IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
HARLEY-DAVIDSON, INC.,	)	
HARLEY-DAVIDSON MOTOR COMPANY GROUP, LLC,	)	**Case No. 1:16-cv-01687 (EGS)**
HARLEY-DAVIDSON MOTOR COMPANY,	)	
HARLEY-DAVIDSON MOTOR COMPANY OPERATIONS, INC.,	)	
	)	
Defendants.	)	
	)	

UNITED STATES' MOTION TO ENTER CONSENT DECREE

On July 20, 2017, the United States lodged with the Court a proposed consent decree resolving the claims against the Defendants (collectively, "Harley-Davidson"), and solicited public comments on the decree. The United States has reviewed the comments. None of the comments received warrants withdrawal of the United States' support for the decree. The decree that is before the Court is fair, reasonable, and in the public interest, and accordingly should be approved.

I. BACKGROUND

A. The Consent Decree And Public Comment

On July 20, 2017, the United States lodged a consent decree with this Court that requires Harley-Davidson to: (1) come into compliance with the Act by undertaking a comprehensive, multi-step nationwide program that includes, among other things, ceasing sale of the illegal

motorcycle "tuners"[1] that are at the heart of this case, buying back any illegal tuners that remain in Harley-Davidson dealers' inventory, and ensuring that any tuners Harley-Davidson sells in the future undergo emissions testing and are approved by the California Air Resources Board, or otherwise by the United States Environmental Protection Agency ("EPA"); and (2) pay a civil penalty of $12 million. *See* Notice of Lodging of Consent Decree, and attached proposed Consent Decree, Dkts. 6, 6-1. As discussed further below, the decree no longer contains a provision found in an earlier August 2016 proposed decree lodged with this Court that would have required Harley-Davidson to pay a third-party organization, located in the Northeast United States, with no other involvement in this case or litigation, to mitigate emissions of hydrocarbons and oxides of nitrogen by replacing old, higher polluting woodstoves with emissions-certified woodstoves ("woodstove project"). We refer to the August 28, 2016 decree as the "superseded consent decree" and the substitute July 20, 2017 decree as the "consent decree" or "decree."

The United States held a 30-day public comment period on the superseded consent decree, *see* 81 Fed. Reg. 57936, 57936-37 (Aug. 24, 2016), and received five comments. Those comments are attached at Exhibit 1 (Exhibit 1-A). The United States also held a 30-day public comment period on the consent decree, *see* 82 Fed. Reg. 34,977-78 (July 27, 2017), and received four comments. Those comments are attached at Exhibit 1-B.[2]

[1] In brief, the illegal tuning products manufactured and sold by Harley-Davidson allow Harley-Davidson dealers, owners and others to change engine functions, among other things, to render inoperative the emission controls on the motorcycles that ensure that the motorcycles meet Clean Air Act emissions standards.

[2] The comments received include: a letter from Natural Resources Defense Council ("NRDC") and Conservation Law Foundation, Aug. 28, 2017 ("NRDC Letter"); a letter from the Attorneys General of Twelve States and the District of Columbia, and the Puget Sound Clean Air Agency ("States"), August 25, 2017 ("States Letter"); a letter from the Sierra Club, received on August 28, 2017 ("SC Letter"); and a letter from the Hearth, Patio & Barbecue Association, August 28, 2017 ("HPBA Letter").

The United States has carefully considered the comments received on the consent decree, as well as on the superseded consent decree. This Motion and the Additional Response to Comments (Exhibit 2) address public comments received on the consent decree and on the superseded consent decree that remain relevant to the consent decree. Following a careful examination of the issues, and as discussed below and in the Additional Response to Comments, the United States has concluded that none of the comments provides a basis for withholding its consent to entry of the decree. As explained below, the proposed decree is fair, reasonable, and in the public interest. Harley-Davidson has agreed to the entry of this consent decree. *See* Consent Decree ¶ 74, Dkt. 6-1.

Accordingly, the United States respectfully requests the Court to approve, execute, and enter the lodged consent decree, Dkt. 6-1. A proposed order is attached, with a copy of the consent decree attached to the order for the convenience of the Court. (Page 28 includes a signature line for the Court.)

B. Statutory Background, the Problem of Aftermarket Defeat Devices and Tampering, and the Complaint

The complaint, Dkts. 1, 4, alleges three types of Clean Air Act ("CAA" or "the Act") violations by Defendants: that Harley-Davidson manufactured and sold 12,682 motorcycles that were not certified by EPA as required by the Act; that Harley-Davidson manufactured and sold over 339,392 "Super Tuners" in violation of the Act's "defeat device" prohibition; and relatedly, that Harley-Davidson's sale of the Super Tuners caused 339,392 violations of the Act's "tampering" prohibition.

Title II of the Clean Air Act, 42 U.S.C. § 7521 *et seq.*, entitled "Emissions Standards for Moving Sources," and its implementing regulations, 40 C.F.R. Parts 85 and 86, establish emissions standards for various classes of motor vehicles and motor vehicle engines. Section

203(a)(1) of the CAA prohibits manufacturers of new motor vehicles from selling, offering for sale, and introducing or delivering for introduction into commerce such vehicles unless they are covered by a Certificate of Conformity ("COC") issued by EPA pursuant to regulations prescribed by the CAA. 42 U.S.C. § 7522(a)(1).[3]

To obtain a COC, a manufacturer must submit an application to EPA for each model year and for each engine family that it intends to sell in the United States. This application must include testing and other information on a representative vehicle sufficient to show, among other things, that the representative vehicle meets the applicable emissions standards. *See* 42 U.S.C. § 7525(a)(1); 40 C.F.R. §§ 86.406-78(c)(1), 86.437-78(a)(1) and (2)(ii-iii); Complaint ¶ 11. A COC issued by EPA lists covered models on its face and expressly states that it covers only those vehicles that conform, in all material respects, to the design specifications described in the manufacture's application to EPA. *See* Complaint ¶ 12. Thus, if a motorcycle does not conform in all material respects to the specifications set forth in the manufacturer's application for the COC, it lacks a valid COC (i.e., is uncertified), and its sale, offer for sale, introduction into commerce, or delivery for introduction into commerce is unlawful. 42 U.S.C. § 7522(a)(1). The point of EPA's certification program is to ensure that vehicles meet emission standards throughout their useful life.

As alleged in the complaint, Harley-Davidson sold 12,682 new motorcycles that were not covered by a COC in violation CAA § 203(a)(1). Complaint ¶¶ 16-17, 21-22. From 2006 to

[3] Section 206 of the CAA establishes a motor vehicle compliance and testing regime and gives EPA authority to issue COCs for motor vehicles that meet regulatory standards. 42 U.S.C. § 7525. Emissions regulations for on-highway motorcycles, certification procedures, and various other on-highway motorcycle requirements are set forth in 40 C.F.R. §§ 86.401-86.449. *See, e.g.*, § 86.407-78 (requiring a COC for all new motorcycles manufactured, sold, imported, etc., in/into the United States).

