual facts and only if such inferences are otherwise permissible under the governing substantive law; *Clarksburg Casket*, 8 E.A.D. at 500 (affirming initial decision granting Agency's motion for an accelerated decision upon finding that favorable inferences

[7] At page 64 of the Opposition Brief, Respondent states that:

> In 1982, California adopted an express exemption for racing vehicles from its mobile source emission standards. See CAL. HEALTH & SAFETY CODE § 43001. Racing vehicle is defined as "a competition vehicle not used on public highways." CAL. HEALTH & SAFETY CODE § 39048. In addition, CAL. CODE REGS., tit. 13 § 2222 requires manufacturers of aftermarket parts that are exempt from emission standards, including racing vehicles, to include a disclaimer indicating the restricted use.

Given these provisions nowhere come near having equivalent provisions in the CAA, it stretches credulity how Respondent can state that it in good-faith thought these provisions provided guidance on how to comply with the CAA.

sought by nonmovant company concerning chemical reporting obligations under the Emergency Planning and Community Right to Know Act were overwhelmed, and thus rendered unreasonable, by the Agency's contrary inferences based on the company's deficient reporting).

D. Respondent's Interpretation of the Principal Effect Element Has No Legal or Factual Basis.

In its Opposition Brief, Respondent does not retract the acknowledgement that its Subject Parts replace one or more TWCCs on the Subject Vehicles – as it indicated for each Subject Part – "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." CX 007. However, Respondent claims that this acknowledgment has no bearing on this case, as it is possible that there really weren't TWCCs in the vehicles at the time the Subject Products were installed. However, evidence of actual installation of the Subject Product is not called for or necessary to establish liability under the statute. Rather, Respondent's acknowledgment that the Subject Parts will remove TWCC's installed in motor vehicle by OEMS is sufficient to establish that the Subject Parts have a principal effect of bypassing, defeating, or rendering inoperative an emissions-related element of design.

Moreover, even if the Subject Part is installed in a vehicle that has already had its TWCCs removed, the Subject Part is nonetheless extending the state of removal, bypass, and defeat of the OEM's elements of design installed to meet CAA emission standards. It makes no sense that such act is legal while the original removal of the elements of design is not.

This is not at all controversial—this has been the EPA's interpretation of the Act since at least 1991. On March 13, 1991, EPA issued to the repair/service industry, "Fact Sheet: Exhaust System Repair Guidelines" to explain the revised provisions of section 203(a)(3) after the 1990 Amendments.

The Agency stated that "these guidelines reflect EPA's position that any pipe used to replace the section of exhaust where the catalytic converter *should be*, would be considered illegal." (*emphasis added*) CX 314 at 1. The Fact Sheet also provide these pertinent Q & A's:

> Question 2. Can I remove a converter from a vehicle that is used only for "off-road" driving?
>
> Answer 2. No….The federal tampering prohibition pertains to "motor vehicles," which are defined by section 216(2) of the Act as "any self-propelled vehicle[s] designed for transporting persons or property on a street or highway." A light-duty vehicle manufacturer certifies an engine-chassis configuration as meeting the applicable emissions standards for motor vehicles manufactured in a given model year, and it is not legal for anyone to "de-certify" a motor vehicle for "off -road" use.
>
> ***
>
> Question 4. If a vehicle is brought into a muffler shop with a missing converter and a replacement pipe already installed, is it tampering to install a new replacement pipe?
>
> Answer 4. Yes. Section 203(a)(3)(B) makes it illegal for any person to sell or to install any part where a principal effect would be to bypass, defeat, or render inoperative any device or element of design of a vehicle's emission control system. A principal effect of a replacement pipe is to defeat or bypass the catalytic converter system as it was designed by the manufacturer. It is, therefore, a prohibited act to install a replacement pipe in any situation. It is also a prohibited act to replace the entire exhaust pipe without replacing the catalytic converter….
>
> Question 5. If a converter-equipped vehicle is brought to a muffler shop with the converter already removed by the owner, is it tampering to install a section of pipe in the space left vacant by the converter's removal?
>
> Answer 5. Yes. The installation by a muffler shop of a section of pipe in the void left where the vehicle owner removed the converter is considered by the Agency to be part of the act of tampering….Section 203(a)(3)(A) clearly prohibits all individuals from removing or rendering inoperative any emissions control device or element of design. If a repair facility completes, assists, or participates <u>in any way</u> in this act of tampering begun by someone else, it has also acted in violation of section 203(a)(3)(A) of the Act and by installing a defeat device has violated section 203(a)(3)(B).

U.S. Environmental Protection Agency, Fact Sheet: Exhaust System Repair Guidelines (Mar. 13, 1991), CX 314 at 3 and 4. Respondent's interpretation defies a common-sense reading of the Act and would upend its longstanding application to the vehicle service industry. Therefore, Respondent's interpretation of the "principal effect" element should be rejected.

E. There is No Subjective Knowledge Element of Proof in Section 203(a)(3).

Like its arguments concerning the "intended for" language in section 203(a)(3)(B), Respondent avers that the "knows or should have known" language also requires the Government to establish *mens rea* concerning actual knowledge that an illegal act of tampering of a motor vehicle would in fact occur. Furthermore, Respondent argues the Government would have to also establish Respondent knew or should have known that its Subject Parts would be used on a motor vehicle that: (1) did not already have its TWCCs removed; (2) was not a purpose-built racing vehicle using the frame and other components that are identical to those used in a certified motor vehicle, or (3) was not a motor vehicle that has been converted to a dedicated competition vehicle.

