ORAL ARGUMENT NOT SCHEDULED

No. 12-5234

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States of America,
Appellee

v.

Volvo Powertrain Corporation,
Appellant

California Air Resources Board,
Appellee.

Appeal from the United States District Court
for the District of Columbia, No. 1:98-CV-02547(RCL)

APPELLANT'S REPLY BRIEF

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GLOSSARY

CAA	Clean Air Act
CARB	California Air Resources Board
CD	Consent Decree
EPA	Environmental Protection Agency
HDDE	Heavy Duty Diesel Engine
VCE	Volvo Construction Equipment Corporation
VTC	Volvo Truck Corporation

SUMMARY OF ARGUMENT

The district court transgressed foundational principles when it expanded the Decree to penalize Powertrain for a *non-party's* actions, undertaken *outside* the United States, concerning a type of engine *not subject* to the Decree. The district court compounded its error by fashioning a $72 million "equitable" penalty from a stipulated-penalties provision that the district court conceded does *not* apply here—without requiring the Agencies to prove that the penalty approximates any competitive harm or unjust enrichment caused by Powertrain. The importance of this appeal extends beyond the parties at hand, as the array of *amici* indicate. Reversal is required.

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The Agencies entered into a Decree with appellant Powertrain and one of its corporate siblings, Construction.[2] The Decree required that all nonroad engines "manufactured by" those two companies comply with the pull-ahead requirement. CD ¶60. It provided for monetary penalties against Powertrain only if *Powertrain* certified non-compliant engines. CD ¶116. As CARB admits, the Agencies declined to include a different corporate sibling—Penta—in the Decree. CARB Br. 27.

[2] CARB entered into a Settlement Agreement with Powertrain and Construction. Contrary to CARB's waiver contention, Powertrain's arguments on appeal apply equally to EPA and CARB. *See infra* Part V.

The Agencies now claim that engines manufactured and certified by Penta trigger liability under the Decree. That position violates the bedrock rule that "a court may not enter a consent decree that imposes obligations on a party that did not consent to the decree." *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 529 (1986) (citations omitted). The Decree cannot be read to impose the pull-ahead requirement on Penta-certified engines when Penta did not consent to the Decree.

Paragraphs 110 and 129 of the Decree, on which the Agencies principally rely, do not support the district court's decision to sweep Penta-certified engines under the Decree and impose a $72 million penalty on Powertrain. Paragraph 110's "non-circumvention provision" must not be interpreted to override the parties' decision to exclude Penta-certified engines from the Decree. Paragraph 110 merely ensures that if a signatory conveys its facilities to another company, the acquiring company must comply with the pull-ahead. It cannot be a vehicle for punishing Powertrain for the actions of a nonparty to the Decree. At minimum, Paragraph 110 is ambiguous when read in light of the whole Decree. Accordingly, contempt principles require reversal because the district court imposed retrospective sanctions under a consent decree—the quintessential contempt remedy—when the Decree does not unambiguously cover Penta engines.

A single sentence in Paragraph 129 cannot bear the enormous weight the Agencies place on it. It provides simply that "[i]n reviewing any dispute under this Section, . . . the Court . . . should consider the effect of the resolution on other Settling HDDE manufacturers." CD ¶129. This general directive does not authorize the district court to ignore the parties' express decision to allow monetary penalties against Powertrain only when *Powertrain* certifies non-compliant engines. *See* CD ¶116. It certainly does not allow the court to use the inapplicable stipulated-penalties provision to impose an "equitable" fine without any evidence that such a fine is necessary to prevent competitive advantage by Powertrain. *See* EPA Br. 69 (conceding district court's "fail[ure] to require actual evidence of Powertrain's unjust enrichment"). The district court's penalty award should be reversed outright because it is contrary to Paragraph 116 of the Decree, or, at the least, vacated and remanded for an evidentiary hearing.

ARGUMENT

I. The district court's award of $72 million in retrospective sanctions under the Decree must be analyzed under the contempt framework.

Because consent decrees are court orders that prohibit conduct under the threat of judicial sanction, principles of contempt apply whenever a party seeks retrospective relief under a decree. Powertrain Br. 25-28. A party seeking such relief must establish (1) by clear and convincing evidence, that (2) the defendant violated a "clear and unambiguous provision of the consent decree," *United States*

v. Microsoft Corp., 147 F.3d 935, 940 (D.C. Cir. 1998), and that (3) the defendant "has not diligently attempted to comply in a reasonable manner." *King v. Allied Vision, Ltd.*, 65 F.3d 1051, 1058 (2d Cir. 1995).[3] These principles guarantee that parties to a decree have clear notice of conduct that will subject them to liability. The district court legally erred when it failed to apply these governing principles to EPA's request for retrospective relief.

A. Powertrain did not waive its right to the contempt standard.

1. The Agencies lead with the assertion that Powertrain "waived" its argument that contempt standards apply. EPA Br. 23; CARB Br. 18. Even if a party could waive the structural constraints on a district court's power to enforce a decree, *but see infra* at 5-7, Powertrain did not do so here. Powertrain referenced the contempt standard in the "Principles of Law" section of its brief below.[4] EPA protested, arguing that "[because] the United States did not move for contempt but simply sought stipulated penalties under the Consent Decree, the . . . elevated standard of proof [for contempt] does not apply."[5] Like EPA, "CARB disagree[d] with Powertrain" that the contempt framework applies because "the case against Powertrain . . . is not for civil contempt but breach of contract."[6] The issue of

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[3] Neither Agency disputes that this is the proper standard for contempt.

[4] *See* Mem. for J.R., at 13.

[5] U.S. Opp. to J.R., at 9 n.8.

[6] CARB Opp. to J.R., at 3.

whether the contempt standard applies was squarely joined before the district court.

Powertrain's counsel reiterated part of the contempt standard in the hearing before the district court: "You will see mentioned in our brief that we contend it is clear and convincing evidence that is required."[7] In later stating that "we're satisfied with the preponderance standard," Powertrain's counsel did not somehow disavow application of the entire contempt framework. Rather, he conveyed that *under the proper construction of the Decree* the standard of proof makes no difference to the outcome of this case.[8] There was no waiver here.[9]

2. In any event, a defendant cannot "waive" the plaintiff's burden in consent-decree cases to show violation of a clear and unambiguous decree by clear and convincing evidence. *See Reynolds v. McInnes*, 338 F.3d 1201, 1208 (11th Cir. 2003) (analyzing motion to enforce consent decree under contempt standards despite defendant's failure to invoke contempt standards below). These heightened standards are fundamental restraints on a district court's authority to restrospectively enforce its own orders. In *Reynolds*, the Eleventh Circuit

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[7] Transcript, at 5.

[8] *Id.* ("where you're not really finding facts, I'm not sure there's much difference" between preponderance and clear-and-convincing standards).

