



Neutral Citation Number: [2025] EWHC 1931 (KB)

Case No: QB-2022-002405 and others

**IN THE HIGH COURT OF JUSTICE**  
**OF ENGLAND AND WALES**  
**KING'S BENCH DIVISION**

Rolls Building  
Fetter Lane  
London  
EC4A 1NL  
Date: 25 July 2025

**Before:**

**MR JUSTICE CONSTABLE**

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**Between:**

**VARIOUS CLAIMANTS**

**- and -**

**Claimants**

**MERCEDES-BENZ GROUP AG AND OTHERS**

**FORD MOTOR COMPANY AND OTHERS**

**NISSAN MOTOR CO., LTD AND OTHERS**

**STELLANTIS AUTO SAS AND OTHERS**

**AND OTHERS**

**Defendants**

**- and-**

**CLIENTEARTH**

**MUMS FOR LUNGS C.I.C.**

**THE SCOTTISH NOX EMISSIONS STEERING GROUP**

**Interested Parties**

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Tom De La Mare KC, Adam Kramer KC, Gareth Shires and Anna Dannreuther (instructed by Leigh Day and PGMBM Law Ltd) for the Claimants

Richard Blakeley KC, James Purnell, Zahra Al-Rikabi (instructed by Herbert Smith Freehills Kramer LLP) for the Mercedes-Benz Group Defendants

Sonia Nolten KC and William Clerk (instructed by McGuire Woods London LLP) for the Ford Defendants

Richard Sage and Frederick Simpson (instructed by Signature Litigation LLP) for the Renault Defendants

Anneli Howard KC and Michael d'Arcy (instructed by Hogan Lovells International LLP) for the Nissan Defendants

James Cutress KC and Christopher Monaghan (instructed by Cleary Gottlieb Steen & Hamilton LLP) for the PCD Defendants

Prashant Popat KC and Lucy McCormick (instructed by Freshfields LLP) for the Volkswagen Defendants

Thomas Fairclough (instructed by Hogan Lovells International LLP) for the BMW Defendants

Tim Buley KC and Barney McCay (instructed by Mishcon de Reya LLP) for Mums for Lungs C.I.C. ('Mums for Lungs') and ClientEarth

Andrew Smith KC (instructed by Thompsons Solicitors LLP) for the Scottish NOx Emissions Steering Group

Hearing dates: 7, 8, 9 July 2025

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## **JUDGMENT**

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10.30 on the 25<sup>TH</sup> of July 2025.

Mr Justice Constable:

**A. INTRODUCTION**

1. This is a further judgment relating to the ongoing management of the NO<sub>x</sub> emissions litigation, in which cohorts of Claimants bring claims against manufacturer defendants (**‘the Manufacturer Defendants’**), and others involved in the sale or financing of vehicles. The Claimants allege the existence of illegal ‘defeat devices’ used in tests undertaken by regulators. A 10-week trial in respect of liability, considering sample vehicles across a range of manufacturers (**‘the Lead Defendants’**), is set down to commence in October 2025 (**‘the PDD Trial’**) before Cockerill J. Closing submissions, together with an opportunity for other Manufacturer Defendants (who have been referred to as ‘Additional Lead Defendants’ or ‘ALGLOs’) and Non-ALGLO Defendants to make legal submissions, is fixed for March 2026. A 10-week causation and loss trial - the need for which is contingent on any findings of liability - is due to start in October 2026.
2. One issue with which the parties and the Court have had to grapple throughout is the asserted confidentiality of technologies and strategies which are the subject of scrutiny in this litigation. The Manufacturer Defendants each claim that the divulging of documents which contain proprietary technological know-how either to the other Manufacturer Defendants or into the public arena, and thus making them available to other competitors, could be used to their commercial disadvantage. So far, management of this issue has principally involved a complicated series of confidentiality ring orders between each related claimant and defendant group (referred to as ‘CROs’), and a ‘Pan-NO<sub>x</sub>’ CRO between the Claimants and the Lead Defendants which, by agreement endorsed by Order of the Court, permits the sharing of disclosure claimed to be confidential to a restricted group of recipients. The CROs contain provisions that permit a party receiving the disclosure, here the Claimants, to seek to have the designation of documents amended, identifying why it is reasonable and necessary for the designation of the document to be amended. The Claimants have sought the de-designation of virtually all documents which are to be contained in the bundle for the upcoming PDD Trial, claiming that the documents are not confidential or should, in any event, be de-designated as non-confidential so as to further open justice. They have also sought the removal of redactions from pleadings and witness evidence where the Lead Defendants have claimed that the contents are confidential.
3. The Court has already had to consider the de-designation of documents over which a Lead Defendant has claimed confidentiality. The Mercedes Claimants were successful in obtaining (save in one very limited respect) wholesale de-designation of a raft of documents the Mercedes Defendants (**‘Mercedes’**) had claimed were confidential: see Cavallari v Mercedes-Benz Group AG & Ors [2024] EWHC 190 (KB). Having reviewed the authorities, Cockerill J provided clear guidance on the appropriate approach to be adopted. The Mercedes Defendants thereafter unsuccessfully sought, notwithstanding the de-designation of these documents as non-confidential, an order pursuant to CPR 31.22(2) prohibiting the collateral use of the documents - see the joint judgment of

Cockerill J and Constable J at [2024] EWHC 695 (KB). There was a further application pursuant to CPR 31.22(2) by the Mercedes Defendants following the first substantive hearing in this litigation. This was a preliminary issue relating to whether and in what circumstances various decisions by the German authorities were binding on this Court (**‘the KBA Issues Trial’**). The application targeted, very precisely, particular elements of technical information within much wider documents which had been read by or referred to by the Court during the KBA Issues Trial. The application succeeded in part, principally because the open justice principle was not engaged in circumstances where the information was wholly irrelevant to the public’s ability properly to understand the KBA Issues Trial and Judgment (see Constable J at paragraph [26] at [2024] EWHC 3186 (KB)).

4. A considerable amount of documentation has been disclosed into the various CROs. Notwithstanding original intentions, the compression of the timetable and the significant burden placed on the Manufacturer Defendants in terms of disclosure, has meant that in practice many documents have been designated as confidential on a ‘precautionary’ basis. Each side criticises the other, either in respect of the quantity of documents placed into the CROs on the part of the Manufacturer Defendants, or the scale and timing of de-designation requests on the part of the Claimants. Resolution of these complaints is not central to this judgment, and in circumstances where the Court is aware of the extent of work being carried out by all parties to meet Court Orders such that the forthcoming PDD Trial remains effective, an overly critical approach to any party would not be justified. Nevertheless, as I make clear below, even when minds have become more focussed, I have been left in no doubt that the Manufacturer Defendants have been over-zealous both to the issue of redactions (of documents and witness statements) and the designation of confidentiality.
5. That said, save for the Mercedes Defendants, all the Lead Defendants were content, for what they contended were pragmatic reasons coupled with a desire to balance their concerns with the acknowledged importance of open justice, for the majority of the relevant technical data they consider to be confidential, including importantly the parameters and values which are central to the allegations, to be referred to in open court throughout the trial, subject to certain restrictions. To this end, the Lead Defendants’ central proposal at the outset of the hearing was to create a three-tiered categorisation of documentation as follows (the following taken from Ford’s draft Order):

“Green” documents:

- (1) comprise documents and unredacted parts of documents over which no confidentiality is asserted; and
- (2) can be referred to in open court and once referred to will become subject to the collateral use exception in CPR 31.22(1)(a), save that such documents cannot be deployed against another Lead Defendant at the PDD Trial unless such documents are Pan-Lead Documents (as defined in the Pan-Lead CRO).

“Amber” documents:

- (1) are documents which are to be treated for the purpose of the PDD Trial as “confidential in principle” and comprise documents and redacted parts of otherwise “Green” documents, over which confidentiality is asserted;
- (2) can be read out in open court and put on electronic presentation of evidence (‘EPE’) screens;
- (3) pending conclusion of the procedure set out at paragraph 9 of this Order, remain subject to the restrictions on collateral use set out in CPR 31.22, the provisions of the CRO into which they were disclosed and (insofar as applicable) the Pan-Lead CRO; and
- (4) pending conclusion of the procedure set out at paragraph 9 of this Order, do not become part of the publicly accessible court record including for the purposes of CPR 5.4C, and cannot be shared with third parties, or be used for any purpose other than the determination of the respective claims against the Lead Defendants (and, insofar as applicable, used collaterally in accordance with the Pan-Lead CRO), even if they are read to or by the Court, or referred to, at a public hearing, and CPR 31.22(1)(a) shall not apply.

