IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. DAIMLER AG and MERCEDES-BENZ USA, LLC, Defendants.	Civil Action No.: 1:20-cv-2564-EGS **UNOPPOSED MOTION TO ENTER CONSENT DECREE; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT**

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UNOPPOSED MOTION TO ENTER ATTACHED CONSENT DECREE

The United States, by and through the undersigned attorneys, moves this Court to enter, as a final judgment in this matter, the Consent Decree attached to this Motion as Exhibit 1, by signing it on page 139. Entry of the Consent Decree would resolve the claims alleged against Daimler AG and Mercedes-Benz USA, LLC (together, "Daimler") in the Complaint filed by the United States in this action and certain claims alleged in a separate complaint filed by the California Attorney General's Office on behalf of the California Air Resources Board (CARB) under civil action number 1:20-cv-2565-EGS, which the Court consolidated with this action on September 14, 2020. This Motion is unopposed; Daimler has specifically agreed not to oppose entry of the Consent Decree by this Court. (Ex. 1, CD, at ¶ 108). Further, on December 1, 2020, undersigned counsel informed counsel for Daimler that we would be filing this Motion, and Daimler confirmed that it is not opposed.

As set forth in the accompanying Memorandum of Points and Authorities in Support of this Motion, the Court should sign and enter the proposed Consent Decree because it is fair, reasonable, and consistent with the public interest.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION

I. INTRODUCTION

On September 14, 2020, the United States filed a Complaint (ECF No. 1) with this Court against Daimler seeking civil penalties and injunctive relief under Sections 204 and 205 of the Clean Air Act (CAA or "the Act"), 42 U.S.C. §§ 7523 and 7524, and regulations promulgated under Section 202 of the CAA, 42 U.S.C. § 7521, and codified at 40 C.F.R. Part 86. The Complaint alleges that Daimler violated the CAA when, among other things, it installed undisclosed software functions and "defeat devices" used to cheat on emissions tests in more than 250,000 of its diesel vehicles sold in the United States between 2009 and 2016.

Contemporaneous with the filing of the Complaint, the United States lodged with this Court a proposed Consent Decree (ECF No. 2-1) that resolves the United States' claims and claims alleged in a separate complaint filed by the California Attorney General's Office on behalf of CARB. The proposed Consent Decree secures significant relief for the Nation's air resources by requiring Daimler to repair around 250,000 vehicles at no cost to consumers, fully mitigate excess air pollution caused by the non-compliant vehicles, and pay a civil penalty of $875 million. In accordance with paragraph 108 of the Decree, the United States published notice of the lodging in the Federal Register and invited the public to comment for a period of 30 days. 85 Fed. Reg. 59551 (Sept. 22, 2020). The 30-day public comment period expired on October 22, 2020, with the United States having received 16 comments.

The United States has carefully considered the public comments and the terms of the Consent Decree and determined that the Decree is fair, reasonable, and consistent with the goals of

the CAA. The United States therefore respectfully moves this Court to sign and enter the attached Consent Decree[1] as a final judgment.

II. BACKGROUND

A. Summary of Allegations in the United States' Complaint (ECF No. 1)

The Complaint alleges that between 2009 and 2016 Daimler sold more than 250,000 diesel-engine vans and passenger cars in the United States that contain undisclosed auxiliary emission control devices (AECDs) and unlawful "defeat devices" used to circumvent emissions testing. The United States alleges claims for relief under CAA Section 203(a)(1), (a)(2), (a)(3)(A), and (a)(3)(B), 42 U.S.C. § 7522(a)(1), (a)(2), (a)(3)(A), and (a)(3)(B).

1. Sale of Uncertified Vehicles

Section 203(a)(1) of the CAA, 42 U.S.C. § 7522(a)(1), prohibits vehicle manufacturers from selling any new motor vehicle in the United States that is not covered by a valid certificate of conformity (COC) issued by the Environmental Protection Agency (EPA). To obtain a valid COC, a vehicle manufacturer must submit an application to EPA that, among other things, discloses all AECDs installed in the vehicle and certifies that the vehicle meets applicable emissions standards. (ECF No. 1 at ¶¶ 19, 21–22, 26).[2] The Complaint alleges that Daimler failed to disclose numerous

[1] As explained in more detail in Section VI below, during the public comment period, the parties identified three scrivener's errors to paragraph cross-references in the Consent Decree lodged on September 14, 2020 (ECF No. 2-1). None of these errors are germane to any of the public comments the United States received. The United States has corrected these errors in the attached version of the Consent Decree and asks the Court to sign and enter this version. The United States has also attached as Exhibit 7 a redline of the corrected Decree against the version lodged at ECF No. 2-1, showing the few changes to paragraph cross-references. Under paragraph 103 of the proposed Consent Decree, these scrivener's errors are defined as "non-material" and do not require approval by the Court. But the parties agree that the Court should enter the corrected version of the Decree attached as Exhibit 1.

[2] COCs are issued across new model years and "test groups," which are comprised of vehicles with similar engine design that are subject to the same emission standards for pollutants regulated

AECDs installed in its diesel vehicles when applying for COCs, meaning that the vehicles were not covered by a valid COC issued under EPA's regulations when Daimler sold them to consumers. (*Id.* at ¶¶ 30, 78–79, 90).

2. Defeat Devices and Tampering

Section 203(a)(3)(B) of the CAA, 42 U.S.C. § 7522(a)(3)(B), is commonly known as the Act's "defeat device prohibition" (even though that term is not used in the text) because it prohibits knowingly selling or installing a part or component in a vehicle to bypass, defeat, or render inoperative any aspect of the vehicle's emissions control system, unless certain narrow exceptions apply (*e.g.*, the device is only used in an emergency vehicle). *See* 40 C.F.R. § 86.1803-01 (defining "defeat device" and listing exceptions). Section 203(a)(3)(A) of the CAA, 42 U.S.C. § 7522(a)(3)(A), similarly prohibits tampering with a vehicle's emissions control system by removing or rendering inoperative a part installed to comply with the CAA. The Complaint alleges that some of the undisclosed AECDs Daimler installed in its vehicles are unlawful defeat devices that cause the vehicles' emissions control systems to perform less effectively during normal driving than they perform while undergoing federal emissions testing. (ECF No. 1 at ¶¶ 74–75, 81). Because of these devices, the vehicles meet emission certification limits for nitrogen oxides (NO_x) during testing but can emit higher levels of NO_x during real-world driving. (*Id.* at ¶¶ 74–75, 77). The Complaint further alleges that Daimler tampered with the affected vehicles before their sale to consumers when it installed the undisclosed AECDs and defeat devices in them. (*Id.* at ¶¶ 100–01).

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under the CAA. (ECF No. 1 at ¶¶ 15, 20).

3. Failure to Provide Information

Section 203(a)(2) of the CAA, 42 U.S.C. § 7522(a)(2), requires vehicle manufacturers to provide information required under Section 208 of the CAA, including information that the EPA Administrator requires to determine compliance with the Act. The Complaint alleges that EPA needed and required information about Daimler's undisclosed AECDs and defeat devices to determine whether the company was acting in compliance with the CAA, and Daimler failed to provide that information in its applications for COCs. (*Id.* at ¶¶ 35–36, 105–06).

B. Summary of Terms of the Proposed Consent Decree (Ex. 1)

The proposed Consent Decree (Ex. 1) requires Daimler to: (1) fix its vehicles at no cost to consumers; (2) offer an extended warranty on all parts expected to be impacted by the fix; (3) conduct future testing of the affected vehicles to demonstrate compliance with emissions standards for their full useful life; (4) perform projects to fully mitigate damage caused to the Nation's air; (5) implement new corporate compliance measures to discourage future cheating; and (6) pay a civil penalty of $875 million, plus retroactive stipulated penalties of about $70.3 million. The total value of the settlement will reach $1.5 billion.

1. Vehicle Recall and Repair, Extended Warranties, and Future Testing

The proposed Consent Decree requires Daimler to recall the affected vehicles, remove the defeat devices, and bring the vehicles into compliance with applicable NO_x emissions standards. Because the vehicles span numerous models and model years, the Decree separates them into 12 "emission modification categories" (EMCs) for purposes of developing and implementing repairs. EMCs are generally made up of vehicles with similar characteristics and engine design. (Ex. 8, Bunker Decl., at ¶ 10). The fix, called the "Approved Emission Modification" (AEM) in the

Decree, is not identical for each EMC, but every AEM will include certain software updates and replacement of some hardware. (Ex. 3, CD Appx. B, Attach I.).