[9] *Pure Country, Inc. v. Sigma Chi Fraternity*, 312 F.3d 952 (8th Cir. 2002), is inapplicable. It did not address waiver of contempt standards, but merely upheld the district court's determination that the plaintiff lacked standing to bring an enforcement action under a consent decree. *Id.* at 959.

explained that "consent decrees, like all injunctions, are to be enforced through the trial court's civil contempt power." *Id.* Because defendants failed to object below, the court found no error in the district court's failure to utilize contempt "*procedures*," such as a show-cause hearing. *Id.* at 1208, 1210-11 (emphasis added). But when it reviewed the district court's interpretation and enforcement of the decree, the court of appeals applied the higher *substantive* contempt standards, notwithstanding the defendant's failure to urge them below. *Id.* at 1211. The court declared that "[t]he plaintiffs' failure to follow the proper procedure should not, and does not, relieve them of their burden to prove by clear and convincing evidence that . . . the consent decree [was violated]." *Id.* The court therefore concluded that "[t]he district court erred in failing to apply that standard of proof." *Id.* After carefully analyzing the decree and the evidence, the court held that plaintiffs failed to satisfy the demanding contempt standard to show a violation of the decree. *Id.* at 1216-17.

In an earlier appeal in *Reynolds*, the plaintiff similarly sought to enforce a consent decree without using contempt procedures, with no objection from the defendant. The Eleventh Circuit nonetheless employed the contempt framework to review the district court's "declaratory judgment" purporting to enforce the decree. *Reynolds v. Roberts*, 207 F.3d 1288, 1300-01 (11th Cir. 2000). Accordingly, the court reasoned that "a district court may not impose obligations

on a party that are not *unambiguously* mandated by the decree itself" and held that the district court had impermissibly done just that. *Id.* (emphasis added). Thus, even if Powertrain had failed to invoke contempt standards below, the *Reynolds* cases correctly explain that the contempt framework always constrains a court's enforcement of decrees.

B. The contempt standard always applies when a party seeks retrospective relief for an alleged consent-decree violation.

The Agencies reiterate their district-court arguments that the contempt framework applies only when a party formally moves for "contempt," but does not apply when a party seeks retrospective relief that is substantively identical to a civil-contempt penalty.

1. Many courts have suggested that contempt is the proper framework for seeking *any kind* of enforcement of a decree. *See* Powertrain Br. 26-28 (collecting cases); *Firefighters*, 478 U.S. at 518 ("[N]oncompliance with a consent decree is enforceable by citation for contempt of court." (citation omitted)); *Reynolds*, 207 F.3d at 1298 ("[I]njunctions, including consent decrees, are to be enforced . . . through the trial court's civil contempt power."); *Brewster v. Dukakis*, 675 F.2d 1, 3 (1st Cir. 1982) ("[E]nforcement through contempt proceedings . . . is customary when a party believes that the provisions of a consent decree have been violated.").

This Court, however, need not determine whether contempt standards must be applied to *every* action alleging a violation of a consent decree. At the very least, whenever a party seeks *retrospective relief* under a consent decree, it must show, by clear and convincing evidence, that the defendant violated an unambiguous order, regardless of whether it labels its motion as a request for contempt. *Hawkins v. Dep't of Health & Human Servs. for N.H.*, 665 F.3d 25, 30 n.6 (1st Cir. 2012) ("The label given to a motion to enforce a consent decree does not control the legal requirements applicable to such a motion," which always stem from contempt principles); *Reynolds*, 338 F.3d at 1208 (analyzing motion to enforce a consent decree under contempt standards despite movant's failure to seek "contempt"); *EEOC v. N.Y. Times Co.*, 196 F.3d 72, 80 (2d Cir. 1999) ("Although no contempt sanctions were imposed upon appellants, we review this [consent-decree-enforcement proceeding] in the same manner as if the court had held appellants in contempt."). Courts empowered with broad discretion to enforce their own orders present a heightened potential for abuse. The higher threshold for retrospective relief acts as a structural protection against a court penalizing parties for "violating" ambiguous provisions of its own orders.

2. EPA's contrary argument elevates form over substance. The relief sought by EPA and awarded by the court—a remedial, "equitable" fine of $72 million—is indistinguishable from what would have been awarded in a

"contempt" proceeding. In *Microsoft*, this Court referred to the United States' "request for $1,000,000 a day in damages" as a "pure contempt remed[y]." 147 F.3d at 941. *See also Hutto v. Finney*, 437 U.S. 678, 691 (1978) ("Civil contempt may . . . be punished by a remedial fine."); *In re Grand Jury Proceedings*, 142 F.3d 1416, 1424 (11th Cir. 1998) ("The traditional sanctions [for civil contempt] are a fine or imprisonment."). Contempt standards are triggered by the relief awarded rather than the "label" attached to the motion or order. *E.g.*, *Hawkins*, 665 F.3d at 31 n.6.

EPA's formalistic argument would end the longstanding application of contempt standards to consent-decree litigation. What party would ever file a motion for contempt if it could circumvent the higher burden yet obtain the same spectrum of remedies merely by changing the motion's label? EPA correctly states that the contempt power is more condemnatory than other court orders because it "can lead to sanctions that justify imposing a higher burden of proof." EPA Br. 27. But the "virility and damage potential" of the contempt power stems not from its label, as EPA seems to think, but from the inherent danger of a district court unilaterally imposing huge penalties (*sans* jury) based upon ambiguous provisions of its own previous orders. *See Project BASIC v. Kemp*, 947 F.2d 11, 16 (1st Cir. 1991) (reversing $500,000 contempt sanction under consent decree). The heightened standards that attend retrospective enforcement of decrees arise from

"the most fundamental postulates of our legal order," which "forbid the imposition of a penalty for disobeying a command that defies comprehension." *Int'l Longshoremen's Ass'n, Local 1291 v. Phila. Marine Trade Ass'n*, 389 U.S. 64, 76 (1967) (reversing contempt finding under decree). They do not rise or fall based upon the form of a motion.[10]

3. EPA does not cite a single case holding that a court may impose retrospective relief under a decree without first finding a violation of a clear and ambiguous order. Most of the cases EPA cites involve prospective relief, such as clarification of a decree or injunctive relief.[11] For example, in *Berger v. Heckler*, 771 F.2d 1556, 1569 (2d Cir. 1985), the Second Circuit affirmed in part a district court order amending a consent decree based on a finding that the defendant failed

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[10] It is similarly irrelevant that Powertrain formally invoked the district court's jurisdiction by filing a motion to review EPA's penalty assessment. Powertrain invoked the district court's jurisdiction only to resolve EPA's assertion that Powertrain's actions violated the Decree. Because EPA sought—and the district court awarded—retrospective penalties for alleged violations of the Decree, contempt standards apply regardless of how the parties initially brought the dispute to the court's attention. The Decree explained the procedures by which disputes were to be brought to the court, CD ¶¶129-36; it did not purport to alter the substantive contempt framework that always governs retrospective enforcement of decrees. *Id.* ¶121 (recognizing that a dispute that proceeds to district court after EPA's demand for penalties constitutes "an action to enforce this Consent Decree" by the United States); *id.* ¶132 ("Judicial review of any dispute governed by this Paragraph shall be governed by applicable principles of law.").

[11] *See, e.g.*, *Smith v. Bounds*, 813 F.2d 1299, 1303 (4th Cir. 1987) (awarding prospective relief to ensure future compliance with court order); *Alexander v. Hill*, 707 F.2d 780, 783 (4th Cir. 1983) (same); *Smith v. Miller*, 665 F.2d 172, 175 (7th Cir. 1981) (same); *Class v. Norton*, 505 F.2d 123, 125 (2d Cir. 1974) (same).

to comply fully with the original decree. The Second Circuit reviewed this prospective order as an exercise of the court's "basic authority to compel compliance with its orders." *Id.* at 1569 n.19.