September 2009, Harley-Davidson sold several motorcycle models that were neither listed in an application for certification to EPA nor listed on the face of an issued COC. Complaint ¶ 17. Harley-Davidson affixed an EPA label identifying motorcycles as covered by a COC, but in fact, they were not. *Id*.

Section 203(a)(3)(B) of the CAA, the "defeat device prohibition,"[4] prohibits any person from manufacturing, selling, offering for sale, or installing, any part or component (referred to herein generally as a "defeat device") intended for use with, or as part of, any 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 vehicle/engine in compliance with regulations under Title II of the CAA, where the person knows or should know that such part or component is being offered for sale or installed for such use or put to such use. 42 U.S.C. § 7522(a)(3)(B). Bypassing, defeating, or rendering inoperative any aspect of the certified emission control system undermines the whole certification program, because the vehicle is no longer in a configuration that has been demonstrated to meet emission standards.

To obtain a COC, motorcycle manufacturers must develop computer controlled "maps" for the air-fuel combustion ratio and spark ignition timing that balance engine performance against the creation of emissions, and that are calibrated so that motorcycles comply with the applicable emissions standards. Complaint ¶¶ 22-23. As incorporated into Harley-Davidson's certified on-highway motorcycles, these maps function as elements of design installed on a motor vehicle in compliance with regulations under Title II of the CAA. Thus, Harley-

[4] *See* S. Rep. No. 101-228, at 124 (1989), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3509 ("The bill also makes illegal the manufacture, sale, or offering for sale of so-called 'defeat devices' that render inoperative elements of a vehicle emission control system. Such devices include . . . aftermarket computer programmable read-only memory chips that enrich the air/fuel mixture, increasing emissions, or bypass emission control devices.").

Davidson's on-highway motorcycles receive COCs and, in their certified configuration, they comply with the Act's emissions standards.

As alleged in the complaint, however, Harley-Davidson manufactured and/or sold over 339,392 Screamin' Eagle Pro Super Tuners and Screamin' Eagle Race Tuners (hereafter, "Super Tuners" or "illegal Tuners") for use on its certified on-highway motorcycles. Complaint ¶ 19. A principal effect of the Super Tuners is to bypass, defeat, or render inoperative devices or elements of design, such as the certified fuel map(s) and spark timing map(s), that were installed on or in the motorcycles in compliance with applicable regulations, thus taking the motorcycles out of their certified configuration. *Id.* ¶ 24. Installation of the Super Tuners increases the power and performance of the motorcycles, and it also allows dealers or motorcycle owners to further increase motorcycle power by removing certified parts, such as catalytic converters, or by adding other aftermarket parts, such as different mufflers or exhaust pipes. *Id.* ¶ 25. Installation of the illegal Tuners is believed to have caused additional emissions of nitrogen oxides and hydrocarbons wherever the motorcycles were driven. *Id.* ¶ 28. In short, the complaint alleges that Harley-Davidson's manufacture and/or sale of the illegal Tuners resulted in at least 339,392 violations of the CAA's defeat device prohibition, Section 203(a)(3)(B), 42 U.S.C. § 7522(a)(3)(B). *See also* Complaint ¶¶ 34-36.

Similar to the defeat device prohibition, Section 203(a)(3)(A) of the CAA, 42 U.S.C. § 7522(a)(3)(A), the "tampering prohibition," prohibits any person from removing or rendering inoperative any device or element of design installed on a motor vehicle in compliance with the regulations promulgated under Title II of the Act 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. (It is also a violation to

cause any of the acts set forth in Section 203(a). 42 U.S.C. § 7522(a)). Such actions likewise undermine the certification process, because the vehicle is no longer in the certified configuration demonstrated to meet emission standards.

The complaint alleges that Harley-Davidson's sale of the illegal Tuners caused violations of the Act's "tampering" prohibition. The complaint alleges that Harley-Davidson sold and shipped the Super Tuners to Harley-Davidson dealers for resale and/or installation. Harley-Davidson dealers installed the Super Tuners on motorcycles before and/or after the motorcycles had been sold and delivered to the ultimate purchaser. The dealers also sold the Super Tuners to motorcycle owners for installation on their motorcycles. The complaint alleges that Harley-Davidson caused persons to install the Super Tuners on motorcycles, and thus to remove or render inoperative certain certified fuel maps and spark timing maps that were installed on or in the motorcycles in compliance with applicable regulations. The complaint alleges that Defendants knew that the installation of the Super Tuners removed or rendered inoperative devices or elements of design that were installed on or in the motorcycles in compliance with regulations under Title II of the CAA. *See* Complaint ¶¶ 22-24, 26-27, 39-44. As alleged, Harley-Davidson's actions caused the installation of at least 339,392 illegal Tuners in violation of the CAA's tampering prohibition, Section 203(a)(3)(A), 42 U.S.C. § 7522(a)(3)(A). *See also* Complaint ¶¶ 39-44.

EPA is very concerned about the prevalence of aftermarket devices that defeat emissions controls on motor vehicles driven on our public roads and highways, as is the case with Harley-Davidson's motorcycles. Vehicle manufacturers rely on engine calibrations as well as filters, catalysts, and other hardware in their exhaust systems to meet air pollution standards; and vehicle owners, dealers, and other people illegally seeking to remove or otherwise render

inoperative these treatment systems (often in an effort to increase power or fuel economy) increasingly do so using off-the-shelf, aftermarket software products (i.e., "tuners") that reprogram the vehicle's electronic control module so the vehicle can run without these emissions controls. This "tampering" with the emission control system can be done with little or no technical expertise. The illegal Tuners sold by Harley-Davidson also allow persons to further increase power and performance by removing certain other certified parts or by adding other aftermarket parts. Complaint ¶ 25. This can increase emissions even more.

While many businesses sell aftermarket parts legally, others do not. Compliant businesses, which take measures to ensure their products do not defeat emission controls and adversely affect emissions, are at a disadvantage when they compete with companies that violate the Act's prohibitions and sell parts for use on motor vehicles that bypass, defeat, or render inoperative pollution control systems, thereby undermining the Clean Air Act's certification process and emissions standards.

For these reasons, EPA considers the injunctive relief that Harley-Davidson has agreed to perform pursuant to the consent decree extremely valuable to protecting public health. It will not only ensure that Harley-Davidson will cease sale of its illegal Tuners, but given that Harley-Davidson is an industry leader, it will also demonstrate to the aftermarket parts industry at large that the Clean Air Act strictly prohibits defeat devices and that EPA is committed to preventing their use on our public roads and in our communities.

II. THE CONSENT DECREE

The proposed consent decree, Dkt. 6-1, requires Defendants to pay a civil penalty, to stop selling the illegal Tuners, and to perform other actions to ensure compliance with the CAA.

A. CIVIL PENALTY

Harley-Davidson will pay a $12,000,000 civil penalty along with any interest that accrues from the date that the consent decree was lodged. Consent Decree ¶ 8.

