UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:	)	Docket No.: CAA-03-2021-0058
	)	
Keystone Automotive Operations, Inc.	)	
	)	
Respondent	)	

BUSINESS CONFIDENTIALITY ASSERTED

Keystone Automotive Operations, Inc. ("Respondent" or "Keystone") submits exhibits with its Prehearing Exchange that contain material claimed to be confidential business information ("CBI") pursuant to 40 C.F.R. § 2.203(b). Specifically, Respondent's Exhibits RX 40-41, 70-84, 266, and 275 contain CBI. These exhibits contain information regarding Respondent's pricing and customers of the parts at issue in this case, as well as company financial information. Respondent has made or is making a claim of CBI over the prices identified in this information and any information that would identify the purchasers or the specific quantity of products sold to such purchaser, and any internal company financial information. These exhibits, therefore, are filed under seal pursuant to 40 C.F.R. § 22.5(d).

Respondent's Prehearing Exchange also contains limited references to information contained in the exhibits identified as CBI. Accordingly, Respondent has made targeted and limited redactions on pages 9-10, 15-16, 23-28, and 30-32, and 34 of its Prehearing Exchange to remove those confidential references. The redacted version is being filed in the public record consistent with 40 C.F.R. § 22.5(d). Also consistent with 40 C.F.R. § 22.5(d), in the unredacted version, Respondent includes the information subject to redaction in red font in order to clearly identify the information it claims as CBI.

In addition, exhibits RX 30, 33-34, and 267-273 contain personally identifiable information ("PII"), some of which may be sensitive PII. To safeguard these potential witnesses' privacy in keeping with the Privacy Act of 1974 (codified at 5 U.S.C. § 552a), Respondent also files these exhibits under seal.

A copy of the Prehearing Exchange and associated exhibits with all CBI and PII redacted has been filed electronically via the Office of Administrative Law Judges ("OALJ") E-Filing System. An unredacted copy of the Prehearing Exchange and associated exhibits containing CBI and PII has been filed under seal with the OALJ via a file-share system established by the OALJ. If you have any questions, please contact Jennifer Adams at (713) 632-1427 or at jennifer.adams@hoganlovells.com.

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Respondent	)	

RESPONDENT'S PREHEARING EXCHANGE

Respondent Keystone Automotive Operations, Inc. ("Respondent" or "Keystone"), through counsel, files this Prehearing Exchange, consistent with section 22.19 of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Consolidated Rules") and with the Prehearing Order issued by the Presiding Officer on March 31, 2021 ("Prehearing Order"). Respondent may amend or supplement this Prehearing Exchange as provided by sections 22.19(f) and 22.22(a)(1) of the Consolidated Rules.

The heading numbers below correspond to those set forth in the Prehearing Order.

1.A. Potential Witnesses

At this time, Respondent anticipates that it may call any or all of the following witnesses at the evidentiary hearing in this matter, whose testimony is expected to include, but may not be limited to, the matters generally described. Respondent may supplement this list, upon adequate notice to the Presiding Officer and to Complainant, should Complainant's Rebuttal Prehearing Exchange, other information, or the lapse of time before the hearing reveal the need for additional or alternative witnesses.

1. Bill Rogers:

Bill Rogers is the President of Keystone. His responsibilities include overall leadership for Keystone, including direct responsibility for all employees, operations, sales, cost centers, etc. He has been in this role since July of 2015.

Mr. Rogers may testify, in either a fact and/or expert capacity, regarding Respondent's business, its role as a wholesale distributor, and its affiliated businesses and their operations and structure in the aftermarket parts industry. Mr. Rogers also may testify regarding the alleged violations in this matter, Respondent's good faith efforts to ensure the sale of compliant parts, and Respondent's actions in response to the EPA investigation. Mr. Rogers also may testify as to his education, training, experiences, and credentials.

A copy of Mr. Rogers's curriculum vitae is included as RX 267 in accordance with the Prehearing Order.

2. Jane Donnelly:

Ms. Donnelly has been employed by Respondent and/or affiliated entities for over a decade. She currently serves as a Director, Marketing.

Ms. Donnelly may testify as a fact witness on Respondent's role as a wholesale distributor, including the supplier application and intake process, the process for offering parts for sale, including information received by third-parties, and marketing practices of Respondent. Ms. Donnelly may also testify regarding Respondent's actions in response to the EPA investigation.

3. Ken Schuck:

Mr. Schuck currently serves as Vice President at KAM Marketing, a marketing agency that provides product sales support, marketing, and sales representation for the automotive manufacturing industry. KAM's clients include specialty automotive product suppliers, automotive retailers and distributors, and truck specialties, among others. Mr. Schuck has worked at KAM Marketing since 1995 and has been the account manager for Keystone since 2001. Mr. Schuck has a Bachelor of Arts in Marketing from Temple University. Mr. Schuck may testify, in either a fact and/or expert capacity regarding the wholesale distribution process generally as well as the industry standard with respect to wholesale distribution practices and knowledge of wholesale distributors regarding product-specific information, including the appropriate level of diligence/investigation a wholesale distributor conducts on parts it offers for sale. He also may testify as to his education, training, experiences, and credentials.

A copy of Mr. Schuck's curriculum vitae is included as RX 268 in accordance with the Prehearing Order.

4. Amy Faulk

Ms. Faulk is a distinguished drag racer and member of the Specialty Equipment Market Association's ("SEMA") Hall of Fame. Ms. Faulk is the first female National Hot Rod Association ("NHRA") World Champion in the Sportsman (amateur) category, and she was recognized by

NHRA as the "Winningest Woman in Racing." Ms. Faulk has won the NHRA Super Stock Driver of the Year award, as well as numerous national title victories. Ms. Faulk also was honored by the Memphis International Raceway with their Lifetime Achievement Award in 2012, and she earned SEMA's "Person of the Year" title in 1996.

Ms. Faulk currently serves as the Chief Executive Officer at Hypertech, Inc., a company dedicated to enhancing the performance of cars, trucks, and off-road vehicles. She has previously served on SEMA's Board of Directors and SEMA's Motorsports Parts Manufacturers Council. Ms. Faulk is a founding member of SEMA's Businesswoman's Network and is responsible for the development of the annual Silent Auction at the SEMA Show, which raises money for the SEMA Memorial Scholarship Fund.

Ms. Faulk may testify, in either a fact and/or expert capacity, regarding her personal experience as a race car owner and driver, her understanding of and experience with certain parts at issue in the Complaint and their use in racing, and the racing industry generally. She also may testify as to her education, training, experiences, and credentials.

A copy of Ms. Faulk's curriculum vitae is included as RX 269 in accordance with the Prehearing Order.

5. Thomas Deery:

Mr. Deery is an independent consultant focused on the motorsports business and event management with more than 45 years of leadership in the motorsports community and broad experience in motorsports events, series, and operational administration. Mr. Deery served as President and COO of World Racing Group for fourteen years, where he supported over 1,200 racing events. Mr. Deery also served as the Vice President, Weekly Racing and Regional Touring Series for NASCAR. Mr. Deery is a graduate of the University of Wisconsin – Platteville where he earned a Bachelor of Science degree in Business and Economics.

Mr. Deery may be called to testify as an expert witness regarding the size and scope of the racing industry and the relationship with the associated market for aftermarket racing parts. Mr. Deery is expected to provide testimony describing the multiple types of racing conducted across the United States, the various related metrics, including number of racing tracks, sanctioning bodies, races, racing participants, and the vehicles involved in racing and associated financial and economic impacts. He also may testify as to his education, training, experiences, and credentials.

A copy of Mr. Deery's curriculum vitae is included as RX 270 in accordance with the Prehearing Order

6. John Lambert:

Mr. Lambert is a trained engineer and currently serves as the General Manager at Hypertech, Inc., a company dedicated to enhancing the performance of cars, trucks, and off-road vehicles. Mr. Lambert began working at Hypertech in 2002 and focuses on products, including engineering. Prior to serving as the General Manager, Mr. Lambert served as the Tuning Manager at Hypertech. Mr. Lambert has extensive experience in tuners and related equipment.

Mr. Lambert may be called to testify as a fact or expert witness regarding uses of the parts at issue in the Complaint. He also may testify as to his education, training, experiences, and credentials.

A copy of Mr. Lambert's curriculum vitae is included as RX 271 in accordance with the Prehearing Order.

7. Chuck Wanamaker, III:

Mr. Wanamaker is the owner and technician at Waldwick Auto Service Center and Franklin Auto Care, automotive service centers. Mr. Wanamaker has serviced cars for over thirty years, with a specialty in antique and classic cars and racing vehicles. Mr. Wanamaker is a licensed state inspector, he operates a licensed private inspection facility, and he is a certified emissions repair technician. Mr. Wanamaker has deep familiarity with certain parts at issue in the Complaint, including knowledge of how the parts work and how they can be used in various vehicle types. Mr. Wanamaker owns over 150 cars spanning in model years from 1928 to 2008.

Mr. Wanamaker may be called to testify as a fact or expert witness regarding parts at issue in the Complaint, including their use in classic and antique cars and racing vehicles. He also may testify as to his education, training, experiences, and credentials.

A copy of Mr. Wanamaker's curriculum vitae is included as RX 272 in accordance with the Prehearing Order.

8. Richard Waitas:

Mr. Waitas is a Senior Manager at MagnaFlow, an international market leader in performance automotive parts. He has experience providing marketing and engineering project management. Mr. Waitas has been with MagnaFlow for nearly two decades and previously served as the Director of Engineering and Product Development Manager. Mr. Waitas has significant knowledge regarding aftermarket parts, particularly exhaust-related parts and other parts used for racing purposes.

Mr. Waitas may be called to testify as a fact or expert witness regarding parts at issue in the Complaint, including the purpose of the parts, how they work, and their uses. He also may testify as to his education, training, experiences, and credentials.

A copy of Mr. Waitas's curriculum vitae is included as RX 273 in accordance with the Prehearing Order.

9. Jonathan Shefftz:

Mr. Shefftz is an independent consultant with more than 25 years of experience in applying economics to litigation disputes, regulatory enforcement, and public policy decisions. Mr. Shefftz's clients have included federal and state governmental agencies, private litigators, and other private-sector entities. He is a qualified expert witness in United States District Court, federal agency administrative court, and state courts. Mr. Shefftz holds a Bachelor of Arts in

economics and political economy from Amherst College and a Master of Public Policy in government and business, energy and environmental policy from Harvard University.