There may be good reason to judge prospective relief under a lesser standard. After all, clarification of a decree gives the parties clear notice of what is required going forward, unlike the retroactive interpretation and punishment imposed here. *See Microsoft*, 147 F.3d at 940-42 (approving refusal of contempt penalty because decree was ambiguous, but holding that district court could clarify the ambiguous term to govern future behavior); *Vertex Distrib., Inc. v. Falcon Foam Plastics, Inc.*, 689 F.2d 885, 892 (9th Cir. 1982) (same); *Brewster*, 675 F.2d at 3-4 (clarification is an "intermediate step" a court should take where "the clarity of obligation necessary for enforcement through contempt has not yet been established").

EPA cites two other consent-decree cases for the proposition that parties may request a "supplementary order" awarding monetary penalties. But these cases do not hold that courts may issue such orders without first finding a violation of a clear and ambiguous command. In *Cook v. City of Chicago*, 192 F.3d 693, 695 (7th Cir. 1999), the defendant admitted that it violated the decree, and thus the proper liability standard was not in issue. In *United States v. Local 359, United Seafood Workers*, 55 F.3d 64 (2d Cir. 1995), defendants similarly did

not dispute the administrator's interpretation of the decree, but argued that the administrator's monetary award was not supported by the evidence. The Second Circuit disagreed, holding that "[u]nder any standard, the Administrator's . . . factual findings are amply supported by the record." *Id.* at 68. Later Second Circuit caselaw holds that contempt standards apply to supplementary orders that enforce decrees through retrospective monetary relief. *N.Y. Times*, 196 F.3d at 77, 80-81.[12]

4. Finally, it is not "exceedingly odd" that a party seeking retrospective sanctions under a decree labors under a higher liability standard than one seeking relief under a settlement agreement. *See* EPA Br. 29-30. In exchange for stricter enforcement standards, consent decrees offer plaintiffs significant advantages compared to settlement agreements. Consent decrees subject

[12] EPA suggests that contempt principles do not apply because it sought stipulated penalties, which it analogizes to bringing a breach-of-contract action for liquidated damages. Br. 25, 31. But as EPA concedes, the stipulated-penalty provision here "did not cover the situation where Penta sought certificates," Br. 61, and thus the district court was required to "exercise its equitable discretion to determine a penalty." 854 F. Supp. 2d at 71. EPA must not be allowed to benefit from the district court's purported equitable authority to award penalties not authorized by the Decree, while evading the heightened standards that constrain such retrospective enforcement. In any event, *Harris v. City of Philadelphia*, 47 F.3d 1311 (3d Cir. 1995), does not support EPA's argument that stipulated-penalty claims are exempt from the contempt standard. There, "[t]he City [did] not contest the finding of fact that it was [in violation of the decree] . . . [or] raise any legal question over the [decree's] proper interpretation." *Id.* at 1321. Thus, as in EPA's other cases, the proper liability standard was never at issue.

defendants to "continuing oversight and interpretation by the court" and make it "easier to channel litigation . . . into a single forum." *Firefighters*, 478 U.S. at 524 n.13. A plaintiff seeking to enforce a decree need not file a new lawsuit or prove its case to a jury. *D. Patrick, Inc. v. Ford Motor Co.*, 8 F.3d 455, 459 (7th Cir. 1993). Consent decrees also offer courts "a more flexible repertoire of enforcement measures," *Firefighters*, 478 U.S. at 524 n.13, including additional injunctive relief and a broader range of monetary penalties to compensate a party's loss or coerce compliance.

In light of these advantages to the plaintiff, "[a] party saddled with significant obligations under a settlement would obviously prefer that the obligations be memorialized in a simple contract as opposed to a court order." *See* Anthony DiSarro, *Six Decrees of Separation: Settlement Agreements and Consent Orders in Federal Civil Litigation*, 60 AM. U. L. REV. 275, 287 (2010). But the promise that ambiguous provisions will not be enforced retrospectively "[can] persuade an obligor to agree to a consent decree." *Id.* at 287-88. As *amici* U.S. Chamber of Commerce *et al.* explain, a company is willing to submit itself to the court's equitable enforcement powers only so long as it obtains "certainty and predictability" about the "precise nature" of its obligations and assurance that courts will not impose new ones through *post hoc* interpretation. Br. 6, 9, 12, 14-15. EPA seeks the benefits of decrees without the countervailing protections for

defendants. The district court's approach—not Powertrain's—would "discourage the use of consent decrees." *Id.* at 14.

II. The Agencies fail to rebut Powertrain's interpretation of the Decree; thus, the district court's decision should be reversed.

A. The Agencies' myopic interpretation of Paragraph 110 conflicts with the plain language of that provision and the Decree overall.

The Agencies signed a decree with Powertrain and Construction, requiring nonroad engines "manufactured by" those companies to comply with the pull-ahead requirement. CD ¶60. But "there was no reason to have Volvo Penta, a manufacturer of primarily marine engines, join [the Decree]." CARB Br. 27. The Agencies do not dispute that Penta manufactured and certified the engines at issue here. *See* Powertrain Br. 29-31. That should be the end of the matter, for "[a] court may not enter a consent decree that imposes obligations on a party that did not consent to the decree." *Firefighters*, 478 U.S. at 529-30. The Agencies' position violates this principle by retroactively imposing the pull-ahead requirement on Penta without its consent.

This principle cannot be evaded by punishing Powertrain for Penta's actions in certifying nonroad engines. And even if it could, nothing in the Decree supports imposing liability on Powertrain for Penta-certified engines.

1. *Even viewed in isolation, Paragraph 110 does not impose liability on Powertrain for engines certified by Penta.*

Even considered in isolation, the plain text of Paragraph 110 does not impose an obligation *on Powertrain* for all engines "manufactured at" its facilities. The text requires only that "engines manufactured at" facilities owned by Powertrain as of 1998 "must meet all applicable requirements." CD ¶110. Paragraph 110 does not specify *who* is responsible for ensuring that the engines meet the applicable requirements.

It is unreasonable to read Paragraph 110 to impose liability upon Powertrain for engines manufactured and certified by a third party. Under that reading, Powertrain would be liable for the actions of a successor company that acquired Powertrain facilities and manufactured non-compliant engines. This would make no sense, for Powertrain would by definition have no ability to control the actions of the acquiring company. Even EPA and the district court agree that in the facility-acquisition scenario, the acquiring company—not Powertrain—would be responsible for ensuring that nonroad engines complied with the pull-ahead requirement. EPA Br. 33-34; 854 F. Supp. 2d at 69 (noting that "the parties agree" that "a company that had purchased Volvo Powertrain facilities . . . bec[a]me bound by the decree"). This necessary concession, however, equally dictates that Paragraph 110 cannot be read to impose liability on Powertrain for engines certified by *any* third party. Paragraph 110 does not distinguish between

the acquisition scenario that all agree is covered and the Penta-certification scenario that the Agencies claim is covered. Because imposing liability upon Powertrain makes no sense in the acquisition scenario, the same text necessarily prohibits imposing liability upon Powertrain in the Penta-certification scenario (even if it were covered).