B. ENJOINING SALE OF DEFEAT DEVICES AND ENSURING FUTURE COMPLIANCE WITH THE CLEAN AIR ACT

The consent decree includes a comprehensive, multi-step nationwide program of injunctive measures intended to secure and maintain Harley-Davidson's compliance with the Clean Air Act. The injunctive requirements of the consent decree apply to a broad category of aftermarket tuning parts, called "Tuning Products." The term "Tuning Products" includes not only the illegal Tuners specified in the complaint but also any other "similar aftermarket devices, including modules and chips."[5] Consent Decree ¶ 7.m.

First, by August 23, 2016, Harley-Davidson was required to cease the manufacture, sale, offer for sale, and/or distribution for use in the United States of any Tuning Product, unless the Tuning Product is authorized by an Executive Order issued by the California Air Resources Board ("CARB") (hereafter, "Executive Order")[6] or is otherwise approved by EPA. Consent Decree ¶ 12. Harley-Davidson reported that it has met this requirement.

Second, Harley-Davidson must offer to buy back Super Tuners that have been supplied to Harley-Davidson dealers but have not yet been sold to an ultimate purchaser. Consent Decree ¶ 13. Harley-Davidson must offer the buy back at no cost to the dealers, and the buyback offer must include, at a minimum, Harley-Davidson's full sales price to the dealer, and all shipping

[5] The Super Tuners named in the complaint are Screamin' Eagle electronic fuel injection Race Tuners (Part No. 32107-01L) and Screamin' Eagle Pro Super Tuners (Part Nos. 32109-08, 08A, 08B, and 08C).

[6] CARB has an active aftermarket parts certification program (calling its equivalent of a COC an "Executive Order"), and California's motorcycle emissions standards are at least as stringent as EPA's. The CARB certification process is designed to ensure that any tuning products that receive an EO comply with these emissions standards.

and handling costs. The illegal Tuners obtained through the buyback shall be destroyed. *Id*. The buyback offers were to occur by September 1, 2016 and November 1, 2016, and Harley-Davidson reported that it has complied with these requirements.

Third, Harley-Davidson is required to deny, and instruct its dealers to deny, all warranty claims for functional defects of powertrain components for motorcycles (Model Year 2017 and newer) if it has any information to show motorcycles were tuned by a Tuning Product that was not covered by an Executive Order or otherwise approved by EPA. *Id.* ¶ 14. Harley-Davidson is also required to instruct its dealers to deny such warranty claims where Harley-Davidson or any of its dealers has any such information. Defendants must also update their warranty policies and product literature to make this known to Harley-Davidson customers.

Fourth, concerning sales abroad, Harley-Davidson must mark all uncertified Tuning Products as: "Not Authorized For Use In, Or Export To, The United States or its Territories." *Id.* ¶¶ 15, 17.c. Harley-Davidson must also note this on product literature or any catalog advertising such Tuning Product. Harley-Davidson is required to notify the United States at least seven days before any sales to Mexico or Canada and must subsequently report to EPA any such sales, including the quantity and the name of the recipient. *Id*. ¶ 15. EPA was concerned that Harley-Davidson might sell its products in large numbers to Canada and Mexico, thus allowing U.S. citizens to buy them there in person or by mail and bring them back into the United States. This reporting and tracking system allows EPA to monitor these sales.

Fifth, to confirm that its tuning products meet emissions requirements, Harley-Davidson must conduct annual tailpipe emissions tests on a motorcycle that has been modified with Harley-Davidson's most popular certified "kit" (that is, a tuning product combined with one or more additional aftermarket parts, with the kit chosen based on sales numbers for the prior year)

and tuned to reflect the worst case tailpipe emissions scenario for that kit. *Id.* ¶ 16. These test results must be reported to EPA and are in addition to testing that CARB requires for its Executive Order certification.

Sixth, in terms of the certification violations, the decree contains a requirement that Harley-Davidson comply with CAA Section 203(a)(1) by obtaining an EPA-issued COC before selling, offering for sale, importing, or introducing, or delivering for introduction into commerce a new motorcycle. *Id.* ¶ 11.

Seventh, the consent decree requires significant certified semi-annual reporting (by July 31st and January 31st of each year, beginning after lodging) to assist EPA in monitoring compliance. *Id.* ¶ 17. The report must include:

- a certification that, for the preceding reporting period, it sold in the United States only Tuning Products that were covered by an Executive Order or were otherwise approved by EPA, as required by Paragraph 12 (Cease Sale of Uncertified Tuning Products);

- a copy of each Executive Order application for a Tuning Product made during the reporting period (including all supporting documentation and test data), and identification of any Executive Orders issued for a Tuning Product during the reporting period;

- a statement of the number of Tuning Products, if any, that were not covered by an Executive Order that, during the preceding reporting period, Defendant exported to, sold in, or distributed for use in Canada and/or Mexico and the recipient(s) of the Tuning Products;

- the status of the compliance requirements set forth in Paragraph 13 (Buyback and Destruction of Subject Tuners) and Paragraph 14 (Denial of Warranty), *e.g.*, the number of warranties that Harley-Davidson has denied, or that Harley-Davidson is aware that Harley-Davidson dealers have denied;

- a description and the results of the annual emissions tests required by Paragraph 16 ("Annual Emissions Testing");

- any problems encountered or anticipated in implementing the Consent Decree, together with implemented or proposed solutions; and

- a description of any non-compliance with the requirements of the Consent Decree

> and an explanation of the violation's likely cause and of the remedial steps taken, or to be taken, to prevent or minimize such violation.

Finally, the consent decree imposes on Harley-Davidson significant stipulated penalties for decree violations, including $3,000/day for late payment of the penalty; $5,000 for each Tuning Product they manufacture, sell, offer to sell, distribute, or import in violation of the decree; escalating penalties ($1,500 to $3,000) for failure to comply with requirements for the buyback, foreign sales, and emissions testing; $2,000 for warranty violations; and escalating penalties ($1,000 to $2,000 per day) for reporting violations.

EPA considers this comprehensive package of nationwide (and beyond) injunctive relief extremely important. Harley-Davidson is an industry leader with an iconic product base and a national following. The fact that Harley-Davidson has signed on to a consent decree that requires it to undertake steps, not only to cease selling aftermarket products that contain defeat devices, but to create incentives against their continued use, undertake confirmatory testing, and ensure products sold abroad have appropriate labeling, will provide a template for industry to follow. Given the significant problem of widely-sold illegal aftermarket parts, this settlement sends a strong message to the industry as a whole and sets a strong foundation for EPA's future enforcement efforts in this arena.

III. STANDARD FOR ENTRY OF CONSENT DECREE

Entry of a consent decree is a judicial act and, as such, requires approval of the court. *United States v. Wells Fargo*, 891 F. Supp. 2d 143, 145 (D.D.C. 2012) (citing *United States v. Microsoft Corp.*, 56 F.3d 1448, 1462 (D.C. Cir. 1995)). The "generally applicable" standard for judicial review applied to a proposed consent decree in the District of Columbia Circuit is whether the settlement "fairly and reasonably resolve[s] the controversy in a manner consistent with the public interest." *Massachusetts v. Microsoft*, 373 F.3d 1199, 1206 n. 1 (D.C. Cir. 2004)

(citations omitted); *see also New York v. Microsoft Corp.*, 231 F. Supp. 2d 203, 205 (D.D.C. 2002) (same); *United States v. District of Columbia*, 933 F. Supp. 42, 46 (D.D.C. 1996) (same).