The company has already developed AEMs for six EMCs, and EPA and CARB have approved these AEMs ("the already-approved AEMs") after closely reviewing emissions testing and other technical data and concluding that vehicles updated with the already-approved AEMs should comply with the NO_x emissions standards to which they were originally certified. (Ex. 8, Bunker Decl., at ¶ 12). Daimler will develop plans to fix the remaining EMCs ("the future AEMs") over about the next 12 months and submit those plans to EPA and CARB for approval. (Ex. 3, CD Appx. B, Attach. I). Because the future AEMs will be based on the already-approved AEMs, EPA expects that vehicles receiving these updates will also comply with applicable emissions standards. (Ex. 8, Bunker Decl., at ¶ 13).

Daimler must, within 15 days of the date of entry of this Decree (for the already-approved AEMs) or 15 days of receiving EPA-CARB approval (for the future AEMs), notify consumers about an AEM and provide them with agreed-upon disclosures that discuss possible impacts the AEM may have on their vehicles.[3] (Ex. 2, CD Appx. A, at ¶ 15.a). The company must offer each AEM at no cost to consumers for at least 15 years after a vehicle's model year or eight years after EPA and CARB approve an AEM for the applicable vehicle. (*Id.* at ¶ 7). It must also provide consumers who receive an AEM in their vehicles with extended warranties on parts that relate to the fix. (*Id.* at ¶¶ 18.a, 18.c, 18.d). The warranty period will last at least four years or 48,000 miles (whichever comes first) from the date a consumer receives the AEM, and it may last longer in some

[3] Exhibit 3, Attachment B shows a disclosure that consumers who own Sprinter vans will receive. The disclosure describes possible impacts to the vehicle, including diesel exhaust fluid consumption, on-board diagnostic system changes, and fuel economy.

instances. (*Id.* at ¶¶ 18.b, 18.c, 18.d). Daimler will have to fix at least 85 percent of the affected passenger cars nationally (and 85 percent of the affected cars in California) within two years of the date of entry and at least 85 percent of the affected vans nationally (and 85 percent of the affected vans in California) within three years of the date of entry.[4] (*Id.* at ¶ 4). The company must also conduct in-use testing of the AEM-modified vehicles to demonstrate on-going compliance with the emissions standards on the road for the vehicles' full useful life. (Ex 1, CD, at ¶ 19.b). Daimler will have to pay steep stipulated penalties if it fails to comply with any of these terms. (*Id.* at ¶¶ 53.b.iii, 53.b.v, 53.b.ix, 53.b.xi–xii, 53.b.xvii, 53.c.i, 53.c.iii).

2. Full Mitigation of Excess NO_x

The proposed Consent Decree requires Daimler to, within 40 months of the date of entry, replace 15 old, unregulated engines in line-haul locomotives with new, less-polluting engines. (*Id.* at ¶ 35.a). These projects are intended to fully mitigate the total lifetime excess NO_x emitted from Daimler's vehicles throughout the United States, except in California, which has reached a separate agreement with Daimler to mitigate NO_x within its borders. (*Id.* at ¶ 35.b). In selecting engines for replacement, the company must use reasonable best efforts to find locomotives that run long distances to geographically diverse locations across the continental United States. (*Id.* at ¶ 35.c.i).

3. Corporate Governance Reforms

The proposed Decree includes a corporate compliance program. Unlike in settlements with other vehicle manufacturers, Daimler has made its compliance program available to the public as an attachment to the Consent Decree. (Ex. 5, CD Appx. D). In brief, the Decree requires Daimler to:

[4] The Consent Decree sets the number of affected national passenger cars (including in California) at 62,759, the number of affected California passenger cars at 12,910, the number of affected national vans (including in California) at 147,838, and the number of affected California vans at 24,036. (Ex. 2, CD Appx. A, at ¶ 4).

- Revise its corporate structure to ensure that employees involved in certification testing and monitoring for purposes of vehicle certification under the CAA and California law are organizationally separate from product development (Ex. 1, CD, at ¶ 23);
- Implement a robust whistle-blower program and an advertising campaign focused on it (*Id.* at ¶ 26);
- Revise the company Code of Conduct to require, among other things, employees to report violations of environmental and safety regulations (*Id.* at ¶ 21);
- Enhance annual AECD and defeat device training and emissions certification and compliance training (*Id.* at ¶ 29.d);
- Implement an annual risk assessment process to find and address compliance risks relating to emissions and certification processes (*Id.* at ¶ 27);
- Implement an automated system to analyze software used in its engines (including gasoline engines) to detect any AECDs or defeat devices embedded in the software (*Id.* at ¶ 30.g);
- Require its suppliers to notify it of any potential AECDs or defeat devices in parts or software provided by those suppliers (*Id.* at ¶ 28);
- Implement a significant program to evaluate certain new model year light-duty and medium-duty motor vehicles using portable emissions measurement system (PEMS) testing to ensure that the vehicles comply with emissions standards under real-world driving conditions. (*Id.* at ¶ 30.h.i.A–B);
- Hire an independent external compliance consultant who will regularly review the goals and performance of Daimler's internal audit team and provide recommendations on any improvements to these internal audits. (*Id.* at ¶ 33).

4. Civil Penalty and Retroactive Stipulated Penalties

The proposed Consent Decree requires Daimler to pay a civil penalty of $875 million, plus interest accruing from September 14, 2020, at the rate specified in 28 U.S.C. § 1961. (*Id.* at ¶ 8). Of this sum, Daimler will pay $743,750,000 to the United States and $131,250,000 to CARB. (*Id.* at ¶¶ 9–10). The company must also pay about $70.3 million in retroactive stipulated penalties within 30 days of entry—$27,600,800 to the United States and $42,707,900 to CARB. (*Id.* at ¶ 53.c.i). All penalties paid to the United States will go to the United States Treasury.

III. DESCRIPTION OF PUBLIC COMMENT PROCESS

The Department of Justice must hold a 30-day comment period on certain proposed consent decrees and may withdraw from the decree if the comments disclose facts or considerations indicating that the settlement is inappropriate, improper, or inadequate. 28 C.F.R. § 50.7. The Department must, when seeking entry of a proposed decree, file any comments it receives with the court. *Id.* Here, we invited the public to comment on the proposed Consent Decree for 30 days from September 22, 2020, to October 22, 2020, 85 Fed. Reg. 59551, and we received 16 comments, which are collectively attached as Exhibit 9.

The majority of comments (13) came from Mercedes-Benz customers, mostly from individuals who own motorhomes with Mercedes-Benz diesel van engines and chassis. We also received one comment from the Pennsylvania Department of Environmental Protection (Penn. DEP), one comment from the National Tribal Air Association (NTAA), and one comment from a former Mercedes-Benz service technician. The United States has grouped the comments into categories and responded to the public's concerns in Section V below. In short, after careful consideration of the comments, the United States does not believe that it should withdraw from this

settlement, nor should any of the comments prevent the Court from entering the Decree as a final judgment under the standard discussed in Section IV.A below.

IV. DISCUSSION

A. Legal Standard for Judicial Approval of a Consent Decree

The decision to approve a proposed consent decree is committed to the discretion of the district court. *United States v. Hyundai Motor Co.*, 77 F. Supp. 3d 197, 199 (D.D.C. 2015) (citation omitted). The court's review of the proposed decree is informed by public policy favoring settlement. *See Env't Def. v. Leavitt*, 329 F. Supp. 2d 55, 69–70 (D.D.C. 2004) (citing *Citizens for a Better Env't v. Gorsuch*, 718 F.2d 1117, 1126 (D.C. Cir. 1983)). In reviewing a proposed consent decree, the court should not "substitute its judgment for that of the parties." *United States v. Harley Davidson, Inc.*, 2020 WL 5518466, at *3 (D.D.C. Sept. 14, 2020) (quoting *United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1435 (6th Cir. 1991)). The court's deference is "particularly strong" when the settlement "has been negotiated by the Department of Justice on behalf of a federal administrative agency . . . which enjoys substantial expertise in the environmental field." *Akzo*, 949 F.2d at 1436; *see United States v. District of Columbia*, 933 F. Supp. 42, 47 (D.D.C. 1996) (citation omitted). The district court should enter the consent decree if the settlement "fairly and reasonably resolve[s] the controversy in a manner consistent with the public interest." *Massachusetts v. Microsoft Corp.*, 373 F.3d 1199, 1206 n.1 (D.C. Cir. 2004) (citation omitted).

B. The Proposed Consent Decree is Fair

When examining the propriety of a proposed consent decree, courts first consider whether the decree is procedurally and substantively fair. *Harley Davidson*, 2020 WL 5518466, at *4. As discussed below, the proposed Consent Decree unquestionably meets both of these standards.