This result is confirmed by comparing Paragraph 110 with its companion "non-circumvention provision," Paragraph 109. Paragraph 109 illustrates that the parties knew how to impose obligations on Powertrain when it interacted with third parties, and they did so expressly. CD ¶109 ("VTC [Powertrain] shall not . . . circumvent the requirements of this Consent Decree through [various measures with third parties].") Paragraph 110's contrasting lack of any command to Powertrain reflects that Paragraph 110 does not impose obligations on Powertrain at all, but only a company that may acquire Powertrain's facilities. *Cf. Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166, 1177 (2013) (stating that Congress' "use of explicit language in other statutes cautions against inferring" the same result from less explicit language, for "these statutes confirm that Congress knows how to [achieve a result] when it so desires"). Tellingly, no party claims in this Court that Powertrain violated Paragraph 109, the only non-circumvention provision that constrains *Powertrain's* conduct.

Contrary to EPA's claim (Br. 33-34), Powertrain's endorsement of successor liability under the Decree is not inconsistent with Powertrain's assertion that "applicable requirements" are only those requirements imposed by Paragraph 60. A successor inherits only "requirements" that were first "applicable" to its predecessor under Paragraph 60. The Agencies, by contrast, would have Paragraph 110 independently impose liability on Powertrain for Penta-certified engines to which Paragraph 60's requirements were *never* "applicable."

EPA similarly misreads Powertrain's brief when it argues that Powertrain's interpretation of "applicable requirements" renders Paragraph 110 superfluous. *See* EPA Br. 32-33. Without Paragraph 110, Paragraph 60's applicable requirements would cover only engines manufactured by original signatories. Paragraph 110 serves the important role of ensuring that a company that acquires a signatory must comply with the pull-ahead requirement of Paragraph 60 that was "applicable" to its successor. Powertrain Br. 32-33.

This interpretation also gives effect to Paragraph 110's "regardless of" clause, contrary to EPA's contention (Br. 34-35). EPA's quoted dictionary definition recognizes "in spite of" as a principal meaning of "regardless of," but EPA then acts as if only EPA's preferred definition is relevant. "In spite of" fits with Powertrain's interpretation of Paragraph 110, for it conveys that the pull-ahead will apply to engines manufactured by successors "in spite of" the fact that

the signatory no longer owns the facility. In any event, EPA cannot employ a surplusage argument against Powertrain because the "regardless of" clause is wholly superfluous under the Agencies' reading. *Microsoft Corp. v. i4i Ltd. P'ship*, 131 S. Ct. 2238, 2240 (2011) (stating that the anti-surplusage canon "assists only where a competing interpretation gives effect to every clause and word of a statute"). Under EPA's interpretation, once Paragraph 110's opening clause sweeps in "engines manufactured at facilities owned or operated by VTC on or after January 1, 1998," there is no need to specify that the pull-ahead applies "regardless of" ownership at the time of manufacture.

2. *The Agencies' interpretation of Paragraph 110 conflicts with the Decree's liability structure.*

The remainder of the Decree confirms that Paragraph 110 should not be read to encompass engines manufactured and certified by Penta, a party excluded from the Decree. The Agencies never explain why the parties would have provided in Paragraph 60 that the nonroad pull-ahead applies only to engines "manufactured by" Powertrain and Construction, only to substitute an overlapping but broader "manufactured at" test 50 paragraphs later, under the ill-fitting guise of a non-circumvention provision. If the parties wished to delineate primary liability in this fashion, they could easily have done so in Paragraph 60, by simply providing that the pull-ahead applies to engines "manufactured by or manufactured at" the facilities of Powertrain or Construction.

The Agencies' interpretation of Paragraph 110 is also irreconcilable with Paragraph 116's core penalty provision because it imposes liability on Powertrain for engines certified by a third party. Paragraph 116 authorizes monetary penalties against Powertrain only when *Powertrain* "seeks certificates." CD ¶116. Powertrain's reading renders the main penalty provision consistent with the liability provisions, and the Agencies' does not.

It is irrelevant that Paragraph 116 is "not the exclusive means of enforcing the Decree." EPA Br. 36. Paragraph 116 is indisputably the *main* penalty provision. If Paragraph 110 were truly a central provision imposing liability upon Powertrain for Penta-certified engines—as the Agencies contend—surely the core penalty provision would authorize monetary penalties against Powertrain when another company certifies engines "manufactured at" Powertrain facilities. But it does not. The only reasonable inference is that Paragraph 110 does not impose liability on Powertrain for Penta-certified engines.[13]

3. *The Agencies' interpretation is inconsistent with Paragraph 110's non-circumvention purpose.*

EPA appropriately acknowledges Paragraph 110's non-circumvention title and purpose. Br. 38. At one point, EPA declares that Paragraph 110 is

[13] EPA's reference to the generic "relief" language of Paragraph 151 (Br. 36-37), does not support an inference that Paragraph 110 covers Penta-certified engines, especially when compared to Paragraph 116's preclusion of monetary relief against Powertrain for engines it did not certify. *See infra* Part III.A.

designed to prevent manufacturers from "enter[ing] into arrangements unbeknownst to the government and thereby avoid[ing] liability on technical grounds." *Id.* at 4. Powertrain did no such thing. *Cf.* EPA Br. 38 (conceding that Powertrain did not use a "craft or scheme" to avoid the Decree). Powertrain continued doing precisely what it was doing at the time the Decree was executed—building nonroad engines to Penta's specifications that Penta subsequently certified and sold. Powertrain Br. 13, 33, 35.

Perhaps recognizing that, EPA later redefines circumvention to include Powertrain's *failure to prevent* Penta from certifying engines that do not comply with the nonroad pull-ahead. Br. 38-39. This is wrong on multiple levels. First, this cannot be circumvention because the Decree's requirements only apply to engines certified and manufactured by *Powertrain*, not by Penta. Second, Powertrain simply continued doing what it had since before the Decree's execution—building engines for Penta's certification—and something the parties indisputably decided not to cover in Paragraph 60 when they required Construction's intervention but not Penta's. Merely doing what one has always openly done, and the parties declined to prohibit, cannot be circumvention.[14]

[14] EPA claims Powertrain has circumvented the Decree "at least as much as allowing Powertrain's own engines to be produced by its successor." Br. 39. EPA is correct that Paragraph 110 would bar "Powertrain's own engines" from escaping Paragraph 60's applicable requirements. But there is no analogous circumvention

Finally, EPA's suggestion that Powertrain somehow bears responsibility for Penta-certified engines because it has a contractual and intercorporate relationship with Penta cannot stand up to scrutiny. The parties chose to include one corporate sibling in Paragraph 60—Construction—and not Penta. Absent express provisions, obligations that a Decree imposes on one company may not be expanded to apply to another non-party to the Decree merely because it is part of the same corporate family. *United States v. Armour & Co.*, 402 U.S. 673, 677-80 (1971) (antitrust decree prohibiting signatory's participation in retail food business could not support an injunction against acquisition of signatory by retail food company). The *Armour* Court rejected virtually identical arguments to those EPA makes here. *Compare* EPA Br. 38 ("the intent behind the pull-ahead provisions" requires holding Powertrain responsible for Penta-certified engines) *with Armour*, 402 U.S. at 680-82 (rejecting purpose-based argument as "out of place" in "deal[ing] with the construction of an existing consent decree").

