IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA Plaintiff, v. DERIVE SYSTEMS, INC., SCT HOLDINGS, INC. and SCT DELAWARE HOLDINGS, INC.; DERIVE POWER, LLC; SCT PERFORMANCE, LLC and BULLY DOG ACQUISITION, LLC, and DERIVE EFFICIENCY, LLC, Defendants.	Civil Action No. 1:18-cv-2201

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Plaintiff United States of America, on behalf of the United States Environmental Protection Agency ("EPA"), has filed a Complaint in this action concurrently with this Consent Decree, alleging that Derive Systems, Inc., f/d/b/a SCT Holdings, Inc. and SCT Delaware Holdings, Inc.; Derive Power, LLC, f/d/b/a SCT Performance, LLC and Bully Dog Acquisition, LLC; and Derive Efficiency, LLC (collectively referred to as "Defendants") violated Section 203 of the Clean Air Act ("Act," or "CAA"), 42 U.S.C. § 7522(a)(3)(B), which prohibits the "following acts and causing thereof," including "any person [that] manufacture[s] or sell[s], or offer[s] to sell, or install[s], 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 . . . ."

Under Sections 203, 204, and 205 of the Act, the United States alleges it is entitled to injunctive relief and the assessment of civil penalties against Defendants for their violations of the Act. 42 U.S.C. §§ 7522, 7523, and 7524.

Between 2013 and 2014, entities now part of Defendants acquired SCT Holdings, Inc. ("SCT") and its subsidiaries, and certain assets of Bully Dog Technologies, LLC ("Bully Dog").

The Complaint alleges that between 2013 and the present, Defendants manufactured and sold certain Handheld Devices and Custom Tuning Software products that contained one or more prohibited components under Section 203(a)(3)(B), in the form of certain Calibrations in Pre-Loaded Tunes and/or access to certain Calibration parameters in the Custom Tuning Software.

The Complaint alleges that when installed on a 2012 Ford F-250 truck with a 6.7 liter Powerstroke diesel engine, a Pre-Loaded Tune installed on a Bully Dog GT Platinum Handheld Device with associated product number 40420 caused the motor vehicle to produce Nitrogen Oxides ("NOx") emissions that exceeded the established standards that must be met by the Original Equipment Manufacturer ("OEM") to obtain a Certificate of Conformity ("COC") to introduce the motor vehicle or motor vehicle engine into United States commerce ("EPA Bully

Dog Test").

Since acquiring SCT and certain assets of Bully Dog, Defendants developed compliance policies, pursuant to which Defendants terminated business relationships with several companies and individuals based on concerns that customers were using Defendants' products to violate the CAA, including but not limited to using such products to bypass, defeat, or render inoperative emission controls on motor vehicles or motor vehicle engines.

After EPA commenced an investigation, notified Defendants of such investigation in April 2015, and received information from Defendants in accordance with one or more CAA Section 208 Information Request(s), EPA issued a Notice of Violation ("NOV") to Defendants on January 17, 2017, relating to specific products. EPA's investigation led to the concurrent filing of the Complaint and this Consent Decree.

The United States has reviewed Financial Information submitted by Defendants to determine Defendants' financial ability to pay a civil penalty in this action and to finance the requirements of this Consent Decree. The United States has determined that Defendants, which currently have approximately 160 employees, have limited financial ability to pay a civil penalty in this action.

Defendants do not admit any liability to the United States arising out of the conduct, transactions, or occurrences alleged in the Complaint and NOV.

The Parties recognize, and the Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith and will avoid litigation among the Parties and that this Consent Decree is fair, reasonable, and in the public interest. The Parties also recognize that the requirements of this Decree only apply to Defendants' United States sales.

Defendants offer an extensive range of products including over 2900 Existing Pre-Loaded Tunes that are supported by Defendants. This Decree provides a framework for Defendants to conduct independent emission testing and implement other injunctive relief intended to ensure compliance with Title II of the Act.

NOW, THEREFORE, before the taking of any testimony, without the adjudication or admission of any issue of fact or law except as provided in Section I with the consent of the Parties, IT IS HEREBY ADJUDGED, ORDERED, AND DECREED as follows:

I. JURISDICTION AND VENUE

1. This Court has jurisdiction over the subject matter of this action and over the Parties pursuant to under 42 U.S.C. §§ 7522, 7523, and 7524; 28 U.S.C. §§ 1331, 1345, & 1355. Venue lies in this District under Section 205 of the Act, 42 U.S.C. § 7524, because this District is the location of the Administrator's principal place of business. For purposes of this Decree, or any action to enforce this Decree, Defendants consent to the Court's jurisdiction over this Decree and any such action and over each Defendant and consent to venue in this judicial district.

2. For purposes of this Consent Decree, Defendants agree that the Complaint states claims upon which relief may be granted under Sections 203, 204, and 205 of the Act.

II. APPLICABILITY

3. The obligations of this Consent Decree are binding upon the United States, and apply to and are binding upon all of the Defendants and any successors, assigns or other entities or persons otherwise bound by law.

4. Defendants' obligations to comply with this Consent Decree are joint and several. No transfer of ownership or operation of the Defendants' businesses, whether in compliance with the procedures of this Paragraph or otherwise, shall relieve Defendants of their obligation to ensure that the terms of the Decree are implemented, unless (1) the transferee agrees to undertake the obligations required by the Decree with respect to the business(es) it acquires (and not any other businsess(es) of Defendants that it does not acquire) and to be submitted for the Defendants as a Party under the Decree and thus be bound by the terms thereof as they relate to the acquired business(es); (2) the United States consents to relieve Defendants of their obligations because the transferee has the financial and technical ability to comply with the requirements of this Consent Decree; and (3) the Court agrees to the substitution. However, if Defendants transfer only part of their business(es), Defendants shall remain obligated to ensure that the terms of the Decree are

implemented for the part of the business(es) retained by Defendants. Defendants may not transfer ownership or operation of Defendants' businesses for the first 120 Days from the Date of Lodging. At least Thirty Days prior to such transfer, Defendants shall provide a copy of this Consent Decree to the proposed transferee and shall simultaneously provide written notice of the prospective transfer to the United States in accordance with Section XV (Notices). Any attempt to transfer ownership or operation of the Defendants' businesses without complying with this Paragraph constitutes a violation of this Decree.

5. Defendants hereby agree that they are bound to perform duties scheduled to occur by this Consent Decree before the Effective Date. In the event the United States withdraws from or withholds consent to this Consent Decree in accordance with Paragraph 100, or the Court declines to enter this Consent Decree, then the preceding requirement to perform duties scheduled to occur before the Effective Date shall terminate.

6. Within Thirty Days of Lodging, Defendants shall provide a copy of this Consent Decree and its Appendices to all officers, directors, employees (which includes but is not limited to engineers, sales, and compliance employees), and agents whose duties might reasonably include compliance with any provision of this Decree, as well as to any contractor retained to perform work required under this Consent Decree. Defendants shall condition any such contract upon performance of the work in conformity with the terms of this Consent Decree.

7. Defendants shall also notify those individuals identified above that it is a violation of the Clean Air Act for any of them to be involved in the manufacture, sale, or offering for sale of any product, alone or in combination with other products, to bypass, defeat, or render inoperative any Element of Design of the emission control system, including but not limited to EGR, DPF, DOC, NAC, SCR, and/or OBD.

8. In any action to enforce this Consent Decree, Defendants shall not raise as a defense the failure by any of their officers, directors, employees, agents, or contractors to take any actions necessary to comply with the provisions of this Consent Decree or to have received a copy of this Consent Decree.

III. OBJECTIVES

9. The objective for this Consent Decree is for Defendants to comply with Title II of the Clean Air Act, particularly Section 203(a)(3)(B), 42 U.S.C. § 7522(a)(3)(B).

IV. DEFINITIONS

10. Terms used in this Consent Decree that are defined in the Act or in regulations promulgated in accordance with the Act shall have the meanings assigned to them in the Act or such regulations, unless otherwise provided in this Decree. Whenever the terms set forth below are used in this Consent Decree, the following definitions shall apply:

"Act" means the Clean Air Act, as amended, 42 U.S.C. § 7401 et seq.;

"Authorized Reseller Agreement" or "ARA" means an agreement that Defendants enter into with a third party that sells Defendants' products. Nothing in this Decree prohibits Defendants from revising their ARA periodically, provided the revised ARA complies with the requirements of this Consent Decree;

"Calibration" means a collection of calibratable parameters that are used to refine the operation of a motor vehicle's embedded control system;

"Certificate of Conformity" or "COC" means a document EPA issues to ensure that every new motor vehicle or motor vehicle engine introduced into United States commerce satisfies applicable emission standards;

"Complaint" means the complaint filed by the United States in this action;

"Consent Decree" or "Decree" means this Decree and all appendices attached hereto and identified in Section XXV of this Decree;

"Custom Tuning Software" means any software application developed and licensed by Defendants that enables Defendants and their customers to create Calibrations to be loaded into Electronic Control Unit(s);

"Day" means a calendar day unless expressly stated to be a business day. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next business day;

"Defendants(s)" or "Derive" means Derive Systems, Inc., SCT Holdings, Inc., SCT Delaware Holdings, Inc., Derive Power, LLC, SCT Performance, LLC, Bully Dog Acquisition, LLC, and Derive Efficiency, LLC;

"Defueling Option" means an adjustable parameter available in a Pre-Loaded Tune that can be turned on or off using Defendants' Handheld Devices where the purpose is to activate, modulate, delay, or deactivate the operation of the Pre-Loaded Tune where user-defined conditions are met. For example, defueling can be activated on cold starts such that the stock calibration is used to run the vehicle until engine coolant temperature reaches 170 degrees Fahrenheit;

"Diagnostic Trouble Code" or "DTC" means any malfunction code that sets when a malfunction is detected by the OBD;

"Diesel Oxidative Catalyst" or "DOC" means exhaust aftertreatment devices that reduce emissions from diesel-fueled vehicles and equipment. DOCs generally consist of a precious-metal coated, flow-through honeycomb structure contained in a stainless steel housing. As hot diesel exhaust flows through the honeycomb structure, the coating of precious metal causes a catalytic reaction that breaks down pollutants into less harmful components. The DOC includes all hardware, components, parts, sensors, subassemblies, software, auxiliary emission control devices (AECDs), and Calibrations that collectively constitute the system for implementing this strategy;

"Diesel Particulate Filter System" or "DPF" means all hardware, components, parts, sensors, subassemblies, software, AECDs, Calibrations, and other Elements of Design that collectively constitute the system for controlling emissions of particulate matter by trapping such particulates in a filter and periodically oxidizing them through thermal regeneration of the filter;

"Element of Design" is any control system (i.e. computer software, electronic control system, emission control system, computer logic), and/or control system calibrations, and/or the results of systems interactions, and/or hardware items on a motor vehicle or motor vehicle engine, as defined in 40 C.F.R. § 86.1803-01;

"Effective Date" shall have the definition provided in Section XVI;

"Electronic Control Unit" or "ECU" (a/k/a "engine control module" or "ECM") means an electronic hardware device, together with the software and calibrations installed on the device, that is capable of controlling, among other things, the operation of the emission control system in a motor vehicle;

"EPA" means the United States Environmental Protection Agency and any of its successor departments or agencies;

"Executive Order" or "EO" means an official exemption issued by the California Air Resources Board ("CARB") exempting an aftermarket product from the prohibitions of Section 27156 of the California Vehicle Code upon review by CARB that the aftermarket product has been found not to reduce the effectiveness of the applicable vehicle pollution control systems;

"Exhaust Gas Recirculation" or "EGR" means the strategy for controlling NOx emissions by recirculating a portion of engine exhaust gas into the cylinders of the engine, together with all hardware, components, parts, sensors, subassemblies, software, AECDs, and Calibrations that collectively constitute the system for implementing this strategy and for adjusting the volume of exhaust gas in the engine cylinders;

"Existing Pre-Loaded Tune" means a Pre-Loaded Tune introduced into commerce before the Date of Entry;

"Financial Information" means the documentation identified in Appendix A, which was submitted to the United States by Defendants under a confidentiality agreement and which Defendants assert includes Confidential Business Information;

"First Year of Testing" means the first twelve months of independent vehicle emission testing conducted on Defendants' Existing Pre-Loaded Tunes according to the protocol defined in this Decree at Paragraph 27 and Appendix C.

