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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 United States of America,
10 Plaintiff,
11 v.
12 Gear Box Z Incorporated,
13 Defendant.
14

No. CV-20-08003-PCT-JJT
ORDER

15 At issue is Plaintiff United States of America’s Motion for Preliminary Injunction
16 (Doc. 37, Mot.), to which Defendant Gear Box Z Inc. filed a Response (Doc. 42, Resp.),
17 the United States filed a Reply (Doc. 46, Reply), Defendant filed a Sur-Reply (Doc. 55,
18 Sur-Reply) with leave of Court, and the United States filed a Reply to Sur-Reply (Doc. 61,
19 Reply to Sur-Reply) with leave of Court. The Court held a hearing on the Motion on
20 February 17, 2021. (Doc. 88; Doc. 95, Transcript (“Tr.”).) At the hearing, the Court granted
21 leave for non-party Specialty Equipment Market Association (“SEMA”) to file an Amicus
22 Curiae brief (Doc. 89-1, Amicus Br.), and responses with leave of Court were filed by
23 Defendant (Doc. 103, Def.’s Resp. to Amicus Br.) and the United States (Doc. 105, U.S.
24 Resp. to Amicus Br.).

25 **I. BACKGROUND**

26 Defendant Gear Box Z, Inc., an Arizona corporation, manufactures and sells
27 aftermarket products for the modification of diesel engines on motor vehicles including
28 Ford, General Motors, and Dodge trucks. In April 2017, the United States Environmental

1 Protection Agency (“EPA”) notified Defendant that it was under investigation for selling
2 products that, when installed, circumvent or delete an engine’s emissions controls,
3 violating the Clean Air Act (“CAA”), 42 U.S.C. § 7522(a)(3)(B). After Defendant provided
4 the requested information, the EPA sent a Notice of Violation (“NOV”) to Defendant in
5 December 2017.

6 Defendant produces and sells both hardware and software products, and the EPA
7 claims that virtually all of Defendant’s products are defeat devices—because they defeat
8 emissions controls—and that each independently violates the CAA. (Doc. 37-4, Attach. A,
9 Defeat Device Product List.) The hardware products the EPA claims are used to defeat
10 emissions controls include block plates, which block emissions gas recirculation (“EGR”)
11 flow to the engine; delete pipes, which replace the original equipment manufacturer’s
12 (“OEM”) exhaust pipe; and diesel particulate filter (“DPF”) emulators, which simulate
13 signals to the engine control module (“ECM”) that the DPF is functioning properly when
14 it is not. Installation of this hardware requires new software, which Defendant also sells, to
15 “tune” the vehicle so that it functions without emissions controls by modifying or
16 overwriting the vehicle’s emissions calibrations that the OEM put in place for compliance
17 with federal regulations and certification by the EPA. Defendant also produces and sells a
18 kind of “tuner,” which is a handheld device preloaded with Defendant’s tunes. The tunes
19 also function to mask the disabling of emissions controls by reprogramming the ECM so that
20 the on-board diagnostics (“OBD”) do not detect, record, or notify the driver (or an
21 inspector) of the disabling; as a result, no malfunction indicator light (“MIL”) will activate.

22 By circumventing or defeating emissions controls, a driver can obtain enhanced
23 vehicle performance through greater power, torque, and/or fuel economy, because
24 emissions controls consume engine power and fuel. On the flip side, excess emissions
25 cause known harm to human health and the environment—an issue the Clean Air Act
26 attempts to remedy.

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1 Since receiving the NOV's, Defendant has continued to produce and sell its
2 products.¹ The parties failed to resolve the NOV's outside of court, and the United States
3 filed this lawsuit on January 3, 2020, and filed a Motion for Preliminary Injunction on
4 August 20, 2020.

5 **II. ANALYSIS**

6 In order to obtain a preliminary injunction, the United States must show that “(1)
7 [it] is likely to succeed on the merits, (2) [it] is likely to suffer irreparable harm in the
8 absence of preliminary relief, (3) the balance of equities tips in [its] favor, and (4) an
9 injunction is in the public interest.” *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir.
10 2015) (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 9 (2008)). The Ninth
11 Circuit Court of Appeals, employing a sliding scale analysis, has also stated that simply
12 “serious questions going to the merits” but “a hardship balance that tips sharply toward the
13 plaintiff can support issuance of an injunction, assuming the other two elements of the
14 *Winter* test are also met.” *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1078 (9th Cir.
15 2013) *cert. denied*, 134 S. Ct. 2877 (2014) (quoting *Alliance for the Wild Rockies v.*
16 *Cottrell*, 632 F.3d 1127, 1132 (9th Cir. 2011)) (internal quotations omitted).