4. *The surrounding circumstances further confirm Powertrain's interpretation.*

Though they make sweeping assertions about the parties' supposed intent, the Agencies offer no surrounding-circumstances evidence that supports

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when Penta continues to certify *Penta's own engines*, which have never been covered by Paragraph 60.

their expansive interpretation of Paragraph 110; they attempt only to discredit some of Powertrain's evidence.[15]

Neither Agency responds to the undisputed evidence that Paragraph 110 was designed to address the manufacturers' specific concerns that a settling defendant, Detroit Diesel, might sell its manufacturing operations to a non-party to the litigation, Mercedes-Benz, who would otherwise not be obligated to meet the Decree's "applicable requirements." Powertrain Br. 15-16, 33. This evidence decisively supports Powertrain's interpretation and militates against a broad reading of Paragraph 110 that sweeps in non-successors to the Decree.

The Agencies further do not dispute that they required Construction to intervene under the Decree but declined to require Penta's intervention, even though they knew Penta was manufacturing nonroad engines. Powertrain Br. 35-36; *see* CARB Br. 26-27.[16] While admitting that they excluded Penta as a "minor

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[15] Contrary to CARB's argument, this Court may consider surrounding circumstances when interpreting the Decree's plain language, not merely to resolve ambiguities. *Pure Country*, 312 F.3d at 959 ("[E]ven when interpreting the meaning of a consent decree 'as written,' we are not to ignore the context in which the parties were operating, nor the circumstances surrounding the order."); 11 WILLISTON ON CONTRACTS § 32:7 (4th ed. 2012) ("[T]he circumstances surrounding the execution of a contract may always be shown and are relevant to a determination of what the parties intended by the words they chose.").

[16] While not disputing—and, in the case of CARB, admitting—that they knew Penta manufactured nonroad engines prior to the Decree, the Agencies contradictorily insinuate that Construction's intervention motion misled them by stating that it was "the Volvo Group company" making nonroad engines. EPA Br.

player," the Agencies frankly applaud the district court for overriding Penta's exclusion through its interpretation of Paragraph 110. EPA Br. 42. The court, however, must enforce the parties' agreement to exclude Penta, not manipulate the text of the Decree to retroactively "guard[] against the possibility that Penta might take on a different role during implementation of the Decree." *See id.* If the Agencies were displeased that Penta began certifying more nonroad engines between 1998 and 2005,[17] they could have asked Penta to intervene or moved to modify the Decree.

The Agencies cannot dispute that their interpretation of Paragraph 110 to cover all engines "manufactured at" a Powertrain facility rendered Construction's intervention wholly unnecessary because Construction manufactured all of its engines "at" Powertrain's Skovde facility (just like Penta). Powertrain Br. 35-36; EPA Br. 41-42; CARB Br. 26-27. The Agencies' *post hoc*

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41. The Agencies do not inform the Court that this statement appeared in a motion *drafted by EPA*, which naturally reflected the Agencies' decision to include Construction and not Penta under the Decree. *See* Volvo Motion to Supplement the Record, at 1-2.

[17] The fact that Penta certified fewer engines in 1998 than in 2005 is no indication of circumvention. Penta's certification of nonroad engines began to rise long before the nonroad pull-ahead requirement came into effect. *See* February 24, 2006 letter from Julie Domike to Leslie Kirby-Miles, at Table 2b. And Penta was not manufacturing and certifying engines that otherwise would have been certified by Powertrain, for the two companies have distinct customer bases. *See* Powertrain Br. 8-9, 10-11 (reflecting that Powertrain manufactures HDDEs, while Penta makes nonroad and stationary engines).

argument that Construction's intervention was "protective" of the possibility that Construction might begin manufacturing elsewhere directly conflicts with EPA's statement that its permitting personnel *do not check plant locations* on certification applications.[18]

The parties' consistent post-execution conduct is highly probative of their mutual understanding of their obligations under the Decree. *See United States v. Atl. Ref'g Co.*, 360 U.S. 19, 22-23 (1959). Notwithstanding EPA's curious claim that its labyrinthine bureaucracy gives certifications only "limited significance," Br. 46-47, the Agencies must not be permitted to exclude Penta from the Decree, never hint that Penta engines were covered during the implementation period (even as it audited Powertrain), certify Penta's engines under ordinary regulatory standards, and then, *mirabile dictu*, declare that the once-certified engines are instead in violation to the tune of $72 million. *See* Powertrain Br. 16-19, 36-39. It blinks reality to suggest that this chain of events is not probative of the parties' intent. *See Atl. Ref'g*, 360 U.S. at 22-23 (rejecting government's interpretation of decree that was contrary to "the consistent reading given to the decree, by both the United States and [the companies]" during the years after execution, including "approval [of] a plan" and "acquiescence" in "annual reports"

[18] U.S. Opp. to J.R., at 27 n.21. This admission also strongly suggests that the parties did not intend the Decree to reach engines based solely on their being "manufactured at" a Powertrain facility.

that would have been "highly suspect under the reading the Government today gives the decree").

5. *Because the Decree does not apply to any Penta-certified engines, the district court's holding should be reversed.*

This Court may reverse the decision below in its entirety because it conflicts with the Decree's plain language, which read as a whole, unambiguously precludes imposing liability on Powertrain for *any* Penta-certified engines. This is true regardless of whether contempt principles apply and regardless of whether the Settlement Agreement with CARB has any independent relevance.

If this Court agrees that contempt standards govern the district court's retrospective enforcement of the Decree, the outcome is even clearer. Powertrain's interpretation arguments readily illustrate that the Decree is at least reasonably susceptible to Powertrain's interpretation with respect to Penta engines. *See* Powertrain Br. 46-50. Consent-decree principles of fair notice compel reversal of the decision below and entry of judgment in Powertrain's favor because the Agencies failed to prove that Powertrain violated *a clear and unambiguous order* under the Decree. *See id.* (collecting cases); *Amici* Br. 20-21.

B. The Decree does not cover engines that have not been imported into the United States.

Even if Powertrain could be held liable for some Penta-certified engines, it cannot be held liable for engines that have not been imported into the

United States. *See* Powertrain Br. 39-43; *Amici* Br. 15-17. It is undisputed that if an engine does not fall within the definition of "Nonroad CI Engine," it need not comply with the pull-ahead. *See* CD ¶¶60, 110. Paragraph 3 defines a "Nonroad CI Engine" as an "engine subject to the regulations in 40 C.F.R. Part 89." *See* CD ¶3. The Agencies never get past this threshold, for they cannot show that non-imported engines are "subject to" the Part 89 regulations. Thus, Penta engines sold in Asia and Europe are not covered by the Decree.

EPA argues that Powertrain's interpretation "conflates the definition of nonroad engines with the regulatory and statutory requirements that apply to them." Br. 48. But it is *the Decree* that defines covered engines by express reference to whether Part 89 regulations apply to them. That is what it means to be "subject to" regulations. The mere fact that an engine in Sweden fits the generic definition of nonroad engine in Part 89, *see id.* at 49, does not render it "subject to" those regulations unless the regulations have legal force with respect to the engine. WEBSTER'S THIRD NEW INT'L DICTIONARY 2275 (1986) (listing first adjectival meaning of "subject" as "falling under or submitting to the power or dominion of another"). Because Title II is designed to protect air quality and health in the United States, the regulations authorize enforcement of applicable requirements or

prohibitions only for engines imported into the United States.[19] These provisions do more than impose substantive requirements; they also delimit the territorial scope of the regulations, teaching that engines outside the United States are not "subject to" the regulations. *See Amici* Br. 15-16. To the extent there is any doubt about the geographic scope of EPA's authority under Part 89, the presumption against extraterritoriality resolves it. *See EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991).