However, the legislative history of section 203(a)(3) indicates that Congress did not intend the knowledge language in the statute to function as a subjective *mens rea* standard. In the House Report by the Committee on Interstate and Foreign Commerce ("Committee") concerning the CAA Amendments of 1977, Report No. 95-294, the Committee explained that it was adding a revision to section 203(a)(3) to the Act "to assure that vehicle emission control systems will function as intended during the time the vehicle is in use." H.R. Rep. No. 95-294, at 297 (1977) (CX 307 at 2). The original version of section 203(a)(3) applied to only manufacturers and dealers, and the Committee's amendment would add "garages, service stations, non-dealer automotive repair centers, and other businesses and persons engaged in providing motor vehicle repair service for pay" as subject to the tampering prohibition of the Act. *Id.* The Committee adopted this amendment because the existing limitation of the prohibition "was inequitable and inconsistent with the intent and purpose of the Act." *Id.* The Report further states that [i]n adopting this amendment the Committee endorse the construction of the terms "knowingly" and "remove or render inoperative given by the Federal District Court in *United States v. Haney*, 371 F. Supp. 381, 384 (M.D. Fla. 1974)" The reference to

Id. at 3. This legislative history makes clear that Congress did not intend knowledge standard in Section 203(a)(3) to require the Government to establish subjective knowledge to refer to the violator's knowledge of the facts that make up the elements of violation set forth in the language of the statute (e.g., that a device or element of design was rendered inoperative). Applying this logic to the knowledge element of section 203(a)(3)(B), if a person knows or should know that the defeat device (,

Congress's reference to *Haney Chevrolet, Inc.* elucidates Congress's thinking behind instituting the knowledge element in section 203(a)(3). In *Haney Chevrolet, Inc.,* a dealership that had removed emission control devices from a motor vehicle it was servicing and released the motor vehicle to the owner without said devices was held to be in violations of section 203(a)(3) of the Act. *United States v. Haney Chevrolet, Inc*., 371 F. Supp. 381 (M.D. Fla. 1974). In that case, the dealership raised the defense that the Government did not establish the knowledge element was satisfied because the dealership's employees intended that the devices would be removed only temporarily until a solution to the motor vehicle's engine problems could be found. The court rejected this argument, finding that the dealership knew that the motor vehicle's emission controls were removed and left the dealership without the controls, and that the dealership's subjective intent had nothing to do with the knowledge element of section 203(a)(3). *See id.*, at 384-85. Thus, the legislative history indicates that Congress specifically endorsed the *Haney* court's rejection of a subjective knowledge standard in section 203(a)(3).

Respondent argues the Motion cites legislative history supporting not Complainant's but Respondent's view that Congress intended there to be an actual knowledge element of proof in section 203(a)(3)(B). However, Respondent quotes part of the legislative history text out of context. The full relevant passage is as follows:

> 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. In *Ced's*, a manufacturer of "test tubes" that, when installed on a motor vehicle, remove and replace the vehicle's catalytic converter, challenged having to respond to an EPA information request under section 114 of the Act, arguing it was not subject to the information request obligations of the Act because it was not among the listed categories of persons subject to the tampering prohibition as written in the Act at that time. *Ced's*,, 745 F.2d 1092. The Seventh Circuit held that *Ced's*, as an entity who, by manufacturing and selling catalytic converter defeat devices, could cause a violation of the tampering prohibition to occur, is subject to the Act and its information gathering obligations. *Id*. at 1096. *Ced's* argument that there were potential legal uses for its defeat devices was unavailing to persuade the court from finding otherwise. Id. at 1096-97. In referring to the legal issues raised in the *Ced's* case, Congress was clearly concerned that defeat device manufacturers and sellers like *Ced's* would not escape liability through raising "cumbersome" issues of proof after the 1990 Amendments took effect. Congress thus crafted section 203(a)(3)(B) specifically to foreclose defeat device manufacturers like *Ced's* from avoiding liability by claiming that, despite their products having a principal effect of defeating emission controls, they did not have actual knowledge as to how users will actually use their products. Thus, in light of this legislative history, Congress' purpose in enacting revisions to section 203(a)(3) should not be frustrated by imputing into the Defeat Device Prohibition a requirement to show that an actual event of tampering would occur due to the manufacture or sale of a defeat device.

It is uncontroverted that Respondent had reason to know that its Subject Parts were designed to fit motor vehicles and that they defeat a motor vehicle's certified emissions-related element of design. As previously discussed in Complainant's motion, the Act does not require actual knowledge of how the

Subject Parts were used by the user—if the Respondent knew or should have known its Subject Parts fit with and had a principal effect of defeating an emissions-related element of design of a motor vehicle, that is enough to establish liability. And, as Complainant has noted before, reading the Act to require the Government to prove both subjective knowledge and that the Subject Parts actually went on motor vehicles would subvert Congressional intent to make the section 203(a)(3) easier to enforce, frustrate the Act's objective to deter tampering and defeat devices, and establish an enormous exclusion in the Act that would swallow the prohibition. *See Consumers Scrap Recycling,* 11 E.A.D. at 294 (it is a cannon of statutory construction that exceptions and exemptions are to be narrowly construed); *City of Edmonds v. Oxford House, Inc*., 514 U.S. 725, 731-32 (1995) (narrowly interpreting statutory exception in Fair Housing Act); *Comm'r v. Clark*, 489 U.S. 726, 739 (1989) (explaining that statutory exceptions are to be construed narrowly to preserve the primary operation of the general rule) (cited by *Consumers Scrap*, 11 E.A.D. at 294). Respondent does not speak to the extent its proposed interpretation of the Act would have on the enforceability of the Act, or how to square its interpretation with the Congressional-intended purpose of section 203(a)3), as it really can't without acknowledging that its interpretation guts the prohibition to irrelevance.

F. Respondent Has Failed to Put the Facts Supporting A Finding of Its Liability in Genuine Dispute.

Finally, Respondent's defense is premised on its presumption that its Subject Parts likely ended up on purpose-built racing vehicles or vehicles converted such that they are no longer able to drive on public roads. With all of the information that Respondent has put into the record concerning racing, Respondent has not established any reason to believe that its Subject Products were used solely on converted racing vehicles rather than motor vehicles not used for racing or motor vehicles used sometimes for racing and sometimes for driving on public road. There is nothing inherent in Respondent's Subject Parts that impede their use on the public roads. With the exception of one sale of

a Subject Part, Respondent admits that, in providing its Subject Parts to large distributors to sell to consumers with no restrictions, it has no idea whether its Subject Parts were installed on dedicated racing vehicles or not. Opposition Brief at 39. But it clearly understood that its Subject Parts can work on motor vehicles, and that the manufacture and sale of defeat devices was a proscribed activity, as the legality disclaimers Respondent placed on its products convey. It cannot now be allowed to escape liability by claiming it had no reason to know that the Subject Parts defeat the emission controls of certified motor vehicles.