17 **A. Likelihood of Success on the Merits**

18 Under the relevant portion of the CAA, it is prohibited

19 for any person to manufacture or sell, or offer to sell, or install, any part or
20 component intended for use with, or as part of, any motor vehicle or motor
21 vehicle engine, where a principal effect of the part or component is to bypass,
22 defeat, or render inoperative any device or element of design installed on or
23 in a motor vehicle or motor vehicle engine in compliance with regulations
24 under this subchapter, and where the person knows or should know that such
part or component is being offered for sale or installed for such use or put to
such use.

25 42 U.S.C. § 7522(a)(3)(B).

26 In its Motion and supporting papers, the United States provides extensive evidence
27 as to the functionality of Defendant’s products and their capability to act as defeat devices,

28 ¹ As an indication of sales volume, in a 28-month reporting period from 2015 to 2017,
Defendant sold 8,323 products that the EPA considers to be defeat devices.

1 and Defendant does not explicitly address or refute that evidence. Instead, Defendant
2 argues it is not in violation of the CAA because its products fall under certain of the CAA’s
3 exceptions, including the “maintenance exception” and exceptions or exclusions for use on
4 motor sports, military, and emergency vehicles. (Resp. at 2–3; Sur-Reply at 1–3.)
5 Defendant also contends the United States cannot demonstrate the knowledge component
6 of the CAA’s prohibition. (Resp. at 13.) The Court examines these arguments in turn.

7 **1. Maintenance Exception**

8 The so-called maintenance exception provides as follows:

9 No action with respect to any device or element of design referred to in
10 [§ 7522(a)(3)] shall be treated as a prohibited act under that paragraph if (i)
11 that action is for the purpose of repair or replacement of the device or
12 element, or is a necessary and temporary procedure to repair or replace any
13 other item and the device or element is replaced upon completion of the
14 procedure, and (ii) such action thereafter results in the proper functioning of
15 the device or element referred to in [§ 7522(a)(3)].

14 42 U.S.C. § 7522(a)(5).

15 Defendant contends that its hardware and software products can be used for the
16 repair of a motor vehicle and can be removed or reversed, and thus, under the maintenance
17 exception, the products are not prohibited by the CAA. (Resp. at 5–16.) In response, the
18 United States argues that Defendant’s products are not designed for “necessary and
19 temporary” repair procedures; the products are not designed such that their installation is
20 to be reversed; and even if use of the products is reversible, the statute requires that the
21 changes made using the products are actually reversed, resulting “in the proper
22 functioning” of the original emissions controls, which changes using Defendant’s products
23 are not. (Reply at 5–9.)

24 Although the United States has the burden to show a likelihood of success on the
25 merits to obtain the requested injunctive relief, the burden of proof applicable to an
26 exception to a CAA prohibition lies with Defendant. *See United States v. First City Nat’l*
27 *Bank of Houston*, 386 U.S. 361, 366 (1967) (stating the general rule that the burden falls
28 to the party that “claims the benefits of an exception to the prohibition of a statute” (citing

1 *F.T.C. v. Morton Salt Co.*, 344 U.S. 37, 44–45 (1948)); *E.E.O.C. v. Kamehameha*
2 *Sch./Bishop Estate*, 990 F.2d 458, 460 (9th Cir. 1993). That is, the United States has the
3 burden to show Defendant’s products fall within the CAA’s prohibitions; Defendant has
4 the burden to show the maintenance (or another) exception to the prohibitions applies to
5 its products.

6 Other than its own conclusory statements, Defendant has pointed to no evidence
7 that, under the statutory exception, its products were designed “for the purpose of repair or
8 replacement” of a device or element in compliance with the CAA regulations, or for “a
9 necessary and temporary procedure to repair or replace any other item.” This failure of
10 evidence alone is fatal to Defendant’s claim that it can demonstrate that the maintenance
11 exception applies to its products.