Mr. Shefftz may testify as an expert witness regarding the potential penalty analysis associated with the allegations in the Complaint, including the potential economic benefit and gravity components. Mr. Shefftz also may testify as to his education, training, experience, and credentials.

A copy of Mr. Shefftz's curriculum vitae is included in RX 266 in accordance with the Prehearing Order.

Upon adequate notice to Complainant and the Presiding Officer, Respondent reserves the right to call: (a) witnesses listed by Complainant in its Prehearing Exchange or rebuttal, (b) additional witnesses or testimony by existing witnesses to respond to Complainant's Rebuttal Prehearing Exchange, and/or (c) such other witnesses as otherwise may become necessary.

1.B. List of Exhibits

Respondent intends to introduce at the hearing the exhibits listed in Attachment A. Copies of the exhibits are being produced with this Prehearing Exchange. Each exhibit is labeled as prescribed by the Prehearing Order, and the pages of each exhibit are numbered in the manner prescribed by the Prehearing Order.

The exhibits (1) support Respondent's denials as described in its Answer, submitted on March 3, 3021; (2) support any asserted defenses; and (3) support Respondent's position regarding reduction or elimination of a potential penalty.

Respondent also may present enlargements, excerpts, compilations of excerpts, and other demonstrative exhibits developed from the information in the listed exhibits. Further, Respondent reserves the right to use as exhibits excerpts from or copies of applicable regulations, statutory provisions, case law, and/or other legal authority.

Respondent may supplement this list, upon adequate notice to the Presiding Officer and to Complainant, should Complainant's Rebuttal Prehearing Exchange or other information reveal the need for additional or alternative exhibits.

1.C. Estimate of Time Needed to Present Direct Case

Respondent estimates that the amount of time needed to present its direct case is approximately four (4) days. Respondent does not require the services of an interpreter.

3.A. Documents in Support of Denials Made in Answer

Documents supporting Respondent's denials made in its Answer are described in Section 1.B.

3.B. Explanation of Affirmative Defenses

Pursuant to the Prehearing Order, Respondent is submitting an explanation of the arguments in support of the defenses asserted in its Answer. The pleading of the defenses identified in the Answer and described below shall not be construed as an undertaking by Respondent of any burden that would otherwise be the responsibility of the Complainant. Respondent has not waived any defenses and reserves its right to amend or supplement these defenses or to delete or withdraw such defenses as may become necessary as the matter progresses. Documents supporting Respondent's defenses are described in Section 1.B.

Explanation of Arguments in Support of Defenses - Introduction

Complainant alleges that Keystone violated section 203(a)(3)(B) of the Clean Air Act ("CAA"), which provides the following prohibition:

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

42 U.S.C. § 7522(a)(3)(B).

Complainant bears the burden to demonstrate actionable violations of section 203(a)(3)(B) of the CAA by Keystone. Complainant has not alleged facts that satisfy its burden. Specifically,

Complainant has failed to and cannot demonstrate that (1) the parts at issue were intended for use with or as part of "motor vehicles," (2) a principal effect of the identified parts was to bypass, defeat, or render inoperative any device or element installed on or in a motor vehicle, or (3) that Keystone knew or should have known that any such part was being offered for sale or installed for such use or put to such use. Accordingly, Complainant has not met its burden and has not demonstrated that Keystone violated the CAA.

Keystone is a wholesale distributor of aftermarket automotive equipment and accessories. The role of a distributor in the U.S. economy is to be an intermediary. Keystone buys from manufacturers and sells to retailers or jobbers (which are merchants who install or service products and sell to consumers or other businesses). In its role as a wholesale distributor, Keystone has very few touchpoints with the products at issue here:

- It did not design any of the products;
- It did not manufacture any of the products;
- It did not test or certify any of the products;
- It did not warrant any of the products;
- It did not offer technical support for any of the products;
- It did not install any of the products; and
- It did not know the end use or user of the products.

Assuming arguendo that the parts violated the CAA's prohibition on defeat devices, because of its unique role in the marketplace, Keystone did not know, nor should it have known, that the parts in question were offered for sale for use for a purpose that violated the CAA.

Notably, Complainant designated over 40 exhibits that it purports are manufacturer advertisements and instructions; these documents did not originate from Keystone or come from Keystone's files. Complainant collected all of these exhibits from manufacturer websites assumedly because Keystone did not develop its own content for advertisements, nor did it draft, review, or approve instruction sheets or product manuals for the products at issue. It could not have because it lacks the knowledge of the parts required to develop this content.

Keystone acted reasonably and in accordance with industry standard for wholesale distributors in the level of diligence it conducted on the parts it sold. Keystone has a purchase agreement with each of the suppliers of the parts at issue. RX 70-84. In those agreements, Keystone requires its suppliers to [redacted] so that Keystone would comply itself with all applicable rules and regulations. *See id*. Keystone puts these protections in place because as a wholesale distributor, **Keystone cannot possibly know all relevant aspects of the various products it distributes: it sells parts from over [redacted] manufacturers and suppliers and has approximately [redacted] SKUs[1] currently set up in its system.** RX 41; *see also* RX 37. **Complainant's allegations relate to [redacted] SKUs, which constitute approximately [redacted] of the total SKUs Keystone handles.** *Id.*

[1] Of these [redacted] SKUs (a unique identifier for each product) in its system, Keystone stocks over [redacted] unique SKUs. RX 41.

The same is true on a manufacturer level – the SKUs at issue in the Complaint make up a small fraction of the total SKUs for any particular manufacturer within Keystone's system. *Id.* For example, the [redacted] Mr. Gasket SKU at issue in the Complaint represents [redacted] of the total universe of Mr. Gasket SKUs available in Keystone's system. *Id.* Similarly, Ford supplied [redacted] of the parts at issue, and that part represents [redacted] of the total universe of Ford SKUs available in Keystone's system. *Id.* In other words, the parts at issue are a tiny percentage of the parts Keystone carries for each manufacturer and an even tinier percentage of the parts Keystone carries overall, which is why Keystone did not know, nor should it have known, that the parts in question were offered for sale or use for an improper purpose.

Importantly, the parts at issue are not inherently illegal, as Complainant purports. Many legal uses exist for these parts. The parts at issue can be roughly grouped into four categories: (1) parts associated with the exhaust gas recirculation ("EGR") system, (2) exhaust pipes, (3) parts associated with the air pump system, and (4) tuning products. Each category (and individual part) has legal uses. For example, the first three categories can all be used in legal, sanctioned racing/competition motorsports and on vintage/classic vehicles, which are not subject to the same emission standards as newer vehicles. EGR parts and exhaust pipes can also be used to improve safety in farm vehicles and avoid part damage in high-heat situations. Tuners, category 4, have a wide array of legal uses; they can be used to modify engine management functions, make drivability enhancements, calibrate the speedometer, analyze vehicle diagnostics, and other uses that do not unfavorably impact emissions, which is why the California Air Resources Board ("CARB") has issued numerous Executive Orders for tuners, certifying that they comply with CARB regulations. Tuners also can be used for race purposes. These are just a few examples of the many legal uses that exist. RX 274 provides further detail and example photos of vehicles where the parts at issue have legal uses.

In fact, at the time of this Prehearing Exchange, many parts at issue continue to be offered for sale by companies like Amazon, Walmart, Auto Zone, and others. *See e.g.,* RX 91-265. **These parts are regularly sold and continue to be sold because they have a vast number of legal uses.**

Considering the nature of Keystone's business and the legal uses that exist for the parts, Complainant cannot establish critical elements of its case for which it carries the burden.

Moreover, once Keystone understood Complainant's position, Keystone acted reasonably and responsibly in implementing measures to stop the sale of the parts at issue (despite the fact that there is a legal market for these parts).

First Affirmative Defense: No Statutory Authority

Neither the CAA nor its implementing regulations give the EPA enforcement power over the alleged conduct. Legal uses exist for the parts at issue in this Complaint, including legal competition use and other legal uses. For these reasons, Complainant lacks statutory authority to charge Keystone with violating section 203(a)(3)(B) of CAA.

Competition-Use

Legal Authority

The parts at issue are intended for use in vehicles that do not meet the definition of "motor vehicle." The CAA contemplates three categories of vehicles: motor vehicles, nonroad vehicles, and vehicles used solely for competition. 42 U.S.C. § 7550(2), (10), (11). The CAA defines "motor vehicle" as "any self-propelled vehicle designed for transporting persons or property on a street or highway." 42 U.S.C. § 7550(2). The prohibition in section 203(a)(3)(B) only applies to motor vehicles.[2] It does not apply to racing vehicles used solely for competition.

Congress made clear that motor vehicles do not include vehicles that are "modified or used" for racing. RX 1 (Excerpt of House Consideration of the Report of the Conference Committee, December 18, 1970 at 117). The House of Representatives discussed the very question at issue in this matter: if a motor vehicle is modified or used for racing, does the CAA cover it? *Id.* In the exchange, the question was answered, and the public was told, no, the CAA does not govern those vehicles:

> Mr. Nichols: . . . . I would ask the distinguished chairman if I am correct in stating that the terms "vehicle" and "vehicle engine" as used in the act do not include vehicles or vehicle engines manufactured for, *modified for or utilized in* organized motorized racing events which, of course, are held very infrequently but which utilize all types of vehicles and vehicle engines?
>
> Mr. Staggers: In response to the gentleman from Alabama, I would say to the gentleman they would not come under the provisions of this act, because the act deals only with automobiles used on our roads in everyday use. *The act would not cover the types of racing vehicles to which the gentleman referred, and present law does not cover them either*.

Id. (emphasis added).

The same definition of "motor vehicle" in the CAA applies today as it did when Representative Staggers made clear that motor vehicles "modified for or utilized in" racing do not come under the provisions of the CAA.[3]

The 1990 Amendments to the CAA further demonstrated Congress's intent to exclude racing vehicles used for competition. These amendments made clear that "vehicles used solely for competition" were beyond the scope of the definition of nonroad vehicles. 42 U.S.C. § 7550(11).

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[2] The prohibition in section 203(a)(3)(B) further only applies if no other legal use exists, such as use in classic/vintage vehicle.

[3] "The term 'motor vehicle' means any self-propelled vehicle designed for use in the United States on the highways other than a vehicle designed or used for military field training, combat, or tactical purposes." RX 1 at 177. "The term 'motor vehicle' means any self-propelled vehicle designed for transporting persons or property on a street or highway." 42 U.S.C. § 7550(2).

By making this distinction between nonroad vehicles and vehicles used for competition, Congress continued to show that racing vehicles are a separate category outside the CAA.