“Red” documents:

- (1) are documents which are to be treated for the purpose of the PDD Trial as being in the “top tier of confidentiality”, and comprise documents and redacted parts of otherwise Green or Amber documents, for which the following procedure is adopted;
  - (2) can be read out in court or put on EPE screens when only legal teams and Part 35 Experts for Lead Parties are present in court;
  - (3) pending conclusion of the procedure set out at paragraph 9 of this Order, remain subject to the restrictions on collateral use set out in CPR 31.22, the provisions of the CRO into which they were disclosed and (insofar as applicable) the Pan-Lead CRO; and
  - (4) pending conclusion of the procedure set out at paragraph 9 of this Order, do not become part of the publicly accessible court record including for the purposes of CPR 5.4C, and cannot be shared with third parties, or be used for any purpose other than the determination of the respective claims against the Lead Defendants (and, insofar as applicable, used collaterally in accordance with the Pan-Lead CRO), even if they are read to or by the Court, or referred to, at a public hearing, and CPR 31.22(1)(a) shall not apply.
6. Paragraph 9 of the draft Ford Order provided that following the conclusion of the PDD Trial, and to the extent that any Amber or Red document, or any part thereof, had been read to or by the Court, or referred to, during the PDD Trial, the Court

would (to the extent it considers necessary and/or upon application) consider to what extent the collateral use restrictions set out above and in the CROs were to be disapplied in those specific instances.

7. The Lead Defendants, save for the Mercedes Defendants, categorised the parameters and values within the pleadings and other documents (with some exceptions) as Amber. The Mercedes Defendants maintained that the parameters and values should be Red.
8. Whilst on the Lead Defendants' proposal, the relevant contents of the 'Amber' documents could be read in open court (as could the pleadings, witness or expert evidence which referred to them), the terms of their original draft Order nevertheless imposed restrictions on reporting or other collateral use of the contents of the documents read out until the outcome of the procedure envisaged in paragraph 9. As Mr Kramer KC, for the Claimants, pointed out, this created two problems. The first was one of principle: restrictions on contemporaneous reporting were incompatible with the principle of open justice. The second was one of practicality: it would be confusing and dangerous for different reporting restrictions to apply to different documents. The public or journalists could potentially be in contempt if they failed to understand that, notwithstanding a particular document being referred to in open court, a document's contents could not be reported. Constant warnings for some documents or some parts of some documents would be cumbersome, and may be ineffective where the public or journalists attended only parts of the trial.
9. By the conclusion of the three-day hearing, this proposal had undergone some revision. Mr Sage on behalf of the Renault Defendants accepted - largely with support of the other Lead Defendants- that whilst the Amber category should be maintained, the reading of part of an Amber document in open court would have the ordinary consequences in that its contents could be reported or disseminated by any member of the public or a journalist attending. The only restriction to the usual application of CPR 31.22(1)(a) in respect of an Amber document was that the loss of protection against collateral use was restricted to that part of the document, rather than the whole document. The practical distinction between how a Green document and an Amber document was treated at trial, and how its contents could be reported, substantially dissolved.
10. The Lead Defendants, notwithstanding this concession, maintained their objection to the Claimants' application to remove the redactions on pleadings. The effect of this was that, although a party or journalist could learn the various parameters and values claimed to lie at the heart of the alleged PDDs by attending the trial itself, this information would not otherwise be publicly available. Alongside the Claimants' application in this respect are applications by three interested parties, ClientEarth, Mums for Lungs, and the Scottish NO<sub>x</sub> Emissions Steering Group (**'the Interested Parties'**) for unredacted copies of the pleadings pursuant to CPR 5.4C(1). As explained further below, it is the detailed technical information central to the allegations made which has been redacted, and there is therefore considerable overlap between the Interested Parties' applications and those made by the Claimants. If the Interested Parties succeed, and the relevant parameters and values are therefore made public through the pleadings, there

would plainly be no remaining confidentiality in the related parts of the disclosure which contain the same information.

11. It is for this reason that I consider the application by the Claimants, and the Interested Parties, for unredacted versions of the pleadings first, after setting out the relevant law. Thereafter I consider the applications relating to documents in respect of which the Interested Parties had no direct involvement.

## **B. THE LAW**

### *CPR 5.4C(1) and Open Justice*

12. “*Publicity is the very soul of justice*” (Scott v Scott [1913] AC 417, in which the House of Lords drew upon Jeremy Bentham).
13. It is for this reason that open justice is “*a fundamental principle of English Law*” (JC Bamford Excavators Ltd v Manitou UK Ltd [2023] EWCA Civ 840 at [71]). As observed by Toulson LJ in R (Guardian News and Media Ltd) v City of Westminster Magistrates’ Court (Article 19 intervening) [2012] EWCA Civ 420; [2013] QB 618, and endorsed by Lady Hale in Cape Intermediate Holdings Ltd v Dring [2019] UKSC 38, “*Open justice lets in the light and allows the public to scrutinise the workings of the law, for better or for worse.*”
14. CPR 5.4C (Supply of documents to a non-party from court records) is one of the central civil procedural mechanisms reflecting the importance of open justice. It states as follows:
  - “(1) The general rule is that a person who is not a party to proceedings may obtain from the court records a copy of –
    - (a) a statement of case, but not any documents filed with or attached to the statement of case, or intended by the party whose statement it is to be served with it;
    - ...
  - (2) A non-party may, if the court gives permission, obtain from the records of the court a copy of any other document filed by a party, or communication between the court and a party or another person.
    - ...
  - (3) A non-party may obtain a copy of a statement of case or judgment or order under paragraph (1) only if –
    - (a) where there is one defendant, the defendant has filed an acknowledgment of service or a defence;
    - (b) where there is more than one defendant, either –
      - (i) all the defendants have filed an acknowledgment of service or defence;

- (ii) at least one defendant has filed an acknowledgment of service or a defence, and the court gives permission;
  - (c) the claim has been listed for a hearing; or
  - (d) judgment has been entered in the claim.
- (4) The court may, on the application of a party or of any person identified in a statement of case –
  - (a) order that a non-party may not obtain a copy of a statement of case under paragraph (1);
  - (b) restrict the persons or classes of persons who may obtain a copy of a statement of case;
  - (c) order that persons or classes of persons may only obtain a copy of a statement of case if it is edited in accordance with the directions of the court; or
  - (d) make such other order as it thinks fit.”
- 15. The ‘general rule’ therefore is that a person who is not a party to proceedings may obtain from the court records a copy of a statement of case (which includes particulars of claim, defences and replies). This reflects the principle that the allegations parties to civil proceedings make against one another are public (see DMK v News Group Newspapers Ltd [2016] EWHC 1646 (QB), per Warby J (as he was then) at [12]). CPR 5.4C(3) sets out circumstances in which a non-party may obtain a copy of a statement of case or a judgment or order pursuant to CPR 5.4C(1). It is not in dispute that one or more of the requirements of 5.4C(3) have been met in this case.
- 16. The rule is ‘general’ in the sense that there may be exceptions to it. This is provided for in CPR 5.4C(4), pursuant to which a party or any person identified in a statement of case may apply to the Court for the right under CPR 5.4C(1) to be restricted in one way or another. In the face of the application for unredacted copies of the pleadings, it is in substance an order pursuant to CPR 5.4C(4)(c) sought by the Manufacturer Defendants restricting publication to the redacted versions.
- 17. CPR 5.4C(1) can be distinguished from CPR 5.4C(2), which relates not to statements of case, but to other documents on the court record. To obtain such documents, it is necessary for the third party to obtain the permission of the Court.
- 18. In Dring, Lady Hale identified that the principal purpose of open justice is two-fold. The first is to enable public scrutiny of the way in which the courts decide cases, holding the judges to account for the decisions they make and to enable the public to have confidence that they are doing their job properly. The application from the third parties places more emphasis, however, on the second, which goes beyond the policing of individual courts and judges:



*“It is to enable the public to understand how the justice system works and why decisions are taken. For this they have to be in a position to understand the issues and the evidence adduced in support of the parties’ cases. In the olden days, as has often been said, the general practice was that all the argument and the evidence was placed before the court orally. Documents would be read out. The modern practice is quite different. Much more of the argument and evidence is reduced into writing before the hearing takes place. Often, documents are not read out. It is difficult, if not impossible, in many cases, especially complicated civil cases, to know what is going on unless you have access to the written material.”*

19. Dring itself was not a case under CPR 5.4C(1), in respect of access to pleadings, but pursuant to CPR 5.4C(2), access to other documents. It was in this context that Lady Hale observed that although the Court has the power to allow access, the applicant has no right to be granted it “*save to the extent that the rules grant such a right*”. It is therefore for the person seeking access to documents pursuant to CPR 5.4C(2) to explain why he seeks it and how granting him access will advance the open justice principle. In this respect it may well be that the media are better placed than others to demonstrate a good reason for seeking access. But there are others who may be able to show a legitimate interest in doing so.
20. This requirement was emphasised in the judgment of Picken J, in Dring, when the matter had been remitted to the Court following the Supreme Court judgment ([2020] EWHC 1873 (QB)). Applying the Supreme Court’s decision, Picken J identified that an applicant (under CPR 5.4C(2)) should not merely show that access to documents would be in accordance with the open justice principle but also that such access would advance the open justice principle. A very recent example of where such an applicant could not do so was in X & Y v BBC “In re HMP” [2025] EWCA Civ 824. In this case the Court of Appeal identified circumstances in which the courts must respect the limits of the open justice principle. Court files may contain a great deal of information that is commercially sensitive or confidential or (as in X & Y) personal and private, relating to children. Where the objective of the BBC, whilst undoubtedly part of a legitimate journalistic investigation, was neither to scrutinise the way in which courts decided cases, nor to enable the public to understand how the justice system worked and decisions were made, the BBC was unable to demonstrate how granting it access to the documents sought would advance the open justice principle.
21. What open justice means, and the dual purpose that lays behind it, are plainly immutable irrespective of whether an application is being made pursuant to CPR 5.4C(1) or CPR 5.4C(2). However, the approach of the Court to applications under the two regimes is different. This is reflected in the different approach CPR 5.4C takes to the different classes of documents. On the basis of the authorities identified, in particular by Mr McCay in his helpful oral submissions, the relevant principles relating to CPR 5.4C(1) can be summarised as follows:
  - (1) CPR 5.4C(1) creates a “presumption” amounting to “a very clear default principle” that a non-party should be entitled to obtain unredacted copies of statements of case, judgments and orders (see Various Claimants v News Group Newspapers Ltd and another [2012] EWHC 397 (Ch), at [60]; WH