12 Defendant’s principal contention is that installation of its products can be
13 reversed—an attribute Defendant argues theoretically brings use of the products within the
14 exception—and that Defendant does not know what its customers ultimately do with its
15 products. The Court agrees with the United States (Reply at 5) that the exception requires
16 not only reversibility, but that the CAA-compliant device or element—which Defendant’s
17 products modified—“*is replaced*” upon completion of any maintenance procedure
18 resulting “in the proper functioning of the device or element” under the CAA. Put another
19 way, it is not sufficient that installation of Defendant’s products can be reversed; the
20 installation must actually be reversed. This is logical, considering the purpose of the CAA
21 and its implementing regulations in this context is to reduce harmful emissions. The plain
22 language of the exception makes it clear that it is not intended as a long-term loophole.
23 Defendant has proffered no evidence that any installation of its products has been reversed.

24 The United States has produced evidence that the design of certain of Defendant’s
25 products indicates that their installation is not intended to be reversed. For example,
26 through an examination of the source code, it is evident that Defendant did not design its
27 software to reverse the changes it makes and return the vehicle back to the EPA-certified
28 condition. (Doc. 37-2, Jones Decl. ¶¶ 88–89.) Likewise, the United States has produced

1 evidence that Defendant’s contention that it designed its parts for maintenance purposes is
2 not credible. Specifically, existing OEM diagnostic tools are sufficient for a technician to
3 diagnose and fix problems with a vehicle without the need for third-party tuners such as
4 Defendant’s (Jones Decl. ¶¶ 71–72), and common diagnostic trouble code readers—to
5 which Defendant equates its tuners—cost \$20, as opposed to the average cost of
6 Defendant’s tuners of \$400.

7 What sales and customer evidence there is indicates that the purpose of Defendant’s
8 product line is not for short-term maintenance.² For example, Defendant’s responses to
9 customer requests about what Defendant’s product line can do have included statements
10 such as, “Not only will you see an increase in mileage, but it will give you around 70 more
11 [horsepower] which is really handy for towing.” (Tr. at 19; Pl.’s Ex. 24.) And, “On average
12 we are seeing a 20% increase in fuel mileage and power, but each truck is different.” (Pl.’s
13 Ex. 31.) No customer evidence before the Court indicates customers have actually used
14 Defendants’ products for maintenance and repair. For all these reasons, Defendant has not
15 shown the maintenance exception applies to its products.

16 **2. Other Exceptions or Exclusions**

17 Defendant also argues that other exceptions, or exclusions, exist in the CAA to cover
18 uses for its products, including an exclusion for the use of defeat devices in motor sports
19 or competition vehicles as well as exceptions for emergency and military vehicles. Much
20 ink has been spilled already in this case regarding whether a motor sports exception, or
21 exclusion, exists in the CAA and if so, what its limits are. (Docs. 55, 61, 89-1, 103, 105.)
22 Indeed, the Amicus Curiae brief and its responses examine this question in great detail. But
23 Defendant has not produced a single piece of evidence that a single one of its products has
24 been used on a motor sports vehicle (or an emergency or military vehicle, for that matter).
25 By contrast, the United States has produced ample evidence, as was its burden, that
26 Defendant’s products are used in motor vehicles as contemplated by the CAA. (*See, e.g.*,
27 U.S. Resp. to Amicus Br. at 5–9.) Any examination of the question whether a motor sports

28 ² Defendant has consistently claimed it has not kept records of who it sold its products to
or for what purpose customers use its products.

1 exception or exclusion exists and is applicable here would be entirely hypothetical at this
2 point. Without any evidence that there is a motor sports use for Defendant’s products, the
3 motor sports exclusion issue is moot.

4 **3. Knowledge**

5 Defendant also suggests that the United States cannot show that Defendant “knows
6 or should know” that its products are “being offered for sale or installed” as defeat devices,
7 as required by the CAA, 42 U.S.C. § 7522(a)(3)(B), because Defendant does not know
8 what its customers do with its products. (*E.g.*, Resp. at 13.) As the Court alluded to above,
9 Defendant’s suggestion is belied by its own statements in response to customer questions
10 on its website and on social media platforms. Defendant’s own product manuals and
11 advertisements also demonstrate that Defendant knows its products are installed as defeat
12 devices. (*E.g.*, Doc. 37-3, Jorquera Decl. ¶¶ 49–52.) Defendant cannot claim a lack of
13 knowledge simply by not keeping sales records, and the evidence clearly shows that
14 Defendant knows the purpose of its products is for use as defeat devices.

15 Considering all the evidence before the Court, the United States is likely to succeed
16 on the merits to show that Defendant is violating the CAA by manufacturing and selling
17 its products.