The law makes clear that a vehicle can start its life as a motor vehicle and then be converted to a competition vehicle, thereby taking it outside the definition of motor vehicle and outside the bounds of the CAA. EPA's own importation regulations and guidance recognize "racing vehicles" as a subset of motor vehicles based on current physical attributes and use. 40 C.F.R. section 85.1511(e) allows "racing vehicles" to be imported if the vehicles meet one or more of the exclusion criteria in Section 85.1703. *See also* 40 C.F.R part 1068 (exclusions and exceptions applicable to competition use engines and equipment). The exclusion criteria pertain to physical attributes of the vehicle but do not require that the vehicle be designed or originally manufactured with those physical attributes.

In the importation guidance, EPA explains that vehicles used exclusively for competition or racing are excluded from the motor vehicle emission requirements in the CAA: [4]

> Section 3: Exclusions
>
> Some vehicles are excluded from the motor vehicle emission requirements of the Clean Air Act. Reasons for exclusion include vehicle age (i.e., manufactured prior to the regulations), fuel type, maximum speed, *exclusive use for competition or racing*, or lack of features associated with practical street or highway use. . . . .

RX 28 at 13 (Overview of EPA Import Requirements for Vehicles and Engines (March 2011)) (emphasis added)*; see also* RX 27 (Procedures for Importing Vehicles and Engines (July 2010)).

Further, EPA's comments to the public support the CAA not applying to competition vehicles. As discussed in detail in relation to Respondent's Fifth Affirmative Defense, Lack of Fair Notice, in 2015, EPA sought, for the first time, to prohibit modifying a motor vehicle to convert it to a competition-only vehicle in a rule entitled "Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium and Heavy-Duty Engines and Vehicles – Phase 2." RX 2 (80 Fed. Reg. 40565 (July 13, 2015), § 86.1854-12). Following immense public opposition, EPA withdrew the proposed rule and affirmed that its "focus is not (nor has it ever been) on vehicles built or used exclusively for racing, but on companies that violate the rules by making and selling products that disable pollution controls on motor vehicles used on public roads." RX 19 (Excerpt of 81 Fed. Reg. 73478 (October 25, 2016), pg. 73957).

A legal market exists for the parts at issue here as they are used in competition-only vehicles that do not meet the CAA definition of "motor vehicle." EPA, therefore, lacks statutory authority to enforce the CAA with respect to the alleged violations.

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[4] Similarly, "special exemptions" under the Motor Vehicle Safety Act, and implementing regulations thereunder, exempt imported vehicles and equipment used solely for competitive racing events from the requirements of the Motor Vehicle Safety Act. 49 U.S.C. § 30114; 49 CFR 591.5(j)(1)(v). If EPA seeks a different interpretation here regarding vehicles used solely for competitive racing events, it would create a conflict between various regulatory regimes.

Racing Industry Background

Section 203(a)(3)(B) of the CAA only applies to "motor vehicles." Vehicles converted to competition use only vehicles are not "motor vehicles", as defined by the CAA. This was important in 1970, and it remains important today. Competition motorsports are a vital part of the American culture and economy. The U.S. racing industry encompasses both professional and amateur racing. Professional racing includes the well-known Formula 1, IndyCar, International Motor Sports Association ("IMSA"), and National Association for Stock Car Auto Racing ("NASCAR") circuits. Vehicles used in professional racing are typically built for that purpose and make up only a small portion of the U.S. racing vehicle population.

An extensive network of amateur racing bodies also exists in the U.S. Prominent nationwide amateur circuits include the National Hot Rod Association ("NHRA"), the Diesel Hot Rod Association ("DHRA"), the National Auto Sport Association ("NASA") and the Sports Car Club of America ("SCCA"). *See e.g.*, RX 61 (SEMA 2008 Insight: Motorsports & Performance); RX 62 (SEMA 2015 Market Report); RX 63 (SEMA 2019 Market Report). Amateur racing can include drag racing (an acceleration contest on a designated track), sports-car racing on tracks, drifting competitions, diesel drag racing, etc. *See e.g.*, RX 61. Other competition motorsports exist as well, such as monster trucks and sled pulls. .

Thomas Deery will provide testimony at the hearing on the size and scope of the amateur racing industry. Mr. Deery has more than 45 years of experience and leadership in the motorsports community. *See* RX 270. At the hearing, he will describe the size of the U.S. amateur racing industry and the different types of racing conducted, including that there are approximately 250 sanctioning bodies for race events, approximately 1,300 race tracks, more than 74,000 racing events run each year, and more than 395,000 racing vehicles. *See e.g.*, RX 61; RX 65 (Survey of Operating Tracks, 2015)); RX 69 (Survey of Operating Tracks, 2019); RX 64 (map of motorsports facilities prepared by National Speedway Directory).

Retail sales of racing products, like the types of parts at issue in this matter, make up a nearly $2 billion market annually. RX 24 ("RPM Act Introduced in U.S. House of Representatives" (May 20, 2021)). Most of the vehicles raced on the estimated 1,300 racetracks operating across the U.S. have been converted from street vehicles to competition-only vehicles and make use of the types of parts at issue here. *See* RX 24.

Vehicles used in amateur racing are typically vehicles that started as street cars or "motor vehicles" (as defined in the CAA) and are later extensively modified to become competition-only vehicles. Modifications can include gutting the interior of the vehicle to remove all unnecessary weight (e.g., seats, dashboard components, mats, coverings). Safety devices used for street driving (e.g., air bags) are often replaced with protective structures seen on a racetrack (e.g., roll cages, harnesses). These modifications make racing vehicles unsuitable and impractical for street use. Modifications and upgrades also are made to the vehicle's engine, exhaust systems, and other mechanical components. The installation of many of the parts at issue will cause significant vehicle performance reduction, including triggering limp mode, such that driving the vehicle

without further adjustments would not be possible except for short distances.[5] Moreover, installation of these parts in the manner that EPA suggests they were installed (i.e., with certain components of the emission control system removed, disabled, or rendered inoperative), would also cause these vehicles to fail state vehicle emissions inspections, thereby prohibiting their use on public roads.

Amy Faulk, dubbed the "Winningest Woman in Racing" and inductee to the SEMA Hall of Fame, will testify at the hearing regarding how she converts vehicles using the types of parts at issue and then only drives the vehicles on racetracks. *See RX* 45, 60. Neither in the definition of motor vehicles nor anywhere else in the CAA does it prohibit someone like Ms. Faulk from converting a motor vehicle for use in competition.

Other Legal Uses

In addition to competition use, each category of the parts in question has other legal uses, and therefore Keystone could not have known that the "principal effect" was for an illegal use. For example, tuners can be used to modify engine management functions, make drivability enhancements, calibrate the speedometer, analyze vehicle diagnostics, and other uses that do not unfavorably impact emissions. Other parts at issue can be used to improve safety in farm vehicles and avoid part damage in high-heat situations, and to increase performance while maintaining the emission-control system. Another legal use of many parts relates to restoration of "classic" cars. The practice of restoring classic cars is a rich part of American history and culture. These vehicles are often rebuilt from the ground up and are used to drive on weekends and holidays, in parades, for classic car shows, for clubs, for museums and collections, etc. A recent article estimated that there are 31 million vehicles that are more than 30 years old in the U.S. *See* RX 22 *(The Collector Car Market is Bigger Than You Think*, https://insider.hagerty.com/trends/not-so-niche/ (November 18, 2020)).

Second Affirmative Defense: Exemption

EPA has no authority to enforce provisions of the CAA to activities outside of its statutory authority. As explained in detail above, the CAA prohibition in section 203(a)(3)(B) is limited to "motor vehicles" and does not apply to vehicles used for solely for competition, including vehicles that have been permanently converted to competition-use only vehicles. EPA is not able to demonstrate the parts at issue were "intended for use with, or as part of, any motor vehicle or motor vehicle engine" because vehicles used solely for competition are not "motor vehicles."

Third Affirmative Defense: No Deference

Complainant's interpretation of key statutory and regulatory provisions is not entitled to deference. EPA incorrectly interprets and applies certain critical statutory and regulatory

[5] Limp mode or limp home mode is a reduced power mode that is activated when the car's computer system detects an issue that could result in damage to the engine, transmission, or emission controls; the vehicle's power is reduced significantly to protect the vehicle components. Typically, this results in the vehicle being locked into second or third gear and unable to be driven faster than 30-40 miles per hour. The vehicle will also experience sluggish acceleration and the engine warning light on the instrument cluster will illuminate.

provisions upon which it bases its allegations, including section 203(a)(3)(B), the term "motor vehicle," and other provisions of the CAA and its implementing regulations. The parts at issue were not "intended for use with, or as part of, any motor vehicle or motor vehicle engine" because vehicles used solely for competition are not "motor vehicles" under the CAA. Consequently, the EPA has incorrectly interpreted and applied critical statutory and regulatory provisions upon which it based its allegations. As such, this interpretation is not entitled to deference.

Even assuming the statutory terms are uncertain or ambiguous, EPA's view still does not govern. Because section 203(a)(3)(B) can be used in criminal, as well as in civil enforcement proceedings, it must be interpreted under the rule of lenity. Lenity is an interpretive rule that resolves ambiguity in favor of potential defendants and is part of the traditional process to determine the meaning of statutory language. An agency, no less than a court, must interpret a doubtful criminal statute in favor of the defendant.

Fourth Affirmative Defense: No Violations

EPA bears the burden to demonstrate actionable violations of section 203(a)(3)(B) of the CAA by Keystone. In order to prove its claims, Complainant must prove that Keystone knew or should have known that it offered for sale parts or components for "use with, or as part of, any motor vehicle or motor vehicle engine, where a principal effect of the part or component [was] to bypass, defeat, or render inoperative" devices or elements of design on a motor vehicle by which it complies with regulatory emission standards. Complainant must prove knowledge; it is a required element of Complainant's claims.

Keystone did not know, nor should it have known, that the parts in question defeated emission control devices on motor vehicles. Keystone is a distributor of aftermarket automotive equipment and does not itself manufacture any of the parts at issue.

Of the [redacted] sales that Complainant alleges violate the CAA, [redacted] of them were sold wholesale (excluding returned parts). RX 40. Most sales occurred on Keystone's "B2B" website, which requires an account and password to access.[6] *See* CX 156. For the wholesale business, in order to make a purchase from Keystone, a customer must first submit for approval a new customer form and application. RX 39 (Keystone Customer Application & Credit Agreement). Once Keystone approves the customer, the information the customer sees on the website for any of the parts at issue originated with the supplier of the part. Manufacturers/suppliers fill out a new part set up form. RX 42-43. Information from the approved suppliers is then uploaded to Keystone's system (where it is made available on Keystone's B2B website). Keystone does not develop its own original content for the parts at issue.