"Approval of a settlement is a judicial act that is committed to the informed discretion of the trial court." *United States v. Hyundai Motor Co.*, 77 F. Supp. 3d 197, 199 (D.D.C. 2015) (quoting *District of Columbia*, 993 F. Supp. at 47). The Court, however, does not have the power to modify a settlement; it may only accept or reject the terms to which the parties have agreed. *United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1435 (6th Cir. 1991); *Officers for Justice v. Civil Service Comm'n of City and County of San Francisco*, 688 F.2d 615, 630 (9th Cir. 1982).

In general, the "[v]oluntary settlement of civil controversies is in high judicial favor." *Citizens for a Better Env't v. Gorsuch*, 718 F.2d 1117, 1126 (D.C. Cir. 1983) (citation omitted). The parties and the public "benefit from the saving of time and money that results from the voluntary settlement of litigation." *Id.*; *see also, e.g., Aro Corp. v. Allied Witan Co.*, 531 F.2d 1368, 1372 (6th Cir. 1976) (Settlements conserve the resources of the courts, the litigants, and the taxpayers, and "should . . . be upheld whenever equitable and policy considerations so permit."). The presumption in favor of voluntary settlements is "particularly strong where a consent decree has been negotiated by the Department of Justice on behalf of a federal administrative agency like EPA which enjoys substantial expertise in the environmental field." *Akzo Coatings*, 949 F.2d at 1436; *see also Envtl. Defense v. Leavitt*, 329 F. Supp. 2d 55, 70 (D.D.C. 2004) (in reviewing and approving a CAA settlement, policy in favor of settlement "has particular force where . . . a government actor committed to the protection of the public interest has pulled the laboring oar in constructing the proposed settlement.") (quoting *United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 84 (1st Cir. 1990)). Accordingly, the Court should "accord

broad deference . . . to EPA's expertise in determining an appropriate settlement and to the voluntary agreement of the parties in proposing the settlement." *Hyundai*, 77 F. Supp. 3d at 199 (quoting *District of Columbia*, 933 F. Supp. at 47) (internal quotation marks omitted).[7]

Finally, in reviewing a consent decree, the role of this Court is "not to impose its own judgments as to how it would prosecute and resolve a particular case." *District of Columbia*, 933 F. Supp. at 51. "[T]he controlling criteria is not what might have been agreed upon . . . , nor what the district court believes might have been the optimal settlement." *United States v. Cannons Eng'g Corp.*, 720 F. Supp. 1027, 1036 (D. Mass. 1989) (citations omitted), *aff'd*, 899 F.2d 79, 84 (1st Cir. 1990) (court determines "not whether the settlement is one which the Court itself might have fashioned, or considers ideal," but whether the proposed decree meets the standard for entry.); *see also Officers for Justice*, 688 F.2d at 625, 630.

IV. ARGUMENT

The inquiry for this Court is whether the consent decree that is currently before it is fair, reasonable and in the public interest. The United States initially lodged a consent decree that, in addition to the injunctive relief and civil penalty in the current consent decree, also included a woodstove project. Due to a new policy issued by the Attorney General while the consent decree

[7] Sierra Club claimed, citing *United States v. Telluride Co.*, 849 F. Supp. 1400 (D. Colo. 1994), that because this case was settled without active litigation it does not deserve judicial deference, but, rather, requires a "searching review." Ex. 1-B, SC Letter at 4; *see also* Ex. 1-B, NRDC Letter at 3. However, by far the majority of cases brought by the Department of Justice on behalf of EPA are settled without active litigation, and therefore no adverse inferences should be drawn from that fact here. The parties' negotiations in this case were long, hard-fought and complex, with all parties represented by competent counsel and advised by expert consultants and experienced technical employees. The robust negotiations and adversarial nature of the parties' relationship significantly distinguishes this case from the *Telluride* matter, where, according to the district court, the United States had no technical assistance of its own and instead relied "heavily, if not exclusively" on defendant's expert. *Id.* at 1403-04.

was pending, the United States became concerned about the woodstove project, sought to renegotiate those provisions of the decree, was unable to negotiate an acceptable revised or alternative project with Harley-Davidson, and ultimately lodged the instant decree. The question before the Court is whether the current consent decree is fair, reasonable, and in the public interest, not whether the superseded decree is better or worse. As we explain below and in the Additional Response to Comments, Ex. 2, the proposed consent decree before the Court meets this standard, and the comments received do not demonstrate otherwise.

A. THE CONSENT DECREE IS FAIR.

This Court's review of the fairness of the consent decree incorporates analysis of both procedural and substantive fairness. *District of Columbia*, 933 F. Supp. at 48.

1. The Consent Decree is Procedurally Fair.

"An assessment of procedural fairness involves looking to the negotiating process and attempting to gauge its candor, openness, and bargaining balance." *Id*. (quotation and citations omitted). In general, courts find consent decrees procedurally fair when they result from good faith, arms-length negotiations in which parties were represented by competent legal counsel.[8]

This settlement meets these criteria. First, the negotiation process was adversarial. The parties are the United States, as the enforcer of the CAA, and Harley-Davidson, which vigorously defended itself throughout the negotiations. The parties negotiated for over a year. Second, the United States was represented by legal and technical staff with substantial

[8] *See, e.g., United States v. Montrose Chem. Corp.*, 50 F.3d 741, 746 (9th Cir. 1994) (deference given to "affected parties . . . represented by experienced lawyers [who] have hammered out an agreement at arm's length and advocate its embodiment in a judicial decree"); *Cannons*, 899 F.2d at 87 (fact that decree was negotiated at arm's length among experienced counsel, and that the agency operated in good faith supports finding of procedural fairness); *Akzo*, 949 F.2d at 1435 (good faith efforts of the parties indicated by arms-length negotiation process).

experience in enforcing the mobile source requirements of the CAA. Likewise, Harley-Davidson was represented by experienced counsel and technical personnel. Each side was fully equipped to determine the strengths and litigation risks of their respective positions. Finally, it was the United States that approached Defendants to try to revise the consent decree, and there is no merit to commenters' suggestion that there was anything collusive about the negotiation process that ensued or the ultimate results here. *See* page 31 below.