"Full Operation and Functionality of the OBD" means that the OBD system performance after the installation of any aftermarket part or Calibration is equivalent to that of the OBD system installed by the original equipment manufacturer (OEM) when the vehicle was certified by EPA. Full Operation and Functionality of the OBD includes retaining OBD monitoring capability necessary to identify potential emission problems associated with vehicle operation and aftermarket part or Calibration installation.

"Handheld Device" means a physical device manufactured by Defendants that is capable of modifying and/or replacing Calibrations on the targeted motor vehicle ECU;

"Limited Access Parameters" include the software parameters available in Defendants' Custom Tuning Software that control OBD Functions, OBD Thresholds, EGR Type Switch, and EGR Hardware Present Switch;

"Marketing Materials" means all marketing, user manuals, training, and other informational materials prepared by Defendants that discuss any of their products to retailers, custom tuners, dealers and end users;

"New Pre-Loaded Tune" means a Pre-Loaded Tune introduced into commerce on or after the Date of Entry;

"Nitrogen Oxides" or "NOx" means the oxides of nitrogen;

"NOx Adsorber Catalyst" or "NAC" means the strategy for controlling NOx emissions from partial lean burn gasoline engines and from diesel engines, by means of a periodic process of adsorbing the NOx emissions on the NAC during lean combustion and regenerating the NAC by short richer than stoichiometric combustion, together with all hardware, components, parts, sensors, subassemblies, software, AECDs, and Calibrations that collectively constitute the system for implementing this control strategy;

"Original Equipment Manufacturer" or "OEM" means the manufacturer responsible for the design and production of a motor vehicle or motor vehicle engine;

"On-Board Diagnostics" or "OBD" means the strategy for monitoring the functions and performance of the emission control system and all other systems and components that must be monitored under 13 C.C.R. §§ 1968.1 and 1968.2, for identifying and detecting malfunctions of such monitored systems and components, and for alerting the driver of such potential malfunctions by illuminating the malfunction indicator light ("MIL"), together with all hardware, components, parts, sensors, subassemblies, software, AECDs, and Calibrations that collectively constitute the system for implementing this strategy;

"Oxygen sensors" are Elements of Design in motor vehicles that monitor the oxygen concentration of exhaust gas or stoichiometry of combustion. The sensors measure differences between the amount of oxygen in the exhaust gas and the amount of oxygen in air.

"Paragraph" means a portion of this Decree identified by an Arabic numeral;

"Parameters of Concern" or "POC" include Calibrations that affect fueling, airflow, open-closed loop, front and rear oxygen sensors, EGR operation, and spark timing, including, but not limited to the following parameters that currently exist in Defendants' Advantage III Software (which is a Custom Tuning Software): fuel injection timing, fuel rail pressure (including pulse width or fuel mass), smoke limiters, EGR-related parameters, fresh airflow, mass air flow transfer function, fuel open loop and electronic throttle control, rear oxygen sensor switch, Fore Aft Oxygen Sensor Control (FAOSC) disable switch, and spark timing;

"Part or Component" includes any part or component intended for use with, or as part of, any motor vehicle or motor vehicle engine (e.g., ECU, Element of Design, tuner, tune, calibration map, or software that is installed on or designed for use with such vehicles or engines);

"Parties" means the United States and Defendants;

"Pre-Loaded Tune" means a modified ECU Calibration developed and entered into commerce by Defendants;

"Section" means a portion of this Decree identified by a roman numeral;

"Selective Catalytic Reduction System" or "SCR" means all hardware, components, parts, sensors, subassemblies, software, AECDs, Calibrations, and other Elements of Design that collectively constitute the system for controlling NOx emissions through catalytic reduction using an ammonia-based diesel exhaust fluid ("DEF") as the reducing agent, including without limitation all hardware, components, parts, sensors, subassemblies, software, AECDs, Calibrations, and other Elements of Design relating to (1) the DEF storage tank; (2) the DEF injectors, (3) the dosing control unit, and (4) the SCR catalysts assembly;

"United States" means the United States of America, acting on behalf of EPA;

"Verified Customers" for purposes of this Decree mean those software customers that Defendants have determined are utilizing the parameters of their Custom Tuning Software for legitimate purposes under Title II of the Act, and

"Worst Case Scenario Tune" means a Pre-Loaded Tune that is the most challenging emissions compliance calibration of all the Pre-Loaded Tunes available for use with a given motor vehicle or motor vehicle engine analyzed according to the requirements of Paragraph 27 and Appendix C.

V. CIVIL PENALTY

11. Within Thirty Days after the Effective Date of this Consent Decree, Defendants shall pay the sum of $300,000.00 as a civil penalty, together with interest accruing from the Effective Date. Interest on the civil penalty shall accrue at the rate specified in 28 U.S.C. § 1961 as of the date of payment.

12. Defendants provided Financial Information, which is generally described in Appendix A, that demonstrates Defendants have a limited ability to pay civil penalties at this time. Therefore, Defendants shall pay the penalty amount in three installment payments plus interest. Defendants shall pay the first payment of $100,000.00 within Thirty Days of the Effective Date, together with interest from the Effective Date. Defendants shall pay the second payment of $100,000.00, with interest from the Effective Date of that payment no later than November 1, 2019, and pay the third payment of $100,000.00 with interest from the Effective Date of that payment no later than November 1, 2020.

13. Defendants shall pay the civil penalty due by FedWire Electronic Funds Transfer ("EFT") to the United States Department of Justice in accordance with written instructions to be provided to Defendants, following entry of the Consent Decree, by the Financial Litigation Unit of the United States Attorney's Office for the District of Columbia. At the time of each payment, Defendants shall send a copy of the EFT authorization form and the EFT transaction record, together with a transmittal letter, which shall state that the payment is for the civil penalty owed in accordance with the Consent Decree in United States v. Derive [insert caption] and DOJ case number 90-5-2-1-11627, to the United States in accordance with Section XV of this Decree (Notices); and by mail to the United States Attorney's Office for the District of Columbia, Judiciary Center Building, 555 4th St NW, Room 10-312, Washington, D.C., 20001.

14. Defendants shall not deduct any penalties paid under this Decree in accordance with this Section or Section VIII (Stipulated Penalties) in calculating its federal income tax.

15. The United States shall be deemed a judgement creditor for purposes of collection of the civil penalty required by this Decree.

16. In the event of a sale of any of the Defendants, the full civil penalty payment and any associated stipulated penalties are due before the date of the sale of any of the Defendants.

VI. COMPLIANCE REQUIREMENTS

17. Defendants shall comply with the Clean Air Act Section 203(a)(3)(B), 42 U.S.C. § 7522(a)(3)(B), in their operations. The schedules set forth in the Compliance Requirements

Section are based in part upon Defendants' financial condition, which was verified by the United States after review of requested Financial Documentation, generally described in Appendix A.

18. Defendants agree as of the Date of Lodging, not to manufacture, offer for sale, sell, convey, or otherwise transfer any product, including Handheld Devices, Pre-Loaded Tunes, or Calibrations that contains user-adjustable features for the following: SCR, DPF, NAC, DOC, or any diagnostic trouble codes (DTCs) associated with these emission controls.

19. Defendants shall not introduce any user-adjustable features that disable EGR, rear oxygen sensors, or associated DTCs in any Calibrations developed by Defendants as of the Date of Lodging, other than the Handheld Devices subject to the schedule identified in Paragraph 21.

20. Defendants shall not introduce any New Pre-Loaded Tunes into commerce without a reasonable basis that demonstrates the New Pre-Loaded Tune does not adversely affect emissions and retains the Full Operation and Functionality of the OBD, consistent with Paragraph 27.

Handheld Devices

21. According to the schedule outlined in this Paragraph, Defendants shall not manufacture, offer for sale, sell, convey, or otherwise transfer any product intended for use on vehicles of model years 2000 and newer that contains user-adjustable features for the following: rear oxygen sensors, EGR, or any DTCs associated with these emission controls. Defendants shall remove these user-adjustable features from any of its Calibrations intended for use on vehicles of model years 2000 and newer prior to sale by the following dates: no later than June 1, 2019, for all of their Calibrations compatible with any Ford vehicles; no later than December 1, 2019, for all of their Calibrations compatible with any General Motor (GM) vehicles; and no later than August 1, 2020, for all of their Calibrations compatible with any other vehicles.

22. After Defendants remove the user-adjustable features according to the schedule identified in Paragraph 21, Defendants shall immediately destroy all products in stock containing the user-adjustable features identified in Paragraph 21, or provide proof to the United States of a software fix that removes these user-adjustable parameters. Defendants shall provide a declaration under penalty of perjury regarding these efforts. The declaration and associated

proof shall be reported to the United States in the applicable semi-annual progress reports required under Section VII (Reporting Requirements).

23. Defendants shall also make reasonable efforts to ensure that all Handheld Devices containing the user-adjustable features identified in Paragraph 21 in the inventory of authorized dealers are modified or destroyed by June 1, 2019 for those supporting Ford vehicles; December 1, 2019 for those supporting GM vehicles; by August 1, 2020, for all other vehicles. Reasonable efforts include but are not limited to sending written notices to the authorized dealers that these devices should not be sold, and that any further sale of these devices violates Title II of the Act.

24. No later than the Date of Entry, Defendants shall not provide technical support or information (including Marketing Materials) pertaining to the use, manufacture, creation, or sale of any of the user-adjustable parameters for EGR, rear oxygen sensors, or the DTCs for these parameters.

25. From the Date of Lodging, Defendants agree not to offer for sale, sell, convey, or otherwise transfer in any way the design, technology, manufacturing processes or techniques, or intellectual property used to manufacture the user-adjustable features for EGR, rear oxygen sensors, or associated DTCs to any other individual or other entity.

Vehicle Testing

26. **Calibration Information**: For all Pre-Loaded Tunes, including those that are not subject to independent emissions testing, Defendants shall document and explain all Calibration parameters modified, relative to the OEM stock Calibrations for each 2014 Model Year (MY) and later vehicle/engine model that are still supported by Defendants to their customers. Defendants shall provide this documentation to EPA no later than Thirty Days from the Date of Lodging. In this documentation, Defendants shall explain how they modify the engine and/or transmission control from the OEM stock Calibration. Defendants shall use the same level and format of detail required by the CARB Executive Order application Form A and corresponding ECU Modification Information Form (similar to form attached as Appendix B), and may include multiple vehicles such that the information provides sufficient detail for EPA to understand all modifications from each OEM stock Calibration caused by Defendants' Pre-Loaded Tune.

a. EPA, upon review of the calibration information, may request any particular Calibration files Defendants used to make the comparisons, and EPA may request the Calibrations in their original electronic format and software tools from Defendants to enable further evaluation by EPA. Defendants shall provide this information to EPA within Ten Days of the request, or at an otherwise mutually agreed time that takes into consideration the volume of additional information requested.

b. EPA may request further analysis or explanation of the changes made by Pre-Loaded Tunes, such as changes that may affect a specific Calibration parameter. For those Calibration parameters modified by Defendants, but not selected for independent emission testing under this agreement, if Defendants do not adequately address EPA's request for further analysis or explanation, the Parties shall confer to discuss EPA's concerns. If the Parties are unable to resolve EPA's concerns about whether Calibration parameters bypass, defeat, or render inoperative any device or Element of Design of the emission control system, either Party may invoke the dispute resolution process of Section X.

27. **Reasonable Basis for Pre-Loaded Tunes.** Defendants shall demonstrate a reasonable basis that Pre-Loaded Tunes do not adversely affect vehicle emissions and retain the Full Operation and Functionality of the On Board Diagnostic System (OBD).

a. Existing and New Pre-Loaded Tunes.