Keystone also owns a small number of retail stores, known as A&A Auto Stores. A&A Auto's sales constitute only approximately [redacted] of Keystone's total annual sales. CX 143. Of the [redacted] sales that Complainant alleges violate the CAA, only [redacted] occurred at the A&A Auto Stores (excluding returned parts). RX 40. A&A Auto Stores do not design, manufacture, test,

[6] Others occurred via the wholesale customer care process, which includes phone sales.

certify, or warrant any of the products in question and did not install or offer technical support on any of the products at issue.

With the large volume of products and without any insight into end uses for the vast majority of the sales at issue, Keystone did not know and could not have known that the parts in question may be or have been used to defeat emission-related devices. Since Keystone did not and could not have knowledge of all the attributes of every part or component it sold, it reasonably relied on its suppliers. Keystone follows a new supplier onboarding process that includes standard industry practices. The procedure aims to ensure that the suppliers are financially stable, the company is legitimate, and the overall catalog of products is appropriate for Keystone's business. Keystone requires each supplier to sign agreements and produce assurances of insurance and legal business credentials. If a supplier does not meet the requirements, Keystone does not accept it as a supplier.

Keystone contractually requires its suppliers [redacted]. RX 70-84. For example, one of Keystone's suppliers is Derive Systems, Inc. ("Derive"). Derive manufactured the tuning products at issue here, which account for [redacted] of the alleged violations. On November 27, 2017, Derive assured Keystone that its products "do not defeat any emission equipment."[7] RX 30. Subsequently, on September 24, 2018, the United States of America filed a complaint against Derive and a consent decree that included alleged CAA violations stemming from the sale of certain tuning products from its SCT brand, also at issue in this Complaint. RX 31-32. In the consent decree with Derive, the United States allowed Derive to continue selling the very same products at issue here under a phase-out plan that gave Derive until as late as August 2020 (depending on the product type) to remove certain features from its products. RX 32 at 12-13.

Two days later, on September 26, 2018, Derive sent Keystone a letter from its outside counsel that expressly stated that its parts complied with the CAA and were legal for continued sale:

> The Consent Decree does not require Derive or its customers to stop selling any Derive products. It does not recall any Derive products already in the market or on its dealer's shelves. And it does not prohibit Derive from continuing to license its custom tuning software.

RX 33 (Letter, "Consent Decree in U.S. v. Derive Systems, Inc. et al Civil Action No. 18-2201" (September 26, 2018) (emphasis original)).

In response to this letter, Keystone asked Derive for clarification on what specific parts were legal for continued sale. Derive responded by providing a list of specific part numbers that it represented were "approved/cleared products for sale." RX 34-36. Importantly, this list included the very SCT parts for which EPA now seeks to penalize Keystone. RX 36.

[7] Similarly, on November 28, 2017, MBRP, Inc. emailed Keystone stating that "[a]ll of [its] exhaust are legal for sale in US and do not delete or effect emissions systems unless otherwise noted." RX 20.

As a wholesale distributor, Keystone reasonably relied on its suppliers who confirmed the legality of their parts.

Based on the foregoing, Keystone could not have possessed the knowledge required for liability under section 203(a)(3)(B). EPA has failed to establish critical elements of its claims for which it bears the burden of proof and, as a result, EPA cannot prove that Keystone violated the CAA. It was never Keystone's intent to sell potentially non-compliant products. Once Keystone understood EPA's position with regard to the parts at issue, Keystone implemented measures to stop the sale of the parts at issue. Keystone took these measures out of an abundance of caution and despite the fact that various legal uses exist for the parts at issue, as described above.

Fifth Affirmative Defense: Lack of Fair Notice – Competition Use

It is a fundamental principle of our legal system that laws must provide fair notice of prohibited conduct, or they will violate due process as protected by the Fifth Amendment. *FCC v. Fox Televisions Stations, Inc*., 567 U.S. 239 (2012). In the context of the CAA, courts have found that parties cannot be penalized where they did not receive fair notice of EPA's interpretation of the applicable punitive regulations. Specifically, a regulation that allows for monetary penalties "must give . . . fair warning of the conduct it prohibits or requires, and it must provide a reasonably clear standard of culpability to circumscribe the discretion of the enforcing authority and its agents." *U.S. v. Hoechst Celanese Corp.*, 128 F.3d 216 (4th Cir. 1997). Here, the EPA's decades-long practice of permitting conduct like that alleged in the Complaint affirmatively misled Keystone and the public or, at a minimum, failed to provide Keystone notice that the EPA considered Keystone's actions unlawful. As a result, EPA's current enforcement action for pre-fair-notice conduct is a violation of due process as protected by the Fifth Amendment.

As explained in detail in regard to the First Affirmative Defense, motor vehicles converted to competition-use only vehicles fall outside the parameters of the CAA. A competition vehicle is not a "motor vehicle" as defined by the CAA, and, therefore, EPA cannot prove a violation of the CAA. If, however, the CAA is interpreted to prohibit converting motor vehicles into competition vehicles, then Keystone lacked fair notice of what the law required.

It is undisputed that the parts at issue in this matter can be used to increase performance on race vehicles. It is also undisputed that an extensive legal racing community and market exists in the United States. This is why beginning in 1970, the message to the public was that a vehicle modified for racing is not covered by the CAA. RX 1 (Excerpt of House Consideration of the Report of the Conference Committee, December 18, 1970 at 117). This continued in 1990 when Congress drafted its second set of amendments to the CAA. As discussed above, these additions included nonroad vehicles in EPA's regulatory authority and specifically excluded vehicles used solely for competition from the definition of "nonroad vehicles," further making clear to the public that vehicles used solely for competition fall outside the CAA. 42 U.S.C. § 7550(11).

After decades of the public reasonably believing that a legal racing market existed, in 2015, EPA sought for the first time to prohibit modifying a motor vehicle to convert it to a competition-only vehicle in a rule entitled "Greenhouse Gas Emissions and Fuel Efficiency Standards for

Medium and Heavy-Duty Engines and Vehicles – Phase 2." RX 2 (80 Fed. Reg. 40,565 (July 13, 2015), § 86.1854-12). The 628-page proposed rule established next generation greenhouse gas emission standards for medium and heavy-duty engines and vehicles. *Id.* EPA buried the proposed prohibition on converting street vehicles to competition-only vehicles on page 428 and included with several unrelated items in "Section 14: Other Proposed Regulatory Provisions:"

> Certified motor vehicles and motor vehicle engines and their emission control devices must remain in their certified configuration even if they are used solely for competition or if they become nonroad vehicles or engines, anyone modifying a certified motor vehicle or motor vehicle engine for any reason is subject to tampering and defeat device prohibitions of paragraphs (a)(3) of this section and 42 U.S.C. 7522(a)(3).

RX 2. *See also e.g.*, RX 4, 6.

As SEMA explained in its comments in response to the proposed rule change, the proposal was "*a significant policy change* on how competition use engines/vehicles are regulated." RX 4 (SEMA, Comment Letter on Proposed Rule: Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles, Phase 2: Vehicles Used Solely in Competition (December 28, 2015)) (emphasis added). The public saw this for what it was – a change of policy that would have a dramatic impact on the racing industry:

> Before the Clean Air Act was enacted and since that date, thousands if not millions of certified vehicles have been modified to become vehicles used solely for competition. Products have been manufactured, sold and installed on these competition vehicles throughout this time. . . . However, the EPA has never implemented a policy making it illegal for certified vehicles to become competition-use only vehicles. *Such a policy would overturn decades of understanding within the regulated community and expose that community to unfair findings of noncompliance and civil penalties*.

Id. at 2 (emphasis added).

Because the public did not previously have notice that EPA considered these conversions to violate the CAA, the proposed action was met with immense public opposition. Media coverage pointed out the devastating impact that it would have on the racing industry. One publication described EPA's efforts to change the law as "highly problematic for a number of reasons - chief among them the fact that a large amount of race cars used in club racing across the U.S. fall into this category [of vehicles designed for public use turned into track-dedicated race cars]." RX 5. (News Article – EPA Seeks to Ban Conversion, February 9, 2016).

Members of Congress, industry groups, and other concerned parties provided testimony and submitted comments expressing concern with the proposed rule change and pointing out its divergence from EPA's prior approach. *See e.g.*, RX 6 (Statement of Chairman Lamar Smith of the Committee on Science, Space, and Technology (March 15, 2016)), RX 7 (Statement of Chairman Barry Loudermilk of the Oversight Subcommittee of the Committee on Science, Space,

and Technology (March 15, 2016)), RX 8 (Testimony of Christopher J. Kersting, President & CEO of SEMA (March 15, 2016)), RX 9 (Testimony of Patrick McHenry Excerpt from Hearing Transcript (March 15, 2016)), RX 10 (Statement of Mr. Ralph Sheheen (March 15, 2016)); RX 11 (Letter from Attorneys General (April 1, 2016)); RX 12 (Letter from the House of Representatives Committee on Energy and Commerce (April 12, 12016)).

Chairman Lamar Smith of the Committee on Science, Space, & Technology, explained the proposed change in law that would have drastic impacts on the racing industry:

> Today, we will hear about how the EPA wants to expand its Clean Air Act authority and enforce it against amateur racecar drivers and the industry that supplies amateur racers with parts and modifications. This is an industry that supports American small business jobs, manufacturing, and technology.
>
> . . .
>
> Congress never intended the Clean Air Act to apply to these vehicles and the law is clear on this point. Racecars are not regulated by this law.

RX 6; *see also* RX 9 ("Congress never intended for the EPA to regulate vehicles that are modified for use on race tracks").

Chairman Smith noted that "[n]early all businesses that manufacture components for this industry could become the subject of enforcement actions by the EPA." RX 6. We now know that EPA takes the position to expand it even further to include wholesale distributors, like Keystone. Finally, Chairman Smith expressed concern that EPA's actions would turn what had been a legal market into an illegal one without proper notice or justification:

> This overreach has the potential to result in billions of dollars in enforcement penalties simply for the production of items that have been legally used by amateur racers for years. It will stifle technological advances in this field and cause the loss of many American jobs.