2. The Consent Decree Is Substantively Fair.

"A consent decree that is substantively fair incorporates concepts of corrective justice and accountability: a party should bear the cost of harm for which it is legally responsible." *District of Columbia*, 933 F. Supp. at 48 (quotation and citations omitted). In reviewing substantive fairness, factors considered by courts include the strength of the plaintiff's case, the good faith efforts of the negotiators, the opinions of counsel, and the possible risks of litigation if the settlement is not approved. *See id.*; *see also, e.g., United States v. Hooker Chem. & Plastics Corp.*, 607 F. Supp. 1052, 1057 (W.D.N.Y. 1985), *aff'd*, 776 F.2d 410 (2d Cir. 1985); *Stewart v. Rubin*, 948 F. Supp. 1077, 1087 (D.D.C. 1996) ("A settlement is a compromise which has been reached after the risks, expense, and delay of further litigation have been assessed."); *New York v. Microsoft*, 231 F. Supp. 2d at 205. Importantly, this assessment does not require the Court to make a determination of liability, assess "the legal rights of the parties," or "resolve the merits of the claims or controversy." *Citizens for a Better Env't*, 718 F.2d at 1125-26 (quoting *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 616 F.2d 1006, 1014 (7th Cir.1980)). Ultimately, the value of resolving a controversy through consent is derived precisely from avoiding "a protracted examination of the parties' legal rights." *Id*. at 1126.

This settlement is substantively fair because it imposes an appropriate civil penalty and requires Harley-Davidson, an industry leader, to stop selling the illegal Tuners and to implement the other elements of a comprehensive, nationwide program of compliance measures. As such, it holds Defendants appropriately accountable for their violations.

After the parties were unable to reach agreement on an alternative to the woodstove project, the United States considered whether it was better to proceed with the consent decree without the woodstove project or to forego settling the case and, instead, proceed to litigate its claims against Harley-Davidson. The United States considered the litigation risks and delays associated with litigating this case, compared with the very favorable injunctive relief and the $12 million civil penalty included in the settlement, all of which could be obtained immediately, and ultimately determined to move forward with the settlement as it now stands. *See, e.g.*, *Akzo Coatings*, 949 F.2d at 1436, n.25 ("Weighing strongly in favor of approval is the fact that the plan can be implemented immediately. Rejection of the plan would result in the expenditure of considerable time, money, and effort in litigation.") (citation and quotation marks omitted).

B. THE CONSENT DECREE IS REASONABLE.

In the context of an environmental regulatory statute, the standard for determining whether a consent decree is reasonable is: (1) whether it is technically adequate to accomplish the goal of protecting the environment; (2) whether it will sufficiently "compensate the public;" and (3) whether it reflects the relative strength or weakness of the government's case against the environmental offender. *District of Columbia*, 933 F. Supp. at 50; *Cannons Eng'g*, 899 F.2d at 89-90; *see also United States v. Georgia-Pacific Corp.*, 960 F. Supp. 298, 299 (N.D. Ga. 1996) ("The Decree is reasonable in that it is technically adequate and adequately compensates the public for the alleged violations."). This consent decree is reasonable because it holds Harley-

Davidson accountable for its violations of the CAA and satisfies the three reasonableness requirements.

1. The Consent Decree Adequately Protects the Environment.

First, the consent decree is technically adequate to protect the environment because, as to the alleged violations, it brings Defendants into compliance with the CAA. Most importantly, the decree precludes Harley-Davidson from selling any Tuning Products in the United States unless they are covered by an Executive Order from CARB (or are otherwise approved by EPA). This requirement, plus the consent decree's testing requirements, will ensure that motorcycles with Harley-Davidson tuning products meet applicable emissions standards. Other consent decree requirements further decrease the likelihood that Harley-Davidson's illegal Tuners will be sold in the United States—for example, the dealer buyback program and the requirement that any non-conforming products distributed abroad are labeled as not authorized for sale in the United States.[9] In addition, the decree will discourage motorcycle owners from tampering with their motorcycles (that is, by installing illegal Tuners and other non-compliant aftermarket parts enabled by them) by requiring Harley-Davidson to deny any warranty claims from newer model motorcycles if they have been modified with an illegal Tuner. The decree also ensures Harley-Davidson's future compliance with the CAA by requiring it to obtain a COC before selling, offering for sale, importing, or introducing, or delivering for introduction into commerce any new motorcycle model.

[9] Although the decree requires Harley-Davidson to buy back any illegal Tuners left in dealers' inventory, as Sierra Club notes, it does not require Harley-Davidson to buy back illegal Tuners that have already been installed on motorcycles or the tampered motorcycles themselves. SC Letter at 6. This would be a very difficult, and likely unsuccessful, endeavor at least in part because customers who deliberately installed, or asked dealers to install, these illegal parts (and possibly additional parts enabled by the illegal Tuners) are unlikely to bring their motorcycles in to have them removed.

EPA considers the injunctive relief obtained here particularly important to combat illegal defeat devices. This settlement requires a major manufacturer of illegal aftermarket parts to stop selling them because they are in violation of the Clean Air Act. As Sierra Club noted, "[t]here is no indication whatsoever that Harley-Davidson would have brought itself into compliance if not for the actions of the U.S." SC Letter at 15. Given Harley-Davidson's prominence in the industry, this is a very significant step toward stopping the sale of illegal aftermarket defeat devices that cause harmful pollution on roads and in communities. This will also send a clear warning to anyone else who manufactures, sells, or installs these types of illegal products to take heed of Harley-Davidson's corrective actions and to stop violating the law themselves.

Contrary to commenters' assertions, mitigation is not a required element of a settlement.[10] The Clean Air Act contains no such requirement. The United States has, at times, sought to obtain requirements in consent decrees to mitigate environmental harm and, at times, has sought mitigation as an element of relief in litigated cases. But the Clean Air Act does not *require* mitigation as a remedy in any particular case. While the Act states that a violator "shall be subject to a civil penalty," 42 U.S.C. § 7524(a), the Act contains no such requirement that a violator be subject to a mitigation requirement. Rather, the United States has taken the view, as a general matter, that mitigation is a *permissible* form of equitable relief that can be included as a component of an enforcement remedy under the Act.[11] Thus, while mitigation can be an

[10] *See, e.g.,* Ex. 1-B, NRDC Letter at 4 ("[M]itigation . . . provide[s] important relief, as required by law . . . ."); Ex. 1-B, SC Letter at 7-8 (Because the decree lacks mitigation, "it cannot be approved or entered as a final judgment.").

[11] *See, e.g., United States v. Holtzman,* 762 F.2d 720, 724 (9th Cir. 1985) (finding Section 204 of the Clean Air Act, 42 U.S.C. § 7523, the provision authorizing injunctive relief for mobile source violations, encompasses "the full scope" of the court's jurisdiction in equity); *cf. United States v. Cinergy Corp.*, 582 F. Supp. 2d 1055, 1060 (S.D. Ind. 2008) (finding that court had inherent

available remedy, it is not mandated by the Act and is not required to be included in any particular settlement agreement.

Further, "a consent decree need not impose all the obligations authorized by law." *United States v. Oregon*, 913 F.2d 576, 581 (9th Cir. 1990). And of course, the test is not whether a proposed consent decree corresponds to some particular ideal. *United States v. Allegheny-Ludlum Industries, 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"). Rather, the test is whether the consent decree satisfies the criteria for entry, which take into account the risks and uncertainties of litigation.