EPA correctly concedes that the Decree modifies the parties' obligations under the regulations only "as specified," Br. 51 (quoting CD ¶63)—for example, by imposing the pull-ahead requirement. Otherwise, it admits that the Decree merely "enables EPA to exercise its *ordinary regulatory and enforcement authority*" as to these requirements, *id.* at 52 (emphasis added). Tellingly, EPA never asserts that it could exercise Part 89 authority over non-imported engines, even ones for which Certificates have been obtained. And the Decree nowhere "specifie[s]" that EPA may go beyond this "ordinary . . . authority" to reach non-imported engines; indeed, the definition of nonroad engine, as well as Paragraphs

[19] Indeed, EPA concedes that Title II *only* "makes it unlawful to *import or introduce into commerce* new engines that are not covered by [a] certificat[e]." Br. 8. CARB similarly does not suggest that it has jurisdiction to enforce California regulations extraterritorially. *See Anschutz Corp. v. Merrill Lynch & Co.*, 690 F.3d 98, 111 (2d Cir. 2012) ("California courts have long recognized a presumption against the extraterritorial application of state law.").

61-63, flatly bar it. *E.g.*, CD ¶62 (authorizing EPA to take "enforcement action against prohibited acts that would be applicable if the [pull-ahead] limits specified in Paragraph 60 of this Decree were emissions standards and procedures adopted under Section 213 of the Act).[20]

Though parties may agree to expand their obligations beyond the underlying statute, *see Firefighters*, 478 U.S. at 522, the presumption against extraterritoriality and the text of the Decree itself dictate that, absent express language, the Decree should not be interpreted to cover non-U.S. engines not covered by the CAA. *See also id.* at 525, 527 (consent decree "must further the objectives of the law upon which the complaint was based"). There is no such language here. Yet EPA asks the Court to invert these presumptions, repeatedly asking whether the Decree "limit[s]" its coverage only to engines imported into the United States (Br. 50-52), without providing any support in law or evidence that the parties intended to enlarge EPA's jurisdictional authority. It makes no sense to assume that an international manufacturer, like Powertrain or any other settling

[20] EPA suggests that Paragraph 110 "specifies" coverage of non-imported engines that would not otherwise fall within EPA jurisdiction. Br. 51. But Paragraph 110 only reaches "*Nonroad CI Engines* . . . for which a Certificate of Conformity is sought." CD ¶110 (emphasis added). By using this defined term, Paragraph 110 reaffirms that the pull-ahead covers only engines "subject to" Part 89 regulations, which excludes engines certified but never imported.

manufacturer, would agree to such a vast expansion of EPA's regulatory authority without expressly saying so in the Decree. *See Amici* Br. 16-17.

At most, the Decree is ambiguous as to whether it covers engines that have not been imported into the United States; thus, under applicable contempt standards, the district court's holding on this ground should be reversed and remanded with instructions to exclude non-imported nonroad engines from any liability or penalty determination. *See* Powertrain Br. 48-50.

C. The Decree's definition of "nonroad engine" precludes liability for stationary engines.

The Agencies admit that engines *actually used* as stationary engines are *not* "nonroad engines" as defined by the Decree and therefore, as a textual matter, are unambiguously excluded from the pull-ahead requirement. EPA Br. 53-54; CARB Br. 32. Despite this concession, the Agencies ask the Court to abandon a textualist interpretation of the Decree as "absurd" and "unworkable," and instead re-define nonroad engines based upon their labeling or certification. EPA Br. 54-55; CARB Br. 32.

Nothing in the Decree supports departing from the use-based, regulatory definition of "Nonroad Engine" incorporated in Paragraph 3 in favor of a certification or labeling-based approach.[21] *See* Powertrain Br. 43-45; *Amici* Br.

[21] Contrary to the Agencies' assertions, the fact that Paragraph 110 applies if "a certificate is sought" proves nothing, for this provision's plain language limits

18-19. Indeed, Paragraph 60 requires that the pull-ahead "shall be met throughout the Useful Life of the engine," confirming that the Decree looks beyond the moment of certification and labeling to determine compliance. CD ¶60.

Nor does EPA explain why the use-based, regulatory definition that applies on a daily basis to all engine manufacturers is rendered unworkable when it is applied to the handful of signatories to the Decree. *See Amici* Br. 18-19 (reviewing the "long-standing and well understood [distinction]" between regulations that apply to nonroad and stationary engines). Moreover, even if EPA's difficulty of proving liability were relevant to interpretation, concerns about administrability are overblown on the present facts. Of the 1,092 engines imported to the United States, Penta sold 86% (or 936) of them to *a single customer*, Kohler Corporation, for use in generators as stationary engines.[22] While it may be difficult to track the precise destination and current use of every single engine throughout the world, the vast majority can be readily excluded from the scope of the Decree.

Nonbinding EPA "guidance" which "recommend[s]" that stationary engines be labeled as such, EPA Br. 57, cannot supplant the use-based Part 89 definition that the Decree expressly incorporates. *Sierra Club v. Meiburg*, 296 F.3d 1021, 1030-32 & n.10 (11th Cir. 2002) (rejecting policy and workability

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its application to "Nonroad CI Engines," a term defined to exclude engines used in a stationary capacity.

[22] *See* Geraci Dec. ¶¶12-13.

arguments based upon "EPA guidance document" where decree "does not define [term] by reference to any guidance documents," but only "by reference to . . . a specific regulation").[23] EPA's approach would vitiate the fair notice due to Powertrain by abandoning the unambiguous text and retroactively imposing liability based on judicial re-drafting of the Decree. *See id.*

EPA speculates that Powertrain "made a business decision" to certify and label its engines as nonroad. Br. 57. But it was *Penta* that made the decision to certify—not Powertrain—and it is unreasonable to penalize Powertrain for Penta's independent decision. Regardless, Penta's decision was necessarily made in light of the Decree's plain text, which excludes engines sold for *use* as stationary engines. And had Penta known that EPA would later reinterpret the Decree to reach engines certified as nonroad, Penta would never have voluntarily incurred massive penalties by certifying all 8,354 engines, when only a fraction were being sold for nonroad use. To conclude otherwise defies all logic.

At most, the Decree is ambiguous with respect to whether it covers engines actually used in a stationary capacity; thus, this Court should reverse and remand with instructions to exclude engines actually used in a stationary capacity from any liability or penalty determination. *See* Powertrain Br. 49-50.

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[23] Tellingly, neither Agency addresses Powertrain's reliance on *Sierra Club*, even though it was an asterisked authority in Powertrain's opening brief.

III. This Court should reverse the $72 million penalty as an abuse of discretion.

A. The district court abused its discretion by awarding monetary penalties that are precluded by the Decree.

Even if Powertrain is held to have violated Paragraph 110, the monetary judgment must be reversed because the Decree prohibits imposing monetary penalties against Powertrain for Penta's certification of engines. The Agencies do not dispute that a decree may eliminate a court's equitable discretion to impose monetary penalties for a given violation, *see* Powertrain Br. 51-52; they disagree only about whether this Decree does so.

The Decree includes a chapter entitled "Stipulated Penalties And Other Payments." It spans seven numbered Paragraphs and 18 pages of the Decree. CD ¶¶116-22. As such a consolidated and reticulated provision suggests, these paragraphs contain the exclusive authorization for monetary penalties against Powertrain for violations of the Decree.