(1) For New Pre-Loaded Tunes, Defendants shall demonstrate a reasonable basis by either (1) obtaining an Executive Order ("EO") from the California Air Resources Board; or (2) performing independent emission testing consistent with the principles below in sub-Paragraph 27 (b, c, d, and f–g) of this Paragraph and Appendix C.

(2) For Existing Pre-Loaded Tunes where Defendants do not have an EO for that Pre-Loaded Tune, Defendants shall demonstrate a reasonable basis by either (1) submitting to CARB a Complete Application that covers the given Pre-Loaded Tune; or (2) performing independent emission testing consistent with the principles below beginning in sub-section (b) of this Paragraph.

(a) "Complete Application" to CARB under this sub-

Paragraph, means an Exemption Application that includes a complete Form A vehicle/engine list by Test Group, complete device description, complete ECU Modification Info form, and installation descriptions.

(b) If CARB denies or Defendants withdraw any EO application submitted under this sub-Paragraph, Defendants shall cease selling that Existing Pre-Loaded Tune immediately and must take reasonable efforts to remove that Existing Pre-Loaded Tune from commerce. For purposes of this Paragraph, denial shall mean a letter from CARB officially denying and terminating an EO application.

(c) Defendants shall diligently pursue the CARB EO application and provide any additional information required by CARB. For a given Existing Pre-Loaded Tune, no reasonable basis exists due to submission of an application to CARB if the application is still pending two or more years after submittal or CARB has not acted on the application because Defendants have failed to provide information. EPA may, in its unreviewable discretion, extend the deadline under this sub-Paragraph upon written request of Defendants.

(3) For Existing Pre-Loaded Tunes for which Defendants elect to demonstrate a reasonable basis in accordance with testing under this Paragraph (including following requirements of Appendix C), Defendants shall submit to EPA for review and approval a proposed schedule and testing plan (referred to hereafter as "Schedule and Test Plan") in accordance with the requirements of this Paragraph and Appendix C that includes the prioritization of all testing to occur during the First Year and the subsequent testing years required by this Decree.

(a) The Schedule and Test Plan shall explain the factors considered and the good engineering judgment analysis applied in proposing the priority and order for testing during the First Year of Testing (or subsequent year) consistent with this Paragraph.

(b) The Schedule and Test Plan shall explain the analysis of the Pre-Loaded Tune selected for testing as discussed in sub-Paragraph 27.d below. Defendants shall

also propose specific methods to address any anticipated problems with the testing principles articulated below.

(c) The Schedule and Test Plan shall include a list of all the vehicles compatible with the Pre-Loaded Tune selected for testing, identify which vehicles are grouped together, identify the proposed vehicles selected for testing, explain the analysis of vehicle grouping factors discussed in sub-Paragraph 27.b below, and any requested methodology refinements for performing OBD function checks prior to vehicle testing.

(4) Demonstrating a reasonable basis for a Pre-Loaded Tune under this Consent Decree is not an authorization to sell any product with such Pre-Loaded Tune(s) in California unless Defendants have obtained an EO from CARB for those Pre-Loaded Tune(s).

b. **Selection for Independent Emission Testing:** Defendants shall use good engineering judgment to select the Worst-Case Scenario Tune on the worst-case vehicles for testing.

(1) Good engineering judgment with respect to vehicle grouping selection for independent testing shall, at a minimum, include application of the following factors:

(a) Same OEM;

(b) Same vehicle emission BINs;

(c) Engine displacements within 15% of largest displacement or 50 CID, whichever is larger;

(d) Same method of air aspiration (e.g. turbocharger, supercharger, normally aspirated);

(e) Same fuel type (e.g. diesel/gasoline); and

(f) Same fuel metering system (e.g. port injection, direct injection, sequential injection).

(2) If, after considering the above factors, and applying good engineering judgment, Defendants determine that application of all of the factors is unnecessary because including all factors would otherwise not impact the vehicle groupings, presents significant complications that will delay testing, or application of all factors is technically infeasible, then Defendants shall document this analysis and explicitly explain to EPA the reason for such grouping in its Schedule and Test Plan.

(3) In general, good engineering judgment means that: Defendants have accurately recorded tune features with sufficient technical documentation for EPA to ascertain whether Defendants have reasonably selected the Worst-Case Scenario Tune and the vehicle or engine operated with the Defendants' subpart or component will continue to satisfy emissions requirements, such as meeting standards within useful life or maintaining emissions performance outside useful life. Good engineering judgement retains the Full Operation and Functionality of the OBD.

c. **Grouping Prioritization for Testing of Existing Pre-Loaded Tunes:** During the First Year of Testing and each subsequent year of testing required under the Decree, Defendants shall prioritize testing using the following steps:

(1) Defendants shall make a separate prioritization list for each fuel type (diesel, gasoline, alternative fuel) and shall update these lists each year as certain groups are tested by Defendants and new models are added.

(2) Prioritize Existing Pre-Loaded Tunes based on vehicle grouping model year range. For each applicable fuel (e.g., diesel, gasoline), rank highest those groups that include the current Model Year, and in reverse chronological order prior Model Years back to and including Model Year 2014.

(3) Where there are multiple groups that have identical model year ranges, prioritize the vehicle make and models associated with the projected trends of higher frequency of customer use based on historic information.

(4) If there is insufficient information to prioritize certain groups by frequency of use by customers, prioritize vehicle make & models certified closest to their

respective criteria pollutant standard.

(5) If there are groupings that remain equally ranked after all steps above, prioritize vehicle make & models by the number of OEM calibration parameters modified by Defendants.

(6) Because of the results of the EPA Bully Dog Test, Defendants shall test the 40420 Bully Dog Handheld Device installed on a Ford F-250 or F-350 truck with a 6.7 Liter Powerstroke diesel engine with GVWR of 10,000 pounds that is certified to Tier 2 standards in the First Year of Testing. The EPA engine family/group must be one of the following: FFMXD06.761B, EFMXD06.761A, DFMXD06.761A, CFMXD06.761A, or BFMXD06.761A. The Handheld Device shall be set on the "extreme" setting, and all Defueling Options must be disabled.

d. Calibration Selection for Testing:

(1) When Defendants select a vehicle from a group for testing, they shall also document their analysis of the selection of the Worst-Case Scenario Tune for that vehicle group. Defendants shall document an evaluation that includes compare files for each Pre-Loaded Tune for the selected test vehicle in each group and a narrative explaining why these Pre-Loaded Tunes are being grouped together, as well as the changes made to the OEM Calibrations by each tune, and explain why Defendants have selected a particular Pre-Loaded Tune as the Worst-Case Scenario Tune for that vehicle group.

(a) The evaluation by Defendants shall include information on all changes made to emission control technologies and Elements of Design, and identification of features that change emissions during real world conditions. For the Existing Pre-Loaded Tunes, such evaluation shall be documented in the proposed Schedule and Test Plan with enough specificity to allow EPA to understand the changes made by each tune and to understand Defendants' selection of the Worst-Case Scenario Tune.

e. Timing for Testing of Existing Pre-Loaded Tunes: No later than Sixty Days from the Date of Lodging, Defendants shall submit to EPA for review and approval a Schedule and Test Plan regarding the Existing Pre-Loaded Tunes for the First Year of Testing

according to the factors set forth above in sub-Paragraphs 27.a–d.

(1) If EPA has not provided either approval or comment to the proposed Testing and Schedule Plan within Sixty Days of submission, Defendants may commence the First Year of Testing.

(2) Defendants shall complete the First Year of Testing no later than twelve months from either the date of receiving EPA's approval, or fourteen months after submission of the Schedule and Test Plan to EPA, whichever is earlier.

(3) The Parties may agree to substitutions to the prioritization of vehicle testing.

(4) Subsequent Years of Testing Required to Complete Testing of Existing Pre-Loaded Tunes. For each new year of testing, Defendants must clearly identify any proposed changes to methodology utilized in developing the Schedule and Test Plan for the First Year of Testing. No later than Sixty Days before the end of each year of testing, Defendants must submit to EPA for review and approval a Schedule and Test Plan for vehicle testing to be performed on the Existing Pre-Loaded Tunes for the next year of testing. Upon the earlier of EPA's Approval or Sixty Days after EPA's receipt of Defendants' Schedule and Test Plan for each year of testing, Defendants must commence testing included in the Schedule and Test Plan, unless EPA provides comments or otherwise disapproves the Schedule and Test Plan. The independent emission testing to be completed shall follow all of the requirements of this Paragraph and Appendix C. Testing of Existing Pre-Loaded Tunes shall be completed no later than Five Years from the Date of Entry. Each Schedule and Test Plan submitted to EPA, including the plan for the First Year of Testing, shall identify Defendants' overall schedule to complete all testing ("Estimated Completion Schedule"). Estimated Completion Schedule information relating to years other than the specific year covered by the Schedule and Test Plan ("Future Years") shall be provided for information purposes only and shall not be binding upon Defendants. Nothing provided in the Estimated Completion Schedule shall preclude Defendants from revising their compliance approach for any Existing Pre-Loaded Tune that is included in the Estimated Completion Schedule for a Future Year. Defendants shall expeditiously perform their testing schedule to the extent feasible.

f. **OBD Function Check Prior to Emission Testing**: For independent emission testing under this Consent Decree, Defendants shall ensure evaluation and confirmation of the Full Operation and Functionality of the OBD before conducting the emissions tests, according to the directions contained in Appendix C, attached to this Decree.

g. **Specific Testing Requirements**: For independent emission testing under this Consent Decree, Defendants shall ensure the emission testing is performed according to the directions contained in Appendix C, attached to this Decree.

h. **Records Retention:** Defendants shall maintain the underlying documents that support each proposed Schedule and Test Plan submitted under this Paragraph for at least five years from the date of the Proposed Testing Report. Defendants shall also maintain all testing records for New Pre-Loaded Tunes for the duration of the Decree and shall makes the testing results available to EPA upon demand.

28. **Emission Test Failure:** If any Pre-Loaded Tune fails emission testing, Defendants shall not place the failing New Pre-Loaded Tune into commerce, and must take all reasonable steps to remove any failing Existing Pre-Loaded Tune(s) from the stream of commerce. Notwithstanding the foregoing, Defendants do not need to take steps to remove the Existing Pre-Loaded Tune from commerce if, within Thirty Days of receiving the failed test result, Defendants can demonstrate to EPA that either sub-Paragraph 28.a or b below apply:

a. The test run is not representative of the vehicle operation at the time of the testing, and good engineering judgment demonstrates that the tune does not adversely affect emissions.

b. A change to the Pre-Loaded Tune will ensure that the tune does not adversely affect emissions. Such change must be proposed to EPA no later than Thirty Days after receiving the failed test result(s) or at a mutually agreed-to time by the Parties. After this change has been developed, Defendants must take reasonable steps to advertise the availability of an update for the Existing Pre-Loaded Tune.

(1) In any of the above circumstances, EPA may require additional information, including additional testing, to support Defendants' reasonable basis that the Pre-

Loaded Tune does not adversely affect emissions.

29. There is no reasonable basis to demonstrate that a Pre-Loaded Tune or any product does not adversely affect vehicle emissions where documentation is fraudulent or materially incorrect, or where emissions testing was performed incorrectly.

Customer Verification Program for Users of Custom Tuning Software

30. Since certain of the software parameters contained in Defendants' Custom Tuning Software enable users to modify engine settings developed by OEMs and certified by EPA and CARB, Defendants shall commence a customer verification program for all customers of their Custom Tuning Software. The customer verification process must require each potential customer of Defendants' Custom Tuning Software to provide information about their intended use of the Custom Tuning Software. Unless a potential customer provides written confirmation to Defendants that they will use the software solely to develop legitimate products that do not bypass, defeat, or render inoperative a vehicle's emission control system (hereinafter referred to in this Section as "Legitimate Uses"), Defendants shall not sell the Custom Tuning Software, provide updates, or grant license applications to the potential customer. Examples of non-legitimate uses may include using Defendants' Custom Tuning Software to make modifications to vehicles regulated by EPA such as permanently disabling rear oxygen sensors to enable the removal of catalytic converters, permanently disabling EGR, and modifying, bypassing, and/or disabling other Elements of Design certified by OEMs such as engine fueling and airflow, without a reasonable basis that the modification does not adversely affect emissions performance (hereinafter referred to as "Non-Legitimate Uses"). Defendants must determine which access level of functionality of the software, if any, is appropriate to sell to the customer based on its intended use(s) of the software parameters.

a. The customer verification process shall be developed by Defendants and submitted to EPA for review and approval no later than September 1, 2018. Defendants shall begin implementing the customer verification process no later than Thirty Days after receiving EPA's approval and comments. For existing customers, Defendants shall complete the implementation of the customer verification process prior to approving any request to renew its software license or providing an update to a customer unilaterally. For all new customers,

Defendants shall complete the customer verification process immediately upon approval by EPA of the verification process. The verification process shall include the following information:

(1) The potential buyer's name, address, contact person, and identification of all users of the Custom Tuning Software (if any).