1. Procedural Fairness

The procedural fairness prong is generally met if the settlement is the product of good-faith negotiations with "bargaining balance," *District of Columbia*, 933 F. Supp. at 47 (citation omitted), and those attributes certainly apply here. Settlement negotiations lasted more than three years and included dozens of in-person meetings and countless drafts of the proposed Decree. All sides were represented by teams of experienced environmental counsel who vigorously defended their respective client's positions and consulted with technical experts when needed. (Ex. 1, CD, at 140–46 (signatures of counsel)).

In fact, groups of experts employed by each party embedded themselves among the legal teams, often filling large conference rooms during multi-day settlement discussions and actively participating in negotiations alongside the attorneys. (Ex. 8, Bunker Decl., at ¶ 8). EPA's and CARB's engineers played a particularly important role in evaluating settlement provisions that relate to vehicle repair and testing, with technical staff from the agencies attending at least 20 days of in-person meetings and many additional telephonic meetings. (*Id.* at ¶¶ 7, 9). Throughout negotiations, these engineers scrupulously examined submissions from and points made by Daimler's engineers and advised government counsel on the legitimacy of the company's technical arguments and the efficacy of its proposed engineering solutions. (*Id.* at ¶ 9). The proposed Consent Decree is therefore neither a "product of collusion" nor a consequence of one-sided bargaining power, but rather a reflection of the parties' arms-length efforts to reach a just and equitable outcome. *See United States v. MTU Am., Inc.*, 105 F. Supp. 3d 60, 63 (D.D.C. 2015) (discussing procedural fairness); *Harley Davidson*, 2020 WL 5518466, at *5. Moreover, the United States complied with the notice-and-comment procedures required under federal regulations, and all

parties involved support entry of the proposed Consent Decree. *Hyundai*, 77 F. Supp. 3d at 199–200 (noting that these factors are indicative of procedural fairness).

2. Substantive Fairness

In considering substantive fairness, courts examine whether the decree incorporates "concepts of corrective justice and accountability." *Hyundai*, 77 F. Supp. 3d at 199 (citation omitted). The district court "does not determine whether the settlement is one which the court itself might have fashioned, or considers ideal." *United States v. Pac. Gas & Elec.*, 776 F. Supp. 2d 1007, 1025 (N.D. Cal. 2011). Rather, "[t]he court need only be satisfied that the decree represents a reasonable factual and legal determination." *United States v. Oregon*, 913 F.2d 576, 581 (9th Cir. 1990) (citation omitted) (internal quotation marks omitted).

At the heart of Daimler's violations is the damage it has caused to our Nation's air. The proposed settlement requires Daimler to atone for its misconduct by repairing most of the affected vehicles and fully mitigating excess NO_x emitted into the air. (Ex. 2, CD Appx. A, at ¶ 4; Ex. 1, CD, at ¶ 23). The company must also take steps to prevent future environmental violations, and it will have to pay a hefty $875 million civil penalty and about $70.3 million in retroactive stipulated penalties. (Ex. 1, CD, at ¶¶ 8, 33–35, 53.c.i). The proposed Decree therefore bears all the hallmarks of substantive fairness, as it requires Daimler to remedy its wrongs and prevent future violations (corrective justice), and it punishes the company for its wrongdoing (accountability). *Hyundai*, 77 F. Supp. 3d at 200; *Harley Davidson*, 2020 WL 5518466, at *7.

C. The Proposed Consent Decree is Reasonable

When evaluating the reasonableness of a proposed consent decree, courts consider three factors: "(1) whether the decree is technically adequate to accomplish the goal of cleaning the environment, (2) whether it will sufficiently compensate the public for the costs of the remedial

measures, and (3) whether it reflects the relative strength or weakness of the government's case against the environmental offender." *Harley Davidson*, 2020 WL 5518466, at *8 (citation omitted). The court should conduct its review from an "objective point of view." *District of Columbia*, 933 F. Supp. at 51.

1. The Consent Decree Adequately Protects the Environment

Courts in this District generally find that a settlement adequately "cleans the environment" if it brings the defendant into compliance with the law and prevents future violations. *Hyundai*, 77 F. Supp. 3d at 200; *Harley Davidson*, 2020 WL 5518466, at *9. The proposed Consent Decree certainly meets these objectives because, as discussed above, it will force Daimler to (1) bring the majority of the affected vehicles into compliance with applicable NO_x emission standards, (2) perform projects to fully mitigate excess NO_x emitted into the air, and (3) implement corporate governance reforms to help ensure compliance with the CAA in the future. (Ex. 1, CD, at ¶¶ 20, 35; Ex. 2, CD Appx. A, at ¶ 4).

The Decree buttresses these requirements with strong future testing and reporting provisions that will help EPA and CARB monitor Daimler's compliance with the settlement's terms. (Ex. 1, CD, at ¶¶ 19, 42). For instance, Daimler must submit semi-annual reports to the agencies that contain information about its progress toward meeting the 85 percent vehicle recall rate, its in-use testing activities, and its work on implementing the mitigation program. (*Id.* at ¶¶ 42.a.viii, 42.b, 42.c). If after receiving an AEM a group of affected vehicles fails to meet applicable emissions standards, not only will the company face significant stipulated penalties, but EPA and CARB may use their regulatory powers to conduct an administrative recall. (*Id.* at ¶¶ 19.b.v, 53.b.xii). There are also tough stipulated penalties built into the Decree to incentivize Daimler to timely and fully implement the mitigation program. (*Id.* at ¶ 53.f). The proposed settlement therefore requires

Daimler to undertake significant work to "clean the environment," and it contains numerous mechanisms to help ensure that Daimler meets its obligations.

2. The Consent Decree Sufficiently Compensates the Public

In environmental civil penalty cases,[5] this prong of the reasonableness test is generally satisfied if the United States considered the statutory penalty factors and the penalty is commensurate with penalties obtained in similar settlements. *E.g.*, *Harley Davidson*, 2020 WL 5518466, at *9. The proposed Consent Decree hits both of these marks.

In negotiating the $875 million civil penalty, the United States, as it should, considered the statutory penalty factors found under Section 205(b) of the CAA, 42 U.S.C. § 7524(b), including the gravity of Daimler's violations (*e.g.*, the number of unlawful vehicles sold and their impact on human health) and any economic benefit that resulted from its wrongful conduct (*e.g.*, profits from uncertified vehicle sales). The United States also considered the potential strength of Daimler's arguments if the case proceeded to litigation. Additionally, the negotiated civil penalty (not including the retroactive stipulated penalties) is commensurate with penalties imposed in other mobile source settlements—in fact, at about $3,500 per vehicle, it is larger, on a per-vehicle basis, than civil penalties paid in other recent defeat device cases. For example, in *Volkswagen*, which addressed unlawful defeat devices in about 590,000 vehicles, the civil penalty obtained was roughly $2,457 per vehicle,[6] and in *Fiat-Chrysler*, which addressed unlawful defeat devices in about

[5] This second prong of the test seems to originate from a case analyzing a CERCLA settlement where the United States sought to recover response and remediation costs. *See United States v. Cannons Eng'r Corp. (Cannons II)*, 899 F.2d 79, 90 (1st Cir. 1990). The United States' Complaint (ECF No. 1) does not seek to recover costs. When applying this factor to non-CERCLA settlements, courts generally focus on whether the United States considered the statutory penalty factors and whether the penalty is commensurate with penalties obtained in similar settlements. *E.g.*, *Harley Davidson*, 2020 WL 5518466, at *9.

[6] *See* Volkswagen Clean Air Act Civil Settlement, https://www.epa.gov/enforcement/volkswagen-

100,000 vehicles, the civil penalty obtained was roughly $3,050 per vehicle.[7] The substantial penalty in the proposed Decree thus fully meets the statutory factors under the CAA's mobile source provisions and amply compensates the public for Daimler's wrongdoing. *Harley Davidson*, 2020 WL 5518466, at *9.

3. The Consent Decree is an Adequate Reflection of the Case

For many of the reasons already discussed above, the proposed settlement adequately reflects the relative strength of the United States' case. When analyzing this factor, courts in this District and others typically weigh the advantages of securing environmental compliance against the uncertainties of protracted litigation, with great credit given to the key role that settlements play in civil enforcement. *See District of Columbia*, 933 F. Supp. at 51; *United States v. Cannons Eng'r Corp. (Cannons I)*, 720 F. Supp. 1027, 1039 (D. Mass. 1989), *aff'd* 899 F.2d 79, 90 (1st Cir. 1990); *Kelley v. Thomas Solvent Co.*, 717 F. Supp. 507, 516 (W.D. Mich. 1989). Indeed, in *District of Columbia*, the court noted that, "[i]t is almost axiomatic that voluntary compliance on an issue where there is a potential disagreement is a better alternative than the uncertainty of litigation over that issue." 933 F. Supp. at 51.

