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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH

UNITED STATES OF AMERICA, *Plaintiff*, v. PERFORMANCE DIESEL, INC., *Defendant*.	CV- 4:19-cv-00075-DN **COMPLAINT**

The United States of America, by authority of the Attorney General and acting at the request of the United States Environmental Protection Agency ("EPA"), alleges:

NATURE OF THE ACTION

1. This is a civil action brought under Sections 203, 204, and 205 of the Clean Air Act ("CAA" or "the Act"), 42 U.S.C. §§ 7522-7524, seeking injunctive relief and civil penalties against Performance Diesel, Inc. ("PDI" or "Defendant") for violations of the CAA related to Defendant's manufacture, sale, and installation of aftermarket products that affect emission controls installed on motor vehicles or motor vehicle engines.

JURISDICTION

2. This Court has jurisdiction over the subject matter of and the parties to this action pursuant to Sections 204 and 205 of the Act, 42 U.S.C. §§ 7523 and 7524, and 28 U.S.C. §§ 1331 (Federal Question), 1345 (United States as Plaintiff), and 1355 (Fine, Penalty, or Forfeiture).

3. Venue lies in this District pursuant to 28 U.S.C. §§ 125(2), 1391, and 1395, as well as Sections 204 and 205 of the Act, 42 U.S.C. §§ 7523 and 7524, because Defendant resides in this District, the claims in this lawsuit arose in this District, and at least some of the acts for which Plaintiff seeks civil penalties occurred in this District.

DEFENDANT

4. PDI is a private Utah corporation solely owned and managed by its president, Jerad Wittwer.

5. PDI manufactures, sells, and installs aftermarket products for motor vehicles equipped with heavy duty-diesel engines ("HDDE").

6. PDI markets its products as products that enhance a vehicle's power or performance, modify a vehicle's fuel economy, or reduce the costs associated with maintaining a vehicle's emission control system.

7. PDI sells its products both directly to consumers and through authorized dealers.

8. PDI resides, is located, and does business in St. George, Utah.

9. PDI is a "person" within the meaning of Section 302(e) of the Act, 42 U.S.C. § 7602(e).

BACKGROUND

10. This action arises under Title II of the Act, as amended, 42 U.S.C. §§ 7521-7590, and the regulations thereunder relating to the control of emissions of air pollution from motor vehicles and motor vehicle engines.

Statutory and Regulatory Objectives

11. In creating the Act, Congress found that "the increasing use of motor vehicles . . . has resulted in mounting dangers to the public health and welfare . . . ." 42 U.S.C. § 7401(a)(2). Congress passed the Act, among other things, "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401(b)(1).

12. "Motor vehicle" is defined as "any self-propelled vehicle designed for transporting persons or property on a street or highway." 42 U.S.C. § 7550(2); 40 C.F.R. § 85.1703.

13. Title II of the Act and the regulations promulgated thereunder establish stringent standards for the emission of air pollutants from motor vehicles and motor vehicle engines that

"cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7521(a). These pollutants include nitrogen oxides ("NO_x"), particulate matter ("PM"), non-methane hydrocarbons ("NMHCs"), and carbon monoxide ("CO"). 42 U.S.C. § 7521(a)(3)(A).

14. EPA has also established National Ambient Air Quality Standards ("NAAQS") for certain pollutants, including ozone, NO_x, PM, and CO. *See* C.F.R. §§ 50.1-50.19.

15. Ozone is a highly reactive gas that is formed in the atmosphere from emissions of other pollutants, including pollutants from motor vehicles and motor vehicle engines.

16. NOx and NMHCs are reactive gasses that contribute to the formation of both PM and ozone.

17. PM is a form of air pollution composed of microscopic solids and liquids suspended in air. PM is emitted directly from motor vehicles and motor vehicle engines and is also formed in the atmosphere from the emission of other pollutants, such as NO_x, from motor vehicles and motor vehicle engines.

18. Exposure to ozone and PM is linked to respiratory and cardiovascular health problems as well as premature death. Children, older adults, people who are active outdoors, and people with heart or lung disease are particularly at risk for health effects related to ozone or PM exposure.

19. CO is a highly toxic gas that can cause headaches, dizziness, vomiting, nausea, loss of consciousness, and death. Long-term exposure to CO has been associated with increased risk of heart disease.

Acts Prohibited by Section 203(a)(3) of the Act, 42 U.S.C. § 7522(a)(3)

20. Section 203(a)(3)(A) of the Act, 42 U.S.C. §7522(a)(3)(A), makes it a prohibited act for "any person to remove or render inoperative any device or element of design installed on or in a motor vehicle or motor vehicle engine in compliance with regulations under this subchapter prior to its sale and delivery to the ultimate purchaser, or for any person knowingly to remove or render inoperative any such device or element of design after such sale and delivery to the ultimate purchaser." This is generally known as the tampering prohibition.