In short, while mitigation is a permissible form of injunctive relief in appropriate cases, it is not required as a term of settlement. The United States has enforcement discretion to craft injunctive relief that is appropriate to the circumstances of each case provided the settlement as a whole meets the flexible and deferential standards for entry.

2. The Consent Decree Sufficiently Compensates the Public.

Several commenters asserted that the settlement does not adequately compensate the public or provide adequate punishment or deterrence for Harley-Davidson because the $12 million penalty is too low and Defendants are no longer required to perform the $3 million in mitigation required by the superseded consent decree. Ex. 1-B: NRDC Letter at 4; States Letter at 7; SC Letter at, *e.g.*, 16. In particular, Sierra Club criticizes the $12 million penalty for not following EPA's penalty policy and not recouping the full economic benefit that Defendants

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authority under Section 113 of the Act, the provision authorizing injunctive relief for stationary sources, to order actions to mitigate harm to the public and the environment arising from defendant's violations).

gained from selling the illegal Tuners. SC Letter at 11-16. Sierra Club also argues that because the United States withdrew the woodstove project, it should have been compensated by increasing the civil penalty. *Id.* at 14.

The penalty amount here was negotiated in good faith as part of an overall settlement. In calculating the penalty for this judicial decree, the United States took into account the statutory penalty factors, 42 U.S.C. § 7413(e),[12] the Defendants' cooperation and the risks of litigation. Considering all of those factors as applied to the particular facts of this matter, in addition to relevant case law, the United States concluded that the total penalty of $12 million, together with the other relief obtained in this settlement, was appropriate to settle the claims alleged in the complaint.

No commenter argued during the first round of public comments that the penalty was inadequate. And for good reason. The penalty is significant and, averaging $34.08 per non-compliant vehicle or illegal Tuner, is commensurate with other mobile source settlements the United States has entered into. For example, in *Tractor Supply,* which addressed approximately 23,000 uncertified off-road recreational vehicles and small engines, the penalty obtained was $775,000, or $33.70 per vehicle/engine; for *Pep Boys,* the defendant paid a $5 million penalty for 241,000 uncertified motorcycles, recreation vehicles, and non-road engines, or $20/vehicle.[13] The United States has obtained a range of penalties in mobile source cases, and the $12 million

[12] These are: "the gravity of the violation, the economic benefit or savings (if any) resulting from the violation, the size of the violator's business, the violator's history of compliance with this subchapter, action taken to remedy the violation, the effect of the penalty on the violator's ability to continue in business, and such other matters as justice may require." 42 U.S.C. 7524(b).
[13] *See* https://www.epa.gov/enforcement/consent-decree-tractor-supply-inc (last accessed Dec. 5, 2017); https://www.epa.gov/enforcement/consent-decree-pep-boys-manny-moe-jack-and-baja-inc (last accessed Dec. 5, 2017).

obtained here is within the range of other decrees the United States has entered into. Further, it is by far the largest penalty obtained to date in an illegal aftermarket parts case and puts other manufacturers and sellers on notice that EPA is ramping up its enforcement actions in this arena.[14]

If the penalty was adequate then, commenters are simply wrong to suggest that the penalty is now inadequate because the settlement no longer requires mitigation. Ex. 1-B, SC Letter at 11. Mitigation costs are *not* a penalty. Mitigation is not imposed for the purpose of punishing the defendant, as is the case with a civil penalty, *Tull v. United States*, 481 U.S. 412, 422 (1987), but rather as an element of injunctive relief intended to remedy harm caused by a defendant's violations. The fact that Harley-Davidson will be required to spend less collectively on this settlement than the superseded decree says nothing about whether the amount imposed as punishment – which remains the same as it was under the superseded settlement – is adequate. Thus, Sierra Club's suggestion that the $3 million Harley-Davidson is not spending on mitigation should have been shifted to the penalty is incorrect. SC Letter at 14. The two are not comparable or interchangeable.

To be sure, one of the Clean Air Act penalty factors that a court would consider in litigation and that the United States considers in settlement is "action taken to remedy the violation." 42 U.S.C. § 7524(b). But that is just one of many penalty factors. In calculating a

[14] To date, EPA has entered into two judicial settlements and an administrative settlement concerning illegal aftermarket parts: *United States v. Edge Products, LLC*, https://www.epa.gov/enforcement/edge-products-consent-decree (last accessed Dec. 5, 2017) (civil penalty of $500,000, based on ability to pay); *United States v. Casper's Electronics, Inc.*, https://www.epa.gov/enforcement/consent-decree-casper-electronic-clean-air-act-settlement (last accessed Dec. 5, 2017) (civil penalty of $80,000, based on ability to pay); *In the Matter of H&S Performance, LLC*, https://www.epa.gov/enforcement/2016-clean-air-act-vehicle-and-engine-enforcement-case-resolutions (last accessed Dec. 5, 2017) (administrative civil penalty of $400,000).

civil penalty, whether for purposes of settlement or for litigation, Defendants are not entitled to a one-for-one reduction of the amount of the penalty based on the cost of mitigation. *See* Environmental Protection Agency, *Securing Mitigation as Injunctive Relief in Certain Civil Enforcement Settlements* (Nov. 14, 2012, 2nd ed.) at 8, https://www.epa.gov/enforcement/securing-mitigation-injunctive-relief-certain-civil-enforcement-settlements-2nd-edition (last accessed Dec. 6, 2017).

Further, commenters stated that without the added cost of the woodstove project, the settlement as a whole does not adequately deter Harley-Davidson or other aftermarket parts manufacturers from violating the law in the future. But the purpose of mitigation is not deterrence, but to attempt to undo the harm caused by the violations. Certainly, there is a deterrent effect from making clear to Defendants that the price of noncompliance may include the costs of remedying the harm they cause, but the removal of the woodstove project under the circumstances of this case should not undermine the deterrent effect of this settlement on Harley-Davidson's or other illegal aftermarket parts manufacturers' calculus as to whether or not to comply with the law going forward. Numerous components of this settlement will have a powerful deterrent effect against future noncompliance. These include the $12 million civil penalty, the very significant injunctive relief that Harley-Davidson is required to perform, the filing of a civil complaint detailing the United States' allegations of Harley-Davidson's violations, and the significant press coverage of Harley-Davidson's alleged violations and the settlement's requirements. These components collectively send a clear message to Harley-Davidson and other regulated entities that the manufacture and/or sale of illegal aftermarket parts will not be tolerated.

Finally, a number of commenters argue in general that the penalty is too low, and Sierra Club in particular questions whether the penalty captures Defendants' economic benefit. While commenters surmise that the benefit to Harley-Davidson of selling each of the Super Tuners must be more than $34, they do not take into account that the economic benefit Harley-Davidson received would likely have been the subject of significant dispute had the matter been litigated. There are many different ways to analyze economic benefit in a case like this, and numerous factors to be considered in proving it, which would have required substantial discovery and expert testimony to resolve.