This settlement, like every settlement, includes compromises, but it also includes significant injunctive relief to benefit the Nation's air and the citizens who breathe it and a substantial civil penalty to punish and deter Daimler and other would-be violators. If the United States elected to litigate its claims, it could take years to proceed through discovery and trial before finally securing an order compelling Daimler to fix the affected vehicles. And the vehicles would, in the meantime,

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clean-air-act-civil-settlement (last accessed Nov 9, 2020).

[7] *See* Fiat Chrysler Automobiles Clean Air Act Civil Settlement Information Sheet (Jan. 10, 2019) https://www.epa.gov/enforcement/fiat-chrysler-automobiles-clean-air-act-civil-settlement-information-sheet.

continue to emit excess NO_x. The proposed Consent Decree secures important and significant relief *now*, and on a scale commensurate with the relief secured in *Volkswagen* and *Fiat-Chrysler*.[8] Accordingly, the Decree meets the third and final prong of the reasonableness test. *See Harley Davidson*, 2020 WL 5518466, at *9.

D. The Proposed Consent Decree is in the Public Interest

This final factor turns on whether the proposed Consent Decree furthers the goals of the CAA. *See MTU Am.*, 105 F. Supp. 3d at 64. The CAA's stated goal is "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). The Court's inquiry on this point is limited. In *United States v. Microsoft Corp.*, the D.C. Circuit explained the standard a court should apply:

> The court should also bear in mind the *flexibility* of the public interest inquiry: the court's function is not to determine whether the resulting array of rights and liabilities "is the one that will *best* serve society," but only to confirm that the resulting settlement is "within the *reaches* of the public interest."

56 F.3d 1448, 1460 (D.C. Cir. 1995) (citations omitted) (internal quotation marks omitted) (emphasis in original). In *Hyundai*, the court conducted a similar inquiry and found a consent decree to be in the public interest because, among other things, it "further[ed] the goals of the [CAA] by taking steps to ensure cleaner air for the public." 77 F. Supp. 3d at 200–01.

The proposed Consent Decree serves the public interest because it too furthers the goal of the CAA. As discussed at length above, the Decree will secure significant injunctive relief to bring the affected vehicles into compliance with the law, mitigate excess NO_x emissions, and promote compliance in the future. (Ex. 1, CD, at ¶¶ 20, 35; Ex. 2, CD Appx. A, at ¶ 4). On top of

[8] Volkswagen and Fiat-Chrysler Settlements, *supra* notes 6 & 7.

these injunctive requirements, the $875 million civil penalty required under the Decree will serve as a strong warning to other manufacturers who may consider installing defeat devices in their vehicles. *See SEC v. Randolph*, 736 F.2d 525, 529–30 (9th Cir. 1984) (deferring to government agency's analysis of deterrence and use of limited enforcement resources). These measures each go to the core of the CAA's purpose and illustrate that the proposed settlement is squarely in the public interest.

For all of the reasons stated above, the proposed Consent Decree meets the standard for entry as a final judgment by the Court.

V. RESPONSE TO PUBLIC COMMENTS

The comments the United States received in response to its notice of lodging are attached to this Motion as Exhibit 9. While the comments are diverse, they generally address: (1) consumer compensation, (2) fuel economy and vehicle performance after AEM installation, (3) emissions after AEM installation, (4) civil and stipulated penalties, (5) failure of emission related parts, (6) warranty provisions, (7) vehicle buyback, (8) the timeline for receiving an AEM, (9) scope of mitigation, (10) consumer participation in settlement negotiations, (11) the amount of and the environmental harm caused by excess NO_x emissions, and (12) coordination with states and tribes.

The following is the United States' response to the concerns raised by the commenters. Because many of the commenters raised the same concerns, we clustered the comments and our responses into categories and issue groups. Exhibit 10 is a table showing which commenter's concerns are addressed by each issue number. Nothing in the comments demonstrates that the proposed Consent Decree is unfair, unreasonable, or inconsistent with the public interest, so after carefully considering each comment, the United States does not believe that it should withdraw from the proposed Decree.

A. Comments Related to the Civil Penalty and Stipulated Penalties

Issue #A.1.a: Several commenters stated that the civil penalty (or fine) should be higher to more severely punish Daimler for its behavior. In particular, one commenter (Heywood) stated that he is "bewildered at how Mercedes Benz got away with such a light penalty," and another commenter (Herrle) stated that "[i]t appears that this current settlement is very lenient to Daimler/Mercedes."

Response: The civil penalty was negotiated in good faith as part of an overall settlement. In calculating the penalty, the United States took, as it should, the CAA's statutory penalty factors found at 42 U.S.C. § 7524(b) into account, including the gravity of Daimler's conduct and any economic benefit the company derived from its violations.

Moreover, the civil penalty is at least as stringent as those imposed in other mobile source judicial matters. In fact, at about $3,500 per vehicle, the civil penalty in the proposed Consent Decree is larger, on a per-vehicle basis, than the civil penalties negotiated in the *Volkswagen* (about $2,457/vehicle) and *Fiat-Chrysler* (about $3,050/vehicle) matters.[9] The penalty is therefore neither "lenient" nor "light," and along with the other components of this settlement, it sends a clear message to Daimler and other regulated entities that emissions cheating will not be tolerated.

Issue #A.1.b: Penn. DEP commented that "DOJ should identify the amount of Daimler's economic benefit from noncompliance . . . so it is clear that the penalty recovers at least that amount."

Response: As discussed above, the United States considered all of the CAA's statutory penalty factors, including any economic benefit Daimler derived from its violations, when

[9] *See* Volkswagen and Fiat-Chrysler Settlements, *supra* notes 6 & 7.

negotiating the civil penalty. To the extent Penn. DEP asks to peek behind the curtain to see the United States' penalty calculus, much of that reasoning is based on privileged work product and data Daimler treats as "confidential business information," meaning that the United States cannot share it with Penn. DEP. *See Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2366 (2019) (holding that where financial information is customarily and actually treated as confidential by its owner and provided to the government under an assurance of privacy, the information is confidential within the meaning of the Freedom of Information Act's Exception 4). EPA also has a compelling interest in maintaining confidentiality over its internal calculations to safeguard its current and future enforcement work against other defendants. Finally, evidence the United States might adduce on economic benefit of non-compliance would be subject to challenge by Daimler and to the Court's review, so revelation of the government's internal calculations would not provide a definitive amount that must be recovered to determine that the settlement is reasonable, fair, and in the public's interest.

But importantly, while the Court may consider the amount of civil penalties imposed in similar settlements, it need not look at specific details about how the penalty in the proposed Decree was calculated to grant the United States' Motion. *See United States v. Lexington-Fayette Urban Cnty. Gov't*, 591 F.3d 484, 489–91 (6th Cir. 2010). Courts should generally approve the civil penalty in a proposed decree if, when viewed as a whole, the settlement will (1) effectively cleanse the environment and (2) serve the objectives of the underlying environmental statute. *Id.* at 489–90. As discussed in Section IV.C.1 above, these criteria are unequivocally met here.

Issue #A.1.c: Penn. DEP commented that "significantly more of the total penalty should go to fund environmentally beneficial projects that reduce mobile source emissions." The agency

specifically recommends shifting money from the penalty amount into the mitigation requirements of the proposed Consent Decree.

Response: The United States exercises wide discretion in negotiating remedies for mobile source CAA violations. *See Harley Davidson*, 2020 WL 5518466, at *9. As discussed in more detail in Subsection E below, the Mitigation Program in the proposed Decree is intended to "fully mitigate the total lifetime excess NO_x emissions from [the affected vehicles] in the United States, excluding California." (Ex. 1, CD, at ¶ 35.b). In addition to and separate from this program, the United States negotiated a civil penalty that will aid the environment by strongly deterring Daimler and others from cheating on emissions tests in the future. This decision is reasonable and well within the contours of the United States' prosecutorial discretion. *See Lexington-Fayette*, 591 F.3d at 489–90; *Harley Davidson*, 2020 WL 551466 at, *9.

Issue #A.1.d: NTAA commented that the United States should set $15 million of the civil penalty aside for mitigation projects in Indian country.