21. Section 203(a)(3)(B) of the Act, 42 U.S.C. §7522(a)(3)(B), makes it a prohibited act for "any person to manufacture or sell, or offer to sell, or install, any part or component intended for use with, or as a 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." This is generally known as the defeat device prohibition.

22. Any person violating Section 203(a)(3) of the Act, 42 U.S.C. § 7522(a)(3), is subject to injunctive relief pursuant to 42 U.S.C. § 7523.

23. Any person violating Section 203(a)(3) of the Act, 42 U.S.C. § 7522(a)(3), is also subject to civil penalties of up to $3,750 for each violation occurring on or after January 13, 2009 through November 2, 2015, and up to $4,735 for each violation occurring after November 2, 2015, and assessed on or after February 6, 2019, in accordance with Section 205(a) of the Act, 42 U.S.C. § 7524(a). *See also* 40 C.F.R. § 19.4 (2018); Civil Monetary Penalty Inflation

Adjustment Rule, 84 Fed. Reg. 2056, 2059 (Feb. 6, 2019) and 84 Fed. Reg. 5955 (Feb. 25, 2019).

24. Pursuant to 42 U.S.C. § 7524(a), each motor vehicle or motor vehicle engine tampered with in violation of Section 203(a)(3)(A) of the Act, 42 U.S.C. § 7522(a)(3)(A), is a separate violation.

25. Pursuant to 42 U.S.C. § 7524(a), each part or component manufactured, sold, offered for sale, or installed in violation of Section 203(a)(3)(B) of the Act, 42 U.S.C. § 7522(a)(3)(B), is a separate violation.

EPA's Certificate of Conformity Program for New Motor Vehicles and Motor Vehicle Engines

26. Manufacturers of new motor vehicles or motor vehicle engines must apply for and obtain a certificate of conformity ("COC") from EPA to sell, offer to sell, or introduce or deliver for introduction into commerce any new motor vehicle or motor vehicle engine in the United States. 42 U.S.C. § 7522(a)(1).

27. To obtain a COC, the original equipment manufacturer ("OEM") must demonstrate that the motor vehicle or motor vehicle engine will conform to established emission standards for NOx, PM, NMHC, CO, and other pollutants during the motor vehicle or motor vehicle engine's useful life. 42 U.S.C. § 7525(a)(2); *see* 40 C.F.R. §§ 86.007-30(a)(1)(i), 86.1848-01(a)(1).

28. The COC application must describe, among other things, the emission-related elements of design of the motor vehicle or motor vehicle engine. *See* 40 C.F.R. § 86.094-21(b)(1) ("The application . . . shall include the following: . . . a description of [the vehicle's] . . . emission control system and fuel system components."); *see also* 40 C.F.R. § 86.1844-01(d)–(e).

29. Once issued by EPA, a COC only covers those new motor vehicles or motor vehicle engines that conform in all material respects to the specifications provided to EPA in the COC application for such vehicles or engines. 40 C.F.R. § 86.1848-01(c)(6).

Emission-Related Elements of Design

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

31. OEMs install a variety of hardware and software elements of design in motor vehicles and motor vehicle engines that control emissions of pollutants in order to comply with the CAA and obtain certification, hereinafter referred to as "Emission-Related Elements of Design."

32. Pursuant to 42 U.S.C. § 7521(m), the OEM is required to install an Onboard Diagnostics ("OBD") System on motor vehicles that monitors, detects, and records malfunctions of all monitored Emission-Related Elements of Design. 40 C.F.R. §§ 86.007-17, 86.010-18, 86.1806-05.

33. The OBD System monitors and detects malfunctions of Emission-Related Elements of Design through a network of sensors installed throughout the motor vehicle and motor vehicle engine.

34. When the OBD System detects a malfunction of an Emission-Related Element of Design, it must illuminate the vehicle's Malfunction Indicator Light ("MIL") on the dashboard. *See* 40 C.F.R. § 86.1806-05(b)–(d).

35. The OBD System is an Emission-Related Element of Design.

36. Exhaust Gas Recirculation ("EGR") Systems are Emission-Related Elements of Design that reduce NO_x emissions by recirculating exhaust gas through the engine, thereby reducing engine temperature and NO_x emissions.