(2) Identification of the software parameters user(s) requests access to (check all that apply):

- ☐ Fuel injection timing
- ☐ Fuel injection quantity, pulse width, and pressure
- ☐ Smoke limiters
- ☐ Spark timing
- ☐ Air flow
- ☐ EGR flow
- ☐ Open Loop/Closed Loop ETC functionality
- ☐ Vehicle diagnostics
- ☐ EGR type switch
- ☐ EGR hardware present switch

(3) If the customer develops compressed natural gas (CNG) conversion kits, a statement from the customer that those kits are in good faith intended to be certified by EPA or CARB before providing access or renew access to its Custom Tuning Software.

(4) Identification of all the intended uses for each of the software parameters by all the end users (i.e. operators of recalibrated vehicles) of a particular software customer which may be done by checklist that includes the following categories:

o Modify ECU to customize drive quality/driveability without any engine/vehicle hardware modifications. Examples include ECU changes only to stock engine/vehicle settings for accelerator pedal progression transfer function, transmission shift points, engine RPM and/or vehicle speed limiters, or similar changes.

o Modify ECU to customize drive quality/driveability to enable proper function with corresponding vehicle hardware modifications. Examples include ECU changes to support installed aftermarket wheel/tire size, modified axle ratio, or similar changes.

o Modify engine performance (torque, horsepower, fuel economy) without any engine/vehicle hardware modifications. Examples include but are not limited to ECU changes only to stock engine/vehicle settings for fueling, airflow, open-closed loop systems, oxygen sensors, EGR operation, spark timing, or similar changes.

o Modify ECU to enable proper function of engine/vehicle when aftermarket parts are installed. Examples include but are not limited to air induction systems, intake manifolds, camshafts, turbochargers or supercharger, or fuel injectors.

o Modify ECU to enable proper function of engine/vehicle when converted to operation on alternate fuels, e.g. compressed natural gas (CNG) or liquefied petroleum gas (LPG).

o Modify calibration to enable proper function of engine/vehicle during engine switching or other modification of pre-1968 vehicles or engines, or vehicles or engines that were never certified by EPA.

o Other (Please describe).

(5) Customers must certify that their use of Defendants' Custom Tuning Software will comply with the CAA.

Limitations and Requirements to Access Software Parameters

31. Except for software users verified by Defendants to be using the Limited Access Parameters for CNG conversion, engine switching, other work involving vehicles not regulated by EPA, or to retain the Full Operation and Functionality of the OBD and all emission control systems, no later than January 1, 2019, Defendants shall deny access to any of the Limited Access Parameters to all new software users and to all existing software users upon renewal or upgrade of their software licenses.

32. **Training for Software Users:** No later than September 1, 2018, Defendants must revise their software training to address the requirements of this Paragraph and Appendix D, attached to this Decree. The revised software training program must be submitted to EPA for review and approval by September 1, 2018. Commencing within 45 days of EPA's approval of its training program, Defendants shall require all new users of Defendants' software that seek access to any POC and/or Limited Access Parameters to complete training prior to being granted software access. Commencing no later than January 1, 2019, Defendants shall require all users of Defendants' software that currently have or seek access to any POC and/or Limited Access Parameters to complete the training prior to renewing any software license, or before receiving customer support from Defendants concerning the Custom Tuning Software.

33. **Confirmation of Verified Customers:** Within Three Years of Entry, Defendants shall take reasonable efforts to confirm that 90 percent of their Verified Customers with access to POC and/or Limited Access Parameters are not selling products for any Non-Legitimate Use. Reasonable efforts may include but are not limited to conducting online searches, monitoring chat room discussions or conducting telephonic or written inquiries of its Verified Customers to determine if all products being sold utilizing Defendants' software are in fact being sold for Legitimate Uses. If Defendants discover that a software customer who has completed the training required by Paragraph 32 is selling products utilizing the Custom Tuning Software for a Non-Legitimate Use, Defendants shall immediately cease selling to and stop supporting that software customer. If Defendants believe that circumstances support either not terminating a software customer or reinstating sales and support of a terminated customer, Defendants may submit a written request to EPA, supported by relevant information seeking approval to continue or reinstate its relationship with that customer. Defendants shall not reinstate or continue such sales until they have received EPA's written approval. Defendants shall report to the United States on their efforts to verify each customer's use of Defendants products in its semi-annual reports submitted under Section VII (Reporting Requirements) of this Decree, and identify the customers not verified in the appropriate semi-annual report.

a. If EPA alerts Defendants to any concern about any customer of Defendants, Defendants shall use reasonable efforts to verify the customer's use of Defendants'

products. Defendants shall provide a report to EPA about that verification within Thirty Days in accordance with Section XV (Notices).

Marketing Materials and General Training Concerning Defendants' Products

34. No later than November 1, 2018, Defendants shall ensure that none of their Marketing Materials provide information that will enable their users to utilize Defendants' products to bypass, defeat, or render inoperative a device or Element of Design of the emission control system. Specifically, Defendants' Marketing Materials shall not contain any demonstration or discussion of how to bypass, defeat, or render inoperative any Element of Design of the emission control system, including but not limited to EGR, DPF, DOC, NAC, and/or SCR. Any discussion of modification of OBD in Defendants' Marketing Materials shall explain that the vehicle's OBD must retain the Full Operation and Functionality of the OBD as defined in this Decree. Defendants shall ensure that any training conducted for its Pre-Loaded Tunes, Handheld Devices, or Custom Tuning Software or software customers is consistent with the following:

a. Statements regarding disabling rear oxygen sensors shall be limited to how to use Defendants' products to develop legitimate products that do not bypass, defeat, or render inoperative a vehicle's emission control systems. Specifically, Defendants shall remove the following excerpts from their existing training: "obviously if there are no cats, then that can be shut off. Now when deleting Cats, you will also need to disable the cross checking from the rear O2 sensors."

b. Shall not contain statements regarding disabling OBD functions or any other Limited Access Parameter without describing legitimate uses for doing so (i.e., on vehicles not regulated by EPA or during development of CNG conversion kits).

35. Marketing Materials must also describe the limited legitimate uses for disabling oxygen sensors, which may include the development of a tune on a chassis dynamometer using wideband oxygen sensors to make calibration adjustments. Defendants must also explain that the customer is required to turn the rear oxygen sensor back on after tune development processes and before selling the tune to customers.

36. User manuals and training materials relating to all of Defendants' products (including their hardware and software products) must contain statements explaining that alterations made to the OEM configuration of a vehicle may violate the CAA if such alterations bypass, defeat, or render inoperative Elements of Design installed on a vehicle in compliance with the CAA, and that users of Defendants' products must make an individual determination that any alterations they perform using Defendants' products do not violate the CAA. Defendants shall include statements in all training materials that any modifications to the vehicle's OBD must retain the Full Operation and Functionality of the OBD as defined in this Decree. Defendants shall also not market their products for use on vehicles other than the vehicle families covered by that product's compliance determination. Defendants shall also include in these materials statements regarding the limited legitimate uses for the Limited Access Parameters and associated precautions that should be taken when using those parameters.

37. Defendants shall not directly or indirectly imply that its products are covered by a compliance determination from EPA, which includes removing "EPA compliant" designations or similar designations from its product materials and Marketing Materials.

Revisions to Authorized Reseller Agreement and Company Policies and Procedures

38. Defendants shall revise their Authorized Reseller Agreement no later than the Date of Entry to include the following:

a. Explicitly prohibit the sale of Defendants' products with delete pipes, delete kits, custom tunes, and other tools that would enable a user to violate the Clean Air Act;

b. Explicitly prohibit the use of Defendants' products as emission defeat products;

c. Include information regarding the legal prohibitions against bypassing, defeating, or rendering inoperative Elements of Design installed on a vehicle in compliance with the CAA. Specifically discuss that modifying parameters such as main fuel injection timing, fuel rail pressure/pulse width/fuel mass, EGR-related parameters, smoke limiters, fresh airflow, MAF transfer function, fuel open loop ETC, and spark timing can affect emissions and that modifying these parameters may violate the CAA and may cause excessive vehicle emissions. Users shall not modify these parameters for installation on a motor vehicle unless they have a reasonable

basis to conclude that such modifications do not adversely affect emissions. State specifically that any user or seller of Defendants' Custom Tuning Software must undergo training as required by Appendix D;

d. Require Defendants' products to be sold only in their original packaging and refrain from altering or removing any label or literature on Defendants' products;

e. Prohibit unauthorized use of Defendants' intellectual property, such as reverse engineering, decompiling, or disassembling software or hardware; and

f. Require their resellers to acknowledge its obligation to comply with all applicable CAA laws and regulations regarding its use of Defendants' products.

Training of Employees

39. No later than November 1, 2018, Defendants shall train their employees and develop internal policies to ensure all of their employees understand and comply with the Act. Defendants shall:

a. Develop a policy to prohibit customer support staff or any employees from assisting customers who inquire about using Defendants' products, alone or in combination with other products, to bypass, defeat, or render inoperative any device or Element of Design of the emission control system, including, but not limited to EGR, DPF, DOC, NAC, SCR, and/or OBD;

b. Expand Defendants' employee(s) web searching to uncover videos showing the unauthorized use of Defendants' product on YouTube (www.YouTube.com). Unauthorized use for purposes of this Paragraph is limited to instances where Defendants' products are shown being used to delete emission controls, such as where someone pairs Defendants' products with hardware that is used to delete emission controls and/or removes an emission control device or element of design;

c. Submit takedown requests to YouTube consistent with any applicable terms of service for any videos detected showing the unauthorized use of Defendants' products;

d. Maintain records of all takedown requests submitted to YouTube, including whether and when those requests were honored;

e. Add explicit environmental compliance requirements to staff personnel

job descriptions for staff whose jobs can affect environmental compliance, including, but not limited to, supervisors and software developers;

f. Maintain a compliance employee whose responsibilities include accountability for compliance with the CAA;

g. Provide training on compliance with the CAA for staff whose jobs potentially affect emission controls, including software developers, customer service, and sales as follows:

(1) For all non-administrative personnel including but not limited to managerial, business development, sale and training, Defendants shall conduct annual training that at a minimum addresses the following:

(a) The prohibition of CAA Title II against tampering and defeat devices;

(b) Civil and criminal liability for violations of the CAA;

(c) Defendants' obligations under the Consent Decree; and

(d) Defendants' policies and procedures regarding use of its products by employees and customers and the consequences for violating those policies.

(2) For all engineering, technical support, and compliance personnel, Defendants shall conduct annual training that addresses all of the above topics as well as the following topics:

(a) Vehicle emission control device operations; and

(b) Elements of Design that can affect emissions.

(3) Develop a system to track training completed by relevant employees and develop post-training verification testing to test employees' knowledge of the information included in the training; and

(4) For employees hired after the Date of Entry, Defendants shall conduct quarterly training for new employees to ensure that all new employees complete the training within 90 Days of starting

employment.