Response: NTAA's concerns are primarily addressed in our responses to Issues E.2.a and E.2.b below. In short, NTAA's suggestion is unnecessary because there is no geographic component to the United States Mitigation Project—in fact, the Decree requires Daimler to use best efforts to repower line-haul locomotives that run to geographically diverse locations across the United States. (Ex. 1, CD, at ¶ 35.c.i). The potential impact of the Program on Indian country is therefore equal to its potential impact on any location in the continental United States. This use of a non-geographically-tethered selection criterion is a reasonable means to spread the benefits of the Mitigation Program across the largest area practical.

In addition, the proposed Decree authorizes Daimler to fund repowering projects that will be "implemented by one or more state, local, *tribal*, independent non-profit organizations, or other

third party entities." (*Id.* at ¶ 36) (emphasis added). So if any tribe has the legal authority to accept funds from Daimler and the ability to implement all or part of the Project, that option is available.

Finally, mitigation and civil penalty are not interchangeable remedies. Penalties are designed to punish and deter while mitigation is designed to repair the environment. Because mitigation is not punitive, the focus when choosing a mitigation project is not on how much it will cost to implement but on how effective it will be at cleaning the environment. The United States has crafted a settlement that will, in its view, adequately punish Daimler and deter future harm to the environment, while also mitigating excess NO_x in as geographically diverse an area as practical. This is a reasonable approach, and the Court should defer to the United States' judgment. *See Harley Davidson* 2020 WL 5518466, at *9.

Issue #A.2: One commenter (Horton) wrote that the proposed Consent Decree should "[r]equire stronger fines for failure to meet deadlines in fixing vehicles and internal procedures."

Response: The proposed Decree includes steep stipulated penalties if Daimler fails to meet deadlines for developing and offering AEMs or fails to comply with many of the Decree's other terms. Here are just a few examples:

- Failure to timely offer an AEM (penalties ranging from $10,000 to $35,000 per day) (Ex. 1, CD, at ¶ 53.b.iii);
- Failure to notify consumers of an available AEM (penalties ranging from $2,000 to $10,000 per day) (*Id.* at ¶ 53.b.v);
- Failure to honor an extended warranty (penalty of $20,000 per vehicle) (*Id.* at ¶ 53.b.ix);
- Failure to timely submit an AEM for EPA's and CARB's review (penalties ranging from $2,000 to $50,000 per day) (*Id.* at ¶ 53.b.xi);

- Failure to develop a future AEM that brings an EMC into compliance with applicable emissions standards (penalties ranging from $7,000 to $25,000 per eligible vehicle) (*Id.* at ¶ 53.b.xii);
- Failure to meet the 85 percent recall and repair rate for affected passenger cars or affected vans (penalty of $9,137,866 per percentage point below 85 percent for vans and $6,445,600 per percentage point below 85 percent for cars) (*Id.* at ¶ 53.b.xvii);
- Failure to complete in-use testing (penalties ranging from $5,000 to $50,000 per day) (*Id.* at ¶ 53.d.i);
- Failure to meet certified emissions standards after an AEM is installed in an EMC (penalties ranging from $7,350 to $26,250 per eligible vehicle) (*Id.* at ¶ 53.d.iii).

The United States believes the stipulated penalties in the proposed settlement will adequately incentivize Daimler to comply with the Decree's terms.

B. Comments Related to Receipt of an AEM

Issue #B.1: One commenter (Horton) raised concerns about the timeline for receiving an AEM and stated that he does not want to drive a polluting vehicle for another three years.

Response: Daimler must make the already-approved AEMs available immediately after entry of the proposed Decree, and these AEMs will cover half of the EMCs. (Ex. 2, CD Appx. A, at ¶¶ 3, 15.a). For the remaining EMCs, EPA and CARB will review, and if appropriate approve, AEMs on a staggered schedule from the end of 2020 through 2021. (Ex. 3, CD Appx. B, Attach. I). Thus, all AEMs may be available by the end of 2021 or the beginning of 2022, not three years from now. (*Id.* at ¶ 5.a.i) (requiring EPA and CARB to approve or disapprove a proposed emission modification report within 45 days of receipt). The commenter's focus on the three-year mark likely comes from the Decree's requirement that Daimler install AEMs in at least 85 percent

of the affected vans within three years of the date of entry. (Ex. 2, CD Appx. A, at ¶ 4). But this does not mean that an owner or lessee must wait three years to have an available AEM installed.

Issue #B.2: Three commenters (Heywood, Keller, and Stephens) raised concerns about the affected vehicles complying with emissions standards after installation of an AEM.

Response: For the already-approved AEMs, Daimler has performed extensive emissions testing to demonstrate that the fixes work and should enable the vehicles to meet applicable NO_x emission standards under real-world driving conditions. (Ex. 3, CD Appx. B, at ¶¶2.b, 4.a and Attach. I; Ex. 8, Bunker Decl., at ¶ 11). Daimler must continue to conduct rigorous testing after it develops the remaining vehicle updates. (Ex. 3, CD Appx. B, at ¶¶ 2.b, 4.a.i.A–B and Attach. I). EPA and CARB review all reports that summarize this testing and may conduct confirmatory testing on a representative sample of vehicles (including real-world testing with PEMS) to corroborate the results, ensure all AECDs have been disclosed, and verify that the vehicles are free of any defeat devices. (*Id.* at ¶ 5).

In addition, the proposed Decree requires Daimler to demonstrate that vehicles that receive an AEM will remain in compliance with applicable emissions standards for the vehicles' full useful life. (Ex. 1, CD, at ¶ 19.b). A number of the vehicles will be tested each year for five years following the date of entry to ensure that the repair is successful and that the vehicles continue to comply with NO_x emission standards. (*Id.*) EPA expects that the vehicles will comply with their certified emissions standards after receiving an AEM, (Ex. 8, Bunker Decl., at ¶¶ 12–13), but the proposed Consent Decree includes provisions that will require Daimler to pay increasing stipulated penalties, up to a specified emissions ceiling called the "Emission Standard Upper Threshold," for any update that does not meet the certified standards. (Ex. 1, CD, at ¶¶ 53.b.xii, 53.d.iii).

Issue #B.3: A large number of commenters raised concerns about fuel economy, vehicle performance, or both after installation of an AEM. Four commenters (Weiss, Heywood, Keller, and Bendy) are concerned that installing an AEM on their vehicles will result in a drop in fuel economy. Three commenters (Weiss, Heywood, and Bendy) are worried that they will experience a decrease in drivability, including loss of engine power.

Response: The proposed Consent Decree addresses the commenters' concerns in two ways. First, the Decree imposes rigorous testing requirements on Daimler to identify, among other things, whether an AEM causes changes in fuel economy or vehicle performance. For each of EMCs 4 through 12, Daimler is required to run special cycle emissions and PEMS tests, as well as A-to-B fuel economy testing. (Ex. 3, CD Appx. B, at ¶¶ 2.b, 2.c.i). For each of EMCs 4 through 7, 9, 10, and 12, Daimler must also perform A-to-B NVH (noise, vibration, and harshness) and drivability testing. (*Id.* at ¶ 2.c.ii–c.iii). Daimler's test results for the already-approved AEMs indicate that drivers should not notice any adverse changes in vehicle reliability, durability, performance, drivability, fuel economy, or other driving characteristics. (Ex. 2, CD Appx. A, at Attach. B).

Second, the Decree requires Daimler to send owners and lessees of affected vehicles notice when an applicable AEM is available, and the notice must include, among other pertinent information, a summary of the AEM generally and a description of any changes, or lack thereof, in fuel economy, NVH, drivability, or diesel exhaust fluid (DEF) tank refill interval resulting from the fix. (*Id.* at ¶ 15). Daimler must also post this information on a public website. (*Id.* at ¶ 16.a). Receipt of an AEM is voluntary, so owners and lessees may decide whether to have a fix installed after reviewing the information in the notice.

Issue #B.4: One commenter (Stephens) stated that an AEM should be developed for

model-year 2017 Sprinter vans.

Response: The United States' Complaint alleges that Daimler installed undisclosed AECDs and defeat devices in various models and model years of diesel vehicles, including model-year 2010 to 2016 Sprinter vans. (ECF No. 1 at ¶ 42). While investigating Daimler's violations, EPA conducted robust emissions testing on the model-year 2017 Sprinter van, (Ex. 8, Bunker Decl., at ¶ 3), and it is not included among the list of impacted vehicles in the Complaint.

Issue #B.5: One commenter (Stephens) stated that the proposed Consent Decree should, in addition to controlling NO_x emitted from the affected vehicles, include measures to control soot.