18 **B. Irreparable Harm**

19 In instances in which a federal agency such as the EPA brings an enforcement action
20 under a statute that authorizes injunctive relief, as the CAA does, the United States need
21 not further demonstrate irreparable harm in seeking a preliminary injunction. *See F.T.C. v.*
22 *Consumer Def., LLC*, 926 F.3d 1208, 1213 (9th Cir. 2019). In any event, the irreparable
23 harm at issue here is obvious. Emissions of harmful pollutants damage human health and
24 the environment—a proposition Defendant concedes. Instead, Defendant argues that
25 because the United States waited two years from the time it sent NOV’s to Defendant to the
26 time it filed suit, somehow addressing the irreparable harm “can wait until the case is
27 decided on the merits at trial.” (Resp. at 18.) Defendant’s argument goes more to a
28 balancing of the equities than irreparable harm in this instance. Harm to human health and

1 the environment is what it is, and any delay in the United States’ enforcement of the
2 CAA—which here was only minimal—does not change the irreparable harm caused by
3 defeat devices. To the extent the United States must make an independent showing of the
4 irreparable harm caused by the manufacture, sale, and use of Defendant’s products, it has
5 done so amply.

6 **C. Balance of Equities and the Public Interest**

7 The United States also has the burden to show that the balance of equities tips in its
8 favor and that a preliminary injunction is in the public interest. *Winter*, 555 U.S. at 20. “A
9 preliminary injunction is an extraordinary remedy never awarded as of right.” *Id.* at 24
10 (citing *Munaf v. Green*, 553 U.S. 674, 689–90 (2008)). “In each case, courts ‘must balance
11 the competing claims of injury and must consider the effect on each party of the granting
12 or withholding of the requested relief,’” paying particular attention to the public
13 consequences. *Id.* (quoting *Amoco Prod. Co. v. Vill. of Gambell, Alaska*, 480 U.S. 531, 542
14 (1987)).

15 Here, the Court must essentially balance the irreparable harm identified above with
16 financial harm to Defendant. As the United States points out, “economic loss does not in
17 and of itself, constitute irreparable harm. Financial injury is only irreparable where no
18 adequate compensatory or other corrective relief will be available at a later date, in the
19 ordinary course of litigation.” (Mot. at 20 (citing *Mexichem Specialty Resins, Inc. v. E.P.A.*,
20 787 F.3d 544, 555 (D.C. Cir. 2015)).) Weighing the harm to human health and the
21 environment the United States seeks to prevent against potential financial loss to Defendant
22 if the sale of its products is enjoined, the balance tips in the United States’ favor in this
23 instance.

24 Likewise, Congress enacted the CAA to combat air pollution, which itself is a
25 declaration of public policy. The public interest in halting Defendant’s acts that likely
26 violate the CAA outweighs Defendant’s interest in continuing to operate a private business.

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1 Having satisfactorily demonstrated all the *Winter* factors, the United States is entitled to a
2 preliminary injunction against Defendant.³

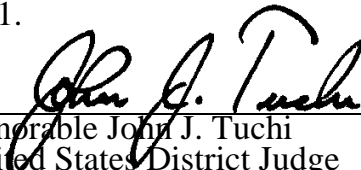
3 **III. PRELIMINARY INJUNCTION**

4 For the foregoing reasons,

5 **IT IS ORDERED** granting Plaintiff United States of America's Motion for
6 Preliminary Injunction (Doc. 37).

7 **IT IS FURTHER ORDERED** that, until the Court rules on the merits of this
8 lawsuit, Defendant Gear Box Z, Inc., and all persons acting for or on its behalf, are hereby
9 enjoined from (1) selling, offering for sale, or transferring any products or components
10 listed in Attachment A to this Order, or any materially similar products; and (2) selling,
11 offering for sale, or transferring any intellectual property associated with the products listed
12 in Attachment A to this Order, or any materially similar products.

13 Dated this 17th day of March, 2021.

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16 Honorable John J. Tuchi
17 United States District Judge

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³ Under Federal Rule of Civil Procedure 65(c), the United States is not required to give security for the issuance of a preliminary injunction.