Moreover, in response to Complainant's Motion indicating that Respondent had no affirmative measures to ensure its Subject Products would not end up on motor vehicles used on the public roads, Respondent, again, identified none. Instead, it placed the onus on the Agency to promulgate regulations specifying what affirmative measures Respondent should take to sell its Subject Parts legally. But Congress has not directed the Agency to promulgate any implementing regulations for section 203(a)(3)—it is the sole responsibility of Respondent to comply with section 203(a)(3) as it stands.

III. RESPONDENT HAS FAILED TO ESTABLISH A GENUINE DISPUTE OF MATERIAL FACT CONCERNING 4,813 VIOLATIONS OF SECTION 203(a)(3)(B) OF THE ACT.

Complainant has based its count of the number of violations of section 203(a)(3)(B), 5,338, on manufacture and sales data Respondent submitted in response to the Agency's Information Request issued pursuant to section 208(a) of the CAA, primarily compiled in a comprehensive excel spreadsheet prepared by Respondent. CX 007. In its Opposition Brief, Respondent asserts that its response to the Agency's Section 208 Information Request was not accurate, and indicates that the number of Subject Products at issue in this Proceeding really is 4,787. Opposition Brief at 40-41. Respondent argues for this reduced number based on a number of reasons: Respondent asserts some of the Subject Parts were returned, Respondent asserts that some of the Subject Parts eventually left the United States for other

countries; Respondent believes some of Subject Parts were sold within the United States but really were intended for sale outside of the United States because the recipients were freight forwarders or American agents for foreign entities; and some of the Subject Parts Respondent says were distributed for "promotional" purposes. Complainant disputes Respondent's legal theories supporting its revised number. Respondent has failed to put forth probative, admissible evidence to support many of its factual assertions.

Nonetheless, in an effort to simplify the issues under consideration by the Tribunal under this Motion, as well as to expedite a decision on the important legal issues concerning Respondent's competition defense that are key for resolution of this case, Complainant, for the purpose of its Motion only, revises its request for accelerated decision for liability from 5,338 violations of section 203(a)(3)(B) of the Act to 4,813 violations based upon invoices Respondents submitted along with its spreadsheet. Respondent submits with this Reply Brief a declaration from EPA engineer Andrew Chew who reviewed the invoices to find, independent of Respondent's spreadsheet, at least 4,813 Subject Parts were sold and shipped by Respondent within the United States between January 15, 2015, through September 26, 2018. Attachment A, Declaration of Andrew Chew. Note that this number is based only upon the invoices that Respondent has provided Complainant. Moreover, as part of this review, Respondent did not provide an invoice indicating that Subject Part no. 17288 had been sold and shipped within the United States during the relevant time period. For purposes of this Motion only, Complainant is not seeking accelerated decision on liability for Subject Part no. 17288, and thus Complainant revises its request for accelerated decision on liability to cover 56 different types of Subject Parts rather than 57 as indicated in the Motion.

IV. CONCLUSION: COMPLAINANT'S MOTION FOR ACCELERATED DECISION ON LIABILITY FOR 4,813 VIOLATIONS OF THE DEFEAT DEVICE PROHIBITION SHOULD BE GRANTED.

Respondent has failed to rebut the material facts the Complainant has put forth establishing liability for 4,813 violations of Section 203(a)(3)(B) of the Act. Respondent's proposed interpretation of law that would allow it to escape liability lacks legal basis and is contrary to the objectives and purpose of Title II of the Act, and therefore should be rejected. Respondent's proposed reading of the Act would severely impede Congress's objective and purpose in establishing a Defeat Device Prohibition to ensure certified motor vehicles retain their emissions-related elements of design. *See King*, 576 U.S. at 498 ("But in every case we must respect the role of the Legislature, and take care not to undo what it has done. A fair reading of legislation demands a fair understanding of the legislative plan.") Moreover, Respondent has "failed to present sufficient evidence from which a reasonable decisionmaker could decide in its favor" and thus has failed to raise a genuine issue of material fact warranting an evidentiary hearing. *In the Matter of Mayaguez Regional Sewage Treatment Plant*, 4 E.A.D. 772, 788-89 (EAB 1993). For these reasons, Complainant respectfully requests the Presiding Officer order an accelerated decision on liability for 4,813 violations of Section 203(a)(3)(B) of the Act against Respondent.

V. RESPONDENT HAS FAILED TO RAISE ANY VALID LEGAL OR FACTUAL BASES TO REBUT COMPLAINANT'S MOTION TO STRIKE AFFIRMATIVE DEFENSES

As noted in Complainant's Motion, "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. *In the Matter of Eagle Brass Co.*, 2016 WL 7488188 at *17 (OALJ Dec. 21, 2016)(citing *Mifflinburg Tel, Inc. v. Criswell*, 80 F. Supp. 3d 566, 574 (M.D. Pa. 2015)). Respondent's Opposition Brief fails to raise facts or legal arguments sufficient to support the affirmative defenses included in Complainant's Motion, and therefore should be struck as a matter of law.

A. 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 continues to argue, without citation to any legal authority, that Complainant's actions in this Proceeding are contrary to 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). Respondent acknowledges that the Executive Order was rescinded, but nonetheless argues that the Executive Order was in effect at the time this Proceeding was initiated and thus failure to live up to its "universal principles" would be "almost definitionally 'arbitrary and capricious' and hence contrary to fundamental rules of administrative procedure." Opposition Brief at 45. Moreover, Respondent argues that, regardless whether such guidance is enforceable by a court, the Presiding Officer should "hew to the fundamental principles outlined" in the Executive Order as a matter of discretion. *Id.* at 46.