Holding Ltd v E20 Stadium LLP [2024] EWHC 817 (Comm), [2024] 4 WLR 52) at [11];

- (2) as such, orders under CPR 5.4C(4) are derogations from the principle of open justice. They must be ordered only when it is necessary and proportionate to do so, on the basis of a clear justification, with a view to protecting the rights which claimants (and others) are entitled to have protected by such means (see G v Wikimedia Foundation Inc [2009] EWHC 3148 (QB), [2010] EMLR 14 at [17]; WH Holding at [11]);
- (3) where the applicant is generally entitled to a document as of right under rule 5.4C, as it is under CPR 5.4C(1), the reasons why it wants it are of little or no importance unless it can be said that the document is sought for some improper purpose (see News Group at [63]). As such, there is not a burden upon the applicant specifically to identify how the application advances the principle of open justice. That public availability of unredacted pleadings does so is inherent in the very clear default position under CPR 5.4C(1);
- (4) the justification for departure is acutely fact-sensitive, but likely to include and probably most likely to be established by reference to one or more of the matters set out in CPR 39.2(3)(a)–(g) (WH Holding). This includes circumstances in which publicity would damage confidential information;
- (5) when an order restricting the CPR 5.4C(1) right is required, it must be limited in scope to reflect the minimum necessary incursion into the principle of open justice (G v Wikimedia Foundation Inc; WH Holding).

### *Confidentiality*

22. Cavallari contains a thorough review of the law relating to confidentiality. One of the reasons given by Cockerill J for that approach was that the Mercedes Defendants up to that point had indicated that those responsible for their original approach to designation may have benefitted from a refresher; the other was (it appears, optimistically) to short circuit the type of disputes now before the Court.
23. This judgment does not repeat that thorough review. The principles relevant to the application before me, drawn from Cavallari and the authorities relied upon both in that case and this, are, instead, summarised as follows:
  - (1) the burden lies on those seeking to displace the application of the open justice principle to produce clear and cogent evidence to explain why that departure is justified. The risk of damage caused to the affected party must be real;
  - (2) the claim to confidentiality needs to be focussed by reference to the precise contents of documents. The Court will not readily accept that the entire contents of a given document or a whole class of documents are confidential. The Court will expect a designation of confidential material

within such documents to be very carefully considered, and for it to be limited to that which is truly required;

- (3) the information must be such that a reasonable person in the position of the parties would regard it as confidential, and reasonableness, usage and practices in the relevant sector (for example, industrial or professional) are to be taken into account. There must be some value to the party claiming confidentiality (not necessarily commercial) in the information being treated as confidential;
- (4) the subjective view of the owner regarding confidentiality is not decisive;
- (5) material which is commercially sensitive to the extent that it is confidential may cease to be confidential because the value of the information is lost by the passage of time and technological progress;
- (6) in this respect, regard may be had to a five-year rule of thumb by way of rebuttable presumption: *“information which was secret or confidential, but which is over five years old must as a rule, on account of the passage of time, be considered historical and therefore as having lost its secret or confidential nature unless, exceptionally, the party relying on that nature shows that, despite its age, that information still constitutes essential elements of its commercial position or that of interested third parties”* Evonik de Gussa GmbH v European Commission [2017] 4 CMLR 1149 at [64] (ECJ). Whilst originating in an EU context, this simply reflects the application of a broadly sound proposition that the older the information in question is, the harder it will be to substantiate its continuing utility or value (even if secret);
- (7) information is generally no longer regarded as confidential once it has entered the public domain;
- (8) while no claim of confidentiality can be maintained in respect of information which can be readily obtained by inspecting an article which is publicly accessible, “relative confidentiality” can be claimed in respect of such information if it can only be obtained by a process of reverse engineering which takes time, effort and skill;
- (9) valid claims to confidentiality can be displaced on account of the public interest in the information entering the public domain on the basis that it reveals serious wrongdoing. This is sometimes called “the Iniquity Exception”. The merits threshold for the existence of an iniquity have been described variously as *‘reasonably be[ing] regarded as being a credible allegation from an apparently reliable source’*, *‘a real likelihood’* (real being used in contradiction to, for example, a fanciful likelihood), or *‘a prima facie case’*. On any view, a claim of iniquity does not need to be established on a balance of probabilities;

- (10) it may, in particular cases, also be necessary to weigh the public interest in maintaining confidence against a countervailing public interest favouring disclosure.

### **C. REDACTIONS TO THE PLEADINGS**

#### *The Interested Parties*

24. ClientEarth describes itself as an environmental law charity which has campaigned for many years for greater action to be taken to reduce air pollution in the UK and the EU. One of ClientEarth's key workstreams is its "Dieselgate" project. The overarching aim of this project is to reduce nitrogen oxide ('No<sub>x</sub>') pollution by tackling the continued use of prohibited defeat devices ('PDDs') in diesel vehicles.
25. Mums for Lungs describes itself as a grassroots organisation that campaigns to improve air quality across the UK, with over 1,500 supporters across the UK. It claims a particular interest in the circumstances in which any historic PDDs operated and what impact these devices have had, including if those PDDs exposed members of the public and Mums for Lungs supporters to NO<sub>x</sub> levels above the applicable legal limits; in understanding fully whether the issues with PDDs are continuing in light of its concern that diesel cars operating PDDs or without adequate emissions regulation systems might still be on the roads in the UK; and in ensuring regulators and those responsible for public health and safety have access to all relevant information to ensure they can protect the public from the effects of excess emissions.
26. The Scottish NO<sub>x</sub> Emissions Steering Group represents claimants in various proceedings in Scotland, which are currently being litigated in the Court of Session. The claims being brought are similar to those being considered by this Court in the Pan NO<sub>x</sub> litigation.
27. The Court also received correspondence from the Ella Roberta Foundation, Asthma & Lung UK, Deutsche Umwelthilfe e.V., a German environmental protection association, T&E UK (the national office of the European clean transport NGO), the Financial Times and Reuters supporting the applications by the Interested Parties (**'the Supporting Interested Parties'**).

#### *Redactions to the Pleadings*

28. For each Defendant group, there is a Generic Particulars of Claim, Defence and Reply. These documents are presently designated non-confidential in their entirety, and as such these documents are unredacted and all three groups presently have access to these pleadings.
29. There are, in addition, 'Individual Particulars of Claim' ('IPOCs'), directed at a particular sample vehicle within the cohort. By way of example, there are 16 IPOCs for the Mercedes Defendants, and lesser numbers for other Lead Defendants, reflecting the number of sample vehicles originally determined for each GLO. There are a smaller number of Individual Defences ('IDefs'),

reflecting the reduction in the number of samples as the management of the litigation continued, and a Consolidated Reply to Individual IDefs.

30. These documents have been redacted by the Lead Defendants. The redacted versions have already been made publicly available to those who wish to access them through a bespoke online system facilitated by the parties at the Court's request.
31. Whilst each Lead Defendant has been responsible for its own redactions, there is significant commonality of approach. All Defendants have redacted parameter values. The Mercedes Defendants have redacted firmware version string numbers, the names of correction factors, map names, formulae, the names of certain alleged devices, information as to how the Extended Glow Plug Heating Device works, and the entirety of Schedule 4 of each IPOC containing the map names and graphs demonstrating how the alleged PDDs operate. The Ford Defendants ('Ford') have redacted formulae, quantitative information, and calculations. Of the Schedules, they redact all map names, maps, and graphs. Prior to providing lesser redacted versions on the evening of 1 July 2025, PCD redacted Ki factors, D and d numbers, and whole passages as to how the alleged defeat devices are said to operate. The revised redactions redact parameters, and maps/graphs derived from the firmware, more closely following the approach of the other Lead Defendants. The Renault and Nissan Defendants redact formulae, as well as all map names, maps and graphs in Schedules 4 and 5.
32. The Interested Parties plainly have not had the benefit of knowing what lies behind the redactions, unlike the Claimants, although the general nature of the type of information sought to have been redacted is clear from the surrounding context of the unredacted pleadings. The categories of redactions are generally as follows:
  - (1) Parameters values;
  - (2) Some (but not all) names of 'correction factors';
  - (3) The names and/or descriptions of firmware maps;
  - (4) Graphs and tables or other types of representations of parameters and values, extracted from the Functional Framework Documents ('FFD'); and
  - (5) Version string names from the firmware.