Response: This settlement aims to bring the affected vehicles into compliance with applicable NO_x emissions standards. Daimler has conducted, and EPA and CARB have reviewed, emissions testing to show that vehicles receiving the already-approved AEMs should comply with applicable NO_x standards under real-world driving conditions. (Ex. 3, CD Appx. B, at ¶¶2.b, 4.a.i.A–B, and Attach. I; Ex. 8, Bunker Decl., at ¶¶ 11–12). The future AEMs will be based on the already-approved AEMs, and therefore EPA expects that vehicles receiving those fixes will meet applicable emissions standards, too. (Ex. 8, Bunker Decl., at ¶ 13). The soot that the commenter describes—which is produced during combustion in all diesel engines—is controlled by a filter already installed in the affected vehicles before it is emitted into the air. (*Id.* at ¶ 17–18). Thus, the AEMs do not need to include any additional "soot controls" to accomplish their purpose of bringing the vehicles into compliance with the law. (*Id.* at ¶ 18).

C. Comments Related to Consumer Compensation and Vehicle Buyback

Issue #C.1: Nearly every consumer who commented on the proposed Consent Decree suggested that the settlement should include financial compensation for the owners of affected vehicles.

Response: The United States' Complaint is brought under Sections 204 and 205 of the CAA. (ECF No. 1 at ¶ 1). These sections authorize the United States to commence civil suits to obtain injunctive relief and civil penalties for violations of the CAA, but these are not consumer protection laws. 42 U.S.C. §§ 7523, 7524(b). The proposed Decree requires Daimler to repair at least 85 percent of the affected vans and at least 85 percent of the affected passenger cars, and leaves it to Daimler to determine how to incentivize such a high level of participation. A group of current and former Mercedes-Benz diesel owners and lessees has filed a class action suit in the District of New Jersey aimed at securing compensation for members of the class. *In re Mercedes-Benz Emissions Litig.*, 2:16-cv-00881 (D.N.J.). The plaintiffs in that case filed a Motion for Preliminary Approval of Settlement on September 14, 2020. *Id.* at ECF No. 299-1. The United States is not a party to the class-action case.

Issue #C.2: One commenter (Heywood) questioned why the proposed Consent Decree does not include a requirement that Daimler buy affected vehicles back from consumers, as Volkswagen was required, in some circumstances, to do under its settlement with the United States.

Response: This case and *Volkswagen* are not the same. Here, EPA believes the vehicles can be brought into compliance with the NO_x emission standards to which they were originally certified, (Ex. 8, Bunker Decl., at ¶¶ 12–13), thus there is not a compelling need for a buyback program to remedy the CAA violations at issue. In *Volkswagen*, on the other hand, there was no emissions-compliant fix available for the 2.0 Liter and Generation One 3.0 Liter vehicles that the company had to offer to buy back. *See In Re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation,* Case No. 3:15-md-02672 (N.D. Cal. 2015), Motion to Enter Second Partial Consent Decree , ECF No. 3083, at 16–17. Daimler's vehicles are more

analogous to the Volkswagen Generation Two 3.0 Liter vehicles, which could be brought into compliance with the emissions standards to which they were originally certified, and for which a buyback was not available. *See id*. at 17.

There are significant environmental benefits that come from bringing the vehicles into compliance with their certified NO_x emissions standards and avoiding the potential scrapping of tens of thousands of vehicles. As the court noted in *Volkswagen* in the context of approving the VW 2.0 Liter Decree, the buyback and emissions modification framework used to address those vehicles is a "compromise" measure and "not a perfect solution," in that the approach (1) fails to achieve compliance and (2) removes vehicles from the road prior to the end of their full useful life. *Id* at 17–18. In contrast, an emissions compliant recall achieves a better, more "environmentally sound" result that avoids wasting assets and brings the vehicles into compliance with the NO_x standard they were originally intended to meet. *Id.* at 18.

D. Comments Related to Failure of Parts and Parts Warranties

Issue #D.1: Several commenters (Soltys, Delaney, Robison, Hunter, Weiss, Stephens, and Hopkins) raised concerns about Mercedes-Benz vehicle breakdowns and part failures. One commenter (Stephens) provided extensive feedback on problems with, among other things, DEF system failures, oil leaks, and engine sludge. Many commenters expressed frustration over emissions-related repairs their vehicles have already received, and some requested that the settlement address those same issues. Mr. Stephens especially goes into great detail in his comment about part failures and vehicle design flaws.

Response: The proposed Consent Decree resolves alleged violations of the CAA arising from emissions cheating and undisclosed AECDs. It does not address nonrelated repair issues, even if those issues involve emissions-related parts. In particular, the underlying problems Mr.

Stephens discusses in his comment, while perhaps extensive, are not related to implementation of an AEM to bring the affected vehicles into compliance with the CAA. (Ex. 8, Bunker Decl., at ¶ 17). Likewise, comments from Mr. Stephens and others about the Diesel Particulate Filter installed in the affected vehicles go to basic diesel engine design and function and are not specific to Daimler's vehicles. (*Id.*) This settlement does not address general problems with diesel vehicle operations or design flaws. But as discussed below, it does require Daimler to provide an extended warranty on parts expected to be impacted by an AEM.

Issue #D.2: Five commenters raised issues about the extended warranty provisions in the proposed Consent Decree. Three commenters (Weiss, Kalif, and Hopkins) noted that replacement of emission-related components can be costly post-warranty, and one commenter (Lucas) asked that Daimler cover "all emission systems in all states" with an extended warranty. Two commenters asked for an extension of the warranty period, one by a few more years (Soltys), and the other for the life of the vehicle (Hopkins). One commenter (Lucas) asked that age and current mileage not be considered in determining the extended warranty period.

Response: Daimler must provide an extended warranty for any vehicle that receives an AEM. (Ex. 2, CD Appx. A, at ¶ 18). Aspects of the warranty go beyond warranties that manufacturers must provide as part of ordinary vehicle sales transactions, including not only the cost of parts and labor but also a longer warranty duration, with the goal of ensuring consumers are protected from any reasonably foreseeable impacts of an emissions modification. (*Id.*) EPA's technical experts have reviewed the Decree's warranty provisions and believe they are fair, reasonable, and consistent with the goals of the CAA. (Ex. 8, Bunker Decl., at ¶ 14).

Under Section 207(i)(1) of the CAA, all manufacturers of new light-duty trucks and vehicles must provide warranty coverage for parts related to controlling emissions, such as the

emission gas recirculation (EGR) system, for the first two years or 24,000 miles of use, whichever occurs first. 42 U.S.C. § 7541(i)(1). Additionally, under Section 207(i)(2) of the CAA, manufacturers must provide a warranty for specified major emission control components for a period of eight years or 80,000 miles, whichever occurs first. 42 U.S.C. § 7541(i)(2). The specified major emission control components are the catalytic converter, the emissions control unit (or engine control module), and the onboard emissions diagnostic system. 42 U.S.C. § 7541(i)(2).

The extended warranty Daimler must provide under the Decree covers any part reasonably expected to be impacted as part of an emissions modification (including the SCR catalyst, the emissions control unit hardware, where replaced as part of an AEM, and the cost of any scan of the onboard emissions diagnostic system for malfunctions and related troubleshooting for malfunctions attributable to a part that is covered under the extended warranty). (Ex. 2, CD Appx. A, at ¶¶ 18.a, 18.c). Further, although Section 207(i) of the CAA requires only a two year/24,000 mile warranty for most of these parts (with the exception of the eight year/80,000 mile warranty for the specified major emission control components) the extended emissions warranty required under the Decree covers all of the parts listed above for the longer period of the following two alternatives: (1) ten years from date of initial sale or 120,000 miles on the odometer, whichever comes first, or (2) four years or 48,000 miles from the date of installation of the AEM, whichever comes first. (*Id.* at ¶ 18.b). This coverage applies regardless of the current age or mileage of the vehicle, or the state in which it is located. (*Id.*) This means, for example, that Daimler must provide an extended warranty for an additional four year/48,000 mile period from the date of modification, even if the vehicle receives the AEM when it is older than ten years or beyond 120,000 miles. Importantly, the extended emissions warranty is associated with the vehicle and does not supersede or void any outstanding warranty, or modify, limit, or affect any state, local, or

federal rights available to owners. (*Id.* at ¶¶ 18.e–h).