40. ***Submission of Deliverables.*** Defendants shall submit any plan, report, or other item (referred to herein as "Submission") that it is required to be submitted for approval under this Consent Decree to EPA. Any specific procedures or specifications for the review of certain Submissions set forth elsewhere in the Consent Decree shall govern the review of such Submissions. Except as otherwise specified, after review of any Submission, EPA shall in writing: (a) approve the Submission; (b) approve the Submission upon specified conditions; (c) approve part of the Submission and disapprove the remainder; or (d) disapprove the Submission. In the event of disapproval, in full or in part, of any portion of the Submission, if not already provided with the disapproval, upon the request of Defendants, EPA will provide in writing the reasons for such disapproval.

41. If the Submission is approved pursuant to Paragraph 40(a), Defendants shall take all actions required by the Submission, in accordance with the schedules and requirements of the Submission, as approved. If the Submission is conditionally approved or approved only in part pursuant to Paragraph 40(b) or (c), Defendants shall, upon written direction from EPA, take all actions required by the Submission that EPA determine(s) are technically severable from any disapproved portions, subject to Defendants' right to dispute only the specified conditions or the disapproved portions, under Section X (Dispute Resolution).

42. If the Submission is disapproved in whole or in part pursuant to Paragraph 40(c) or (d), Defendants shall, within Thirty Days or such other time as the Parties agree to in writing, correct all deficiencies and resubmit the Submission, or disapproved portion thereof, for approval, in accordance with Paragraph 40. If the resubmission is approved in whole or in part, Defendants shall proceed in accordance with Paragraph 41.

43. If a resubmitted Submission is disapproved in whole or in part, EPA may again require Defendants to correct any deficiencies, in accordance with Paragraph 42; or EPA may itself correct any deficiencies, and Defendants shall implement the Submission as modified by EPA. Any stipulated penalties applicable to the original Submission shall accrue during the

Thirty-Day period or other specified period, but shall not be payable unless the resubmission is untimely or is disapproved in whole or in part; provided that, if the original Submission was so deficient as to constitute a material breach of Defendants' obligations under this Decree, the stipulated penalties applicable to the original Submission shall be due and payable notwithstanding any subsequent resubmission. If Defendants do not agree with EPA's decisions, Defendants may invoke Dispute Resolution under Section X of this Decree.

VII. REPORTING REQUIREMENTS

44. Defendants shall submit the following status reports to the United States:

a. By January 31st and July 31st of each year after the lodging of this Consent Decree, and continuing on a semi-annual basis, until termination of this Decree, and in addition to any other express reporting requirements of this Decree, Defendants shall submit a semi-annual progress report(s) for the preceding six months for approval to EPA. The semi-annual progress report shall include but is not limited to the following:

(1) Payment of Civil Penalty and associated Interest under Paragraphs 11–12 and reporting and payment of any Stipulated Penalties pursuant to Section VIII;

(2) Status of removing user-adjustable features for EGR, rear oxygen sensors, and any DTCs associated with these emission controls from Defendants' products under Paragraph 21;

(3) Identification of authorized dealers that were notified regarding the selling of Handheld Devices under Paragraph 23 and confirmation that all authorized dealers were so notified;

(4) Report and documentation (including declaration) required under Paragraph 22 concerning the destruction of all products in stock that contained the user-adjustable features identified in Paragraph 21 and associated declaration;

(5) Status of submission of the Calibration information required by Paragraph 26;

(6) Summary of independent emission testing performed on New Pre-Loaded Tunes, including the vehicle groupings and results of any such tests as required by Paragraph 27;

(7) Status report of any EO applications submitted by Defendants, as well as describing whether the application has been denied by CARB or withdrawn by Defendants, and if applicable, the actions Defendants are undertaking to remove that product from commerce as required by Paragraphs 27–28;

(8) Status of independent emission testing performed on Existing Pre-Loaded Tunes according to EPA-approved Schedule and Test Plan including the results of any such tests as required by Paragraph 27;

(9) Status of the customer verification program under Paragraph 30–33, including the following: number of software users that provided written confirmation to Defendants as required by Paragraph 30; identification of any software user that has access to Defendants' software but which, upon request from Defendants, did not provide the written confirmation required by Paragraph 30; status of Defendants' determination of access level, including the number of software users with access to any POCs and/or Limited Access Parameters; and status of training of Verified Customers including the identification of Verified Customers that have been verified for at least 30 days and have not yet been trained as required under the Decree;

(10) Status of confirmation efforts regarding Verified Customers under Paragraph 33;

(11) Status of revisions to the Authorized Reseller Agreement and submission of the revised Authorized Reseller Agreement under Paragraph 38;

(12) Status and summary concerning all authorized resellers that have

been found to violate Defendants' Authorized Reseller Agreement under Paragraph 38 including the efforts taken by Defendants to cease selling their products to violating reseller and the name of those resellers found to violate Defendants' Authorized Reseller Agreement;

(13) Copies of Marketing Materials that have been revised consistent with Paragraphs 34–37;

(14) Status of development of Defendants' policies required under Paragraph 39.a;

(15) Status of expansion of webcrawler and YouTube takedown requests under Paragraph 39.b–d;

(16) Status of job descriptions and compliance employee under Paragraphs 39.e-f:

(17) Status of Defendants' in-house training under Paragraph 39; and

(18) A description of any violation of the requirements of this Consent Decree (including all Appendices), including an explanation of the violation's likely cause and of the remedial steps taken, or to be taken, to resolve and/or minimize such violation, and to prevent such further violations.

b. If Defendants violate, or have reason to believe that they may violate, any requirement of this Consent Decree, Defendants shall notify the United States of such violation and its likely duration, in writing, within Ten business Days of the Day Defendants first become aware of the violation, with an explanation of the violation's likely cause and of the remedial steps taken, or to be taken, to prevent or minimize such violation. If the cause of a violation cannot be fully explained at the time the report is due, Defendants shall so state in the report. Defendants shall investigate the cause of the violation and shall then submit an amendment to the report, including a full explanation of the cause of the violation, within Thirty Days of the Day Defendants become aware of the cause of the violation. Nothing in this Paragraph or the following Paragraph relieves Defendants of their obligation to provide the notice required by

Section IX (Force Majeure).

45. All reports shall be submitted to the persons designated in Section XV (Notices) and shall include the civil action number of this case and the DOJ case number, 90-5-2-1-11627.

46. Each report submitted by Defendants under this Section shall be signed by an official of the submitting party and include the following certification:

> I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I have no personal knowledge that the information submitted is other than true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

This certification requirement does not apply to emergency or similar notifications where compliance would be impractical.

47. The reporting requirements of this Consent Decree do not relieve Defendants of any reporting obligations required by the Act or implementing regulations, or by any other federal, state, or local law, regulation, permit, or other requirement.

48. Any information provided in accordance with this Consent Decree may be used by the United States in any proceeding to enforce the provisions of this Consent Decree and as otherwise permitted by law.

VIII. STIPULATED PENALTIES

49. Defendants shall be liable for stipulated penalties to the United States for violations of this Consent Decree as specified below, unless excused under Section IX (Force

Majeure). A violation includes failing to perform any obligation required by the terms of this Decree, including any work plan or schedule approved under this Decree, according to all applicable requirements of this Decree and within the specified time schedules established by or approved under this Decree. Stipulated penalties, whether per Day or per product, shall accrue for each violation of a requirement, unless otherwise provided herein.

50. Late Payment of Civil Penalty. If Defendants fail to pay the Civil Penalty payments required under Section V (Civil Penalty) when due, Defendants shall pay a stipulated penalty of $ 500.00 per Day for each Day that the payment is late.

51. Defendants shall pay a stipulate penalty of $2,500.00 for each product per Day if Defendants do the following:

a. Manufacture, offer for sale, sell, convey, or otherwise transfer any product that contains user adjustable features for the following: Calibrations containing SCR, DPF, NAC, DOC, or DTCs associated with those emission controls as prohibited by Paragraph 18;

b. Introduce any user-adjustable features that disable EGR, rear oxygen sensors, or associated DTCs in any Calibrations as prohibited by Paragraph 19;

c. Provide technical support, or information (including marketing materials) for user-adjustable parameters of EGR, rear oxygen sensors, or associated DTCs after the Date of Entry as prohibited by Paragraph 24;

d. Manufacture, offer for sale, sell, convey, or otherwise transfer products containing user adjustable Calibrations that disable EGR, rear oxygen sensors, or associated DTCs after the deadlines set forth in Paragraph 21;

e. Introduce New Preloaded Tune into commerce without a reasonable basis or Executive Order as required by Paragraph 27;

f. Sell Existing Pre-Loaded Tune where EO denied, Defendants withdrew EO application, or failed emission testing under Paragraph 28; or

g. Sell Custom Tuning Software for to customer after discovering it is using the software for a Non-Legitimate Use as prohibited by Paragraph 33 (penalty is per Day per customer).

52. Defendants shall pay a stipulated penalty of $350.00 for each violation per Day of the following Consent Decree violations:

a. Failing to provide CD to officers, directors, employees, or agents as required by Paragraph 6, or failing to notify above individuals of CAA requirements under Paragraph 7;

b. Failing to destroy products in stock containing user-adjustable features according to requirements of Paragraph 22;

c. Failing to conduct reasonable efforts to ensure devices in the inventory of authorized dealers are modified or destroyed according to the requirements of Paragraph 23;

d. Failing to provide documentation of the Calibration modifications as required by Paragraph 26;

e. Failing to submit Calibration files as requested by EPA according to Paragraph 26.a;

f. Failing to submit the Schedule and Test Plan(s) as required by Paragraph 27;

g. Failing to complete each year of Testing according to the approved Schedule and Test Plan;

h. Failing to retain records as required by Section XI (Information Collection and Retention) and Paragraph 27.h;

i. Selling Custom Tuning Software (including providing updates or granting license) to customer that has not provided written confirmation of legitimate use under Paragraph 30 (penalty per Day per customer);

j. Failing to submit customer verification process as required by Paragraph 30.a;

k. Failing to implement the Verification Process for existing customers as required by Paragraph 30.a (penalty per Day per customer not properly verified);

l. Failing to implement the Verification Process for new software customers (penalty per Day per customer not properly verified);

m. Failing to submit software training program as required by Paragraph 32 and Appendix D;

n. Providing access to POCs and/or Limited Access Parameters before completing training as required by Paragraph 32;

o. Failing to complete Confirmation of Verified Customers as required by Paragraph 33;

p. Failing to report verification of particular customer as required by Paragraph 33.a;

q. Failing to revise and use Marketing Materials or Authorized Reseller Agreements as required by Paragraphs 34–36 and 38;

r. Implying products are EPA compliant as prohibited by Paragraph 37; or

s. Failing to train employees as required by Paragraph 39 (penalty per Day for each employee not properly trained).

53. If Defendants sell, convey, or otherwise transfer the design, technology, manufacturing processes, techniques or intellectual property as prohibited by Paragraph 25, Defendants shall pay the United States the greater of $500,000.00 or two times the gross amount received from the sale of such technology.

54. If Defendants fail to deny access to the Limited Access Parameters as required by Paragraph 31, Defendants shall pay a penalty of $5,000.00 per Day for each customer that has access to the Limited Access Parameters in violation of Paragraph 31.

55. Reporting Requirements. Stipulated penalties shall accrue in the amount of $500.00 per violation per Day for each violation of the reporting requirements of Section VII.

56. The United States may in the unreviewable exercise of its discretion, reduce or waive stipulated penalties otherwise due it under this Consent Decree.

57. Stipulated penalties shall continue to accrue as provided in Paragraphs 50–54 during any Dispute Resolution, but need not be paid until the following:

a. If the dispute is resolved by agreement of the Parties or by a decision of EPA that is not appealed to the Court, Defendants shall pay accrued penalties determined to be owing, together with interest, to the United States within Thirty Days of the effective date of the agreement or the receipt of EPA's decision or order.

b. If the dispute is appealed to the Court and the United States prevails in whole or in part, Defendants shall pay all accrued penalties determined by the Court to be owing, together with interest, within Sixty Days of receiving the Court's decision or order, except as provided in subparagraph c, below.

c. If any Party appeals the District Court's decision, Defendants shall pay all

accrued penalties determined to be owing, together with interest, within Fifteen Days of receiving the final appellate court decision.