RX 6 at 2; *see also* RX 7 (Statement of Chairman Barry Loudermilk (March 15, 2016)) (noting that "[t]he proposed regulation would have a devastating effect on the motorsports industry and the industry that supplies the products"); RX 9 (stating that "[t]his new regulation will prohibit responsible, law abiding people who wish to modify their car for racing on closed tracks from doing so" and "will harm all involved").

Chairman Barry Loudermilk echoed these same sentiments noting that the impact of the proposed rule change "cannot be understated" because the rule change would affect all amateur racing:

> The proposed regulation would affect any vehicle used for racing that started as a street or production cars. Race cars are fast and have been modified to be fast and safe. As a result, race cars strictly used at the track are not typically emissions

> compliant. Any race car that has a VIN plate, installed at the factory, can no longer be out of compliance under this proposed rule.

RX 7 (further noting that "millions of cars have been modified to be used strictly at the race track," and "[p]roducts have been manufactured and installed on race-only vehicles since the automobile was invented"); *see also* RX 10 (explaining that most racers, including Mario Andretti and Dale Earnhardt, "begin their careers competing in a division that utilizes a modified production vehicle" "because it is the cheapest and most cost effective form of racing" and further explaining that the rule change "would be devastating to many types of racing").

SEMA, on behalf of the industry, noted that the proposed rule change, if adopted, "**would contradict 46 years of EPA policy and practice under the Clean Air Act**." RX 8 at 2 (emphasis added); *see also* RX 25 (stating that from the inception of the CAA, "parts sold to convert street vehicles to vehicles used exclusively on the track fell outside the scope of the law"). As SEMA explained, it was "unaware of a single instance in which the EPA previously took the position that the law applies to motor vehicles converted for race-use only." **To the contrary, "[i]ndustry, the public and lawmakers have had a clear understanding that these vehicles are excluded from the Clean Air Act."** *Id.* (emphasis added); *see also* RX 10 (noting that until EPA sought to change the rules, "no government entity has questioned the legality of using modified production vehicles exclusively for racing and an enormous industry has been created as a result"); RX 12 ("In the 46 years since enactment of the 1970 Clean Air Act, EPA took no enforcement action with regard to EPA-certified vehicles modified solely for racing, and it was widely accepted that these vehicles were exempted from the statute's anti-tampering provisions").

On April 1, 2016, as the public continued to express its surprise at the proposed rule change, attorneys general from eight states wrote to EPA expressing concern about EPA's actions:

> As proposed, this rule attempts to expand the USEPA's statutory jurisdiction under the Clean Air Act to cover vehicles modified solely for racing or competition. This approach is contrary to the law and would reverse decades of practice by the USEPA.

RX 11.

Had EPA proceeded to adopt the rule change, the public would at least have been made aware as of that time of what EPA considers illegal and what it does not. Instead, however, EPA reversed its course, withdrew the proposed rule, and expressly confirmed that its focus "is not (nor has it ever been) on vehicles built or used exclusively for racing":

> The proposal included a clarification related to vehicles used for competition to ensure that the Clean Air Act requirements are followed for vehicles used on public roads. This clarification is not being finalized. EPA supports motorsports and its contributions to the American economy and communities all across the country. **EPA's focus is not (nor has it ever been) on vehicles built or used exclusively for racing,** but on companies that violate the rules by making and selling products that disable pollution controls on motor vehicles used on public roads. These

> unlawful defeat devices lead to harmful pollution and adverse health effects. The proposed language was not intended to represent a change in the law or in EPA's policies or practices towards dedicated competition vehicles. Since our attempt to clarify led to confusion, we have decided to eliminate the proposed language from the final rule.
>
> We will continue to engage with the racing industry and others in its support for racing, while maintaining our focus where it has always been: reducing pollution from the cars and trucks that travel along America's roadways and through our neighborhoods.

RX 19 (Excerpt of 81 Fed. Reg. 73478 (October 25, 2016), pg. 73957) (emphasis added).

This change of course confirmed to the racing community and public at large that EPA did not view competition-only vehicles (whether originally manufactured for racing or later converted for that purpose) as falling within the scope of the CAA. It would defy logic to suggest that vehicles can be built or used exclusively for racing, but to make it illegal for a company like Keystone to sell into that market.

In May 2016, EPA again reassured the racing community that vehicles used for competition only are not subject to these provisions of the CAA:

> The EPA and the responsible racing community agree on two major points. First, vehicles that are used solely for competition in sanctioned events should be allowed to do so, as they historically have. Second, vehicles driven on public roads must have fully functioning pollution controls as required by the Clean Air Act.
>
> . . .
>
> **Our focus on defeat devices in the enforcement context has recently led to concerns in the racing community that perhaps the EPA seeks to stop the decades-old practice of converting certified production vehicles to competition vehicles that are to be used solely for sanctioned events. To be clear: we are not.**
>
> . . .
>
> For motor vehicles that are certified for use on public roads, the Clean Air Act has always prohibited tampering with or defeating those vehicles' emission control systems. However, just like the purpose-built, dedicated competition vehicles described above, the EPA likewise has no interest in vehicles that begin their existence as normal, EPA-certified production vehicles used on public roads and are then permanently converted to sanctioned competition-use only vehicles.

RX 3 (Letter from Cynthia Giles to Nicholas Craw (May 13, 2016)); *see also* RX 18 (Letter from Nicholas Craw to Cynthia Giles (May 19, 2016)).

Four days after the Giles letter, Janet G. McCabe, Acting Assistant Administrator to the EPA wrote to the Committee on Energy and Commerce to "make it clear that the EPA supports motorsports and its contributions to the American economy and communities all across the country." RX 17 (Letter from McCabe to Fred Upton, Committee on Energy and Commerce (May 17, 2016)). EPA further stated that its "focus is not on vehicles built or used exclusively for racing." *Id.*

Media coverage from 2016 indicates that the public, including the regulated community, heard EPA's message loud and clear. *See e.g.*, RX 13-16. Articles entitled, for example, "EPA Abandons Proposal to Ban Converting Street Cars for Racing" (RX 13), "EPA Drops Proposal Feared to Ban Street-to-Race Car Conversions" (RX 14) "Street-Legal Racing Enthusiasts Have Just Defeated the EPA" (RX 15), and "The EPA's Scary Race Car Ban Proposal is Dead" (RX 16) confirm that the public interpreted EPA's withdrawal of the proposed rule to mean that competition-only vehicles are not subject to the CAA, and street vehicles may be modified for race use, which means companies like Keystone could sell parts into this legal racing market.

On January 6, 2017, H.R.350 - Recognizing the Protection of Motorsports Act of 2017 ("RPM Act of 2017") was introduced in the House. H.R. 350, 115th Cong. (2018). RX 26. The proposed bill was intended to clarify that CAA does not apply to motor vehicles used exclusively for competition. *Id.* The RPM Act of 2017 expressly reflected the understanding that the CAA does not govern racing vehicles, finding:

> (1) at the time the Clean Air Act was written, and each time the Clean Air Act has been amended, the intent of Congress has been, and continues to be, that vehicles manufactured for, modified for, or utilized in organized motorized racing events would not be encompassed by the Clean Air Act's definition of "motor vehicle";
>
> (2) when Congress sought to regulate nonroad vehicles in 1990, it explicitly excluded from the definition of "nonroad vehicle" any vehicle used solely for competition;
>
> (3) despite the clear intent of Congress, the Environmental Protection Agency has cited the Clean Air Act as authority for regulating vehicles used solely for competition; and
>
> (4) the Environmental Protection Agency has exceeded its statutory authority in its recent actions to regulate vehicles used solely for competition.

Id. Although Congress did not pass the RPM Act of 2017, the findings described above reflect the racing community's understanding of the CAA and are consistent with the EPA's messaging regarding nonapplication of CAA to competition vehicles.

This understanding continues today. On May 17, 2021 the RPM Act of 2021 was reintroduced into the House as H.R. 3281. H.R. 3281, 117th Cong. (2021). *See e.g.*, RX 23 (Email from U.S. Motorsports Association (May 18, 2021); RX 24 ("RPM Act Introduced In U.S. House

of Representatives (May 20, 2021)) (noting that Americans have sent over 1.1 million letters to Congress on this issue).

The CAA does not apply to vehicles used solely for competition motorsports. If a different interpretation prevails, Keystone could not have received fair notice of EPA's current interpretation of the CAA in light of persistent and consistent messaging from Congress and EPA that a legal market exists for these parts. Keystone, therefore, may not be penalized for the alleged violations. From the outset, the message from Congress and public understanding has been that the CAA does not apply to vehicles used or modified for racing purposes. It is hard to imagine a scenario where the regulated community has had less notice of what conduct would be prohibited.

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

EPA's handling of the Derive/SCT parts further created confusion in the market and led to a lack of fair notice. Penalizing Keystone without this required fair notice would violate due process as protected by the Fifth Amendment.

In its previous enforcement proceeding against Derive and the resulting consent decree, EPA established a program under which Derive could continue to sell or offer for sale for a period of time the very parts at issue in this Complaint, manufactured and sold by Derive under its SCT brand. RX 31-32. **Nearly [redacted] of the total violations EPA alleges against Keystone involve sales of the exact parts that EPA allowed Derive to continue selling into the regulated community.**

EPA had access to Derive's internal product data, including product manuals, advertising materials, and other information that would provide vastly greater detail about the products at issue than what was available to Keystone. If EPA's position is that these parts are illegal, EPA should not have allowed Derive to continue manufacturing and selling such parts into the regulated community to customers like Keystone. By doing so, EPA created uncertainty and confusion within the regulated community regarding what products and features are illegal.

Seventh Affirmative Defense: Equitable Estoppel

EPA is estopped from retroactively applying a new interpretation of these provisions of the CAA. As previously explained in regard to the First and Fifth Affirmative Defenses, Congress enacted the CAA with the intention that vehicles "modified" or "used" in racing would be excluded. RX 1 (Excerpt of House Consideration of the Report of the Conference Committee, December 18, 1970 at 117). And EPA itself has previously acknowledged the legitimate racing community and indicated it only has interest in enforcing against vehicles used on streets or highways. *See e.g.,* RX 3 (Letter from Cynthia Giles to Nicholas Craw (May 13, 2016)).

EPA now asserts an entirely different position in the context of this enforcement action, effectively seeking to penalize Keystone for precisely the activities in which it has previously stated it had "no interest." *See* RX 3. EPA is estopped from enforcing a contrary interpretation of its enforcement authority and the applicability of section 203(a)(3)(B). Further, EPA is estopped from retroactively applying this new interpretation of the CAA because it has selectively and

inconsistently enforced these same provisions against parties engaged in the same or more egregious conduct than Keystone and because EPA previously indicated that it would not enforce on these claims.