Respondent has not denied Complainant's incontrovertible point made in the Motion that the Executive Order by its own terms establishes no rights or privileges in enforcement proceedings. Respondent has failed to cite any legal authority to support its position that this rescinded Executive Order has any relevance to this Proceeding or should be considered in any way. Therefore, Complainant respectfully requests that the Presiding Officer strike Respondent's Fourth Defense as a matter of law.

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

In its Motion, Complainant seeks to strike Respondent's Fifth Defense as none of the alleged violations in the Second Amended Complaint are barred by the five-year statute of limitations under 28 U.S.C. § 2462. As noted in the Motion, Complainant alleges that 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 that provides 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.

In support of its Fifth Defense, Respondent states, without further explanation, that "[i]nsofar as the original complaint was defective for failure to identify the specific parts alleged to violate the CAA, that complaint is not the proper starting point." Opposition Brief at 46. Respondent argues that the filing of the First Amended Complaint, August 6, 2020, would make the oldest date within the statute of limitations February 21, 2015, rather than January 15, 2015. *Id*. The change associated with the First Amended Complaint was simply the dropping of certain claims, and therefore, was nothing defective about the Original Complaint that would have caused confusion or ambiguity as to the alleged violations that were retained in the First Amended Complaint. Thus there is no basis for Respondent's claim of defect that preserves a statute of limitation defense. Therefore, Complainant requests that its Motion to Strike Fifth Defense be granted.

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

In its Sixth Defense, Respondent claims that Complainant's interpretation of the CAA's definition of "motor vehicle" and the EPA's Penalty Policy applicable to this Proceeding violates the nondelegation clause of the Constitution. U.S. CONST. art. I, § 1. Respondent acknowledges current "intelligible principle" jurisprudence does not support its defense. Opposition Brief 46-48. Moreover, Respondent acknowledges that constitutional challenges against statutory enactments or administrative penalty authority granted to an agency is beyond the jurisdiction of administrative proceedings. *See In*

the Matter of: Martex Farms, Inc., 2006 WL 1582510 *8 (OALJ Feb. 23, 2006). Nonetheless, Respondent indicates it is placing a marker down that it intends to challenge the existing intelligible principle jurisprudence as it applies to this Proceeding in any appeal that may occur in the event of an unfavorable ruling against it by the Presiding Officer. Therefore, Complainant requests that its Motion to Strike Sixth Defense be granted, which Respondent acknowledges is beyond the authority of the Presiding Officer to consider.

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

Respondent contends that it "cannot be held liable for any violations or penalties because EPA failed to provide fair notice of its interpretation of what was required under the law," and, according to Respondent, "EPA's enforcement action thus violates due process as protected by the Fifth Amendment." Opposition Brief at 49. Respondent supports this defense by citing to several regulations and public statements made by the Agency, information concerning the "common understanding" in the industry, and a claim of inconsistent Agency enforcement of the Defeat Device Prohibition. Respondent's arguments concerning a lack of fair notice ring hollow and fail as a matter of law to support its Seventh Defense.

A conviction or punishment violates the Due Process Clause of the Constitution if the statute or regulation under which it is obtained "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *FCC v. Fox Television Stations, Inc*., 567 U.S. 239, 253 (2012). The Due Process Clause, however, does not require that a statute be drafted with "perfect clarity and precise guidance." *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989). "The degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489,

498 (1982).[8] Courts tolerate lesser degrees of specificity for enactments with civil penalties than those with criminal penalties "because the consequences of imprecision are qualitatively less severe." *Id.* at 499; *F.T.C. v. Wyndham Worldwide Corp*., 799 F.3d 236, 250 (3d Cir. 2015). Moreover, economic regulation is subject to a less vagueness test because "its subject matter is often more narrow, and because businesses that face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action." *Hoffman Estates*, 455 U.S. at 498. "For those statutes, a party lacks fair notice when the relevant standard is 'so vague as to be no rule or standard at all.'" *Wyndham*, 799 F.3d. at 250 (quoting *CMR D.N. Corp. V. City of Phila.*, 703 F.3d 612, 631-31 (3d Cir. 2013)). Fair notice is satisfied as long as the violator "can reasonably foresee that a court could construe its conduct as falling within the meaning of the statute." *Id.* at 256.

As Complainant has discussed at length in the Motion as well as earlier in this Brief, it can reasonably be ascertained from the plain language of section 203(a)(3)(B) that acts of Respondent are prohibited and does not at all possess the requisite degree of vagueness that would offend due process. To state a claim that a statute is void for vagueness, the language of the challenged statute must itself be vague. *Little v. Dominion Transmission, Inc*. 138 F. Supp. 3d 699, 705 (W.D. Va. 2015), (citing *Indigo Room, Inc. v. City of Fort Meyers*, 710 F.3d 1294, 1302 (11th Cir. 2013)). In making its fair notice argument, Respondent attempts to veer focus away from the statute and instead focus on whether it had fair notice of Complainant's interpretation of the statute. But for purposes of due process the issue is

[8] In Village of Hoffman Estates, the Supreme Court found that the term "designed for use" as used in a village ordinance prohibiting drug paraphernalia was not unconstitutionally vague, since the standard includes "an item that is principally used with illegal drugs by virtue of its objective features, i.e., features designed by the manufacturer." *Village of Hoffman Estates.* 455 U.S. at 501. The Supreme Court further found that the term "designed for" as used in the ordinance would be plainly understood by a "business person of ordinary intelligence" to refer to "the design of the manufacturer, not the intent of the retailer or customer." *Id*. Likewise, the plain language of "designed for" in the CAA motor vehicle definition should be plainly understood as the design of the vehicle as planned by the OEM, not as altered by the purchaser, and therefore is not unconstitutionally vague.

whether Respondent had fair notice of is not what the statute requires, not the Agency's interpretation of the statute. *Wyndham*, 799 F.3d at 253-254.