58. Obligations Prior to the Effective Date. Upon the Effective Date, the stipulated penalty provisions of this Decree shall be retroactively enforceable with regard to any and all violations of Paragraphs 18, 19, 25, 26, 27(e), and 30(a) that have occurred prior to the Effective Date, provided that stipulated penalties that may have accrued prior to the Effective Date may not be collected unless and until this Consent Decree is entered by the Court.

59. Defendants shall pay stipulated penalties owing to the United States in the manner set forth and with the confirmation notices required by Paragraph 13, except that the transmittal letter shall state that the payment is for stipulated penalties and shall state for which violation(s) the penalties are being paid.

60. If Defendants fail to pay stipulated penalties according to the terms of this Consent Decree, Defendants shall be liable for interest on such penalties, as provided for in 28 U.S.C. § 1961, accruing as of the date payment became due. Nothing in this Paragraph shall be construed to limit the United States from seeking any remedy otherwise provided by law for Defendants' failure to pay any stipulated penalties.

61. The payment of penalties and interest, if any, shall not alter in any way Defendants' obligation to complete the performance of the requirements of this Consent Decree.

62. **Non-Exclusivity of Remedy**. Stipulated penalties are not the United States' exclusive remedy for violations of this Consent Decree. Subject to the provisions of Section XII (Effect of Settlement/Reservation of Rights), the United States expressly reserves the right to seek any other relief it deems appropriate for Defendants' violation of this Decree or applicable law, including but not limited to an action against Defendants for statutory penalties, additional injunctive relief, mitigation or offset measures, and/or contempt. However, the amount of any statutory penalty assessed for a violation of this Consent Decree shall be reduced by an amount equal to the amount of any stipulated penalty assessed and paid in accordance with this Consent Decree.

IX. FORCE MAJEURE

63. "Force majeure," for purposes of this Consent Decree, is defined as any event arising from causes beyond the control of Defendants, of any entity controlled by Defendants, or of Defendants' contractors, which delays or prevents the performance of any obligation under this Consent Decree despite Defendants' best efforts to fulfill the obligation. The requirement that Defendants exercise "best efforts to fulfill the obligation" includes using best efforts to anticipate any potential force majeure event and best efforts to address the effects of any potential force majeure event (a) as it is occurring and (b) following the potential force majeure, such that the delay and any adverse effects of the delay are minimized. "Force Majeure" does not include Defendants' financial inability to perform any obligation under this Consent Decree.

64. If any event occurs or has occurred that may delay the performance of any obligation under this Consent Decree, whether or not caused by a force majeure event, Defendants shall provide notice by electronic transmission to EPA, within 72 hours of when Defendants first knew that the event might cause a delay to the addresses provided in Section XV (Notices). Within Ten Days thereafter, Defendants shall provide in writing to EPA an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; Defendants' rationale for attributing such delay to a force majeure event if it intends to assert such a claim; and a statement as to whether, in the opinion of Defendants, such event may cause or contribute to an endangerment to public health, welfare, or the environment. Defendants shall include with any notice all available documentation supporting the claim that the delay was attributable to a force majeure. Failure to comply with the above requirements shall preclude Defendants from asserting any claim of force majeure for that event for the period of time of such failure to comply, and for any additional delay caused by such failure. Defendants shall be deemed to know of any circumstance of which Defendants, any entity controlled by Defendants, or Defendants' contractors knew or should have known.

65. If EPA agrees that the delay or anticipated delay is attributable to a force majeure event, the time for performance of the obligations under this Consent Decree that are affected by

the force majeure event will be extended by EPA for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the force majeure event shall not, of itself, extend the time for performance of any other obligation. EPA will notify Defendants in writing of the length of the extension, if any, for performance of the obligations affected by the force majeure event.

66. If EPA does not agree that the delay or anticipated delay has been or will be caused by a force majeure event, EPA will notify Defendants in writing of its decision.

67. If Defendants elect to invoke the dispute resolution procedures set forth in Section X (Dispute Resolution), they shall do so no later than Twenty Days after receipt of EPA's notice. In any such proceeding, Defendants shall have the burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a force majeure event, that the duration of the delay or the extension sought was or will be warranted under the circumstances, that best efforts were exercised to avoid and mitigate the effects of the delay, and that Defendants complied with the requirements of Paragraphs 63 and 64. If Defendants carry this burden, the delay at issue shall be deemed not to be a violation by Defendants of the affected obligation of this Consent Decree identified to EPA and the Court.

X. DISPUTE RESOLUTION

68. Unless otherwise expressly provided for in this Consent Decree, the dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising under or with respect to this Consent Decree. Defendants' failure to seek resolution of a dispute under this Section shall preclude Defendants from raising any such issue as a defense to an action by the United States to enforce any obligation of Defendants arising under this Decree.

69. Informal Dispute Resolution. Any dispute subject to Dispute Resolution under this Consent Decree shall first be the subject of informal negotiations. The dispute shall be considered to have arisen when Defendants send the United States a written Notice of Dispute. Such Notice of Dispute shall state clearly the matter in dispute. The period of informal negotiations shall not exceed Twenty Days from the date the dispute arises, unless that period is modified by written agreement. If the Parties cannot resolve a dispute by informal negotiations,

then the position advanced by the United States shall be considered binding unless, within Ten Days after the conclusion of the informal negotiation period, Defendants invoke formal dispute resolution procedures as set forth below.

70. Formal Dispute Resolution. Defendants shall invoke formal dispute resolution procedures, within the time period provided in the preceding Paragraph, by serving on the United States a written Statement of Position regarding the matter in dispute. The Statement of Position shall include, but need not be limited to, any factual data, analysis, or opinion supporting Defendants' position and any supporting documentation relied upon by Defendants.

71. The United States shall serve its Statement of Position within Forty-Five Days of receipt of Defendants' Statement of Position. The United States' Statement of Position shall include, but need not be limited to, any factual data, analysis, or opinion supporting that position and any supporting documentation relied upon by the United States. The United States' Statement of Position shall be binding on Defendants, unless Defendants file a motion for judicial review of the dispute in accordance with the following Paragraph.

72. Defendants may seek judicial review of the dispute by filing with the Court and serving on the United States, in accordance with Section XV (Notices), a motion requesting judicial resolution of the dispute. The motion must be filed within Ten Days of receipt of the United States' Statement of Position under the preceding Paragraph. The motion shall contain a written statement of Defendants' position on the matter in dispute, including any supporting factual data, analysis, opinion, or documentation, and shall set forth the relief requested and any schedule within which the dispute must be resolved for orderly implementation of the Consent Decree.

73. The United States shall respond to Defendants' motion within the time period allowed by the Local Rules of this Court. Defendants may file a reply memorandum, to the extent permitted by the Local Rules.

74. Standard of Review. Except as otherwise provided in this Consent Decree, in any other dispute brought under Paragraph 70, Defendants shall bear the burden of demonstrating that their position complies with this Consent Decree, and Defendants are entitled to relief under

applicable principles of law. The United States reserves the right to argue that its position is reviewable only on the administrative record and must be upheld unless arbitrary and capricious.

75. The invocation of dispute resolution procedures under this Section shall not, by itself, extend, postpone, or affect in any way any obligation of Defendants under this Consent Decree, unless and until final resolution of the dispute so provides. Stipulated penalties with respect to the disputed matter shall continue to accrue from the First Day of noncompliance, but payment shall be stayed pending resolution of the dispute as provided in Paragraph 57. If Defendants do not prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in Section VIII (Stipulated Penalties).

XI. INFORMATION COLLECTION AND RETENTION

76. The United States and their representatives, including attorneys, contractors, and consultants, shall have the right of entry into any of Defendants' business facilities, at all reasonable times, upon presentation of credentials, to:

a. monitor the progress of activities required under this Consent Decree;

b. verify any data or information submitted to the United States in accordance with the terms of this Consent Decree;

c. inspect records and all products regulated under Title II of the Act;

d. obtain documentary evidence, including photographs and similar data; and

e. assess Defendants' compliance with this Consent Decree.

77. Until two years after the termination of this Consent Decree, unless otherwise specified herein, Defendants shall retain, and shall instruct their contractors and agents to preserve, all non-identical copies of all documents, records, or other information (including documents, records, or other information in electronic form) in their or their contractors' or agents' possession or control, or that come into their or their contractors' or agents' possession or control, and that relate in any manner to Defendants' performance of their obligations under this Consent Decree. This information-retention requirement shall apply regardless of any contrary corporate or institutional policies or procedures. At any time during this information-retention

period, upon request by the United States, Defendants shall provide copies of any documents, records, or other information required to be maintained under this Paragraph.

78. At the conclusion of the information-retention period provided in the preceding Paragraph, Defendants shall notify the United States at least Ninety Days prior to the destruction of any documents, records, or other information subject to the requirements of the preceding Paragraph and, upon request by the United States, Defendants shall deliver any such documents, records, or other information to EPA. Defendants may assert that certain documents, records, or other information is privileged under the attorney-client privilege or any other privilege recognized by federal law. If Defendants assert such a privilege, they shall provide the following: (a) the title of the document, record, or information; (b) the date of the document, record, or information; (c) the name and title of each author of the document, record, or information; (d) the name and title of each addressee and recipient; (e) a description of the subject of the document, record, or information; and (f) the privilege asserted by Defendants. However, no documents, records, or other information created or generated in accordance with the requirements of this Consent Decree shall be withheld on grounds of privilege.

79. Defendants may also assert that information required to be provided under this Section is protected as Confidential Business Information ("CBI") under 40 C.F.R. Part 2. As to any information that Defendants seeks to protect as CBI, Defendants shall follow the procedures set forth in 40 C.F.R. Part 2.

80. This Consent Decree in no way limits or affects any right of entry and inspection, or any right to obtain information, held by the United States in accordance with applicable federal or state laws, regulations, or permits, nor does it limit or affect any duty or obligation of Defendants to maintain documents, records, or other information imposed by applicable federal or state laws, regulations, or permits.

XII. EFFECT OF SETTLEMENT/RESERVATION OF RIGHTS

81. This Consent Decree resolves the civil claims of the United States for the violations alleged in the Complaint filed in this action through the Date of Lodging, and also

resolves the civil claims in the Notice of Violation of the Clean Air Act issued by EPA on January 17, 2017.

82. The United States reserves all legal and equitable remedies available to enforce the provisions of this Consent Decree. This Consent Decree shall not be construed to limit the rights of the United States to obtain penalties or injunctive relief under the Act or implementing regulations, or under other federal laws, regulations, or permit conditions. The United States further retains all legal and equitable remedies to address any imminent and substantial endangerment to the public health or welfare or the environment arising at any of Defendants' facilities, or posed by Defendants' products, whether related to the violations addressed in this Consent Decree or otherwise.

83. In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, civil penalties, or other appropriate relief relating to the Defendants' operations, Defendants shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States in the subsequent proceeding were or should have been brought in the instant case, except with respect to claims that have been specifically resolved under Paragraph 81.

84. This Consent Decree is not a permit, or a modification of any permit, under any federal, State, or local laws or regulations. Defendants are responsible for achieving and maintaining complete compliance with all applicable federal, State, and local laws, regulations, and permits; and Defendants' compliance with this Consent Decree shall be no defense to any action commenced under any such laws, regulations, or permits, except as set forth herein. The United States does not, by its consent to the entry of this Consent Decree, warrant or aver in any manner that Defendants' compliance with any aspect of this Consent Decree will result in compliance with provisions of the Act, 42 U.S.C. § 7401, et seq., or with any other provisions of federal, State, or local laws, regulations, or permits.

85. This Consent Decree does not limit or affect the rights of Defendants or of the United States against any third parties, not party to this Consent Decree, nor does it limit the

rights of third parties, not party to this Consent Decree, against Defendants, except as otherwise provided by law.

86. This Consent Decree shall not be construed to create rights in, or grant any cause of action to, any third party not party to this Consent Decree.

XIII. NON-WAIVER PROVISIONS

87. This Consent Decree in no way relieves Defendants of any responsibility to comply with any federal, state, or local laws or regulations.