Eighth Affirmative Defense: Ratification

EPA effectively ratified the industry-wide sale of the parts manufactured and sold by Derive when it allowed Derive to continue marketing and selling such parts to its customers as part of the Derive Consent Decree. *See* RX 32. EPA knew that Respondent and other similarly situated distributors and retailers sold the Derive parts at issue and allowed Derive to continue selling such parts to its customers, thereby ratifying the behavior of the market.

There are [redacted] Derive parts (from Derive's "SCT" brand) listed in the Complaint for which EPA seeks to penalize Keystone's sales. EPA alleges a total of [redacted] violations stemming from Keystone's sale of these SCT parts, which constitute nearly [redacted] of the total violations against Keystone in the Complaint. The timeframe of Keystone's alleged violations is completely contained within the timeframe of sales covered by the Derive complaint and consent decree: EPA's Complaint against Keystone alleges violations involving the sale of Derive SCT parts between January 1, 2015 through August 28, 2018, while the Derive complaint and consent decree cover those same parts sold by Derive between September 20, 2013 through September 24, 2018. *See* RX 31-32. EPA would, therefore, seek to penalize Keystone for its sale of the exact same parts that were sold by Derive during the exact same timeframe, and which Derive was allowed to continue selling even after entering into a consent decree with EPA.

By allowing Derive to continue to sell its parts and represent to members of the wholesale distribution community that these parts were legal for sale, EPA ratified the behavior of the regulated community.

Ninth Affirmative Defense: Inappropriate Administrative Proceeding

The use of the administrative proceeding is inappropriate in this context. The administrative proceeding deprives Keystone of certain rights protected by due process, and the penalties sought are inappropriate for an administrative penalty assessment. Further, Keystone lacks sufficient information to determine whether any constitutional deficiencies with regard to the appointment and removal of EPA's administrative law judges exist. *See e.g., Lucia v. SEC*, 138 S. Ct. 2044 (2018).

Tenth Affirmative Defense: Violation of Due Process and Sixth Amendment Rights

Complainant has not expressed the penalty it seeks in this matter. To the extent Complainant seeks penalties that are penal in character, this proceeding violates Respondent's Sixth Amendment rights to confrontation, compulsory process for obtaining witnesses, and a trial by jury and related procedural rights. It would also violate certain due process protections relating to the burden of proof, obligations to disclose adverse evidence, and others.

Eleventh Affirmative Defense: Violation of the Excessive Fines Clause

To the extent that Respondent's acts or omissions may, without admitting or denying the allegations, be in non-compliance with the CAA, those failures are de minimis in nature. Moreover, as a distributor of aftermarket automotive equipment with approximately [redacted] different SKUs, Respondent has no insight into the design or intended purpose of the products it distributes or their potential impact on emissions, nor does it have insight into or control over how the products are ultimately used by customers. Further, to the extent Complainant has recovered penalties from the manufacturers and/or suppliers of the parts at issue, seeking the same penalties against Keystone and in excess amounts is inappropriate. Therefore, though Complainant has not yet expressed the penalty it seeks in this matter, Keystone anticipates the penalties sought will be grossly disproportionate to the nature of the alleged offense and injury and thereby violate the Eighth Amendment's Excessive Fines Clause.

Twelfth Affirmative Defense: Arbitrary and Capricious Penalties

Complainant has not expressed the penalty it seeks in this matter. To the extent Complainant seeks penalties inconsistent with the nature of any alleged violations, Respondent contends those penalties will be unreasonable, arbitrary, and capricious, contrary to the ultimate standard of review of EPA actions set forth in 5 U.S.C. § 706(2)(A).

The EPA's Clean Air Act Title II Vehicle & Engine Civil Penalty Policy (Jan.18, 2021) ("2021 Penalty Policy") is not based on scientific data regarding relative emission impacts and does not produce fair or equitable penalty assessments.[8] *See* CX 169 (EPA's January 18, 2021 Clean Air Act Title II Vehicle & Engine Civil Penalty Policy).

EPA bears the burden in an administrative proceeding to show why any proposed penalty is appropriate. *See* 40 C.F.R. § 22.24. In the 2021 Penalty Policy, EPA describes its purpose in part as ensuring that civil administrative penalties "are assessed in accordance with the Clean Air Act in a fair and consistent manner" and "are appropriate for the gravity of the violation." CX 169 (EPA's January 18, 2021 Clean Air Act Title II Vehicle & Engine Civil Penalty Policy) at 1. However, EPA is not entitled to any presumption that merely applying the 2021 Penalty Policy will actually achieve a fair or appropriate outcome. In its Guidance on Use of Penalty Policies in Administrative Litigation (Dec. 15, 1995), at 3. EPA recognizes that its burden of persuasion specifically includes demonstrating "why any applicable penalty policy is a reasonable approach to use in the instant case." RX 29. EPA cannot make such a showing here. The 2021 Penalty Policy was not published and made available for public comment, and EPA has not given any basis for the rationale behind the policy. There is a complete absence of scientific support for the critical inputs in the 2021 Penalty Policy, and EPA has failed to account for drastic differences in potential emissions impacts associated with alleged violations on different types of vehicles.

[8] Respondent intends to move to amend its answer to further address the 2021 Penalty Policy. At the time of filing of the answer, Respondent had not had sufficient time to review the new policy and has since learned of fundamental flaws contained therein. Respondent intends to filing a motion to seek permission from the Presiding Officer to amend its answer accordingly.

The most significant issues with the 2021 Penalty Policy are associated with the method for determining the gravity component. EPA provides no explanation of how it developed the categories and penalty values that it assigns in structuring the gravity calculation matrix for alleged defeat devices in Appendix C of the 2021 Penalty Policy. Actual and potential emissions impacts of any specific violation depend on scientific and technical information regarding the nature of the vehicle, the nature of the alleged defeat device, and the likely use and vehicle miles traveled of affected vehicles. The 2021 Penalty Policy provides no explanation of how the egregiousness tiers were developed or how they correspond to risk of harm. EPA also fails to provide any explanation in the 2021 Penalty Policy for the specific values and limitations that it places on further adjustments made to the gravity factor, e.g. business size, or to the overall penalty amount for culpability. If EPA intends to seek a penalty based on application of the 2021 Penalty Policy, Keystone will need additional discovery on the formulation and bases for the gravity factors.

Furthermore, the 2021 Penalty Policy was not in effect at the time of the alleged violations, and it is unclear whether the EPA has applied the policy retroactively in other cases. Retroactive application of the 2021 Penalty Policy in this case would be unreasonable, arbitrary, and capricious, contrary to the ultimate standard of review of EPA actions set forth in 5 U.S.C. § 706(2)(A).

Keystone reserves the right to supplement its submission upon receiving EPA's proposed penalty, explanation of its application of the 2021 Penalty Policy, and discovery on the formulation and bases for the gravity factors.

Thirteenth Affirmative Defense: No Damages or Injury

To the extent Complainant alleges violations stemming from the sale of parts that were ultimately returned by the customer, such allegations are inappropriate because no alleged damage or injury could result from sales that resulted in returns. Complainant does not dispute that the alleged violations include items that were ultimately returned by customers. Complainant's Initial Prehearing Exchange at 14, 17.[9] In fact, [redacted] of the allegations are based on sales where the customer ultimately returned the part to Keystone. RX 40. Further, to the extent Complainant has recovered penalties from the manufacturers of the parts at issue, seeking the same penalties against Keystone and in excess amounts is inappropriate.

Fourteenth Affirmative Defense: No Legal or Equitable Basis for Penalties

Civil penalties are not appropriate or should be substantially mitigated because EPA cannot demonstrate meaningful impacts associated with the alleged violations or an equitable basis for imposing a civil penalty, including harm to human health or the environment, economic benefit to Respondent, or a history of noncompliance by Respondent. Respondent further discusses any potential penalty assessment in Sections 3.C. and 3.D.

[9] Because Complainant does not dispute that returns occurred, Keystone has not listed as exhibits the voluminous records associated with those returns that contain extensive amounts of Confidential Business Information. RX 40 is a summary of the information produced to EPA in Keystone's responses to Complainant's Request for Information. *See e.g.*, CX 142; CX143; CX 144; CX 146; CX 148. If Complainant disputes the amount of returns, Keystone will supplement its exhibits with those records.

Fifteenth Affirmative Defense: Additional Defenses

Investigation and evaluation of EPA's allegations are ongoing and, therefore, Respondent reserves the right to assert additional defenses, claims, counterclaims, and third-parties to this action as evaluation, investigation, and discovery continues in this matter.

3.C. Factual Information Relevant to Penalty Assessment

No penalty is appropriate against Keystone because Complainant cannot meet its burden to prove that Keystone violated the CAA. The Prehearing Order requires Keystone to "provide a detailed narrative statement explaining the precise factual and legal bases" if Keystone contends that the penalty should be reduced or eliminated. Complainant, however, has not specified a proposed penalty. Therefore, Keystone is providing information relevant to the penalty calculation and reserves the right to supplement this information once Complainant provides its proposed penalty. Although Complainant cannot meet its burden to demonstrate any liability, even if Keystone is found liable, the below information supports a minimal/reduced penalty.

Complainant alleges that Keystone sold parts in violation of the CAA from 2015 to 2018. Each sale occurred during a time that Complainant created vast confusion in the market, leaving the regulated community without proper notice on what acts do or do not violate the CAA. For decades, no one, including Complainant, disputed that a legal market existed for competition-use only vehicles.

Despite decades of reassuring the general public that a legal market existed in which legal race parts could be sold, EPA now has done an about-face. This is precisely why we have due process protections – so that government agencies cannot tell the public one day that a legal market exists and then the next day penalize a company for selling into that legal market.

As previously described, Keystone is a wholesale distributor that offers the largest assortment of specialty products in the automotive aftermarket industry. It has approximately [redacted]

[redacted] SKUs in its system, and it stocks over [redacted] SKUs in its warehouses. It has over [redacted] suppliers. Of the parts at issue, Keystone did not design them; Keystone did not manufacture them; Keystone did not test or otherwise certify them; Keystone did not warrant them; Keystone did not offer technical support for them; and Keystone did not install any of them.