Paragraph 116 alone runs 16 pages. Its first clause—and the only one relevant here—provides that "VTC [Powertrain] shall pay stipulated penalties *and other payments* to the United States *as follows*: (a) *If* VTC [Powertrain] seeks certificates of conformity . . . . but cannot certify compliance with . . . the Nonroad CI Engine standard pull-ahead requirements." CD ¶116 (emphases added). Paragraph 116 reflects that the parties considered when to impose monetary

penalties upon Powertrain and opted to impose them only when Powertrain certifies engines. Consequently, Paragraph 116 packs the preclusive textual force of an express command not to award monetary penalties against Powertrain for engines that Penta certifies. *Cf. Christ v. Beneficial Corp.*, 547 F.3d 1292, 1298 (11th Cir. 2008) ("Where Congress has provided a comprehensive statutory scheme of remedies, as it did here, the interpretive canon of *expressio unius est exclusio alterius* applies."). It thus restricts the district court to imposing non-monetary relief for Penta-certified engines. *See Cook*, 192 F.3d at 698 (noting that parties may "specify the consequences of a breach," thus displacing equitable discretion).

None of the general provisions cited by the Agencies overcome Paragraph 116's specific preclusion of monetary remedies for Penta-certified engines. *See* EPA Br. 62-64; CARB Br. 39. Paragraph 118 merely states that "*the United States* specifically reserves all rights or remedies *which may be available*" in addition to the stipulated penalties. CD ¶118 (emphasis added). It does not provide authority for the district court to award penalties under the Decree that are implicitly precluded by Paragraph 116.

Paragraphs 129 and 151 fall outside the Decree's chapter on monetary penalties and do not even mention monetary relief. Paragraph 129 does not mention relief or penalties at all, providing only that "[i]n reviewing any dispute

. . . [the Court] should consider the effect of the resolution on other Settling HDDE Manufacturers." CD ¶129; *cf.* EPA Br. 65 (mistakenly stating that Paragraph 129 requires court to account for competitive effects "when setting a penalty").[24] And Paragraph 151 merely reserves the Court's power to order "such further . . . relief" as necessary to enforce compliance with the Decree. CD ¶151. These general provisions cannot be read to empower the Court to award *monetary* relief against Powertrain when such relief is specifically precluded by Paragraph 116. RESTATEMENT (SECOND) OF CONTRACTS § 203(c) ("specific terms and exact terms are given greater weight than general language"); *Hughes v. United States*, 342 U.S. 353, 357-58 (1952) (holding that a decree's general provision "reserving jurisdiction to amend" and the "inherent equity powers of the court" could not support imposing a remedy made unavailable by specific remedial provisions).

EPA argues that Powertrain's interpretation of Paragraph 116 would render Paragraph 110 "entirely toothless" against Powertrain when other companies manufacture engines at Powertrain facilities. Br. 64-65. Whatever disconnect there is between the two provisions says more about the proper scope of liability under Paragraph 110 than it does about the interpretation of Paragraph

[24] EPA distinguishes the *Harris* and *Cook* cases cited by Powertrain on the sole ground that they did not involve "multiple consent decrees simultaneously negotiated" and a provision like Paragraph 129. Br. 65. But those cases' holding that a decree may constrain a court's equitable discretion to award certain remedies applies in all contexts.

116's specific penalty provisions. *See supra* Part II.A.2. But assuming *arguendo* that Paragraph 110 covers Penta-certified engines, the parties could reasonably have concluded that *monetary* penalties against Powertrain should be allowed only when Powertrain itself certifies engines, thus gaining a direct competitive benefit. But when *another company* certifies engines that were "manufactured at" Powertrain's facilities, the parties could reasonably have concluded that it makes no sense to impose monetary penalties on Powertrain, which reaps no competitive rewards. Instead, in this scenario the court would retain equitable authority to impose a non-monetary penalty on Powertrain.

Because Paragraph 116's detailed provisions authorize the district court to award monetary penalties against Powertrain only if *Powertrain* seeks Certificates for nonconforming engines, the district court abused its discretion by imposing fines on Powertrain when Penta certified nonroad engines.

B. The $72 million "equitable" penalty was improperly drawn from the inapplicable stipulated-penalties provision, which cannot substitute for actual proof of unjust enrichment by Powertrain.

Even if the district court possessed discretion to fashion a monetary remedy despite the plain terms of Paragraph 116, the court abused that discretion by imposing the same fine that would have applied if Powertrain had certified engines, without evidence that this amount was necessary to compensate EPA for harm or prevent unjust enrichment by Powertrain.

EPA correctly states that a compensatory sanction may be based on profits reaped from violating the Decree. Br. 66. And EPA admits it had the burden to show profits or gain by Powertrain. *Id*. But EPA leaps from these sound premises to an unsupported conclusion: that the district court could effectively impose maximum stipulated penalties on Powertrain in the name of preventing unjust enrichment, *without the need for actual evidence of profits*. Br. 67-69.

The district court did not "reasonably approximate[] the profits accruing to Powertrain" by relying on a stipulated-penalties provision that concededly does not apply. EPA Br. 67. Stipulated penalties might be a reasonable approximation of profits if *Powertrain* had certified nonconforming *engines*. EPA accurately explains that nonconformance penalties are designed to level the playing field among "manufacturers" of regulated engines. EPA Br. 68. But EPA never explains how stipulated penalties would approximate Powertrain's profits when *Penta* manufactured, certified, and sold the engines to *its* customers. Without some evidence to show that Powertrain benefited from Penta's certification of engines to the tune of $72 million, reliance on stipulated penalties was an abuse of discretion. As importantly, it is grossly inequitable to impose maximum penalties *on Powertrain*, which had no input into Penta's decision to seek Certificates.

Even if it were relevant to a penalty against Powertrain, there is no evidence that *Penta* gained a competitive advantage. The court assessed penalties for all 8,354 Penta engines, when only a fraction of those engines entered the U.S. nonroad market to compete with settling manufacturers. These penalties go far beyond remedying any competitive advantage Penta "might" have gained; they place Powertrain on an entirely unequal footing by imposing a $72 million penalty on Powertrain for engines that largely *did not even require certification*.

Similarly, the fact that Caterpillar paid stipulated penalties cannot provide a measuring stick for Powertrain's alleged unjust enrichment unless Caterpillar's failure to comply was similarly situated to Powertrain's actions here. Yet EPA ignores Powertrain's showing that Caterpillar's situation was far different. *See* Powertrain Br. 58-59. Instead, EPA and the district court effectively presume that Paragraph 129 requires imposing the maximum stipulated penalty under Paragraph 116, even though Paragraph 116 is concededly inapplicable. *See* 854 F. Supp. 2d at 73 (noting that a lesser penalty "might" offer Powertrain a competitive advantage); EPA Br. 19 (same). The text of Paragraph 129 contains no such maximum-penalty presumption, nor does it relieve EPA of its burden to justify any equitable award. To the contrary, Paragraph 129 requires actual "consideration" of whether there is, in fact, any unfair impact on other settling

parties. The district court erred by imposing the maximum penalty without evidence that it was necessary to prevent competitive advantage.