In support of its fair notice defense, Respondent cited he 2016 Greenhouse Gas preamble and the regulations on importation which have already been shown to be not relevant earlier in this Brief. Respondent also cites to a statement EPA made to Congress concerning the Greenhouse Gas proposed rulemaking and a May 2016 letter EPA issued to the Automotive Competition Committee for the United States ("ACCUS"). With respect to the statement to Congress, it essentially mirrors the preamble language of the 2016 Greenhouse Gas rulemaking. Regarding the ACCUS letter, the letter neither permitted removal of emission controls from motor vehicles in converting them to competition vehicles, nor did it create or serve as public notice about manufacturer or seller defeat device liability. The -ACCUS Letter did not state that individual owners are allowed to remove or defeat emission controls on EPA-certified motor vehicles for purposes of converting a motor vehicle to a vehicle used solely for competition. At most, the letter describes how the Agency expects to exercise case-by-case enforcement discretion in choosing tampering cases and claims. The letter does not represent an Agency reinterpretation of the CAA or implementing regulations, nor did it enshrine an exemption from the Defeat Device Prohibition. And it certainly did not endorse makers of defeat devices to sell their products indiscriminately to the public (as Respondent has done) and avoid liability by simply placing a legality disclaimer on the product.

For all of its review of Agency statements on the subject, Respondent has not pointed to any statement that EPA has made, or regulation EPA has promulgated, that provides an interpretation of what Section 203(a)(3) prohibits that differs at all from how Complainant is applying the statute in this case. There has been no EPA pronouncement stating that the CAA allows the conversion of a certified motor vehicle to an unregulated competition vehicle. There is no EPA pronouncement stating that defeat

device manufacturers can sell their parts indiscriminately to the public as long as they claim intent that they don't end up on vehicles used on the public roads. Moreover, Respondent cannot point to any formal policy change concerning enforcement of the statute to justify a fair notice defense. *See Libertarian Party of Ohio v. Husted*, 751 F.3d 403, 423-424 (6th Cir. 2014) (holding fair notice defense against the enforcement of a state statute that prohibited a gubernatorial candidate from appearing on the ballot failed where the candidate could not point to any change in the state's policy for enforcement of the statute, nor could the candidate point to any prior adoption of a non-enforcement policy that the candidate could rely upon to ascertain what the statute prohibits).

Further, Respondent claims there was a common understanding and common industry practice to place legality disclaimers on defeat devices so that they could sell defeat devices and not be held liable under the CAA. Opposition Brief at 61-62. Yet, defeat device manufacturers placed legality disclaimers on their products with obvious awareness of the CAA Defeat Device Prohibition, and they decided these disclaimers would allow them to avoid liability under that Prohibition. An industry practice without valid basis that was done specifically to shield defeat device manufacturers from the Defeat Device Prohibition cannot possibly support a fair notice defense—it makes a mockery of the rule of law principle undergirding the Due Process Clause of the Constitution.

Finally, Respondent claims the Agency has not enforced Section 203(a)(3) for a period of many years, and such non-enforcement supports its argument that it did not have fair notice that its conduct was prohibited under the Act. This assertion is untrue—the EPA has had a long-standing history of enforcement of Section 203(a)(3), *see e.g.*, settlements in *United States v. Casper's Electronics, Inc*., 2007 (https://www.epa.gov/enforcement/consent-decree-casper-electronic-clean-air-act-settlement); *United States v. Edge Products LLC*, 2013 (https://www.epa.gov/enforcement/edge-products-llc-settlement); and *In the Matter of H&S Performance, LLC*, 2015

(https://www.epa.gov/sites/production/files/2016-01/documents/hscafo.pdf); *United States v. Harley-Davidson, Inc., et al*, (originally lodged 2017) (https://www.epa.gov/enforcement/harley-davidson-clean-air-act-settlement). And even, assuming for the sake of argument, EPA has not previously enforced the Section 203(a)(3), the lack of enforcement alone does not support a fair notice defense. *See Libertarian Party of Ohio*, 751 F.3d at 423 (that a person subject to an enforcement action is surprised by the enforcement does not necessarily show that the person did not know what was required).

For these reasons, Complainant's Motion to Strike Respondent's Seventh Defense should be granted.

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

The main thrust of Respondent's argument is that Complainant's proposed penalty is "disproportionately large" and therefore so punitive to amount to a criminal sanction. Respondent ignores that the primary purpose of civil penalties is deterrence, not punishment. *In re: Ocean State Asbestos Removal, Inc. / Ocean State Building Wrecking and Asbestos Removal Co., Inc.,* 7 E.A.D. 522, 548 (EAB 1998) (citing *In re Sav-Mart, Inc*., 5 E.A.D. 732, 738 (EAB 1995). In this matter, the size of the proposed penalty is based in large part on the amount of economic benefit (i.e., illegal profits) Respondent enjoyed from committing the violations. The penalty therefore needs to be of a size to deter Respondent and others from engaging in what is otherwise a very profitable enterprise. Moreover, the penalty has to be sizable for deterrence purposes for others in the automotive parts industry, as given the number of violations at issue as well as the prominence of Respondent within the aftermarket exhaust parts industry, others will be looking at the penalty assessed in this Proceeding carefully as part of their calculus as to whether it is worth the legal risks to continue to manufacture and sell defeat devices. The proposed penalty in this case, which is significantly below the statutory maximum authorized by Congress, can hardly be called equivalent to a criminal sanction.

Moreover, the legislative history indicates that Congress increases penalties for Title II violations as part of the 1990 CAA amendments specifically for the purpose of providing "a stronger deterrent against violations of the relevant provisions, especially with regard to more expensive vehicles." S. Rep. 101-228, at 124-25 (1989). As Respondent cites to no legal authority supporting its view that this proposed penalty should be viewed as sufficiently penal to raise Constitutional concerns, Complainant's Motion to Strike Respondent's Eighth Defense should be granted.