33. A typical redaction of parameters values, taken from a footnote within the Mercedes IPOC for Sample Vehicle MBC1, looks as follows:

<sup>6</sup> Below are the environment Air Temperature limits. Two limits are present, which represent the temperature at engine start ( ) and the continous environment air temperature during engine runtime ( ):

- ( "Lower release threshold EAT for emission path (start value)").
- ( "Lower release threshold EAT for the emission path (continuous)").
- ( "Upper release threshold EAT for emission path (start value)").
- ( "Upper release threshold EAT for the emission path (continuous)").

<sup>7</sup> Below are the Intake Air Temperature limits. Two limits are present, which represent the temperature at engine start ( ) and the continous environment air temperature during engine runtime ( ):

- ( "Lower approval threshold IAT for the emission path (start value)").
- ( "Lower approval threshold IAT for the emission path (continuous)").
- ( "Upper approval threshold IAT for the emission path (start value)").
- ( "Upper approval threshold IAT for the emission path (continuous)").

34. The thresholds are identified in narrative form, but the technical string name has been redacted, as have the upper and lower values for the relevant parameter. The redactions made to the narrative explanations of alleged defeat devices combine the various types of redactions. So, by way of example, a particular defeat device is alleged against the Mercedes Defendants by reference to the way in which a correction factor is applied to the EGR (exhaust gas recirculation) rate. The introduction to this section of the pleading, as redacted, reads as follows:

76. The EGR rate is also modulated by reference to an ( ). The ( ) is applied differently in Normal Mode as compared to Bypass Mode, but in both Modes the effect of the ( ) is that the EGR rate is higher in NEDC test conditions and reduced in other conditions of normal operation and use.

35. The allegation relating to this particular (unidentified, in the redacted version) correction factor reads as follows:

81. In NEDC test conditions, where both [REDACTED] and [REDACTED] will be within the range of 20 - 30°C, the effect of the [REDACTED] is that on engine start there is a reduction of the EGR base map value of [REDACTED]. However, as the engine warms by approximately [REDACTED] (depending on the starting temperature), the reduction is reduced to [REDACTED] and then to [REDACTED], meaning that after a temperature increase of [REDACTED] there is no reduction to the EGR rate in the base map. As a result, within NEDC conditions and after a very short period of time, the correction factor ceases to apply.
82. By contrast, outside NEDC conditions, the [REDACTED] results in a far greater and more persistent reduction in the EGR rate in many conditions encountered in normal vehicle operation and use. This is partly because higher scale values are used (particularly for lower starting temperatures) and partly because the reduction of EGR rates will persist until the engine temperature reaches [REDACTED].
83. When the bypass map is activated (the precise conditions for which remain under analysis by the Claimants), the same logic applies but the impact on EGR is slightly increased as the reducing factor persists for longer. For example, an engine starting at [REDACTED]:
- 83.1. will initially run with no EGR at all until the engine reaches [REDACTED] and
- 83.2. will then run with substantially less EGR (a minimum deduction of [REDACTED] once the engine reaches [REDACTED]) under all operating conditions until the engine reaches [REDACTED], which in cold conditions may take [REDACTED] or more, particularly when driving in urban areas. Therefore when running at [REDACTED] and [REDACTED] of torque, the engine will decrease EGR from [REDACTED] to [REDACTED], a reduction of [REDACTED] against the base map value.
36. Typically, Schedule 4 to each pleading contains 'Graphs and Data' for the Sample vehicle in question. These have been redacted in their entirety.
37. By way of further example in respect of another Lead Defendant, the Nissan Defendants ('Nissan'), the Claimants make allegations within the IPOC for Sample Vehicle ND1 relating to a Glow Plug post-heating strategy, the purpose and effect of which was to optimise the effectiveness of the ECS during NEDC testing. These have been redacted as follows:

100. The Higher Atmospheric Pressure Window corresponds to the atmospheric pressure found between sea level and around ■■■m. Type 1 testing will very likely be carried out within the Higher Atmospheric Pressure Window.<sup>18</sup> In respect of that window, the Post Heating duration selected is longer at higher coolant temperatures on ignition of between ■■■°C and ■■■°C. In particular:
- 100.1. If the engine coolant temperature is ■■■°C on ignition, the Post Heating duration will be ■■■ seconds.
- 100.2. The Post Heating duration *increases* from ■■■ seconds when the coolant temperature is ■■■°C on ignition to ■■■ seconds at ■■■°C. The length of Post Heating duration selected at coolant temperatures between ■■■°C and ■■■°C on ignition increases linearly as the temperature rises (i.e. the Post Heating duration will have be ■■■ seconds if the coolant is ■■■°C on ignition).
- 100.3. The Post Heating duration remains fixed at ■■■ seconds at coolant temperatures between ■■■°C to ■■■°C (inclusive).
- 100.4. At engine coolant temperatures above ■■■°C, the Post Heating duration decreases linearly as coolant temperature on ignition rises, until ■■■°C, when Post Heating duration is ■■■.
101. By comparison, where the engine coolant temperature was between ■■■ and ■■■°C at atmospheric pressures of ■■■ hPa and below, the Post Heating duration *reduces* from ■■■ seconds to ■■■ seconds linearly as engine coolant temperature on ignition increases.
102. The Glow Plugs do not engage in post-heating when the engine coolant temperature is ■■■°C or more, irrespective of atmospheric pressure.
103. The Glow Plug Post Heating Strategy is designed to enable the ND1 to perform better in Type 1 testing conditions than it would perform in elsewhere. In particular:
- 103.1. The increased Post Heating duration at higher engine temperatures described at paragraph 100.2 does not have a proper basis. It is inferred that this aspect of the strategy was designed to provide longer post-heating duration during Type 1 testing to bring the LNT and the more effective LP EGR into operation more quickly. Perversely, the ND1 has a shorter Glow Plug Post Heating duration when the engine coolant is at the lower temperatures below ■■■°C.
- 103.2. The Glow Plugs do not engage any post-heating where the coolant temperature is above ■■■°C.
- 103.3. If ND1 underwent a cold start, the Glow Plugs would engage in post-heating unless the coolant temperature was over ■■■°C as a result of the ambient temperature. Once the engine in ND1 has been started and then stopped, it will take several hours for the coolant temperature to reduce below ■■■°C. As such, there will likely be no Glow Plug Post Heating if ND1 undergoes a hot start.
38. Again, as with all Lead Defendants, the Graphs and Data in Schedule 4 have been redacted in full. The principal distinction, however, between the other Lead Defendants and Mercedes is that Mercedes maintain that all the redacted data within the pleading should be Red i.e. only referred to in a closed Court during which only parties who are members of the Pan-NOx CRO may be present. The



other Lead Defendants contend (on the whole) that the parameters and values can be regarded as Amber. They can therefore be referred to in open court, and following the concession made during the hearing, with no restrictions on reporting. They maintain a need for the pleadings publicly available upon application pursuant to CPR 5.4C(1) to remain redacted.

*The Interested Parties' Positions*

39. Mr McCay contends that the starting point is that the Interested Parties do not need to justify why they want or need a copy of the unredacted pleadings. They rely upon the dicta of Vos J, as he was then, in News Group in which he said that the reasons why an applicant under CPR 5.4C(1) wants the unredacted pleadings are of little or no importance unless it can be said that the document is sought for some improper purpose. There is, rightly, no suggestion that any of the Interested Parties are seeking unredacted pleadings for any 'improper purpose'.
40. Notwithstanding this primary position, the Interested Parties nevertheless do provide a justification for seeking unredacted versions of the pleadings.
41. Emily Kearsey provided evidence on behalf of ClientEarth. Ms Kearsey has run ClientEarth's 'Dieselgate' Project since 2024. Ms Kearsey has explained that the main strands of the project have been to engage with vehicle market surveillance authorities in the UK and EU to prompt robust, wide-ranging investigations into the suspected use of PDDs, and recalls where non-compliance is established; to seek to increase transparency in relation to the ongoing legacy of Dieselgate; and to gather and disseminate evidence to increase public awareness of the impact of continued suspected use of PDDs. Pursuant to the first of these strands, ClientEarth has submitted legal complaints to the vehicle market surveillance authorities in the UK and elsewhere. In 2023, ClientEarth alleged that the DfT's Article 51 investigation duties were engaged in relation to various vehicle models containing what have, in other European market surveillance reports, been identified as thermal window defeat devices. A second complaint in 2023 alleged that DfT's Article 51 investigation duties were engaged in respect of other potential strategies. ClientEarth also made representations to the Court in respect of documents disclosed in the context of the KBA Issues Trial, in which, as explained above, the Court determined that the redacted information was irrelevant to any Interested Parties' ability to understand the issues then before the Court, and as such permitted limited redactions to remain. The judgment made clear, however, that the position may be very different in the context of the PDD trial.
42. Ms Kearsey gives examples of the ways in which the current redactions to the pleadings are said to hamper the public's ability to understand how the PDDs are alleged to operate, and importantly, whether they would operate for most of the year in the UK. Referring by way of example to the Glow Plug post-heating strategy, extracted from the Nissan IPOC above, Ms Kearsey contends that the redactions applied to these sections make it difficult to understand anything meaningful about how the Glow Plug Device is said to operate or the nature of the contrast between the two sets of temperatures. Various other examples identify that, by virtue of the redactions, it is generally impossible to understand the nature of the applicable parameters to any alleged PDD at all. In relation to

the graphs and data within Schedule 4, Ms Kearsey states that if the schedules contain data relating to the parameters within which the alleged PDDs are operative, that information is of real interest to both the public and market surveillance authorities, and should not be redacted.