ATTACHMENT A-GEAR BOX Z DEFEAT DEVICE PRODUCT LIST

Name	Vehicle Make Application	GBZ Part Number	Type of Defeat Device
DPF-R Ford EGR Block Plates	Ford	GBZ-FBP	Software
Ford 4.0 Programmer	Ford	GBZ-FD40	Software
Ford 4.0 Plus Programmer	Ford	GBZ-FED40	Software
Electron - Ford 2008-2010 6.4L Power Stroke	Ford	GBZ-EM1.0	Software
Electron - Ford 2011-2017 6.7L Power Stroke	Ford	GBZ-EM1.0	Software
Ford Electron Add-Ons (including Plus Tune, Tachyon Tune, and Maintenance Mode)	Ford	GBZ-EM1.0	Software
GBZ - E41 Maintenance Mode & Economy Tune 2011-2016	Ford	Unknown	Software
GBZ - 41 Maintenance Mode 2011-2016 6.7L	Ford	Unknown	Software
Dodge 3.0	Dodge	GBZ-DD30	Software
Dodge Electron Add-Ons (including Plus Tune, Tachyon Tune, and Maintenance Mode)	GM	GBZ-EM1.0	Software
Duramax 4.0 Programmer	GM	GBZ-GMD40	Software
Duramax 4.0 Plus Programmer	GM	GBZ-GMED40	Software

ATTACHMENT A-GEAR BOX Z DEFEAT DEVICE PRODUCT LIST

1	Electron - GM 2007.5-2010 LMM Duramax	GM	GBZ-EM1.0	Software
2				
3	Electron - GM 2011-2017 LML Duramax	GM	GBZ-EM1.0	Software
4				
5	AFE 4" Down-Pipe Back CAT/DPF Delete Race Exhaust for Ford Trucks	Ford	AFEFP4F	Hardware
6				
7	AFE CAT/DPF Delete Race Exhaust for Ford Trucks	Ford	AFEFP2	Hardware
8				
9	AFE DPF Delete Race Exhaust for Ford Trucks	Ford	AFEFP	Hardware
10				
11	Race Exhaust for Ford Trucks	Ford	Unknown	Hardware
12				
13	CAT/DPF Delete Race Exhaust	Ford	Unknown	Hardware
14				
15	4" Down-Pipe Back Cat/DPF Delete Race Exhaust	Ford	Unknown	Hardware
16				
17	11-16 6.7L Diesel MBRP/P1 Installer Series Competition Race Pipe	Ford	Uknown	Hardware
18				
19	AFE 4" Down-Pipe Back CAT/DPF Delete Race Exhaust for GM Trucks	GM	AFEGMP4F	Hardware
20				
21	AFE DPF Delete Race Exhaust for GM Trucks Crew Cab Long Box	GM	AFEGMP- CCLB	Hardware
22				
23	AFE DPF Delete Race Exhaust for GM Trucks Crew Cab Short Bed	GM	AFEGMP- CCSB	Hardware
24				
25	AFE DPF Delete Race Exhaust for GM Trucks Extended Cab Short Box	GM	AFEGMP- ECSB	Hardware
26				

ATTACHMENT A-GEAR BOX Z DEFEAT DEVICE PRODUCT LIST

1	DPF Delete Race Exhaust for Extended Cab Long Box	GM	Unknown	Hardware
2				
3	DPF Delete Race Exhaust-Crew Cab long Box	GM	Unknown	Hardware
4				
5	DPF Delete Race Exhaust for Extended Cab Short Box	GM	Unknown	Hardware
6				
7	DPF Delete Race Exhaust-Crew Cab Short Box	GM	Unknown	Hardware
8				
9	4" Down-Pipe Back Cat/DPF Delete Race Exhaust	GM	Unknown	Hardware
10				
11	DPF Emulator	Dodge	GBZ-DD30	Hardware
12				
13	EGT Emulator	Dodge	Unknown	Hardware
14				
15	AFE 4" Turbo Back DPF Delete Race Exhaust for Dodge Trucks	Dodge	AFEDP4F	Hardware
16				
17	AFE CAB & Chassis DPF Delete Race Exhaust for Dodge Trucks	Dodge	AFEDPCC	Hardware
18				
19	AFE CAT/DPF Delete Race Exhaust for Dodge Trucks	Dodge	AFEDP2	Hardware
20				
21	AFE DPF Delete Race Exhaust for Dodge Trucks	Dodge	AFEDP	Hardware
22				
23	DPF Delete Race Exhaust	Dodge	Unknown	Hardware
24				
25	CAT/DPF Delete Race Exhaust	Dodge	Unknown	Hardware
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ATTACHMENT A-GEAR BOX Z DEFEAT DEVICE PRODUCT LIST

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Cab & Chassis DPF Delete Race Exhaust	Dodge	Unknown	Hardware
4" Full DPF Delete Race Exhaust	Dodge	Unknown	Hardware