Even though Keystone, like many others in the aftermarket parts business, believed a legal racing market existed, it did not specifically aim to profit from that industry. Keystone has relationships with suppliers and sold parts from suppliers that happen to include parts designed for the racing industry in their product portfolios. Race parts constituted a very small portion of Keystone's overall sales and were not a product segment that was actively pursued or targeted by Keystone.

As mentioned above in section 3.B, other legal markets, beyond racing, exist for these parts. Complainant wants a presumption that the parts at issue were used for illegal purposes in all cases, but Complainant has not included any evidence that Keystone sold a part that was actually used in an illegal way. Complainant should be afforded no such blanket presumption, particularly with regard to a critical element of its case for which it carries the burden of proof.

Further, Keystone acted in good faith with respect to its sales both before and after receiving EPA's Request for Information ("RFI"). Prior to receiving EPA's RFI, Keystone relied in good faith on information and representations from manufacturers and suppliers regarding their own product compliance. Keystone required its suppliers to sign purchase agreements under which they were obliged [redacted]. RX 70-84. Keystone also reasonably relied on EPA's own representations to the regulated community regarding what products were legal for sale, as described in more detail above in section 3.B.

Keystone took steps to preemptively stop selling and to quarantine its remaining unsold inventory of parts in the product categories covered by EPA's RFI, including some parts that EPA did not ultimately include in the Complaint. *See* CX 142, 146. Keystone took these steps at its own expense and out of an abundance of caution, before EPA had even issued a Notice of Violation against Keystone. Once Keystone understood EPA's position with regard to the parts at issue, Keystone implemented measures to stop the sale of the relevant parts. *See* RX 275. Keystone's parts review process is intended to be iterative, with continued review and improvements being made to the process where relevant. These proactive measures demonstrate that Keystone acted in good faith by stopping sales of these parts even though various legal uses exist, as described in section 3.B above.

3.D. Arguments in Support of Reduced or Eliminated Penalty

Keystone has not violated the CAA, and EPA cannot satisfy its burden of demonstrating liability or the appropriate applicability of a penalty against Keystone. If, however, the Presiding Officer considers penalty issues, any penalty against Keystone should be reduced based on the facts and circumstances of this matter and the claims against Keystone.

As previously noted, Complainant has not disclosed its proposed penalty to Keystone. Keystone, therefore, is in the difficult position of explaining why any penalty should be reduced or eliminated without the benefit of knowing what penalty Complainant seeks against it. This presents an especially challenging scenario in light of EPA's issuance of a new penalty policy on January 18, 2021. *See* CX 169 (EPA's January 18, 2021 Clean Air Act Title II Vehicle & Engine Civil Penalty Policy). Accordingly, Keystone anticipates that it likely will need to supplement its position as to why the proposed penalty should be reduced or eliminated. Keystone further may

need to supplement its document disclosures and witness list depending on what positions Complainant takes in calculating the proposed penalty.

Applicable Standard for Determining a Penalty

The Presiding Officer's evaluation of a potential penalty is governed by the evidence in the record and the factors set forth in the CAA. 40 C.F.R. § 22.27(b). The applicable CAA penalty provision provides that "the Administrator shall take into account the gravity of the violation, the economic benefit or savings (if any) resulting from the violation, the size of the violator's business, the violator's history of compliance with this subchapter, action taken to remedy the violation, the effect of the penalty on the violator's ability to continue in business, and such other matters as justice may require." 42 U.S.C. § 7524(c)(2).

Importantly, the EPA bears the "burdens of presentation and persuasion that the violation occurred as set forth in the complaint and that the relief sought is appropriate" in light of the evidence and the relevant CAA factors. 40 C.F.R. § 22.24(a). While the Presiding Officer is directed to *consider* any civil penalty guidelines issued under the Act, the Presiding Officer is not *bound* by EPA's penalty policy. *See* 40 C.F.R. § 22.27(b). Ultimately, the Presiding Officer must be guided by the evidence and the statutory criteria.

1. Evaluation of the Statutory Penalty Factors Supports Substantial Mitigation of Any Penalty Amount

The factors enumerated in the CAA penalty provision as applied to Respondent's specific facts support substantial mitigation of any proposed penalty for the alleged violations, as follows.

a. Number of Parts at Issue

A key driver of the economic benefit and gravity components of a penalty analysis is the total number of alleged violations. EPA does not dispute that the number of violations it alleges includes items that were returned to Keystone. In total, [redacted] of the alleged violations relate to parts that were ultimately returned. RX 40. These parts should be excluded from any penalty calculation, as described above in section 3.B.

Further, the Derive "SCT" branded products (part numbers 7015, 5015P, 7416, 5416P, and 3015) should be excluded from the penalty calculation. These parts, totaling nearly [redacted] of the alleged violations, relate to the exact same tuners that were the subject of another consent decree between EPA and the part manufacturer, Derive. Derive's consent decree covered the sale of these tuners over the exact same timeframe as the alleged violations against Keystone. EPA created confusion within the industry regarding the legality of these parts when it allowed Derive to continue selling into the regulated community. EPA's behavior equated to a ratification of the sale of Derive products. Moreover, Derive, the manufacturer, represented on multiple occasions to Keystone that these parts were compliant with the CAA and legal for sale. Based on this information, Keystone did not have the requisite knowledge to create liability under the CAA, nor did it have fair notice of what EPA considered to be illegal under the Act. As a result, Keystone should not be penalized for the sale of these parts, and they should, therefore, be excluded from any penalty calculation.

b. Economic Benefit

EPA bears the burden to demonstrate any alleged economic benefit. Simply stated, economic benefit is the amount by which companies are financially better off as a result of allegedly not having complied with environmental requirements. RX 266. In the most typical matter, the economic benefit calculation considers avoided and/or delayed environmental control costs. Here, however, when EPA claims that the only means of preventing the alleged violations was to abstain from product sales, the economic benefit is calculated based on the profit of the sales. *Id.*

Jonathan Shefftz, an independent consultant with almost three decades' experience in applying economics in litigation and enforcement matters has calculated the economic benefit presented by the alleged conduct in this matter. RX 266.[10] After conducting various calculations and analyses, Mr. Shefftz concludes that the most accurate measure of economic benefit is one calculated considering Keystone's earnings before interest, depreciation, and amortization ("EBITDA") apportioned among the product sales at issue in this case. *Id.* This is because EBITDA provides a reasonable approximation for the indirect cost of sales in addition to the direct costs that are represented in the cost of goods sold. *Id.* Mr. Shefftz then considers four scenarios: (1) the economic benefit of the number of sales alleged in the complaint, (2) the economic benefit of the number of sales excluding those sales that resulted in a return, (3) the economic benefit of the number of sales excluding the Derive/SCT parts, and (4) the economic benefit excluding both the returned parts and the Derive/SCT parts. As previously explained, neither the returned parts nor the Derive/SCT parts should be considered violations and should not be included in the penalty calculation. Therefore, the economic benefit calculated by Mr. Shefftz is [redacted].

c. Gravity

The CAA directs the Presiding Officer to take into consideration the gravity of the alleged violation. The gravity element focuses on the seriousness of the alleged violation. Respondent does not concede any illegal emissions impact here because the parts had a myriad of legal uses.

[10] Additional documents relied on by Mr. Shefftz can be found at CX 171-176, RX 44.

To the extent, however, that the gravity penalty factor is considered, this factor supports a minimal or reduced penalty figure.

First, unlike manufacturers of parts, Keystone did not make and did not even intentionally sell parts intended to defeat emission control systems. To the contrary, Keystone took reasonable steps to ensure its suppliers provided Keystone with only legal and otherwise compliant parts. When Keystone learned for the first time (and contrary to what the EPA had said publicly) that EPA considered the sales in violation of the CAA, Keystone took steps to put protections in place to stop the sale of these products, even though the products did, in fact, have legal uses.

Second, as described above in section 3.B, the parts at issue are intended for use in competition or "race only" vehicles and antique vehicles or other legal uses, which are not subject to the requirements of the CAA. Parts at issue in the Complaint can be used in vehicles that were never equipped with the relevant emission control equipment in their original vehicle configuration (including catalytic converters, diesel particulate filters (DPF), and/or exhaust gas recirculation (EGR) systems), because the vehicles were either manufactured prior to the relevant emission standards under the CAA and its implementing regulations, or certified under the applicable CAA standard without the need for such emission control equipment. In such applications, the parts at issue could not be deemed to "bypass, defeat, or render inoperative any device or element of design installed on or in a motor vehicle or motor vehicle engine in compliance with regulations under [the CAA]" because those vehicles were never installed with such equipment. EPA has previously acknowledged that certain vehicles are "excluded from the motor vehicle emission requirements of the Clean Air Act" due to the "vehicle age (i.e., manufactured prior to the regulations)" as well as due to their "exclusive use for competition or racing." RX 28 at 13. Additionally, these racing and antique/classic vehicles are rarely driven as they are collector's pieces and/or preserved for racing use. With respect to racing vehicles, these vehicles are trailered to and from competition courses and are not driven on public roads, as shown RX 45. As a result, even if there were a potential emissions increase resulting from the installation of these parts (which Respondent rejects), any potential emissions impact would be minimal due to the few miles driven in these vehicle types.

Respondent's expert, Mr. Wanamaker, an automotive engineer with over 30 years of experience with classic and antique cars and racing vehicles, may testify to explain how the parts at issue can be used in classic and antique cars and racing vehicles and for other legal purposes. *See e.g.*, RX 67 ("Wanamaker's /32 Ford Collection is the Envy of Every Hot Rodder (January 27, 2018)). Respondent's expert, Ms. Faulk, may testify regarding her experience with and understanding of these parts with respect to racing vehicles and other legal uses for the parts at issue. *See e.g.,* RX 45.

Finally, as described above in section 3.B, nearly [redacted] of the alleged violations involve Derive "SCT" branded parts that were already the subject of an EPA consent decree with Derive that covered the complete timeframe of Keystone's sales of those same parts. As Respondent's expert, Mr. Shefftz, will testify, these Derive parts represent approximately [redacted] of the cumulative gross profit derived from the sale of the [redacted] parts at issue in the Complaint. *See* RX 266. Both EPA and Derive created confusion in the regulated community regarding the legal status of these parts. Respondent should not be punished for selling these same parts, which Derive was allowed to continue selling as recently as August 2020 and which Derive represented as compliant and

legal parts on multiple occasions. Additionally, the fact that EPA allowed Derive to continue selling these parts indicates that any potential harm from these parts must be minimal, as EPA would not have allowed Derive to continue selling parts that were causing significant environmental harm.

d. Size of Respondent's Business

The primary purpose of this penalty factor is to adjust a penalty amount as needed to provide adequate deterrence relative to the size of the business alleged to be in violation. However, the imposition of a higher penalty amount based on a business's size is not a required component of the penalty calculation. A decision to increase the penalty amount based on business size is dependent on the specific facts of each case, and higher penalties are not required to be imposed even for the largest of companies. See *United States v. General Motors*, 403 F. Supp. 1151 (D. Conn. 1975) (imposing $1 penalty on GM based on specific case circumstances); *United States v. Louisiana-Pacific Corp.*, 682 F. Supp. 1141, 1163 n.25 (D. Colo. 1988) (noting that "a nominal fine may be imposed upon even the largest enterprise in the appropriate circumstances" and imposing only $65,000 penalty on "one of the largest businesses in the United States") (citation omitted).