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

Earlier in this Brief, Complainant has demonstrated that there is no change in law that occurred through Complainant's interpretation of the CAA's Defeat Device Prohibition. Respondent has failed to cite any legal authority for support of its assertion that the Ex Post Facto Clause of the Constitution should apply to this Proceeding. Therefore, Complainant's Motion to Strike Respondent's Ninth Defense should be granted.

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

Respondent continues to advocate for the rule of lenity to be applied in this Proceeding, but fails to cite persuasive legal authority supporting its argument. Respondent asserts that "statutes that involve criminal penalties or that have mixed civil and criminal applications do not receive *Chevron* deference and are subject to the rule of lenity. Opposition Brief at 69. However, there is no holding that has created such a categorical rule. Respondent relies upon a statement respecting denial of certiorari from Justice Gorsuch, *Guedes v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, 140 S.Ct. 789 (2020), and a Sixth Circuit opinion, *Gun Owners of America v. Garland*, 992 F.3d 446 (6th Cir. 2021), involving a *criminal*, not dual application, statute, which was vacated on a petition for rehearing en banc after *(redacted)* filed its brief. *Gun Owners of America, Inc. v. Garland*, 2021 WL 2621112 (6th Cir. Jun. 25, 2021). Most courts have held the opposite, that is, that *Chevron* may be applied in a statute that carries

criminal consequences. These cases rely upon the holding in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon,* 515 U.S. 687, 704, n.18 (1995) ("We have never suggested that the rule of lenity should provide the standard for reviewing facial challenges to administrative regulations whenever the governing statute authorizes criminal enforcement.") The Court applied *Chevron* deference to the Fish and Wildlife Service's interpretation of a statutory term, as set forth under a regulation, where a violation of the provision at issue carried criminal penalties. *Id*. Examples of courts that have followed *Babbitt* include the following: *Guedes v. Bureau of Alcohol, Tobacco, Firearms and Explosives,* 920 F.3d 1, 27-28 (D.C. Cir. 2019), *cert. denied,* 140 S.Ct. 789 (2020). (Bureau of Alcohol, Tobacco and Firearms's regulatory interpretation of statute was entitled to *Chevron* deference, and the Rule of Lenity was not triggered.); *Esquivel-Quintana v. Lynch,* 810 F.3d 1019, 1024 (6th Cir. 2016), *rev'd*, 137 S.Ct. 1562 (2017) (Board of Immigration Appeals' interpretation of statute entitled to *Chevron* deference and the Rule of Lenity was not applicable; the Supreme Court reversed, finding no ambiguity, thus neither *Chevron* nor Rule of Lenity was applicable); *U.S. v. Kelly,* 874 F.3d 1037, 1049-50 (9th Cir. 2017) (Drug Enforcement Agency's listing of drug as a schedule 1 drug entitled to *Chevron* deference, and Rule of Lenity was inapplicable.)

Moreover, there are cases that have applied *Chevron* deference directly in criminal prosecutions. *See, e.g.*, *U.S. v. O'Hagan,* 521 U.S. 642, 673 (1997) (in prosecution for securities fraud, *Chevron* deference given to SEC's regulatory interpretation of statute, stating, "we must accord the Commission's assessment 'controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute."); *U.S. v. Hubenka,* 438 F.3d 1026, 1031 (10th Cir. 2006) (in prosecution for CWA felony, *Chevron* deference given to Army Corps of Engineers' regulatory interpretation of "waters of the United States"); *U.S. v. Kanchanalak,* 192 F.3d 1037, 1047 (D.C. Cir. 1999) (in prosecution for false

statement, Federal Election Commission's interpretation, as expressed in a regulation and an advisory opinion, was entitled to *Chevron* deference.)

Respondent also fails to correctly articulate the Rule of Lenity. Respondent statement that "the case law does not require all ambiguities to be 'gross' in order to trigger the rule of lenity rather than *Chevron* deference" is aberrant. Opposition Brief at 69-70. On page 72, Respondent cites to three Supreme Court cases dating from 1917, 1952, and 1980, none of which directly addressed Respondent's point. Rather, the courts have consistently and emphatically held that for the rule of lenity to be triggered, the ambiguity must be "grievous." In his concurrence in *Shular v. U.S.,* , Justice Kavanaugh summed up the longstanding explanation of how a court reaches a determination of whether an ambiguity is "grievous," stating "this Court has repeatedly explained that the rule of lenity applies only in cases of 'grievous' ambiguity—where the court, even after applying all of the traditional tools of statutory interpretation, can make no more than a guess as to what Congress intended." *Shular v. U.S.,* 140 S. Ct. 779, 788 (2020) (Kavanaugh, J., concurring) (citations omitted). Justice Kavanaugh also explained why the rule of lenity is only applied in exceptional circumstances, stating "of course, when a reviewing court employs all of the traditional rules of construction, the court will almost always reach a conclusion about the best interpretation, thereby resolving any perceived ambiguity. That explains why the rule of lenity rarely comes into play." *Id.*

In arguing the "severity of the uncertainty" of "EPA's view," Respondent asserts that members of Congress and the industry "understood for decades that modified racecars and their parts were legal." Opposition Brief at 69. But this fact, even if true, would not satisfy the threshold for "grievous ambiguity." *See Moskal v. U.S.*, 498 U.S. 103, 108 (1990) (citing *United States v. Rodgers,* 466 U.S. 475, 484 (1984) ("we have declined to deem a statute 'ambiguous' for purposes of lenity merely because

it was *possible* to articulate a construction more narrow than that urged by the Government. Nor have we deemed a division of judicial authority automatically sufficient to trigger lenity.").