E. Comments Related to the United States' Mitigation Program

Two commenters (Penn. DEP and NTAA) raised issues about the "U.S. Mitigation Program," which requires Daimler to replace 15 old, polluting engines in line-haul locomotives with new, less-polluting engines. (Ex. 1, CD, at ⁋⁋ 35–40). The purpose of the project is to prevent future emissions of NO_x from the train engines so as to fully mitigate the adverse health and environmental impacts of excess (illegal) NO_x emissions from the affected vehicles.[10]

The two commenters do not appear to dispute that re-powering locomotives is a valid *type* of mitigation project, in the abstract. Their comments instead seek more details about the specifics of the U.S. Mitigation Program: (1) how the number of locomotives was determined and (2) specifics related to the implementation of the U.S. Mitigation Program (*e.g.*, where the locomotives will run, and how much the Mitigation Program might cost Daimler). Before responding to these comments, it is important to lay out the legal standard for mitigation.

Settlements. Mitigation is not a required element of a CAA settlement. *See e.g.*, *Harley Davidson,* 2020 WL 5518466, at *9 (approving a CAA consent decree with no mitigation project). While the Act states that a violator "shall be subject to a civil penalty," 42 U.S.C. § 7524(a), it contains no requirement that a violator be subject to a mitigation requirement. The United States has, as a general matter, taken the view that mitigation is a permissible form of equitable relief that can be included as a component of an enforcement remedy under the Act. But mitigation is not mandated by the Act and is not required to be included in any particular settlement agreement.

[10] The United States mitigation program does not relate to California, because there is a separate mitigation program contained in a separate partial consent decree between California and Daimler (Ex. 1, CD, at ⁋ 41).

Further, "a consent decree need not impose all the obligations authorized by law." *Oregon*, 913 F.2d at 581. And of course, the test is not whether a proposed consent decree corresponds to some particular ideal, *United States v. Allegheny-Ludlum Indus., Inc*., 517 F.2d 826, 850–851 (5th Cir. 1975) ("The central issue here is not whether the consent decrees achieve some hypothetical standard constructed by imagining every benefit that might someday be obtained in contested litigation"), but whether the consent decree satisfies the criteria for entry and accounts for the uncertainties of litigation.

Litigation. If this case were to proceed to litigation, the United States would have to decide whether to seek mitigation, and it would have to prove a case for the remedy. For example, in *United States v. Ameren Missouri.*, the court applied the Supreme Court's test in *eBay Inc. v. MercExchange, L.L.C.,* 547 U.S. 388 (2006) to determine whether to award mitigation. 421 F. Supp. 3d 729, 819 (E.D. Mo. 2019). The *eBay* factors include irreparable injury and a balance of hardships between the plaintiff and defendant. 547 U.S. at 391. An injunction must also be tailored to remedy specific harm shown and be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs. *See, e.g., Ameren*, 421 F. Supp. 3d at 806. The government's decision as to whether to seek mitigation in litigation is the subject of enforcement discretion. And any lawsuit seeking mitigation would, of course, be accompanied by litigation risks (on both sides) about whether the court would order any mitigation relief at all and about what particular injunction would be issued.

With this background, we address Penn. DEP's and NTAA's specific comments.

Issue #E.1.a: Both Penn. DEP and NTAA requested details about the calculations underlying the Mitigation Program, particularly details about the United States' determination that replacing engines in 15 old, line-haul locomotives will sufficiently mitigate excess emissions from

the affected vehicles.

Response: Work product protections still apply to any litigation preparation materials here, including work done for the case by engineers and other potentially testifying experts. It is not uncommon for cases in litigation to devolve into a "battle of experts" about excess emissions and how to compensate for them. By way of example, in *Ameren,* the court was called on to weigh competing testimony about the amount of excess emissions (from a power plant that violated the CAA), and whether and how to mitigate those emissions. Were this case to go to trial instead of being resolved by entry of the proposed Decree, the United States would be required to put on its case for mitigation, and Daimler would likely hire experts to dispute these issues.

Moreover, EPA has other enforcement and compliance objectives at issue. Because there may be future cases against other manufacturers related to excess emissions, EPA has a compelling interest in maintaining confidentiality over its internal engineering judgments and enforcement approaches.

For these reasons, the United States guards the work done in assessing the excess emissions and their relationship to the Mitigation Project in the proposed Consent Decree. The law protects the calculations because they are both work product and enforcement sensitive. That said, we can provide qualitative discussion of the issues. In simple terms, developing a mitigation project follows these steps:

- Estimate the total excess emissions (past and future) from the affected vehicles;
- Estimate the future avoided emissions from one locomotive engine;
- Determine the total number of locomotive engines needed to equal the excess.

See, e.g., Ameren, 421 F. Supp. 3d at 789–90. It is clear from the comments that Penn. DEP and NTAA both understand the basic principles of mitigation calculations, as well as the details of the

steps in performing such a calculation. NTAA asked about:

- The relationship between replacing locomotive engines and mitigating excess NO_x emissions from the affected vehicles; and
- The quantity of NO_x that would be reduced by replacing the locomotive engines.

Penn. DEP asked about:

- The total amount of NO_x emissions;
- The quantity of excess NO_x emitted from each class of vehicle;
- The United States' calculations of the total amount of excess NO_x emitted from all the vehicles combined;
- The quantity of NO_x reduction per year expected from replacing each locomotive engine;
- The United States' calculations of the NO_x reduction; and
- The expected useful life of the new and old locomotive engines.

The commenters are correct that these were indeed the type of criteria we analyzed when determining the U.S. Mitigation Project.

As for the specific numbers, the number of locomotive engines is intended to fully mitigate the total lifetime excess NO_x emissions from the affected vehicles in the United States (excluding California). (Ex. 1, CD, at ¶ 35.b). The calculations undergirding this statement necessarily incorporate the professional judgment of engineers and enforcement officials because of the complexities and potential uncertainties appended to estimating excess emissions from the affected vehicles and future tons to be avoided by the Mitigation Program. Were this case to proceed to trial, this Court would take evidence of the specific numbers used and error ranges applied and determine exactly how many locomotives are needed, if any. The United States would face litigation risk. But this is a settlement, where the Court can defer to the expertise of

the staff at EPA and not delve into the inner-workings of the agency's calculus. *See Harley Davidson*, 2020 WL 5518466, at *9.

Issue #E.1.b: Penn. DEP also requested specific emission amounts for other types of pollutants (*e.g.*, emissions of carbon monoxide, carbon dioxide, particulate matter, methane, and non-methane hydrocarbons).

Response: This case is about NO_x. The Complaint makes no allegations that any other pollutants exceeded the emission standards, so there is no requirement that the United States calculate emission rates for these other compounds.

Issue #E.2.a: Penn. DEP requested specific information about how much it costs to repower a locomotive engine.

Response: The cost to Daimler to complete the Mitigation Project is irrelevant because mitigation is not a punitive remedy. The key consideration is whether the Program will achieve sufficient NO_x reductions (see above). As an overview, the Mitigation Program works as follows:

- Within 40 months, Daimler must fund the repowering of 15 engines in old line-haul locomotives. (Ex. 1, CD, at ¶ 35.a).
- Daimler selects the engine manufacturer and the locomotive owner, but must follow certain "selection criteria." (*Id.* at ¶ 35.c).
- Daimler may partner with a state, local, tribal, or non-profit entity to complete the project, as long as Daimler funds the work and remains responsible for completion of the project. (*Id.* at ¶¶ 36–37).
- Daimler may petition to alter the program in certain enumerated circumstances. (*Id.* at ¶ 38).

Thus, the burden of funding the Mitigation Program falls on Daimler, not the taxpayers, and how

much Daimler incurs to fund the program is a problem that falls on the company, not on the government. The United States and the public do not need to know whether Daimler's internal project cost estimates turn out to be accurate. The correct focus here is (1) whether the Project will achieve its desired results and (2) whether the company will actually complete the work. The United States believes the answer to both of these questions is "yes." The efficacy of the project is discussed in detail above, and the proposed Decree includes stiff stipulated penalties if Daimler fails to meet its mitigation obligations. (*Id.* at ¶ 53.f).

Issue #E.2.b: NTAA commented that the United States should perform an analysis to ensure that the U.S. Mitigation Program covers any excess emissions that occurred in Indian country. One commenter (Horton) stated that the Mitigation Program should not be limited to California.

Response: Daimler is required to implement the Mitigation Program. While the United States will not select or direct which engines Daimler will repower, the company will be guided by certain "selection criteria," one of which is to "preferentially repower/rebuild locomotives that are likely to run long distances to geographically diverse locations across the continental United States (*excluding California*)." (Ex. 1, CD, at ⁋ 35.c.i) (emphasis added). The intent of this criterion is to ensure that the future NO_x abatement will not be localized to favor any one particular city, state, or tribal area. Given the number of affected vehicles and their geographic diversity, it would be extremely difficult to create a locomotive-based mitigation program that is guaranteed to cover each and every specific location where the vehicles may have operated (or may do so in the future). The use of selection criteria is therefore a reasonable means to spread the benefits of the project across the largest geographical area. Moreover, the Mitigation Program is not limited to California, as Mr. Horton suggests—rather, it excludes California because Daimler and CARB

have reached a separate agreement for mitigation in that state.