43. Jemima Hartshorn, of Mums for Lungs, makes broadly the same point. She states that as a result of the redactions, the pleadings are impenetrable, and that there is a strong public interest in understanding how any PDDs operated at a detailed rather than generic level. Ms Hartshorn makes the point that whilst no findings have yet been made by the Court as to whether any of the Sample Vehicles do in fact contain one or more PDDs, it is already clear from the IPOCs and IDefs that there are circumstances in which the vehicles' emissions control systems were deactivated or operated less effectively. The redactions mean, she says, that she and other members of the public cannot understand the circumstances in which the vehicles may emit higher levels of NO<sub>x</sub> because certain thresholds for temperature, speed, torque or other variables have been met, and it is not possible to tell whether there are circumstances which are likely to occur regularly when driving in England and Wales or whether there are steps that the public can take to avoid them.
44. Mr McGuire is a partner at Thompsons Solicitors and provided a witness statement on behalf of the Scottish NO<sub>x</sub> Emissions Steering Group. At the heart of his evidence is the concern that it was difficult to imagine how the detailed technical evidence could be explored effectively by the Court without full details being presented, given that investigation of the parameters and values 'forms the *de quo*' of the PDD trial. Mr McGuire concluded that it would be difficult if not impossible to follow the case without this material being made available.
45. The Supporting Interested Parties made submissions which, between them, emphasised the importance of open justice, the very substantial public interest in the NO<sub>x</sub> Emissions litigation, and the impact of the nature and extent of redactions on the ability to report accurately and comprehensively on the case.

#### *The Claimants' Position*

46. The Claimants support the Interested Parties' application in respect of the pleadings. Mr Kramer KC makes the point, first, that investigations into parameters and values lie at the very heart of the allegations made. To the extent that parameters and values are to be treated as Red, this would mean large parts of the case (in relation to Mercedes) would have to be conducted behind closed doors. At a practical level, there would be an enormous, and unjustified, burden in the preparation of evidence and submissions in redacted and unredacted forms. Even if the parameters and values are Amber, the redaction to the publicly available pleadings means that those who do not attend the trial would not know what the allegations were. Mr Kramer KC fairly accepted that the use of an Amber category as latterly proposed, where no redactions would be required for documents shown on screen and the content of all and any parameters would be capable of reference in open court, would no longer make the trial unworkable or impractical. However, he reiterated the principled stance that redactions to the pleadings remained incompatible with open justice and unjustified in circumstances where the Lead Defendants have not discharged the burden of

demonstrating why the information ought to be treated as confidential at all. In this regard, Mr Kramer KC's submissions emphasised (in summary): (1) the information's scope and age and (2) the fact that at least some of the information is in the public domain/in the hands of competitors already or capable of identification through chip-tuning or on road testing or collaboration; and (3) the principle of iniquity. Mr Kramer KC submits that in very large part, the approach of Cockerill J in Cavallari provides the answer to the application.

### *The Defendants' Position*

47. Each of the Lead Defendants opposes the lifting of redactions to the pleadings, notwithstanding the concession by some that the parameters and values can be referred to in open court, and reported if so referred to at the forthcoming PDD Trial. The basis for this is the remaining commercial confidentiality in the information, for the reasons set out more fully below.

### *Discussion*

48. The starting point is, as contended for correctly by the Interested Parties, that the substance of the allegations against each Lead Defendant is wholly impossible to follow, at least at any level of technical detail, with the pleadings in their redacted form. Ultimately the case is about the technical detail; this will lie at the heart of the evidence explored at trial. Whilst it may be that various of the Interested Parties may wish to understand that technical detail for reasons collateral to the issue of the advancement of open justice, this does not detract from their submission that, equally, without sight of the parameters and values, they have no hope of being able to understand the issues between the parties.
49. This has, in substance, been conceded by those Lead Defendants who have accepted that the values and parameters should be designated as 'Amber', with no restrictions on their reference in open court and their reporting. It is on this basis that they contended, under their initial proposal, that anyone in Court would be able to 'follow along' (but not report or use collaterally), implicitly accepting that if the public were prevented from seeing the detail of the evidence on parameters and values, they would not be able to 'follow along'.
50. Even if the parameters and values had been established as being highly commercially confidential, the fact that this information is so central to being able to understand the issues within the trial, together with the significant and justified public interest in this litigation, combine to justify the Interested Parties' application pursuant to CPR 5.4C(1) for unredacted versions of the pleadings. The importance of the public being able to understand the substance of the claims against the Lead Defendants outweighs any commercial confidentiality in that material. It should not be necessary for a member of the public or journalist to physically attend Court to understand the allegations. The distinction is arbitrary and contrary to the principle of open justice embedded in CPR 5.4C(1).
51. This conclusion is also demanded in circumstances where, for the reasons set out below, the Lead Defendants have failed to establish at any level of specificity that there is any meaningful confidentiality remaining in the parameters, values and

engineering strategies given the passage of time, regulatory change and obsolescence.

52. Each of the Lead Defendants has given evidence about the iterative design of engines and the retained confidentiality of technical design detail which may, if released, give competitors an advantage. So, for example:

- (1) Mr Norris-Jones, for the PCD Defendants, explains (based upon the prior evidence of Mr Chapelle, Senior Vice President for Powertrains and Chassis Engineering of the PSA Group) that while some aspects may change significantly, others that are not impacted by the Regulations may be based in the same design for many years (e.g., air loop and EGR management, cold start engine function management, stop and start management, torque structure and management, etc.). This means, it is said, that competitors may still be able to gain a competitive advantage should that design become publicly available. The “expiry” of the Euro 5 and Euro 6b emissions regulations has no bearing on the question of whether hardware and software in Euro 5 and Euro 6b vehicles is confidential. Indeed, it is said that there are functionalities in the firmware that are identical or very similar between Euro 5 and Euro 6e (the current legislation).
- (2) Mr Boddy, for Ford, says (based upon the prior evidence of Mr Black, the manager of the EU propulsion controls software team, responsible for the development and delivery of Engine Control software into Ford applications manufactured in Europe) that although technologies advance, they remain based on years of research and development that were initially reflected in earlier iterations/technologies/models – there is a continuum of development. Research and development do not take place in a vacuum – they draw on previous experience, know-how and learnings, rather than starting from scratch. Previous work product continues to be reused, albeit in a modified form, and in varying levels of similarity to previous iterations. On top of the factual similarities themselves, much of this kind of work reveals broader principles and strategies of design and development that span years.
- (3) Mr Hervé Gaulmé, a Renault engineer since 1989, gives evidence that to meet the evolving Euro standards as applicable, modern engine control software evolves through continuous improvements flowing from extensive Capex investment and research and development. Current systems (i.e. those on the road today) are not designed from scratch, but instead are developed from initial software versions and enhanced to meet additional requirements. The robustness of the applicable software is a direct result of the cumulative effect of several thousand individual calibrations, parameters and functionalities and other technical details used in the software of current vehicles, developed over many years. The structure of the software and the ECS Code, is therefore an aggregation of technological modules or bricks, each corresponding to achieving a variety of functional needs which have evolved (and continue to evolve) according to regulations applicable at the time and in the future and to factors relating to customer services, preferences and quality/satisfaction.
- (4) Mr Mirchandani, for Nissan, states, on the basis of what Nissan’s engineers have explained to him, that elements of EGR and LNT technology used in

2015/2016 may have evolved since but are still incorporated in current vehicle models or remain part of possible technological solutions to be implemented as part of the forthcoming EU7 standards in 2026. He observes that EGR and LNT technology is still being used in important overseas territories like Africa and Latin America where diesel vehicles are sold in large numbers and environmental standards are equivalent to Euro 5 or Euro 6b.