Second, by casting the rule of lenity as an "interpretive rule" that is part of the "traditional toolkit for determining the meaning of statutory language," Respondent attempts to insert the rule of lenity into the first stages of a court's review. Opposition Brief at 70-71. This turns the long-established construct surrounding the rule of lenity on its head. Rather, there are longstanding holdings from the Supreme Court confirming that the rule of lenity is to be applied as a last resort and only after all other tools of statutory construction are exhausted. For example, in *Shular*, the Court stated:

> First, as the Court today says and as the Court has repeatedly held, a court may invoke the rule of lenity only 'after consulting traditional canons of statutory construction.' In other words, a court must first employ all of the traditional tools of statutory interpretation, and a court may resort to the rule of lenity only 'after seizing everything from which aid can be derived, [and] the rule of lenity comes into operation at the end of the process of construing what Congress has expressed, not at the beginning.

Shular, 140 S.Ct. at 787-788 (citations omitted). *See also Maracich v. Spears*, 570 U.S. 48, 76 (2013) (citation omitted) ("The rule [of lenity] comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers.

Third, Respondent attempts to bolster its argument by 1) equating the amount of ambiguity necessary to invoke *Chevron*'s two step analysis with the amount of ambiguity necessary to trigger the rule of lenity and 2) declaring that the rule of lenity should be applied before *Chevron*. Opposition Brief at 71. Both premises are wrong because Respondent conflates the proper application of the *Chevron* doctrine with that of the rule of lenity. But the origins, purposes, and functions of these rules are distinct. The Supreme Court has "held that ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion." *National Cable & Telecommunications Ass'n. v. Brand X Internet Services,* 545 U.S. 967, 980 (2005). Moreover,

because "agencies are better equipped" than courts to make "difficult policy choices," "if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." *Id.* Thus, under *Chevron*, if a statute is ambiguous, the court will look to the administering agency's interpretation and defer to that interpretation if it is reasonable. When the rule of lenity is applied, the determination of ambiguity follows a significantly different path. The rule has traditionally been applied in criminal cases, and "a criminal statute is not administered by any agency but by the courts." *Crandon v. U.S.,* 494 U.S. 152, 177 (1990). Courts review criminal statutes using traditional tools of statutory construction to resolve ambiguities in an attempt to discern legislative intent, and only if all else fails will a determination be made that the statute is "grievously ambiguous," triggering the rule of lenity. "The rule comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers. That is not the function of the judiciary." *Callanan v. U.S.,* 364 U.S. 587, 596 (1961).

Consequently, the timing of the invocation of *Chevron* versus the rule of lenity based on the appropriate ambiguity threshold is substantially different. Under *Chevron,* "when we confront an expert administrator's statutory exposition, we inquire first whether 'the intent of Congress is clear' as to 'the precise question at issue.'" *NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.,* 513 U.S. 251, 257 (1995). The question of ambiguity occurs at *Chevron's* step one, and if ambiguity is found, step two (determining the reasonableness of the agency interpretation) follows. In contrast, the rule of lenity is triggered only at the end of the court's analysis and only if the court cannot resolve the ambiguity.

A number of courts have rejected the approach urged by Respondent and held that application of the rule of lenity does not precede a *Chevron* analysis, nor is it applicable at *Chevron* step one. *See, e.g.,*

Guedes, 920 F.3d at 27 (citations omitted) (emphasis in original) ("in circumstances in which *both* *Chevron* and the rule of lenity are applicable, the Supreme Court has never indicated that the rule of lenity applies first. In fact, the Court has held to the contrary.") Further, "the rule of lenity applies only when the ordinary canons of statutory construction have revealed no satisfactory construction. And *Chevron* is a rule of statutory construction, insofar as it is a doctrine that 'construe[s] what Congress has expressed.") *Hosh v. Lucero*, 680 F.3d 375, 383 (4th Cir. 2012) (citation omitted) ("In this particular instance, we defer to the BIA without invoking the rule of lenity. We do so because '[t]he rule of lenity is a last resort, not a primary tool of construction.'"); *Perez-Olivio v. Chavez,* 394 F.3d 45, 53 (1st Cir. 2005) (applying *Chevron* analysis before ROL, stating "because we find that the BOP's method of calculating GCT based on 'time served' is reasonable under § 3624(b), it would be unnecessary to resort to the rule of lenity even if it were to apply to the GCT statute.")

Respondent's related argument, that the ambiguity threshold for *Chevron* step one would also trigger the rule of lenity, is also misguided. *Hosh,* 680 F.3d 383-84 ("Although we have acknowledged that some ambiguity exists in § 1226(c), we find that such ambiguity does not rise to a level of grievousness that would require us to call upon the rule of lenity." Furthermore, "the conditional requirement needed to invoke the rule of lenity—that the statutory ambiguity be 'grievous'—does not exist in this case." *See also* "the conditional requirements needed to invoke *Chevron* do exist, and we therefore rely on *Chevron* instead of the rule of lenity.")

In sum, Respondent has failed to articulate how the definition of motor vehicle or the Defeat Device Prohibition under the Act is so grievously ambiguous to even consider the rule of lenity in this matter, and Respondent's argument concerning the rule of lenity jurisprudence is fatally flawed in light of the overwhelming authority contradicting it. For these reasons, the Motion to Strike Respondent's Tenth Defense should be granted.

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

As Complainant explained in its Motion, it is well-settled law that the Seventh Amendment is not applicable to administrative proceedings. *Tull v. United States*, 481 U.S. 412, 418 n.4 (1987). Furthermore, the Supreme Court has held 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 fails in its Opposition Brief to identify any legal precedent to base this Defense upon. Therefore, Complainant's Motion to Strike Respondent's Eleventh Defense should be granted.

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

As Complainant has noted in its Motion, 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. *In re Woodcrest Manufacturing, Inc.*, 7 E.A.D. 757, 782 (EAB 1998) (citing *United States v. Bajakajian*, 524 U.S. 321, 322 (1998)).