Most significantly, however, the district court abused its discretion by retroactively imposing the maximum stipulated penalties because—unlike Caterpillar—neither Powertrain nor Penta was allowed an informed choice between complying with the Decree's pull-ahead requirements *or* paying a penalty for each nonconforming engine for which it "seeks a Certificate." *See* CD ¶116(a). Fair notice would have enabled Penta to reduce the applicable penalties by "seek[ing] a Certificate" for *only* those engines it intended to introduce into U.S. commerce for use as nonroad engines. Had Penta known that EPA would later reinterpret the Decree to apply to engines never imported into U.S. commerce, it would have never subjected itself to extraordinary penalties by certifying all 8,354 engines, most of which were sold as stationary engines in Asia and Europe.[25]

Stripped of its reliance on the stipulated-penalties provision and its overreading of Paragraph 129, EPA candidly admits that the district court "fail[ed] to require actual evidence of Powertrain's unjust enrichment," Br. 69, or of any

[25] Math. Dec. ¶12.

unfair advantage that should be considered under Paragraph 129 of the Decree.[26] The district court's penalty award must be reversed.

C. The district court abused its discretion by failing to consider any mitigating factors.

Contrary to the Agencies' implications, the district court erred by ignoring *equitable* factors that do not derive from statutory sources, but are instead common-law benchmarks that constrain equitable discretion in crafting remedies under decrees. *See United States v. Huebner*, 752 F.2d 1235, 1245 (7th Cir. 1985) (reversing remedy under decree that did not bear "an equitable relationship to the degree and kind of wrong"); *N.Y. Times*, 196 F.3d at 81 (asking whether a defendant "was not reasonably diligent in attempting to comply" before imposing sanctions under a decree). Nor is there any excuse for the district court's disregard of the Clean Air Act factors in setting the penalty, because the Decree expressly incorporates the Part 89 regulations that recount these factors. 40 C.F.R. § 89.1006(b)(2); *see* CD ¶¶61, 62. The district court abused its discretion by ignoring these factors in favor of a single-minded reliance on the inapplicable stipulated-penalties provision. The Agencies do not contest Powertrain's analysis of the factors, which shows that only a nominal penalty is warranted. *See* Powertrain Br. 61-63. Thus, if the Court concludes that those factors are relevant,

[26] If the Court holds that an assessment of competitive harm is relevant and still open to EPA, a remand for full factual development is necessary.

it must vacate the $72 million award and remand with instructions for an equitable-penalty phase.

IV. The district court erred in awarding pre-demand interest.

Contrary to EPA's inexplicable claim of waiver, Br. 71, the district court expressly recognized that "[Powertrain] contest[s] the government's demand for . . . [pre-demand] interest," but nevertheless awarded "interest accrued from the date of the violation." *See* 854 F. Supp. 2d at 73. An issue squarely raised and passed upon by the district court is properly reviewable by this Court. *HTC Corp. v. IPCom GmbH & Co., KG*, 667 F.3d 1270, 1281-82 (D.C. Cir. 2012).

On the merits, EPA properly concedes that the Decree's plain language provides that penalties under the Decree are "payable upon demand" and "late payment . . . shall be subject to interest and fees as specified in 31 U.S.C. § 3717." *See* CD ¶119; EPA Br. 72. Nor does EPA dispute that under § 3717 interest does not begin to accrue until "notice of the amount due *is first mailed to the debtor*." 31 U.S.C. § 3717(b)(2) (emphasis added). Thus, no matter when penalties first accrued under the Decree, interest could not have accrued until July 3, 2008, the date of EPA's first written penalty demand. *See* Powertrain Br. 63-64.

Paragraph 129 cannot trump the Decree's specific language prohibiting pre-demand interest. *See* CD ¶129. Nor can Caterpillar's payment of pre-demand interest in its case, EPA Br. 72-73, obligate Powertrain to pay interest

that the Decree prohibits. To hold otherwise would mean that one company could be assessed a penalty *not* permitted by the Decree merely because a competitor failed to challenge the penalty awarded in its case. The district court's award of pre-demand interest should be reversed.

V. Powertrain did not waive its right to appeal the judgment and award as to CARB.

CARB complains that Powertrain's opening brief did not independently address the district court's construction of the Settlement Agreement. Br. 15-18. But CARB itself argued below that Powertrain "violated the Settlement Agreement for the same reasons and in the same way it violated the Consent Decree." 854 F. Supp. 2d at 74. The district court agreed, holding that "the analysis of the Consent Decree set out [above] is entirely applicable to the Settlement Agreement." *Id.* There was no reason for Powertrain to go through the formalistic exercise of including a separate section addressing the interpretation of the Settlement Agreement, when all parties recognize that its terms are "essentially the same." *Id.* Powertrain explained the Settlement Agreement's relationship to the Decree and the underlying proceedings in its opening brief, Br. 7, and then set forth its interpretation arguments that apply equally to both agreements. Nothing more was required.

Moreover, CARB's claim that the Settlement Agreement must be assessed independently ignores that CARB would not even have a final judgment

against Powertrain if CARB had not entered into a stipulation tying itself to the penalties awarded *under the Decree*. The district court held that the Settlement Agreement—in contrast to the Decree—did *not* afford it equitable discretion to award monetary penalties to CARB "because the Settlement Agreement is not an order of the Court." 854 F. Supp. 2d at 75. Thus, the district court directed CARB and Powertrain to "submit . . . a proposed order to schedule further proceedings" so that the court could consider parol evidence as to the parties' intent under Paragraph 116 of the Settlement Agreement. *Id.*

Instead, all three parties submitted a stipulation that would allow the district court to enter a final judgment without the need for further proceedings. The parties stipulated to a final judgment "which divides the penalty awarded by the Court as follows: 80% to the United States and 20% to CARB."[27] In light of this agreement to split proceeds of the award under the Decree, the parties stipulated that "further proceedings regarding the stipulated penalty provisions in the Settlement Agreement are unnecessary."[28] Put simply, in exchange for a final judgment and monetary award, CARB tied its fate directly to the Court's award of penalties under the Decree and declared that there would no further proceedings under the Settlement Agreement. It can hardly complain now that Powertrain

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[27] Joint Stip., at 2.

[28] *Id.*

focused its appellate briefing on the Decree. Nor, having inextricably intertwined its fate with the Decree for the sake of expediency and finality, can CARB assert that the contempt standard for reviewing decrees does not apply to this appeal. *See* CARB Br. 17, 20.

CARB itself recognizes its award stems from the Decree later in its brief, arguing extensively that the district court possessed "equitable authority" to fashion a monetary penalty under "the Consent Decree." Br. 38-43. CARB must not be allowed to obtain equitable penalties under the Decree to procure a final judgment and press for such penalties on appeal, while at the same time claiming that Powertrain waived its appeal by failing to separately address a Settlement Agreement that all agree does not permit such equitable penalties.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment below.

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Dated: May 15, 2013

CERTIFICATE OF COMPLIANCE

1. This brief complies with the word limit established in this Court's order of April 24, 2013, because this brief contains 10,000 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in 14-point Times New Roman Font.

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CERTIFICATE OF SERVICE

I hereby certify that on May 15, 2013, I served the foregoing Appellant's Reply Brief on counsel of record by electronic service through the CM/ECF system.

In addition, pursuant to D.C. Circuit Rule 31(b) and this Court's Administrative Order Regarding Electronic Case Filing, I will cause to be mailed to the Court eight paper copies of this brief within two business days of this filing.

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