- (5) Ms Ramsauer, for Mercedes, similarly states that Mercedes-Benz products are not developed in a vacuum, and neither is the technology developed or the documents which relate to those technologies. It is not correct to say that the technology produced for one set of regulations or one vehicle model is then forgotten, or is useless, or no longer has value or the quality of confidence. The time and resource spent on developing models is used, built from and learned from to create subsequent models of vehicles.
53. However, all of this evidence has remained at a largely generic level. There is no specific evidence that the very parameters found in either Euro 5 or early Euro 6 vehicles, which are the subject of the pleaded allegations, are still directly relevant to Euro 6d or Euro 7 designs. This is perhaps unsurprising where the regulatory landscape has fundamentally changed (not least as a result of the very matters which are in dispute in this litigation). As pointed out by Mr Kramer KC, on the basis of evidence provided by Mr Gallagher for the Claimants, the early Euro 6b and c vehicles that are the subject of this litigation have not been capable of sale since 1 September 2019, and the parameterisation for the NEDC test has not been possible since 2017 (i.e. 8 years ago). The introduction of RDE (Real Driving Emissions) testing has meant that fundamental changes were required to the way vehicles functioned to capture a far wider range of driving. For example, to meet Euro 6d standards, Ford, Renault and Nissan all introduced SCR (Selective Catalytic Reduction), and there has been no explanation as to why the (superseded) parameters in a non-SCR vehicle would be of any assistance to a competitor developing SCR cars.
54. Importantly, therefore, there is no detailed explanation, beyond assertion, as to how or why the publication of parameters which form part of an overall iterative design process, but which themselves are older than 5 years, could actually be used by competitors to parameterise their vehicles in any meaningful sense today, against a different regulatory background and where those vehicles have been subjected to their own, separate, iterative design process. Although I accept that those engineers who have given evidence have a genuine, almost instinctive, belief in the confidentiality attached to now long superseded technical developments, in the absence of concrete examples of how such parameters would realistically be of practical use, I regard the suggestion that these parameters would be of any serious use to a competitor developing a vehicle today, which is required to comply with modern Euro standards, as not credible.
55. It is perhaps because of this that some of the evidence served seeks to rely upon the fact that other parts of the world are still permitted to manufacture cars to old Euro standards, such that the parameters and values may be of remaining value. So, Mr Gaulmé explains that Morocco still operates standards “*equivalent to Euro 5*” and that, as a result, “*Renault’s competitors which operate in the Moroccan market could be interested in obtaining the ECS Code to help shortcut*

*the development of Euro 6 vehicles for sale in Morocco*” and, further, that these competitors may also be interested in their Euro 5 code that “*may betray technical information that could be used by competitors*”. However, this evidence is again wholly non-specific. For example, there is no evidence that any competitor is in fact seeking to develop cars solely for such a market. There is no explanation of what restrictions do or do not exist within the Moroccan (or other) legislation that would make the use of such parameters of conceivable assistance in the development of a vehicle, or how parameters iteratively developed for a Renault vehicle would successfully translate to an unidentified competitor developing a different vehicle to unidentified standards.

56. Similar, but even more generic, references by PCD to vehicles manufactured in China do not assist them in rebutting the presumption that public knowledge of the old parameters and values in the Sample Vehicles designed to meet (or not, as the case may be) superseded standards are now, through the passage of time, likely to present no meaningful risk of damage to them.
57. A further point of difficulty for the Lead Defendants, as pointed out by Cockerill J in Cavallari, is their argument of heterogeneity. Each Defendant relies to a greater or lesser extent on the assertion that the parameters and values vary, so as to reflect the individual characteristics of the vehicle. This is said to support the argument that a finding in respect of one vehicle may not safely be translated to an equivalent finding in respect of another vehicle. It is difficult to reconcile this submission with the submission that knowledge of the (old) parameters in respect of a particular aspect of one vehicle would be readily or easily applicable to a different vehicle, itself the subject of its own iterative design.
58. I also accept evidence served by the Claimants that firmware and ECUs are already publicly available for purchase via specialist websites or eBay. Mr Gallagher provides evidence demonstrating that the same or equivalent parameters and values are readily available for sale online in relation to a large number of the sets of firmware. These have been used in the past by experts to produce reports about the existence of PDDs in various vehicle types. Mr Sage submitted, on behalf of Renault, that the links purportedly relating to its vehicles did not in fact link to relevant firmware for the Sample Vehicles, but related instead to other Renault cars. This misses the point. These websites demonstrate the ability of third parties to access and make public the information over which confidentiality is claimed. There is no suggestion that, to those with the technical know-how, this is a particularly difficult or labour-intensive thing to do. It is also of significance, as submitted by Mr Kramer KC, that notwithstanding the public availability of the type of information sought to be redacted (even if not in respect of the Sample Vehicles), the Lead Defendants have not provided any evidence that this public availability has in fact led to any actual damage to their business, for example by an awareness that the information has been used by competitors to short circuit their own design development. The absence of any such real-life impact, where it is clear that much equivalent information is already in the public domain, fortifies the Claimants’ contention that the risk of damage caused by the public availability of parameters and values (indeed, the entire firmware) is more perceived than real.

59. Finally, I consider that even if the Lead Defendants had persuaded me that the values and parameters remained highly commercially sensitive, in the context of this litigation, the public interest would remain squarely in favour of allowing the pleadings to be available in unredacted form. This is because the allegations disclose *prima facie* credible allegations of serious misconduct. As Cockerill J found in Cavallari, this is a ground in its own right to defeat a claim to confidentiality over documents in accordance with the principle of iniquity. The argument is more acute still in the context of whether the detail of the pleaded allegations themselves, let alone any disclosure (as was being considered in Cavallari), should obtain the benefit of a cloak of confidentiality which would have the effect of disabling the public from understanding the issues in dispute.
60. There is therefore no proper justification for retaining redactions in respect of the parameters and values contained within the pleadings.
61. As to the other elements of the pleadings which have been the subject of redactions:
- (1) Graphs, table and maps are visual representations and tabulations of parameters and values. No explanation was provided by the Lead Defendants as to how they provided any information qualitatively different from the values and parameters themselves. It has not been said that any of the graphs, tables or maps contained within the pleadings are irrelevant to the allegations or include information which goes beyond that related to the allegations themselves and to that extent are not necessary in order to understand the technical detail behind the allegations. There is no additional reason for these to be redacted in circumstances where the parameters and values central to the allegations are not.
  - (2) Firmware version string names, the names and/or descriptions of firmware maps and correction factor names. No explanation has been provided as to how these names provide any useful information to a competitor (even if it related to a part of the firmware which itself was presently highly confidential).
62. Therefore, the Interested Parties' application succeeds in full (as does the related part of the Claimants' application) and the pleadings are to be made publicly available in a fully unredacted form forthwith.

#### **D. WITNESS STATEMENTS**

63. A number of the witness statements served on behalf of the Lead Defendants have been redacted. The Claimants seek the removal of the relevant redactions. Insofar as the redactions relate to parameters, values, graphs, maps or other data dealt with above, it follows from the foregoing determination that such redactions should be removed. The redactions applied by Renault and PCD are limited to this type of technical detail. The Ford and Nissan redactions, however, also cover narrative explanations within the witness evidence which go far beyond the redaction of parameters and values.

64. I have specifically reviewed the redactions within the relevant witness statements:

Ford. The relevant witness statement is that of Marcus Davies. Other than parameters, the first set of redactions relates to a calibration process guide which illustrates the iterative process by which calibration would be developed. The redacted illustration is extraordinarily high level, and is plainly not ‘highly confidential’ or remotely useful to third parties. It would be surprising if it did not reflect the type of iterative design process understood and utilised by engineering design departments around the world. The second set of redactions relates to interactions with various authorities about NO<sub>x</sub> related testing. The basis upon which the narrative description of the testing/re-testing could be said to be highly confidential is wholly unclear. There is no particular technical detail or trade secret referred to which could be said to be confidential. Moreover, as Ms Dannreuther for the Claimants demonstrated in submissions, at least some of the technical substance relating to Ford’s explanation as to why it got higher than expected NO<sub>x</sub> results from testing is already in the public domain. None of the redactions were justified.

Nissan. Other than in respect of parameters, all the redactions from each of the Nissan witness statements related to descriptions of, and even a mere reference to the phrase, ‘ROM-DR’. ROM-DR is the name given to a type of design development review meeting. The evidence relating to these meetings within the witness evidence is anodyne. A typical example of redacted text is:

“ROM-DR: in these meetings, performance was evaluated to develop calibration and assess achievements in driveability, emissions, combustion noise and software. Reports from these areas were reviewed in ROM-DR meetings to determine if the calibration could be industrialised for use in the next lot. Any issues would be flagged for further investigation or follow-up. However, decisions regarding calibration parameter content (i.e. the specific tuning of control maps and strategies) were the responsibility of the Calibration team leadership, typically a manager or Senior Calibration Engineer, and were handled outside of the ROM-DR process.”

There is nothing within this text that could conceivably be regarded as so unique to Nissan that it might constitute some sort of highly confidential trade secret. Ms Howard KC, for Nissan, fairly accepted redactions such as this were over-zealous. The redactions relating to general descriptions of what happened during the ROM-DR process were plainly not justified (irrespective of whether some parts of the ROM-DR related disclosure may include confidential but irrelevant information which Nissan would be entitled to keep confidential). One further redaction related to an extremely anodyne reference, at an extremely high level, to the financial aspects of the (now historic) Renault/Nissan alliance. It would be surprising if anything turned on the evidence which is of marginal relevance; but if it did need to be in evidence, because it was relevant, it should not have been redacted.