No penalty enhancement for business size is necessary or justified under the specific facts presented here because no additional deterrence is necessary to affect Respondent's future actions. The segment of Respondent's business that is relevant to EPA's allegations is a very small part of Respondent's overall business. Respondent took steps to stop the sale of these parts prior to even receiving a Notice of Violation from EPA.

EPA's enforcement activities already have accomplished the full deterrent effect on Respondent's activities, and Respondent has no economic incentive to repeat the actions challenged by EPA in the future. Any additional penalty enhancement based on Respondent's unrelated business lines would not serve the intended purpose of the business-size factor, but instead would be punitive and constitute unfair treatment of Respondent relative to other defendants in similar cases. Indeed, rewarding under-capitalized manufacturers and/or retailers of allegedly violative parts with a reduced penalty, while more harshly penalizing legitimate wholesale distributors whose alleged violations are only an incidental portion of their overall business and whose requisite knowledge and intent cannot be established, runs counter to the purpose and goals of the CAA and the principles of fairness and justice.

e. History of Noncompliance

The purpose of this factor is to enhance the penalty amount in instances where a person has violated a similar environmental requirement before and was therefore not deterred by the Agency's previous enforcement response. This is Respondent's first alleged violation of the CAA. Respondent has already taken steps in response to the EPA's initial RFI and continues to review and update its parts review process as needed. This penalty factor supports a minimal or reduced civil penalty.

f. Action Taken to Remedy the Violation

Respondent took immediate measures to preemptively stop selling and to quarantine its remaining unsold inventory of parts in the product categories covered by EPA's RFI, including some parts that EPA did not ultimately include in the Complaint. CX 142 (August 9, 2017 Initial Response to EPA's Request for Information Under Section 208 of the Clean Air Act); CX 146 (October 24, 2017 Response to EPA's request for clarification e-mail). Respondent worked quickly and diligently to cooperate with EPA and is committed to ensuring it sells only compliant products. Respondent has continued to update and refine its parts review process as needed and will continue to do so going forward. Respondent took these measures with respect to all part types covered in the alleged violations in good faith and out of an abundance of caution, even though there are legal uses and a legal market for such parts. These good faith responses by Respondent support a minimal or reduced civil penalty.

g. Other Such Matters as Justice Requires

In addition to the specific factors set forth above, the CAA directs the Presiding Officer to consider "other such matters as justice may require." 42 U.S.C. § 7524(c)(2). Such mitigation factors exist here and should be taken into consideration to mitigate any penalty in this matter.

First, Respondent is a wholesale distributor; Respondent does not manufacture, design, test, certify, warrant, offer technical support, or install any of the products at issue in this matter. Additionally, only a very small portion (less than approximately [redacted]) of Respondent's sales at issue occurred through its retail stores. As a result, Keystone has no knowledge of or control over the end use or user of the products at issue. Any penalty in this matter should be mitigated and substantially reduced in consideration of Keystone's lack of knowledge with regard to the alleged violations.

Second, aftermarket parts wholesale distributors like Respondent were not provided with fair notice regarding potential enforcement against the sale of parts to the racing industry. If Respondent had been given clear information and guidance regarding what constituted illegal sales and/or illegal parts, it would not have sold the parts at issue here. While Respondent contends that the lack of fair notice bars liability in this matter, at a minimum the facts regarding EPA's inconsistent conduct and messaging should be considered as an important component of a penalty evaluation and serve to reduce any penalty recommendation.

Third, Respondent notes that the majority of the parts at issue were manufactured and/or sold by other companies that are either currently the subject of an administrative complaint by EPA for similar alleged violations or have already reached settlement agreements and paid penalties stemming from such allegations (e.g., Borla Performance Industries, Inc., Derive Systems, Inc., and SCT Performance, LLC). To the extent that the allegations in these cases cover the same parts at issue here, that should be considered as a factor in determining a proposed penalty assessment.

Fourth, it is unfair to punish Keystone for selling these parts where other manufacturers and retailers continue to sell the exact same parts with no penalty. In fact, in many cases the manufacturers of the very parts at issue here—the entities who have the most knowledge,

responsibility, and control—continue to market and sell these parts online. *See e.g.*, RX 120, 160-161, 174, 190-191. Additionally, numerous big box retailers also continue to market and sell these parts online, including Amazon, Walmart, Sears, and AutoZone. *See e.g.*, RX 100-102, 119, 222, 257-262. Respondent has provided examples of continued online advertising and sales of the parts at issue in the Complaint. RX 91-265.

Fifth, EPA has penalized other parties, some with the knowledge that Keystone lacks, in amounts far less than what Keystone anticipates EPA will seek from it. This is true even against manufacturers of the parts at issue, who potentially demonstrate a greater culpability and knowledge of the parts' impacts on emissions when compared to distributors like Keystone. The following are examples of such cases brought by the EPA for violations of the CAA §§ 203(a)(3)(A) and 203(a)(3)(B):

- Premier Performance, LLC, a wholesale distributor, and its affiliated companies (at least one of which is a manufacturer) were charged a penalty of $3 million for manufacturing, selling, and installing 64,299 aftermarket parts. This amounts to a penalty per part of $46.66. RX 88.

- MagnaFlow, a distributor and manufacturer, was made to pay a total penalty of $612,849 for the manufacture and sale of 5,674 violating parts for a penalty per part of $108. RX 86.

- Weistec Engineering, Inc., a manufacturer, agreed to pay a total penalty of $8,500 for manufacturing and selling 123 aftermarket parts, resulting in a $69.11 penalty per part. RX 89.

- APEX Integration, Inc. was deemed a first-time violator of the CAA, as is Keystone under the alleged claims. In consideration of this characterization, EPA penalized APEX Integration Inc. $5,000 for the manufacture and sale of 44 violating products, or $113.64 per part. RX 85.

- Harley Davidson, Inc. and associated companies were made to pay a penalty of $12 million for 352,682 violations, resulting in a penalty per part of about $34. RX 87.

The examples above do not include cases where the respondent paid a reduced penalty due to ability to pay considerations. In such cases, numerous examples exist where the manufacturer of aftermarket parts paid a lower penalty per part than what Keystone anticipates EPA will seek against it. *See e.g.*, RX 276 (Pypes Performance Exhaust, LLC, a manufacturer and seller of aftermarket parts, paid $84,000 for selling approximately 18,324 "delete" pipes, for a penalty per part of $4.58); RX 32 (Derive Systems, Inc., a manufacturer, paid a penalty of $300,000 for the manufacture and sale of 363,000 aftermarket parts for a penalty per part of $0.82); RX 277 (Two Brothers Racing, Inc., a manufacturer, paid a penalty of $90,000 for manufacturing and selling 13,597 exhaust systems for a penalty per part valuation of $6.62); RX 278 (OBX Racing Sports, a distributor and manufacturer paid a $25,000 penalty for the manufacture and sale of 1,551 aftermarket parts, for a penalty per part of $16.12).

Finally, Respondent has cooperated with EPA investigators throughout the process leading up to and including the present proceeding. Respondent supplied required documentation and participated in good faith settlement discussions, at great expense. As described above, Respondent took good faith measures to stop the sale of the part types at issue even before receiving a Notice of Violation, and despite there being legal uses for such parts. This cooperation should be considered to mitigate any penalty recommendation.

2. <u>The 2021 Penalty Policy Will Not Produce Fair and Equitable Results</u>

EPA has indicated that it intends to base its proposed penalty on the very recently issued 2021 Penalty Policy. The 2021 Penalty Policy states that it supersedes EPA's Clean Air Act Mobile Source Civil Penalty Policy - Vehicle and Engine Certification Requirements (Jan. 16, 2009) ("2009 Penalty Policy"), which had provided the context for all prior penalty discussions in this matter. EPA bears the burden in an administrative proceeding to show why any proposed penalty is appropriate. See 40 C.F.R. § 22.24. As previously discussed in regard to the Twelfth Affirmative Defense, the 2021 Penalty Policy lacks scientific support for critical inputs and is inappropriate for use in this matter.

Because EPA has yet to apply the 2021 Penalty Policy in this case (or in any other public case), Respondent anticipates further supplementing this submission regarding application of the penalty policy following receipt of EPA's proposed penalty and detailed explanation.

Dated: June 2, 2021

Respectfully submitted:

Jennifer P. Adams

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COUNSEL FOR RESPONDENT

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:	)	Docket No.: CAA-03-2021-0058
	)	
Keystone Automotive Operations, Inc.	)	
	)	
Respondent	)	

CERTIFICATE OF SERVICE

I, Hannah Graae, hereby certify that on this 2nd day of June 2021, I have served a true and correct copy of Respondent's Prehearing Exchange and associated exhibits to the following parties in the manner indicated below.

Original and one copy (with CBI/PII redacted) via the OALJ Electronic Filing System to:

Mary Angeles, Headquarters Hearing Clerk

One copy (with CBI/PII redacted) via the OALJ Electronic Filing System to:

Susan L. Biro, Chief Administrative Law Judge

One copy (with CBI/PII redacted) via electronic mail and/or via electronic secure file transfer system (Egress):

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Counsel for Complainant

Original and one copy of RX 30, 33-34, 40-41, 70-84, 266-273, and 275 (containing information claimed CBI or potential PII) via a file-share system established by the OALJ to:

Mary Angeles, Headquarters Hearing Clerk

One copy of RX 30, 33-34, 40-41, 70-84, 266-273, and 275 (containing information claimed CBI or potential PII) via a file-share system established by the OALJ to:

Susan L. Biro, Chief Administrative Law Judge

One copy of RX 30, 33-34, 40-41, 70-84, 266-273, and 275 (containing information claimed CBI or potential PII) via electronic secure file transfer system (Egress):

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