37. "Aftertreatment" refers collectively to the Emission-Related Elements of Design "mounted downstream of the exhaust valve . . . whose design function is to reduce emissions in the engine exhaust before it is exhausted to the environment." *See* 40 C.F.R. § 1068.30. Diesel Particulate Filters ("DPFs") and Selective Catalytic Reduction ("SCR") Systems are part of Aftertreatment.

38. DPFs are Emission-Related Elements of Design that reduce the level of PM contained in engine exhaust gas.

39. SCR Systems are Emission-Related Elements of Design that reduce NO_x emissions by chemically converting exhaust gas that contains NO_x into nitrogen and water through the injection of diesel exhaust fluid.

40. OEMs set software parameters, also known as calibrations, that control, among other things, engine combustion (e.g. fuel injection timing) and Aftertreatment performance (hereinafter referred to as "Certified Stock Calibrations"). 40 C.F.R. §§ 86.1803-01.

41. OEMs disclose Certified Stock Calibrations in their application for a COC for each vehicle model because they are part of a motor vehicle's overall emissions control strategy. Certified Stock Calibrations that must be included on the COC application include "fuel pump flow rate, . . . fuel pressure, . . . EGR exhaust gas flow rate, . . . and basic engine timing." 40 C.F.R. § 86.1844-01(e)(2); *see also* 40 C.F.R. pt. 85 app. VIII (listing vehicle and engine

parameters and specifications); 40 C.F.R. pt. 86 app. VI (listing vehicle and engine components).

42. Certified Stock Calibrations, including fuel injection timing, are Emission-Related Elements of Design. Retarding fuel injection timing results in lower engine temperatures, thereby reducing NOx formation.

43. Motor vehicles are equipped with Electronic Control Modules ("ECMs"), also known as Electronic Control Units or "ECUs", which are computers that monitor and control vehicle operations, including the operation of Emission-Related Elements of Design described in this Section. OBD Systems and other Emission-Related Elements of Design operate in conjunction with ECMs.

44. The Emission-Related Elements of Design described in this section are installed on motor vehicles or motor vehicle engines in compliance with Title II of the Act and the regulations thereunder. *See, e.g.*, 42 U.S.C. § 7521 (setting emission and OBD standards and directing EPA to establish standards by regulation); 40 C.F.R. § 86.007-11 (establishing emission standards for 2007 and later heavy-duty diesel engines and vehicles); 40 C.F.R. § 86.1844-01(d)-(e) (listing information requirements for COC applications, including calibration information), 40 C.F.R. § 86.004-25(a)(6) (defining "critical emissions-related components").

Types of Aftermarket Products at Issue

45. Third-party manufacturers, including Defendant, have developed products that are designed to alter a vehicle's power or fuel economy, or reduce the costs related to maintaining a vehicle's Emission-Related Elements of Design.

46. These products enhance a vehicle's power, performance, or fuel economy by altering, replacing, or disabling OEM-installed elements of design, including Emission-Related

Elements of Design (hereinafter "Subject Products").

47. Some Subject Products are electronic software products, known as "tunes," that alter, overwrite, or replace aspects of a motor vehicle's ECM and/or OBD System.

48. Tunes can be stored and transmitted in numerous ways, including electronically though email and through electronic storage devices (hereinafter, "Tuners").

49. Some tunes manipulate a vehicle's ECM and/or OBD System to facilitate the bypass, disabling, or removal of pollution control devices, including EGR, DPF, and SCR. These tunes are hereinafter referred to as "Delete Tunes." Delete Tunes manipulate the ECM and/or OBD System so that they will not detect the removal of a vehicle's pollution control devices.

50. Other tunes manipulate a vehicle's ECM and/or OBD System to modify Certified Stock Calibrations such as fuel injection timing. These tunes are hereinafter referred to as "Calibration Tunes."

51. Delete and Calibration Tunes can be used separately or in combination.

GENERAL ALLEGATIONS

52. On May 28, 2013, EPA issued a request for information to PDI under Section 208 of the Act, 42 U.S.C. § 7542, requesting the identification of each heavy duty diesel motor vehicle component, device, or part installed, sold, offered for sale, or manufactured by PDI that changes, affects, or simulates the operation of the diesel engine's emission control components or emission control component monitors, including fuel injection timing values, DPF operation, EGR system operation, SCR system operation, and any sensors or signals related to these components or elements of design.

53. In response, PDI provided information about products that it manufactured,

distributed, or sold that directly affect or interface with heavy duty diesel engine emission control components or emission control component monitors.

54. On March 2, 2017, EPA issued a second request for information to PDI seeking additional information relating to PDI products, including updated sales information.