## **E. DISPUTED DE-DESIGNATION OF DOCUMENTS**

65. The application by the Claimants in relation to the de-designation of documentation was initially presented by way of spreadsheet lists for each Lead Defendant together with samples identified and briefly explained in Section B to the Sixth Witness Statement of Mr Gallagher. Mr Gallagher states that the examples were chosen to illustrate a variety of recurrent categories of claims of confidentiality and to show what he said was an inconsistent approach as between manufacturers to such claims.
66. Notwithstanding the attempts by Mr Gallagher to categorise documents and deal with examples, the sheer number of documents involved means that the Court is left in a position where many of the documents sought to be de-designated (as listed in the spreadsheet) are not themselves before the Court; and of those examples which have been evidenced, the Court has been taken in submissions to a very small number. This is no reflection on the industry or preparation of the Claimants' representatives. Nevertheless, as illustrated by Mr Sage in his submissions, the examples the Court was taken to in respect of particular categories did not always align with the documents said to be the examples for those categories. More significantly, the Lead Defendants are correct that in circumstances where a category of documents is plainly disparate (e.g. 'communications' which could include all sorts of documents covering all sorts of topics giving rise to different reasons to claim commercial confidentiality), it is very difficult, if not impossible, for the Court safely to conclude that the examples to which the Court has been taken, whether in evidence or submission, properly typify the category for the purposes of wholesale de-designation.
67. Perhaps in recognition of this difficulty, Mr Kramer KC emphasised the need for the Lead Defendants to have approached the exercise of de-designation in a focussed way, seeking to retain confidentiality over limited aspects of documents which otherwise contain considerable anodyne and non-confidential material. This was made clear by Cockerill J in Cavallari e.g. at paragraph [57]: '*Any attempt to [meet the legal test for establishing confidentiality] would need to explain exactly what is revealed by a particular part of a particular document and how it could be used.*' The Claimants submit that the Court is left in the same position as Cockerill J was, where large numbers of documents have been sought to be categorised as confidential without any attempt properly to identify the parts of the documents which are confidential and explain in a focussed way that confidentiality. In the absence of targeted identification of confidential aspects, it is therefore said that the documents should be de-designated wholesale (with liberty to apply).
68. The Lead Defendants accept that, in large part, they have not carried out a focussed de-designation exercise in the manner envisaged in Cavallari. Their reasoning is twofold:
- (1) the number of documents the Claimants have sought to have de-designated was initially extremely significant and has only more recently been refined. Mercedes also submit that the number remains excessive and that the Claimants have not, as required by the terms of the CRO, demonstrated as a pre-cursor to any de-designation application that de-designation is reasonable

and necessary. The Claimants' over-generous and untimely approach to de-designation has meant, in light of all the other burdens of this heavy litigation, the Lead Defendants have not been in a position to produce a focussed response; and

- (2) the Lead Defendants' primary position of categorising all *potentially* confidential documents as Amber means that de-designation at this stage is simply unnecessary. In due course, the Court will be aware of those particular parts of particular documents which are referred to, and the documents may be referred to in open court, consistent with open justice. Any issues with CPR 31.22 collateral use can be dealt with as required at the end of the trial (as happened in the KBA Issues Trial), and the parties are left to focus on trial preparation rather than dealing with potential confidentiality issues relating to large numbers of documents which, whilst nominally part of the trial bundle, are in practical terms unlikely to be referred to at trial.

69. In response to this, the Claimants contend as follows: (1) the large number of documents to be de-designated is itself a direct consequence of the illegitimate over-designation of documents as confidential in the first place by the Defendants: it says that over 91.5% of all disclosure provided (750,000 out of 820,000 documents) have been claimed as confidential; (2) the burden of reviewing documents (many of which have been disclosed later than originally ordered) has been such that the Claimants' identification of documents for the trial bundle and de-designation has been held up; (3) it is reasonable and necessary to de-designate documents which are not in fact confidential and which, in good faith, it is anticipated may be referred to at trial and which have been identified for inclusion in the trial bundle; (4) the Cavallari approach remains appropriate. As such, save for certain documents which the Claimants accept may, for now, remain designated as Red, all Amber documents (alternatively all Amber documents over 5 years old) ought to be designated Green (albeit with liberty to apply).
70. I have been left in no doubt that the allocation of documents as confidential by the Lead Defendants has been over-enthusiastic. This is explained in part by the Lead Defendants' general approach to confidentiality in values and parameters, accounting for a large number of the documents, which I have dealt with and rejected, at least insofar as that information forms part of the pleaded allegations. In respect of other documents not containing such information, the over-designation may also be explained - at least in part - by the exigencies of carrying out a significant disclosure exercise under pressure and where time for review (sometimes even for relevance, with documents being placed under a Hollander Order) has been curtailed to maintain deadlines. It is right that the original purpose of the CRO was not to facilitate this precautionary approach to confidentiality reviews during disclosure, but the Court recognises the practical reality that this has happened as a collateral disbenefit of the pressure placed on the parties to maintain the present date for the PDD Trial.
71. In relation to Mr Blakeley KC's point, for Mercedes, about the precondition for de-designation from the CRO, I accept that in circumstances where the Claimants consider in good faith that a particular document ought to be included within the trial bundle, and that document is presently designated as confidential which

designation is disputed, it is both reasonable and necessary for the Claimants to seek to de-designate that document as non-confidential.

72. That said, I am not prepared to de-designate documents wholesale in circumstances where I accept (a) not all categories safely allow mass de-designation to be applied from example to category and (b) that a material contributing reason for the Lead Defendants' practical inability to carry out the type of focussed exercise that, ordinarily, would be demanded of a party seeking to retain confidentiality in a document is the truncated timescales and significant pressures that have been placed on the parties and their legal representatives by the efforts to maintain the forthcoming PDD Trial.
73. The starting point is, as accepted by all parties, that a large number of documents have been redacted by the Lead Defendants because of the inclusion of parameters, values, technical data and equivalent information which I have dealt with in the context of the pleadings and witness statements. These documents should be de-designated to the extent consistent with the determination that such technical information contained within the pleadings is to be regarded as non-confidential. It is not clear how many documents sought to be de-designated remain in dispute once documents categorised as confidential on this basis are de-designated.
74. Next, the Claimants accepted for the purposes of the application that firmware/A2Ls and FFDs, and any parties' equivalent documents, could remain confidential, considering that they contain large amounts of information irrelevant to the matters in disputes. This is notwithstanding the Claimants' general points about the passage of time etc. This is the right approach (at least for now). There is a significant amount of irrelevant technical data in these documents, and the Lead Defendants are entitled to retain such confidentiality as may properly exist in these aspects of the documents undisturbed.
75. The Claimants also accepted in their written submissions that to the extent documents such as reports or presentations contained screenshots or excerpts from firmware/A2Ls and FFDs they do not need to be de-designated now, although they reserved the right to apply for de-designation at a later date. Save to the extent contained in any (now unredacted) pleading, I consider that any such extracts in other documents should remain 'Red'. Although Mr Kramer KC sought to row back from this concession in oral submissions, I consider it appropriate that other technical extracts from the firmware/A2Ls and software which have not been extracted into the pleadings should remain confidential, with liberty to apply for further de-designation. Given the inevitable focus on pleaded issues, it is unlikely that this will impinge materially on trial practicalities, and if and to the extent any such extract which is deployed is demonstrably relevant to pleaded issues, it is likely that any application to de-designate would be met with success for the same reasons as those given in relation to extracts included in the pleadings.
76. As to the remainder of the documents, there is, on the basis of the sort of proposal advanced by Renault by the conclusion of the hearing, no practical difference in terms either of the workability of the trial or open justice between a designation of Green and a designation of Amber. The only difference is that (a) CPR

31.22(1)(a) would only apply to the relevant part of the document, so the collateral use restriction (on the party to whom the document is disclosed, i.e. the Claimants) would not be lost in respect of the document as a whole; and (b) the Lead Defendants would have the opportunity of applying to reinstate the full collateral use restrictions (on the Claimants) within a specified period of time. Neither of these factors impinges upon the ability of the public and journalists to see, understand and report the contents of ‘Amber’ documents in precisely the same way as a ‘Green’ document during the course of a trial. I consider that any incursion into CPR 31.22(1)(a) should be strictly limited (subject to the right to apply). Contrary to the submission of Renault, therefore, the phrase “*read to or by the court, or referred to, ...*” should not be watered down. The extent to which this is applied to a particular document, if a dispute arises, is to be determined in the ordinary way in the context of such authorities as have considered CPR 31.22 and a bespoke wording is unnecessary.