In addition, there was considerable dispute between the parties concerning the emissions impacts of the illegal Tuners and Harley-Davidson's culpability for these emissions, which inform another penalty factor—the "gravity of the violations." Here, the amount of emissions that the motorcycles with illegal Tuners emit varies considerably based on what the motorcycle owner did after he or she installed it, or had it installed. For example, the majority of the Super Tuners were installed on motorcycles with catalysts (which are a primary emissions control component), and the Tuners were made to be compatible with the catalyst. For those owners who did not remove the catalyst or otherwise adjust their motorcycles, excess emissions, if any, would be relatively small. On the other hand, some owners likely did remove the catalyst, which greatly increases emissions; others likely added various aftermarket exhaust systems (which were not produced by Harley-Davidson) that also significantly increase emissions; others may have done both; and still others may have added other aftermarket parts that increase emissions. Similarly, in the motorcycles built without catalysts, owners may have performed various different emissions-affecting modifications in addition to using the Super Tuners. In order to determine the amount of excess emissions attributable to Harley-Davidson's illegal tuners more

precisely, the United States would have needed significant discovery, expert assistance, and perhaps surveys of motorcycle users and dealers, which may or may not have yielded reliable information. Moreover, the parties would undoubtedly have vigorously disagreed on the extent to which Harley-Davidson was responsible for these additional excess emissions, given that the emissions varied so greatly based on how owners individually customized their bikes. Absent the settlement, the parties would likely have had to litigate these issues, and there is no guarantee that the result would have been a higher penalty than was obtained here.

3. The Consent Decree as a Whole Properly Considers the Relative Strengths and Weaknesses of each Party's Case.

The third prong in considering whether a settlement is reasonable is whether it "reflects the relative strength or weakness of the government's case against [the defendant]." *District of Columbia*, 933 F. Supp. at 51. Thus, the reasonableness of a proposed decree "must take into account foreseeable risks of loss." *Cannons Eng'g*, 899 F.2d at 90.

Although the United States believes its case on liability is strong, as with most cases, Defendants have arguments why they believe they would prevail in litigation. Moreover, as discussed above, there is uncertainty concerning how the Court would analyze the various factors that go into determining the penalty, such as economic benefit, the seriousness of the violations, including the amount of excess emissions the United States would be able to prove, and whether a court would hold Harley-Davidson responsible for all of them, or just a portion of them. Prevailing on any of these issues, of course, depends on the Court's view of the facts and the arguments, and is not necessarily assured. Moreover, even if the government's case is very strong, it would take a number of years of complex and expensive litigation (including significant discovery, expert assistance, and emissions testing) to establish liability, the required injunctive relief (including the amount of emissions and mitigation), and the appropriate penalty.

As the D.C. Circuit has explained, "it is precisely the desire to avoid a protracted examination of the parties' legal rights which underlies consent decrees." *Citizens for a Better Env't*, 718 F.2d at 1126. The parties and public "benefit from the saving of time and money that results from the voluntary settlement of litigation." *Id.; see also Akzo Coatings*, 949 F.2d at 1436, n.25 ("Weighing strongly in favor of approval is the fact that the plan can be implemented immediately. Rejection of the plan would result in the expenditure of considerable time, money, and effort in litigation.") (citation and quotation marks omitted).

C. THE CONSENT DECREE IS IN THE PUBLIC INTEREST.

"A settlement agreement which seeks to enforce a statute must be consistent with the public objectives sought to be attained by Congress." *Stewart*, 948 F. Supp. at 1087. Congress passed the Clean Air Act "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 inquiry the Court is required to conduct is limited. In *United States v. Microsoft Corp.*, the D.C. Circuit set forth the standard to be applied:

> 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 at 1460 (emphasis in original) (citing *United States v. Western Elec. Co.*, 900 F.2d 283, 309 (D.C. Cir. 1990)) (additional citations omitted). In *United States v. Hyundai Motor Company*, the D.C. district 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 [Clean Air Act] by taking steps to ensure cleaner air for the public." 77 F. Supp. 3d at 200-01.

The instant consent decree serves the public interest because it too furthers the Congressional goals embodied in the Clean Air Act. By requiring Harley-Davidson to cease the

sale of uncertified motorcycles and illegal Tuners, the settlement protects air quality and promotes public health and welfare without litigation delays or costs. Moreover, the civil penalty and the settlement as a whole send a clear deterrent signal to the industry that the Clean Air Act's mobile source emission standards and defeat device prohibitions will be vigorously enforced. *See SEC v. Randolph*, 736 F.2d 525, 529-30 (9th Cir. 1984) (overturning district court's failure to enter decree because of its finding that decree was not in the "public's *best* interest" because it did not impose severe enough sanctions to adequately deter conduct; deferring to government agency's analysis of deterrence and use of its limited enforcement resources).

D. THE COMMENTS PROVIDE NO BASIS FOR THIS COURT TO WITHOLD ENTRY OF THE DECREE.

The United States received four sets of comments on the decree. *See* Exhibit 1-B. We have already addressed many of the comments that bear on the appropriateness of the decree. However, all commenters asserted, in one way or another, that the Court should reject the consent decree because it no longer includes the woodstove project that was included in the superseded decree. But the proper inquiry for the Court is not whether the consent decree is better or worse than the superseded decree, but whether the decree, when evaluated within its own four corners, comports with the standard for entry. The United States has shown above that it does. Nevertheless, the United States responds here to various comments about the removal of the woodstove project, including, among others, why the United States removed it, whether the Department of Justice correctly interpreted its own new policy's application to the project, and the parties' unsuccessful attempts to negotiate an alternative project.[15]

[15] The final additional comments are discussed in Exhibit 2 (Additional Response to Comments), including several comments received on the superseded decree that remain relevant to this

The superseded consent decree contained a requirement that Harley-Davidson fund a project to mitigate emissions of hydrocarbons and oxides of nitrogen by replacing old, higher polluting woodstoves with emissions-certified woodstoves. Doc. 2-1 at 35, ¶¶ 5-6. The superseded consent decree recited that Harley-Davidson had selected a third-party organization, the American Lung Association of the Northeast ("ALANE," which works in Northeastern states) to perform the project, and required that Harley-Davidson provide funding to ALANE to implement the project. During settlement negotiations, the United States and Harley-Davidson hotly contested the amount of excess emissions caused by Defendants' violations, and the parties were unable to reach agreement on the issue. Originally, rather than litigating that issue, the parties agreed that Harley-Davidson would spend $3 million on the woodstove project, regardless of the amount of emission reductions achieved. Thus, the decision to include the woodstove project in the superseded decree was an exercise of the government's enforcement discretion at that time.