Issue #E.2.c: Penn. DEP commented that 40 months to implement the U.S. Mitigation Program is too long.

Response: Daimler must complete the Program within 40 months (3.3 years), or 45 months (3.75 years) if it uses a bidding process. (Ex. 1, CD, at ⁋ 35.a). Penn DEP comments that the project can and should be completed in two years. The difference between two years and the time period allowed under the Decree is negligible, especially when compared to the years of excess emissions from the affected vehicles (some vehicles have emitted excess NO_x since 2008). Given the number of issues in settling a mitigation claim (*e.g.*, amount of excess emissions, type of mitigation project, procedures for implementation, selection criteria, and duration of compliance), the duration of the program here is a reasonable part of the overall settlement.

F. Comments Regarding Consultation with Tribes, States, and the Public

Issue #F.1: NTAA opposes entry of the proposed Consent Decree, commenting that the United States failed to consult with federally-recognized Native American tribes when negotiating the Decree.

Response: While the United States has an ongoing trust relationship with federally recognized tribes, these duties are imposed by statute and regulation rather than the common law, *see United States v. Jicarilla Apache Nation*, 564 U.S. 162, 173–74 (2011) (citing *United States v. Navajo Nation*, 537 U.S. 488, 506 (2003)), and we are aware of no statute or regulation requiring tribal participation in settlement negotiations for CAA violations at non-tribal sources of air emissions not located in Indian country. Some of the approximately 250,000 diesel vehicles affected by the proposed Consent Decree may be used in Indian country, but this case does not involve a stationary facility located on those lands, and the United States does not have any

evidence that air quality in Indian country is disproportionately impacted by the vehicles. Further, NTAA does not allege that the United States is in breach of a statute or regulation establishing a trust obligation, nor does NTAA allege in its comments that Daimler violated a tribal law, tribal regulation, or any delegation of authority from EPA to a tribe dealing with the CAA mobile source provisions.[11]

EPA and DOJ have policies about consulting with tribes and restrictions on communications with outside parties, and the agencies adhered to those policies here. EPA's procedure in this case was consistent with its Policy on Tribal Coordination and Consultation with Indian Tribes (May 2011) ("EPA Consultation Policy").[12] That policy provides the overall framework for consultation on EPA's actions that "may affect tribal interests" and directs the agency to engage in a process of meaningful communication and coordination between the EPA and tribal officials prior to EPA actions or decisions.[13] The EPA Consultation Policy lists civil enforcement and compliance monitoring as an agency activity normally considered appropriate for consultation.[14] Specifically, the Consultation Policy and related documents, when read together, provide that if a tribal government is not a party to an enforcement action (as was the case here throughout settlement negotiations), then EPA may discuss with the tribe (as with all outside parties) public information, like official court filings or administrative notices of violation issued by EPA, but must avoid disclosing privileged or otherwise sensitive enforcement information that

[11] While federally-recognized tribes are eligible to seek and receive a delegation from EPA to implement their own tribal air programs under the CAA dealing with mobile sources, none have done so. (Ex. 8, Bunker Decl., at ¶ 19).
[12] EPA Policy on Consultation and Coordination with Indian Tribes, (May 4, 2011), https://www.epa.gov/tribal/epa-policy-consultation-and-coordination-indian-tribes.
[13] *Id.*
[14] *Id.* at Article V.B. l.

could inappropriately jeopardize settlement negotiations and enforcement options.[15] Because here EPA issued no notice of violation to Daimler, and the first court filing was the concurrent filing of the Complaint and the lodging of the proposed Consent Decree, there were no filings or administrative notices on which EPA could have consulted with tribes.

Additionally, once an enforcement matter is referred to DOJ for potential litigation, DOJ's consultation policy governs tribal consultation and coordination related to civil judicial actions. The DOJ Policy on Tribal Consultation states that DOJ will consult "with federally recognized Tribes before adopting policies that have tribal implications." But the policy expressly states that the term "policies" does not include matters that (like this one) are the subject of investigation, anticipated or active litigation, or settlement negotiations.[16]

Issue #F.2: Penn. DEP commented that the United States should have included it and all other states that have adopted CARB's emission standards in the settlement negotiations culminating in the proposed Consent Decree.

Response: The environmentally beneficial outcome of the proposed Consent Decree is not geographically limited—emission reductions from the affected vehicles that receive an AEM will

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[15] EPA Policy on Consultation and Coordination with Indian Tribes, (May 4, 2011), https://www.epa.gov/tribal/epa-policy-consultation-and-coordination-indian-tribes; Guidance on the Enforcement Principles Outlined in the 1984 Indian Policy, (January 17, 2001), https://www.epa.gov/enforcement/transmittal-final-guidance-enforcement-principles-outlined-1984-indian-policy-january-17; Questions and Answers on the Tribal Enforcement Process (April 17, 2007), https://www.epa.gov/sites/production/files/documents/qa-tribalenfprocess-041707.pdf. Restrictions on Communicating with Outside Parties Regarding Enforcement Actions, (March 6, 2006), https://www.epa.gov/enforcement/restrictions-communicating-outside-parties-regarding-enforcement-actions.

[16] Department of Justice Policy on Tribal Consultation, DOJ Policy Statement 0300.01 at 4 (Aug. 29, 2013); www.justice.gov/sites/default/files/otj/docs/doj-memorandum-tribal-consultation.pdf. On its terms, this policy does not create any right, benefit, or trust responsibility by a party against DOJ. *Id.* at 7.

take place anywhere those vehicles are driven. While the bulk of the penalty is paid to the United States, it is paid to the Treasury for the benefit of every person in the Nation. The penalty does not have a geographic component. In addition, Penn. DEP's comment that the United States' penalty should instead be shared among states that have adopted CARB's emissions standards is unworkable, as this would unfairly send benefits to only a small portion of the states harmed by Daimler's violations. The CAA contains no provision requiring penalties to be geographically apportioned, and such a requirement cannot be read into the Act.

Issue #F.3: One commenter (Robison) questioned why he was not asked to provide input during settlement negotiations.

Response: The CAA does not require the United States to coordinate with individuals before settling its claims. The United States must publish notice of settlement in the Federal Register and allow the public an opportunity to comment, 28 C.F.R. § 50.7, and it complied with this requirement. 85 Fed. Reg. 59551.

VI. SCRIVNER'S ERRORS IN LODGED CONSENT DECREE

During the 30-day public comment period, the parties identified several scrivener's errors in paragraph cross-references in the Consent Decree lodged on September 14, 2020 (ECF No. 2-1). The first error appears in the sub-header for Paragraph 53.c, which reads, "Injunctive Relief Requirements: Section VI, Paragraphs 18 and 18.a (OBD Requirements)" in the lodged Decree, but should read, "Injunctive Relief Requirements: Section VI, Paragraphs 18 and ***19*** (OBD Requirements)." Next, in Paragraphs 53.c.ii through 53.c.v of the lodged Consent Decree, there are several cross-references to "Paragraph 12 or 13 of the California Partial Consent Decree," which should be to "Paragraph ***16*** or ***17*** of the California Partial Consent Decree." Finally, page

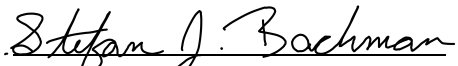
130 of the lodged Decree includes an erroneous cross-reference to Paragraph 18.a under the "As to EPA by mail" section.

The parties have corrected these errors in the version of the Decree attached as Exhibit 1 and ask the Court to sign this version instead of the version lodged on September 14, 2020 (ECF No. 2-1). None of the public comments implicate these errors to cross-references. No other changes were made to the Decree, nor were any changes made to its appendices, which are also attached here again for convenience as Exhibits 2 through 6. Exhibit 7 shows in redline the corrections made to the lodged Consent Decree (ECF No. 2-1). These corrections constitute non-material modifications under the Decree's terms. (Ex. 1, CD, at ¶ 103).

VII. CONCLUSION

The proposed Consent Decree is fair, reasonable, and consistent with the public interest. For all the reasons discussed above, the Court should grant the United States' Motion to Enter the Consent Decree and sign the Decree attached as Exhibit 1 on page 139.

Respectfully submitted,



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