88. This Consent Decree shall not limit any authority of EPA under the Clean Air Act or any applicable statute, including the authority to seek information from Defendants or to seek access to their business facilities. The United States reserves all remedies available to it for violations of the Clean Air Act by Defendants that are not alleged in the Complaint as well as for violations of the Clean Air Act that occur after the date of lodging of this Consent Decree.

89. The United States' agreement to the amount of the civil penalty required by Paragraph 11 of this Consent Decree is based on the Financial Information identified in Appendix A. Defendants certify that the Financial Information submitted to the United States and generally described in Appendix A is true, accurate, and complete. Defendants seek to protect this information as Confidential Business Information and shall follow the procedures set forth in 40 C.F.R. Part 2.

XIV. COSTS

90. The Parties shall bear their own costs of this action, including attorneys' fees, except that the United States shall be entitled to collect the costs (including attorneys' fees) incurred in any action necessary to collect any portion of the civil penalty or any stipulated penalties due but not paid by Defendants.

XV. NOTICES

91. Unless otherwise specified in this Decree, whenever notifications, submissions, statements of position, or communications are required by this Consent Decree (referred to as "notices" in this section), they shall be made electronically or as described below, unless such notices are unable to be uploaded to the CDX electronic system (in the case of EPA) or transmitted by email in the case of any other party. For all notices to EPA, Defendants shall register for the CDX electronic system and upload such notices at https://cdx.gov/epa-home.asp. Any notice that cannot be uploaded or electronically transmitted via email shall be provided in writing to the addresses below:

As to the United States by email: eescdcopy.enrd@usdoj.gov
Re: DJ # 90-5-2-1-11627

As to the United States by mail: EES Case Management Unit
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044-7611
Re: DJ # 90-5-2-1-11627

As to EPA: Director, Air Enforcement Division
Office of Civil Enforcement
US EPA Headquarters, MC 2242A
1200 Pennsylvania Avenue, NW
Washington, DC 20460

As to Defendants: David Thawley, CEO
Derive Systems
4150 Church Street, Suite 1024
Sanford, FL 32771

Solomon Nehrig, Policy Compliance Officer
Derive Systems
4150 Church Street, Suite 1024
Sanford, FL 32771

Any Party may, by written notice to the other Parties, change its designated notice recipient or notice address provided above.

92. Notices submitted under this Section shall be deemed submitted upon mailing, unless otherwise provided in this Consent Decree or by mutual agreement of the Parties in writing.

XVI. EFFECTIVE DATE

93. The Effective Date of this Consent Decree shall be the date upon which this Consent Decree is entered by the Court or a motion to enter the Consent Decree is granted, whichever occurs first, as recorded on the Court's docket.

XVII. RETENTION OF JURISDICTION

94. The Court shall retain jurisdiction over this case until termination of this Consent Decree, for the purpose of resolving disputes arising under this Decree or entering orders

modifying this Decree, under Sections X (Dispute Resolution) and XVIII (Modification), or effectuating or enforcing compliance with the terms of this Decree.

XVIII. MODIFICATION

95. The terms of this Consent Decree, including any attached appendices, may be modified only by a subsequent written agreement signed by all the Parties. Where the modification constitutes a material change to this Decree, it shall be effective only upon approval by the Court.

96. Any disputes concerning modification of this Decree shall be resolved under Section X (Dispute Resolution), provided, however, that, instead of the burden of proof provided by Paragraph 74, the Party seeking the modification bears the burden of demonstrating that it is entitled to the requested modification in accordance with Federal Rule of Civil Procedure 60(b).

XIX. TERMINATION

97. After Defendants have completed the requirements of Section VI (Compliance Requirements) and have made payments of the civil penalties required by Section V and any accrued interest imposed by the CD; and any accrued stipulated penalties as required by this Consent Decree, Defendants may serve upon the United States a Request for Termination, stating that Defendants have satisfied those requirements, together with all necessary supporting documentation.

98. Following receipt by the United States of Defendants' Request for Termination, the Parties shall confer informally concerning the Request and any disagreement that the Parties may have as to whether Defendants have satisfactorily complied with the requirements for termination of this Consent Decree. If the United States agrees that the Decree may be terminated, the Parties shall submit, for the Court's approval, a joint stipulation terminating the Decree.

99. If the United States does not agree that the Decree may be terminated, Defendants may invoke Dispute Resolution under Section X of this Decree. However, Defendants shall not

seek Dispute Resolution of any dispute regarding termination until Ninety Days after service of its Request for Termination.

XX. PUBLIC PARTICIPATION

100. This Consent Decree shall be lodged with the Court for a period of not less than Thirty Days for public notice and comment in accordance with 28 C.F.R. § 50.7. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations indicating that the Consent Decree is inappropriate, improper, or inadequate. Defendants consent to entry of this Consent Decree without further notice and agree not to withdraw from or oppose entry of this Consent Decree by the Court or to challenge any provision of the Decree, unless the United States has notified Defendants in writing that it no longer supports entry of the Decree.

XXI. SIGNATORIES/SERVICE

101. Each undersigned representative of Defendants and the Assistant Attorney General for the Environment and Natural Resources Division of the Department of Justice certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind the Party he or she represents to this document.

102. This Consent Decree may be signed in counterparts, and its validity shall not be challenged on that basis. Defendants agrees to accept service of process by mail with respect to all matters arising under or relating to this Consent Decree and to waive the formal service requirements set forth in Rules 4 and 5 of the Federal Rules of Civil Procedure and any applicable Local Rules of this Court including, but not limited to, service of a summons. Defendants need not file an answer to the complaint in this action unless or until the Court expressly declines to enter this Consent Decree.

XXII. INTEGRATION

103. This Consent Decree constitutes the final, complete, and exclusive agreement and understanding among the Parties with respect to the settlement embodied in the Decree and supersedes all prior agreements and understandings, whether oral or written, concerning the

settlement embodied herein. Except as provided in Section XXV (Appendices), no other document, nor any representation, inducement, agreement, understandings, or promise constitutes any part of this Decree or the settlement it represents.

XXIII. FINAL JUDGMENT

104. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute a final judgment of the Court as to the United States and Defendants. The Court finds that there is no just reason for delay and therefore enters this judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

XXIV. 26 U.S.C. SECTION 162(f)(2)(A)(ii) IDENTIFICATION

105. For purposes of the identification requirement of Section 162(f)(2)(A)(ii) of the Internal Revenue Code, 26 U.S.C. § 162(f)(2)(A)(ii), performance of Section II (Applicability) Paragraphs 6–7; Section VI (Compliance Requirements) Paragraphs 17–28, 30–41, and related Appendices C and D; Section VII (Reporting Requirements) Paragraphs 44.a(2)–44.a(18), and 45–46; and Section XIV (Information Collection and Retention) Paragraphs 76–78, is restitution or required to come into compliance with law.

XXV. APPENDICES

The following Appendices are attached to and part of this Consent Decree:

"Appendix A" is a general description of the Financial Information submitted by Defendants.

"Appendix B" is a sample CARB Executive Order application Form A and corresponding ECU Modification Information Form;

"Appendix C" is the Required Elements for Vehicle Testing and Test Reports; and

"Appendix D" is the Required Training for Defendants' Software Users.

Dated and entered this _day of _____, 2018

_____
UNITED STATES DISTRICT JUDGE

FOR THE UNITED STATES OF AMERICA:

9/19/18
Date

JEFFREY H. WOOD
Acting Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice

9/20/18
Date

PATRICIA MCKENNA
DC Bar # 453903
Counselor
NATALIE G. HARRISON
Trial Attorney
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044-7611
(202) 616-6517

FOR THE U.S. ENVIRONMENTAL PROTECTION AGENCY:

Date: 9/20/2018

ROSEMARIE KELLEY DC Bar # 427333
Director, Office of Civil Enforcement
Office of Enforcement and Compliance Assurance
United States Environmental Protection Agency
Washington, DC 20460

Date: 9/20/2018

PHILLIP A. BROOKS
Director, Air Enforcement Division
Office of Civil Enforcement
Office of Enforcement and Compliance Assurance
United States Environmental Protection Agency
Washington, DC 20460

Date: 9/20/18

KATHRYN PIRROTTA CABALLERO DC Bar # 470724
Air Enforcement Division
Office of Civil Enforcement
Office of Enforcement and Compliance Assurance
United States Environmental Protection Agency
Washington, DC 20460

OF COUNSEL:
MARGARET ALKON DC Bar # 457096
Office of Regional Counsel
United States Environmental Protection Agency, Region IX
75 Hawthorne Street (ORC-2)
San Francisco, CA, 94105

FOR DEFENDANTS:
DERIVE SYSTEMS, INC., SCT HOLDINGS, INC. and SCT DELAWARE HOLDINGS, INC.; DERIVE POWER, LLC, SCT PERFORMANCE, LLC, and BULLY DOG ACQUISITION, LLC; and DERIVE EFFICIENCY, LLC,

20 Sept 2018
Date:

DAVID THAWLEY
CEO, Derive Systems
4150 Church Street, Suite 1024
Sanford, FL 32771

APPENDIX A

DEFENDANTS' FINANCIAL INFORMATION

At the request of the United States, Defendants provided the following information regarding their ability to pay a civil penalty in this matter:

1. Consolidated financial reports for Fiscal Years ("FY") 2014, FY 2014–15, FY 2015–16, FY 2016–17 (preliminary draft) prepared by independent auditors;

2. Tax information for Defendants for FY 2013, FY 2014, FY 2015, FY 2016;

3. Responses to requests by the United States under Section 208 of the CAA, 42 U.S.C. § 7542; and

4. Responses to questions posed by the United States, including information related to:
    a. Defendants' financial projections;
    b. Cash flow;
    c. Sales volume and pricing information;
    d. Corporate structure and history;
    e. Cost estimates of compliance measures required by this Decree;
    f. Defendants financial obligations as of July 2018; and
    g. Other miscellaneous questions.

Defendants submitted the above information under claim of Confidential Business Information.

APPENDIX B

CARB EO FORM A & ECU MODIFICATION APPLICATION

California Environmental Protection Agency
AIR RESOURCES BOARD
9480 Telstar Ave., Suite 4
El Monte, CA 91731-2988

Form A

State of California
AIR RESOURCES BOARD

Vehicle Code Sections 27156 and 38391 Exemption Application for General Criteria Parts

1. Name of Applicant

   Address

   Phone (___)

2. Name of Device Manufacturer*

   Address

   Phone (___)

3. Name of Authorized Representative**

   Address

   Phone (___)

4. Test procedure (check one)

   The test procedure to be used is:

   _____Cold Start CVS-75 Federal Test Procedure

   _____Cold 505

   _____Hot Start CVS-75 (applicable to some diesel-powered vehicles)

5. Evaluation Criteria (check one)

   This application is for certification to:

   _____Emission Standards

   _____Typical Baseline Emission Levels

* If different from name of applicant. Device as used herein is defined to mean add-on or modified part.

** An authorized representative may be required to prove that he/she is authorized to act on behalf of an

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El Monte, CA 91731-2988

applicant or manufacturer.

6. Device Name (s)

7. Briefly describe the purpose of the device

8. Briefly describe the operation of the device

9. List vehicle names, model year, engine displacements and systems that are compatible with the device, and for which exemption is requested. Specify the correct device model for each vehicle.

California Environmental Protection Agency
AIR RESOURCES BOARD
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El Monte, CA 91731-2988

10. The following information is required for the Air Resources Board (ARB) to complete an evaluation. Please place a check mark next to the items that are **enclosed** with the application and provide an explanation for items that are not checked.

(a)____ A detailed description of the device including operating principles, cross-sectional drawing, electrical schematics, and other such material to assist the staff in understanding its operation.

(b)____Copies of all advertising material to be used in selling devices including a sample or facsimile of the packaging label. (Optional)

(c) ____A copy of the installation and adjustment instructions and drawings that will be included with the device.

(d)____A facsimile or prototype of the identification plate or label to be attached permanently to or imprinted on or near each device offered for sale. The plate or label should be placed such that it is visible after the device is installed, and should contain:

i) the manufacturers name

ii) the device name and model number

iii) the Air Resources Board exemption number identified as ARB E.O. No. D-XXX.