Respondent claims that a "potential fine of several million dollars would be grossly disproportionate to the alleged defense" based upon its assertion that "EPA had a decades-long practice of allowing the very conduct for which it now seeks to fine" Respondent, "lack of notice that it was doing anything wrong," and "EPA's seeming endorsement" of the actions alleged as violations." All of these contentions have been fully debunked in Complainant's Motion as well as earlier in this Brief. In addition, Respondent fails to cite any legal authority in support of the proposition that any of above contentions, if true, would lead to a violation of the Eight Amendment if Complainant's proposed

penalty was assessed by this Tribunal. For these reasons, Complainant's Motion to Strike Respondent's Twelfth Defense should be granted.

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

Respondent avers that it had relied upon a prior Agency position concerning the CAA Defeat Device Prohibition in manufacturing and selling thousands of defeat devices, and now that, as Respondent contends, EPA has changed its interpretation regarding the Defeat Device Prohibition after the conduct alleged to be in violation has occurred to Respondent's detriment, and therefore, Complainant should be estopped from enforcing the Act based on EPA's changed interpretation.

As has been discussed at length in Complainant's Motion as well as in this Brief, the Agency's limited statements concerning its willingness to exercise enforcement discretion towards legitimate racers can in no way be interpreted to constitute a formal interpretation of the applicability of section 203(a)(3) of the Act, let alone can it be reasonably considered a blank check for defeat device manufacturers such as Respondent to sell defeat devices indiscriminately as Respondent would like the Tribunal to believe.

Moreover, Respondent attempts to make its estoppel defense easier to prove by attempting to erase current jurisprudence on estoppel defenses against the Government by citing several court opinions from the 1980s in claiming that estoppel arguments against EPA need not include a showing of affirmative misconduct by the Agency. "Equitable estoppel is an equitable doctrine that precludes a party from asserting a right that the party would otherwise enjoy if that party takes actions upon which its adversary reasonably relies to its detriment." *BWX Technologies*, 9 E.A.D. at 80 (citing *Heckler v. Community Health Services of Crawford County, Inc*., 467 U.S. 51, 59 (1984). "For the reliance to be reasonable, the party claiming the estoppel defense must show that at the time it acted to its detriment, it did not have knowledge of the truth nor could such knowledge have been obtained with reasonable

diligence." *In the Matter of: Firestone Pacific Foods, Inc*., 2008 WL 2066621 *9 ((OALJ May 1, 2008) (citing *Heckler*, 467 U.S. at 58).

"When equitable estoppel is asserted against the government, as here, a party bears an especially heavy burden," because when "the Government is unable to enforce the law because of the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined." *BWX Technologies,* 9 E.A.D. at 80 (quoting *Heckler,* 467 U.S. at 60). "Thus, the defense of estoppel is rarely valid against the Federal Government acting in its sovereign capacity." *Firestone Pacific Foods*, 2008 WL 2066621 at * 9 (citing *Heckler*, 467 U.S. at 60-63; *OPM v. Richmond*, 496 U.S. 414, 422 (1990), *reh'g denied*, 497 U.S. 1046 (1990) (noting that the Supreme Court has reversed every finding of estoppel against the government by lower courts)).

Consistent with the principles articulated above, it is well settled in the case law that, "a party asserting equitable estoppel against the government not only must prove the traditional elements of estoppel—that it reasonably relied upon its adversary's actions to its detriment—but must also show that the government 'engaged in some affirmative misconduct.'" *BWX Technologies*, 9 E.A.D. at 80 (quoting *United States v. Hemmen*, 51 F.3d 883, 392 (9th Cir. 1995); *In re B.J. Carney Indus., Inc.,* 7 E.A.D. 171, 196 (EAB 1997); *Firestone Pacific Foods* at 9, (citing *United States v. Marine Shale Processors*, 81 F.3d 1329, 1349 (5th Cir. 1996). "Courts have routinely held that 'mere negligence, delay, inaction, or failure to follow agency guidelines does not constitute affirmative misconduct sufficient to estop the government." *BWX Tech.*, 9 E.A.D. at 80 (quoting *Board of County Commissioners of the County of Adams v. Isaac*, 18 F.3d 1492, 1499 (10th Cir. 1994). *See also B.J. Carney*, 7 E.A.D. at 197-200 (Agency's delay in both notifying the respondent about its violations and then taking enforcement against it for those violations did not constitute affirmative misconduct estopping it from enforcing its complaint against the respondent). "Affirmative misconduct has been defined to mean a 'deliberate lie'

or 'a pattern of false promises,' and does not include a government agent negligently providing misinformation." *Firestone Pacific Foods* at *9 (citing *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1184 (9th Cir. 2001).

In view of the case law cited above, Respondent has not cited any facts that indicate affirmative misconduct on the part of EPA upon which Respondent detrimentally relied upon in committing the alleged violations at issue in this Proceeding. For the above reasons, Complainant's Motion to Strike Respondent's Fourteenth Defense should be granted.

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

As indicated in its Motion, Complainant has adequately demonstrated the Presiding Officer was appointed by the EPA Administrator, and Respondent's claim that for-cause removal procedures applicable to the Presiding Officer violate the separation of powers is without any cited legal support. With respect to Respondent's claim that EAB members are principal Officers of the United States because, as Respondent contends, the "EAB exercises substantial and largely final authority for the EPA," such claim is an unsupported, conclusory statement, and Complainant's reasons set forth in the Motion for why EAB judges are inferior Officers of the United States are unchallenged by Respondent. For these reasons, Complainant's Motion to Strike Respondent's Nineteenth Defense should be granted.

CONCLUSION

For the reasons set forth herein, Complainant requests the Presiding Officer find that Respondent is liable for 4,813 violations of section 203(a)(3)(B) of the Act, 42 U.S.C. § 7522(a)(3)(B). If the 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 Nineteenth Defenses as a matter of law.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that an electronic copy of the foregoing Complainant's Reply Brief in Support of Motion for Accelerated Decision on Liability and to Strike Affirmative Defenses ("Motion") in the Matter of Borla Performance Industries, Inc., Docket No. CAA-R9-2020-0044, was filed with the Headquarters Hearing Clerk via the OALJ E-Filing System and that a true and correct copy of the Motion was sent via email to:

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