55. PDI's marketing materials include statements such as "Tuning is the simplest and most efficient way to unlock the horsepower and fuel economy that you deserve!" and "Why settle for the limits of factory programming?" PDI promoted its products as altering factory programming, which means that the products alter Certified Stock Calibrations.

FIRST CLAIM FOR RELIEF
(Violations for the Manufacture and Sale of Delete and Calibration Tunes)

56. The allegations of the foregoing paragraphs are incorporated herein by reference.

57. Until May 1, 2018, Defendant developed, manufactured, sold, and installed Delete Tunes and Calibration Tunes.

58. Between November 18, 2012 and May 1, 2018, Defendant manufactured, sold, offered for sale, or installed at least 5,549 tunes that alter a vehicle's ECM and/or OBD System (a) so that the vehicle can be operated without one or more pollution control devices or (b) to modify Certified Stock Calibrations, such as fuel injection timing. These tunes are identified in Appendix A to the Complaint and are "Subject Products."

59. The Subject Products identified in Appendix A were intended for use with, or as part of, a motor vehicle or motor vehicle engine.

60. The Subject Products identified in Appendix A alter, overwrite, or replace OEM software (a) involved in monitoring a vehicle's pollution control devices allowing the motor vehicle or motor vehicle engine to operate without input from the pollution control devices or (b)

that controls Certified Stock Calibrations, such as fuel injection timing.

61. A principal effect of at least one component of each Subject Product identified in Appendix A was to bypass, defeat, or render inoperative a vehicle's (a) OBD System, allowing removal of pollution control devices, such as EGR, DPF, and/or SCR or (b) Certified Stock Calibrations, such as fuel injection timing.

62. OBD Systems, EGR, DPFs, and SCR are Emission-Related Elements of Design installed on or in a motor vehicle or motor vehicle engine in compliance with regulations under the Act.

63. Certified Stock Calibrations, including fuel injection timing, are Emission-Related Elements of Design installed on or in a motor vehicle or motor vehicle engine in compliance with regulations under the Act.

64. Defendant knew or should have known that the Subject Products identified in Appendix A were offered for sale or installed for such use or put to such use.

65. Each Subject Product that Defendant manufactured, sold, offered for sale, or installed is a separate violation of Section 203(a)(3)(B) of the Act. 42 U.S.C. § 7524(a).

66. Pursuant to Sections 204 and 205(a) of the Act, 42 U.S.C. §§ 7523 and 7524(a), Defendant is liable for injunctive relief and civil penalties of up to $3,750 per violation occurring on or after January 13, 2009 through November 2, 2015 and up to $4,735 per violation occurring after November 2, 2015.

SECOND CLAIM FOR RELIEF
(Violations for Aftermarket Tampering)

67. The allegations of the foregoing paragraphs are incorporated herein by reference.

68. Defendant has installed Subject Products on motor vehicles or motor vehicle

engines after such vehicles or engines were sold and delivered to the ultimate purchaser.

69. The installation of Subject Products had the effect of removing or rendering inoperative one or more Emission-Related Elements of Design.

70. Defendant knew that the Subject Products would remove or render inoperative one or more Emission-Related Elements of Design.

71. Defendant violated Section 203(a)(3)(A) of the Act, 42 U.S.C. § 7522(a)(3)(A), by knowingly installing Subject Products on motor vehicles or motor vehicle engines after sale and delivery of those vehicles or engines to the ultimate purchaser.

72. Each Subject Product installed by Defendant on a motor vehicle or motor vehicle engine is a separate violation of Section 203(a)(3)(A) of the Act, 42 U.S.C. §§ 7522(a)(3)(A).

73. Pursuant to Sections 204 and 205(a) of the Act, 42 U.S.C. §§ 7523 and 7524(a), Defendant is liable for injunctive relief and civil penalties of up to $3,750 per violation occurring on or after January 13, 2009 through November 2, 2015 and up to $4,735 per violation occurring after November 2, 2015.

PRAYER FOR RELIEF

WHEREFORE, the United States respectfully requests that this Court:

A. Permanently enjoin Defendant from manufacturing, selling, offering to sell, or installing motor vehicle parts or components intended for use with a motor vehicle or motor vehicle engine where a principal effect of such 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 Title II of the Act;

B. Assess civil penalties against Defendant for each violation of Section 203(a)(3) of

the Act, 42 U.S.C. § 7522(a)(3), in the amount of up to $3,750 for each violation occurring on or after January 13, 2009 through November 2, 2015, and up to $4,735 for each violation occurring after November 2, 2015;

C. Award the United States its costs and disbursements in this action; and

D. Award such other and further relief as the Court may deem just and proper.

Respectfully submitted,

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