Between August 18, 2016, when the United States lodged the superseded consent decree with the Court, and the present, a new Attorney General was sworn into office at the Department of Justice. On June 5, 2017, the Attorney General announced a new policy that applies to the Justice Department entitled *Prohibition on Settlement Payments to Third Parties*. *Available at* https://www.justice.gov/opa/press-release/file/971826/download (last accessed Dec. 8, 2017) (the "Third-Party Payment Policy" or the "Policy"). In issuing the Policy, the Attorney General expressed concern that in certain previous settlement agreements, the Justice Department had required Defendants to agree to "payments to various non-governmental, third-party

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decree, and several additional comments received on this decree. In addition, Exhibit 2 provides a list of all the significant comments received on this consent decree, and where they are addressed.

organizations" that "were neither victims nor parties to the lawsuits." *Id*. Thus, the Attorney General prohibited Justice Department attorneys from entering into a civil or criminal settlement that "directs or provides for a payment or loan to any non-governmental person or entity that is not a party to the dispute." *Id*. Pursuant to 28 U.S.C. § 516, the "conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General." *See also* 28 U.S.C. § 519 ("Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party").

The Third-Party Payment Policy became effective immediately upon issuance and applies to, among other things, consent decrees entered into on behalf of the United States. Because the United States had not yet moved for entry of the superseded consent decree when the Policy was issued, the Policy governs the Justice Department's exercise of enforcement activities on behalf of the United States in this case.[16] Concerns stemming from application of the Policy were the primary reason that the United States decided to remove the woodstove project from the settlement here. Because the superseded consent decree required Defendants to pay a non-governmental third-party organization to carry out the project, the project came within the prohibition against third party payments.

Notably, the Third-Party Payments Policy recognized a limited exception for a payment that "directly remedies the harm that is sought to be redressed, including, for example, harm to the environment. . . ." The Policy does not *require* inclusion of third-party payments in such instances; it merely provides a limited carve-out where such payments *may* be deemed

[16] Thus, Sierra Club is incorrect that the policy was inapplicable because it was issued after the superseded decree was lodged. SC Letter at 17-18.

appropriate by law enforcement officials operating under the direction of the Attorney General. As stated in the Notice of Lodging filed with this Court on July 20, 2017, one of the major reasons the United States removed the woodstove project from the settlement was because of concerns about whether the woodstove project in this case was consistent with the Policy. Doc. 6, p. 2.

All four commenters argue that the woodstove project falls squarely within the Policy's "directly remedies the environmental harm" exception. Ex. 1-B: NRDC Letter at 3, States Letter at 4, SC Letter at 18-19, and HPBA Letter at 2. But the Department of Justice determined that the third-party payment provision in the superseded consent decree did not qualify for this "limited exception" because the woodstove project would have been carried out in only one region of the country – the Northeast. Indeed, the United States' understanding was that it would likely have been implemented only in one state. By comparison, the harm from Defendants' illegal Tuners is the environmental impact caused by excess emissions from noncompliant motorcycles whenever and wherever the noncompliant Harleys are ridden, presumably throughout the United States.[17]

In light of the issuance of the Third-Party Payment Policy, the United States approached Defendants to try to revise the decree to address its concerns with the woodstove project. The United States undertook significant efforts to negotiate with Harley-Davidson to modify the proposed woodstove project or to agree upon an alternative project that would redress the harm

[17] Wyoming raised a similar concern about the limited geographic scope of the mitigation, albeit not in the context of the June 5th policy. Ex. 1-A, Letter from Wyoming Department of Environmental Quality at, e.g., 1 (criticizing the superseded consent decree as "not in the public interest" because the mitigation plan only benefited one region). Sierra Club is therefore wrong to criticize the United States for citing public comments as one of several reasons that caused the United States to rethink the woodstove project. SC Letter, p. 26, Ex 1-B.

from Harley-Davidson's violations in a manner that did not run afoul of the Policy. The parties were unable to reach agreement on a revised or alternative mitigation project.[18]

One commenter claimed that Harley-Davidson asked the United States to renegotiate the now-superseded decree and that the United States then "bent to the will of a powerful defendant." Ex. 1-B, NRDC Letter at 4. Without support, the commenter further speculated that the decree is "tainted by improper collusion or corruption of some kind." *Id.* at 3. Nothing could be further from the truth.[19] The United States did not "buckle[] to pressure," *id.* at 4, or otherwise act improperly in negotiating the consent decree. Harley-Davidson did not ask to renegotiate the decree; indeed, the superseded consent decree precluded Harley-Davidson from doing so. *See* Dkt. 2, Superseded Consent Decree, ¶ 74.[20]

Having failed to reach agreement with Harley-Davidson on suitable revisions to the superseded consent decree, and given the Third-Party Payments Policy, the United States chose to move forward with the revised consent decree now before the Court, rather than to forego this significant settlement and proceed to litigate the matter. The United States continues to believe that the $12 million civil penalty is an appropriate penalty for Harley-Davidson's violations and will send a strong deterrent message to both Harley-Davidson and others in the industry not to

[18] While two commenters seem incredulous that the United States could not make Harley-Davidson accept a different approach, this was in fact the case. *See* Ex. 1-B: States Letter at 7-8; Sierra Club Letter at 28-29. The United States cannot unilaterally dictate the terms of settlement; both parties must agree.

[19] Nor is it true, as suggested by the commenter, that the United States "withdrew support of the settlement six months before the Sessions Prohibition was even issued," citing to Dkt. 5. Ex. 1-B, NRDC Letter at 2. The United States' motion sought an extension of time for service to allow its review of the public comments to continue. Dkt. 5 at 2.

[20] As noted in the Notice of Lodging, Doc. 6 at 2-3, Harley-Davidson did ask that the United States delay moving for entry of the decree until the U.S. Government Accountability Office completed its legal review of the woodstove project, see Exhibit 2, Additional Response to Comments, at 5-6, which was something the United States was unwilling to do.

engage in similar conduct in violation of the Clean Air Act. Equally important, EPA considers the comprehensive program of injunctive relief that Harley-Davidson has agreed to perform under the consent decree to be extremely important. The injunctive relief that Harley-Davidson has agreed to will serve as an important precedent in the Agency's efforts to address serious compliance issues that currently exist in the sale of illegal aftermarket products. As a recognized leader in the industry, Harley-Davidson's agreement to undertake these measures should serve as a template for others in the industry to follow.

In sum, the consent decree here, with its robust compliance provisions and $12 million civil penalty, in the particular circumstances of this case, is fair, reasonable, and in the public interest, even in the absence of the woodstove project.

V. CONCLUSION

The agreement before the Court was reached after the parties' careful and informed assessment of the merits of the case, the costs, risks, and delays that litigation would entail, and the value of settlement—including the significant environmental benefits that will accrue from Harley-Davidson's implementation of the stop sale and other components of the consent decree's injunctive relief. The proposed settlement meets the standard for entry and thus should be entered as an order of this Court. The comments addressed here and the additional comments discussed in Exhibit 2 provide no basis for finding otherwise.

Accordingly, the United States respectfully requests this Court to approve the consent decree by signing the accompanying proposed order and signing and entering the consent decree attached to the order (Dkt. 6-1) at p. 28.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon all counsel of record through the Court's CM/ECF system on this 11th day of December, 2017.

s/Leslie Allen
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