(e)____A facsimile or prototype engine compartment plate or label located adjacent to, but not covering, the vehicle manufacturers Vehicle Emission Control Information (tune-up) label. This plate or label is only required if a change is recommended to vehicle manufacturers tune-up parameters. In addition to the recommended tune-up parameter changes, the plate or label must contain the same information as the device label.

(f)____ A list of the companies or persons that will manufacture the device under license.

11. The ARB may require one or more devices for testing. Do you agree to provide the device(s) free of costs?____yes____no. The device(s) will be returned only if return is requested at the time the device(s) are submitted.

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El Monte, CA 91731-2988

Emission Statements

I affirm that to the best of my knowledge this device shall not cause the emission into the ambient air of any noxious or toxic matter that is not emitted in the operation of such motor vehicle without such device.

I understand that an exemption, if granted, does not constitute a certification, accreditation, approval, or any other type of endorsement by the Air Resources Board of any claims concerning alleged benefits of a device. I further understand that no claims of any kind concerning anti-pollution benefits may be made for an exempted device.

Signature of Authorized Representative:

Date:

ECU Modification Info

1. Identify all parameters being sensed and engine parameters or components being controlled.

   a. Explain how and to what degree these parameters/components are being controlled and/or modified.
   b. Include a table listing "Parameters Sensed versus Parameters Controlled."

2. Explain when the changes described in item 1 above are active?

3. Explain how your device's ECU modifications affects performance, fuel economy, and emissions during the following operating conditions:

   a. Low load (e.g. highway cruise speeds, coasting)
   b. High load (e.g. hard acceleration, towing)
   c. Cold start (i.e. below normal operating temperature)
   d. Idle speeds
   e. Rapid-throttle motion (also explain fuel enrichment in terms of percentage)
   f. Wide-open throttle (also explain fuel enrichment in terms of percentage)

	Performance	Fuel Economy	Emissions
Low Load			
High Load			
Cold Start			
Idle Speeds			
Rapid-throttle Motion			
Wide-open throttle			

4. Identify all operating conditions where your ECU modifications command open loop operation, turn off any emission control components, or turn off OEM designated engine derates (power reductions).

5. Disclose if your device's ECU modification utilizes "Dual Mapping". If "Dual Mapping" is being utilized, please provide the details on how and what is being performed.

6. Disclose any and all changes made to the ECU programming that are outside any emissions test cycles (e.g. FTP, SFTP). If so, would these changes cause the vehicle to have greater emissions than it would in its stock configuration?

7. Describe the effects your device's ECU modifications could have on the durability of the engine and any of its emission control components?

ECU Modification Info

Appendix – Controlled Parameters (With the Degree of Stock Modification)

Parameter Controlled	Degree of Control vs. Stock

APPENDIX C

VEHICLE TESTING REQUIREMENTS AND VEHICLE REPORT

I. OBD Function

Derive shall ensure evaluation and confirmation of Full Operation and Functionality of the OBD before conducting any independent emission tests, according to the directions contained in this Decree and Appendix. For each evaluation, a non-Derive generic scan tool shall be used and the following shall be recorded and documented:

(1) Before installation of the Derive Pre-Loaded Tune:

(a) Document monitor status indicators supported by the stock calibration, malfunction indicator lamp (MIL) status, and inactive and active DTCs; and

(b) Record all stock calibration identification (Cal IDs) and corresponding calibration verification numbers (CVNs).

(2) After installation of Derive's Pre-Loaded Tune and before emissions testing:

(a) perform service accumulation necessary to obtain complete status of all OBD monitors that were supported by the stock calibration.; and

(b) document monitor status indicators, MIL status, and inactive and active DTCs. All supported monitors' readiness status must be complete before emissions testing, and there shall be no active DTCs or MIL.

(3) Record all Cal IDs and corresponding CVNs with the Derive Pre-Loaded Tune installed.

II. Testing

(1) Test vehicle shall have no less than 4,000 miles of normal operation.

(2) Test Cycles: Once Derive has identified a vehicle to be tested, Derive must identify the test cycles used by the OEM to obtain the Certificate of Conformity (COC). Testing under this Decree must include at least the Federal Test Procedure ("FTP") cycle. Testing under this Decree must also include the US06 test cycle, SC03 test cycle, and/or Supplemental Federal Test Procedure ("SFTP") cycle, where applicable. For other test cycles used in the test vehicle's COC application, Derive may identify test cycles that it believes will not be affected by the Pre-Loaded Tune in the Schedule and Test Plan, and that may not need to be performed during the testing under this section. This proposal must include Derive's narrative explanation for not permitting these additional test cycles and must be supported by good engineering judgment.

(3) Conduct baseline emissions testing on the unmodified selected vehicle using the test cycles identified in II(2) in this Appendix.

(4) Modified by the Worst-Case Scenario Tune, repeat the test cycle(s) identified in II(2) in this Appendix.

(5) Derive shall pay for testing to be performed by a third-party laboratory capable of performing federal emission test procedures. The laboratory selected is responsible for ensuring the following:

(a) Facility should have no vested interest in the outcome other than compensation for testing services.

(b) Report all results simultaneously to Derive and EPA as

provided in the Notices Section. Mandatory reporting elements for each test report are provided in Appendix A (provided below).

(c) Independent laboratory personnel should perform all the elements of the test plan, including:

1) Use suitable test vehicles.
2) Prepare and precondition vehicles for testing;
3) Use a non-Derive generic OBD scan tool before each test to document OBD functionality and all Cal IDs and corresponding CVNs;
4) Install and uninstall modified hardware or software; and
5) Report modified hardware or software identification information.

(6) If the Pre-Loaded Tune installation prompts allow a user to select a tune for aftermarket hardware parts (e.g., air intakes), testing shall include that calibration with the hardware part installed on the vehicle unless Derive can demonstrate it is not the worst-case emissions calibration through good engineering judgment.

(7) All Defueling Options must be disabled during emissions testing.

(8) When standard emissions testing cannot be performed in accordance with CARB's protocols for aftermarket part certification, Derive may perform emissions testing using the percentage increase evaluation criteria set forth in the California Air Resources Board, Procedures for Exemption of Add-On and Modified Parts (June 1, 1990).

(9) Nothing in this Decree is intended to prohibit Derive from

conducting emission testing during its developmental testing. The independent emission testing requirements do not apply to developmental testing.

III. Required Emissions Testing Reporting Elements

The emissions testing report shall identify any deviations from the procedure set forth in this Appendix and provide a good engineering judgment analysis as to why any such deviation occurred and whether any such deviation is due to any Derive calibration parameters that remove, bypass, defeat, or render inoperative any device or Element of Design of the OBD system.

The testing report shall include the items delineated by this Appendix. Reporting elements shall also include the following:

- Main body of report:
  - Identification of vehicle model, model year, mileage, VIN, and EPA engine family/test group
  - Derive Pre-Loaded Tune installation
    - All installation options available on product for vehicle being tested
    - Selection of installation options for testing
  - Summary table(s) with the following elements from OBD scans:
    - OBD scan information with stock calibration
      - All monitor status indicators (e.g., complete, incomplete, not supported), MIL status, and inactive/active DTCs
      - All Cal IDs and CVNs (stock)
    - OBD scan information after installing Derive Pre-Loaded Tune
      - All monitor status indicators, MIL status, and inactive/active DTCs
      - All Cal IDs and CVNs (modified)

- Overview of test cycles performed, including description of how vehicle was preconditioned, and what type of fan was used for each cycle (e.g., road speed fan or fixed speed fan)
- Summary table(s) with all results and applicable vehicle standards

- Photographs documenting the following: vehicle odometer, vehicle emission control information label, safety compliance label, Derive Pre-Loaded Tune installed, OBD scans (unless scans can be printed in PDF)

- Attachments for raw test reports as reported by the independent laboratory including:
  - Road load verification report
  - Preconditioning reports
  - Emissions results
  - Dyno set and target coefficients
  - Information from emission testing equipment calibration for both emissions measurement systems and the dynamometer
  - Identification of generic scan tool used, including manufacturer and model number

APPENDIX D

SOFTWARE TRAINING

Training must be designed by Derive to be interactive by requiring all users to acknowledge training tenets and test the user's knowledge throughout the training program. Users will not be allowed to access any software Parameters of Concern or Limited Access Parameters until they have answered all questions correctly regarding all items addressed in this appendix. Users must also acknowledge that they have taken required training and understand the CAA implications of using software parameters on motor vehicles. Derive shall retain these acknowledgments and test results for review by EPA upon request.

The training is to be provided to all software users with access to the Parameters of Concern and/or Limited Access Parameters, and at a minimum must address the following topics:

1. CAA Background information. Explain the prohibited acts under the CAA and include examples of recent CAA enforcement matters.

- CAA §203 (a)(3) – Expressly Prohibited Acts:

    - Tampering: "…remove or render inoperative any device or element installed on or in a motor vehicle or motor vehicle engine in compliance with regulations…"

    - Defeat Device: "…manufacture or sell, or offer to sell, or install, any part or component…where a principal effect…is to bypass, defeat, or render inoperative any device or element of design installed on or in a motor vehicle …"

  Element of design includes the following "... any control system (i.e., computer software, electronic control system, emission control system, computer logic), and/or control system calibrations, and/or the results of systems interaction, and/or hardware items on a motor vehicle or motor vehicle engine." 40 C.F.R. §§ 86.094-2 and 86.1803-01.

    - The risk of criminal and civil EPA enforcement for violations of Title II of the CAA using examples from past actions.

2. Discuss harm from automobile emissions, especially from NOx and PM, and danger to public and air from diminishing effectiveness of emission control system.

3. Discuss how vehicle emission control devices work, the targeted pollutants, and common vehicle applications such as OBD, oxygen sensors and three way catalysts, EGR, SCR, DPF, and DOC.

4. Include prominent express warning that states modifying the original manufacturer's engine to remove, defeat, or render inoperative an Element of Design is a violation of the CAA. Such violations of the CAA may subject a person to civil penalties or even criminal prosecution. Civil penalties as of 2018 for the sale or installation of device that removes, defeats, or renders inoperative an Element of Design are as follows: $4,619 per violation for an individual and $46,268 per violation for a dealer or manufacturer. Note that civil penalties in CAA Section 205 are increased each year to keep up with inflation. Inflation adjusted amounts can found in 40 C.F.R. Part 19.

5. Discuss particular Elements of Design that can affect emissions (which shall include the following parameters that can be modified using the Custom Tuning Software: main fuel injection timing, fuel rail pressure/pulse width/fuel mass, EGR-related parameters, smoke limiters, Fresh Airflow, MAF Transfer Function, Fuel Open Loop ETC, and Spark Timing). Include a qualitative description of how adjusting the parameters associated with these Elements of Design can affect emissions and that modifying these parameters may violate the CAA and may also cause excessive vehicle emissions. User shall not modify these parameters for installation on a motor vehicle unless they have a reasonable basis to conclude that the Calibration or product does not adversely affect emissions.

6. Discuss Limited Access Parameters. For those users with access to the Limited Access Parameters, training must include review of EPA's regulations and guidance regarding CNG Conversion kits and switching which includes the following:

- A review of EPA's regulations and guidance regarding engine swaps. Generally, EPA's policy allows engine swaps as long as the resulting vehicle matches exactly to any certified configuration of the same or newer model year as the chassis. A link to or copy of EPA's engine switching fact sheet must be provided (https://www.epa.gov/sites/production/files/documents/engswitch_0.pdf).

- An overview of EPA's vehicle and engine alternative fuel conversion kit regulations must be provided. A link to the following website must be provided https://www.epa.gov/vehicle-and-engine-certification/vehicle-and-engine-alternative-fuel-conversions. EPA has established protocols through which conversion kit manufacturers can demonstrate that:

  - Emission controls in the converted vehicle or engine will continue to function properly; and

  - pollution will not increase as a result of conversion.

7. Discuss Derive's policies regarding customer usage of its products and consequences for violating its policies.