77. In circumstances where the Claimants accept that the debate about de-designation necessarily involves a large number of documents which will not in fact end up being referred to at trial (notwithstanding their legitimate inclusion in an overall pool of documents which may be referred to, as is inevitably the way with a trial bundle), there is therefore little to be gained in practical terms in the specific context of this litigation in distinguishing between Green and Amber. Indeed, absent further action by the Lead Defendants during the trial, the very deployment of an Amber document will have the effect of turning the relevant part of the document from Amber to Green.
78. Therefore, in light of the absence of any impact on the workability of the trial or the principle of open justice, the correct balance to strike in respect of the remainder of the documents at this stage in proceedings is to maintain the designation of Amber where one of the Lead Defendants have so designated some or all of their documents. These documents will therefore be subject to the process of de-designation of the relevant part of the document upon that part being read to or by the Court, or referred to at a hearing which has been held in public. This is a practical approach which mitigates the risk of damage caused to the Lead Defendants by collateral use (by the Claimants) of confidential parts of documents which are part of, but not themselves read to or by the Court or referred to at a public hearing. It mitigates this risk without prejudicing either the Claimants or the principle of open justice.
79. It is therefore necessary now to consider only those documents, or parts of documents, which the Lead Defendants contend should be ‘Red’, which the Claimants consider should be de-designated.
80. According to the Claimants’ table produced at Annex 3 of their Skeleton Argument (as amended), the majority of remaining documents are categorised Green or Amber. The categories of documents labelled Red by various of the Lead Defendants are as follows:
  - (1) AES/BES Documents: PCD, Renault
  - (2) Article 3(9) Documents: Renault

- (3) Test results, reports and plans: Nissan (if contained in ROM-DR documents), and Mercedes (to some extent only)
  - (4) Design documents: Mercedes in respect of design specifications
  - (5) Decisions and exchanges with regulatory authorities: Nissan (open investigations only)
  - (6) Benchmarking: Nissan (if contained in ROM-DR documents)
  - (7) Updates documents: Renault and Ford (a limited amount each)
  - (8) Communications disclosure: Renault, Nissan and Mercedes (the latter in respect of a single document [although Mercedes reserved its right to categorise as Red other documents as it may identify as being confidential])
  - (9) Normal use documents: a single Mercedes document (although it was indicated in oral submissions that this was designated Amber [and noting that Mercedes reserved its right to categorise as Red other documents as it may identify as being confidential])
  - (10) Ramsauer 2 disclosure: relevant only to Mercedes (although it was indicated in oral submissions that these were designated Amber [save for 16 documents which had been designated as Red and which the Claimants had agreed in correspondence not to pursue for the purposes of this de-designation request]).
81. The dispute relating to AES/BES documents is common to all Lead Defendants, save for Ford and Nissan. The BES is a ‘base emission strategy’ that is active throughout the speed and load operating range of the engine unless an AES is activated. An AES is an emission strategy that becomes active and replaces or modifies the base emission strategy for a specific purpose or purposes and in response to a specific set of ambient and/or operating conditions. The AES/BES documents therefore describe (i) the operation of the AES and BES, including a description of the parameters that are modified by any BES and the boundary conditions under which the BES operates and (ii) a description of the fuel logic control, timing strategies and switch points during all modes of operation.
82. The Claimants submit that these documents, limited in number, provide a contemporaneous account to the regulators as to how the Lead Defendants asserted that their vehicles operated. As such, they anticipate that the Court may be invited to compare what was said in the AES/BES documents with the Defendants’ pleaded case and with the expert reports. The documents are phrased in non-technical language and the Claimants submit that they do not therefore contain anything like the technical detail included, for example, in the FFD. All of the AES/BES documents relating to the Sample Vehicles to be considered at the PDD Trial are more than five years old. It is therefore said that the vehicles in production today will no longer be parameterised in the same way, particularly in the case of those vehicles with SCR technology. The same points relating to the public availability of this information are made in respect of the content of these documents. Having reviewed the documents put before the Court, and as

found in *Cavallari*, it is clear that large parts of the documents could not sensibly be regarded as confidential. As it was put in that case in respect of an equivalent document, it ‘contains vast passages of things that are absolutely quotidian public information’.

83. Although some of the Lead Defendants maintain objections to the de-designation of AES/BES documents, the justification for doing so also largely echoes the debate around the redaction of parameters and values, and related graphs and maps which has been determined against the Lead Defendants.
84. For the same reasons as identified in respect of the parameters and values, these documents should be de-designated (and designated Amber), albeit with liberty to the Lead Defendants to apply specific and limited Red redactions in respect of technical data that is irrelevant. This is likely to be not burdensome in light of the relatively limited number of documents and it may be that the redaction of parts of the AES/BES document which are themselves not going to be deployed in cross-examination are unobjectionable to the Claimants. Without prejudging any dispute which may arise in respect of such redactions, it seems likely if there is a readily comprehensible justification for the Claimants deploying a particular part of the document, the Lead Defendants will be unlikely to justify that redaction. This determination also covers the 3 Update documents sought to be categorised as Red by Renault, which are said to be confidential for the same reasons as the AES/BES files.
85. The only other Type Approval documents which a Lead Defendant seeks to categorise as Red are Renault communications produced in the context of submissions to Union Technique de l'Automobile (UTAC) for the purposes of meeting the requirements of Article 3(9) of Regulation 692/2008. It is noted that other defendants have categorised equivalent documents as Green. The Claimants point to the age of the documents (well over 5 years), the fact they relate to obsolete vehicles and the high-level nature of the information. From a review of the documents, it is clear that much of the information in the documents is high-level, generic and not of a confidential nature. The technical information sought to be protected appears to be, in effect, parameters and values. For the same reasons as identified in respect of the parameters and values, these documents should be designated Amber, albeit with liberty to Renault to apply specific and limited Red redactions in respect of technical data that is irrelevant to the case only.
86. Under the Category of test results, reports and plans, and benchmarking, Nissan designate as ‘Red’ any document, in its entirety, produced by or relating to the ROM-DR process, referred to above. Nissan contends that these documents contain highly sensitive material that should not be disclosed openly. They are, it is said, based on performance evaluations and target requirements that Nissan set for its vehicles. These targets are unique to Nissan and differentiate its commercial offering from other OEMs. They include proprietary information belonging to Nissan. It was submitted that, given the uniqueness and proprietary nature of this information, and the fact that the procedures remain applicable to current models, albeit with varying targets, it is crucial that access to these documents is strictly controlled.

87. Whilst it is conceivable that there is some such information, it is evident from a review of these documents that wholesale categorisation as 'Red' is completely unjustified. Large parts of many of them are anodyne. It is also right that much of the relevant material sought to be redacted is, in essence, materially the same redacted parameter/value information which will enter the public domain in any event with the unredacted pleadings. However, I accept the proposition advanced by Ms Howard KC that as a 'category' the ROM-DR documents are not homogeneous. It would be wrong to read across from one document to another. In these circumstances, they should be designated Amber, albeit with liberty to Nissan to apply specific and limited Red redactions in respect of irrelevant technical data. Irrespective of perceived confidentiality, for the reasons explained, to the extent that that part of a document is technically relevant to the pleaded issues, the public interest is such that part should be open. The same analysis applies to 'Red' redactions sought to be maintained by Mercedes in respect of Test Results, reports and plans, . If design documents contain pricing information said to be sensitive, this is to be dealt with as per the communications documents below.
88. All the parties, save for Nissan, accept de-designation as either Green or Amber of decisions and exchanges with regulatory authorities. Nissan accept this in respect of closed (i.e. completed) investigations, but not open (i.e. ongoing) ones. There is no proper justification for this distinction. The same categorisation should apply irrespective of whether the investigation is closed or ongoing.
89. In terms of communications documents, Nissan's position is that it intends to categorise the documents as Green, Amber or Red. It had not done so as at the date of the hearing, and it was therefore difficult for the parties to engage meaningfully with specific examples. As stated above, 'communications' is a disparate category. Insofar as the documents contain technical or commercially sensitive information which is relevant to the matters in dispute, such documents or parts of documents may be categorised as Amber. A Red categorisation is almost certainly likely to be inappropriate if the document (or part of document) is relevant to the issues; however, as Mr Kramer KC accepted as a general proposition, the Lead Defendants have liberty to apply (such application needing to be acutely focussed). There is a single communications document within the Claimants' Annex 3 attributable to Mercedes. This was not a document which was referred to during the hearing. Having reviewed the document, it appears to date from 2008. For all the reasons given, whilst Mercedes may redact for relevance, any (old) data technically relevant to the pleaded issues is unlikely to survive an application for de-designation. This document should, subject to the foregoing, be designated Amber.
90. Some documentation is said to be commercially sensitive because it contains pricing information (e.g. contained within general communications categories). By way of general observation in order to reduce the likelihood of disputes arising during trial, much pricing information will not be of any particular relevance to the technical issues in the case. It may be that there is some collateral relevance if, for example, pricing considerations factor into an alleged motivation for particular technical solutions. Even so, the direct probative value is unlikely to be significant. In the specific context of Nissan/Renault, the precise details of their

commercial arrangements (rather than the fact of such arrangements) are, likewise, generally not likely to be relevant. As such, pricing information can generally be redacted for relevance. However, to the extent the Claimants nevertheless wish to deploy a particular document and can justify doing so by reference to the pleaded issues, it is likely that any application for the information to be unredacted would be successful.

## **F. CONCLUSION**

91. In summary:

- (1) The pleadings are to be unredacted. Unredacted pleadings are to be made available to interested parties who have applied, or apply, pursuant to CPR5.4C(1);
- (2) The witness statements are to be unredacted;
- (3) The FFD/Firmware/A2L files are to remain designated confidential, save in respect of any excerpts etc. which are pleaded and/or included in documents which contain the same extracts as found in the pleadings;
- (4) Other FFD/Firmware/A2L file extracts in documents otherwise Green or Amber may remain designated Red with liberty to apply;
- (5) All documents designated Amber or Red by reason of reference to parameters and values which have been pleaded should be de-designated;
- (6) Other documents designated Amber to remain Amber, but subject to a procedure whereby (a) CPR 31.22(1)(a) would only apply to the relevant part of the document, so the collateral use restriction (on the party to whom the document is disclosed, i.e. the Claimants) would not be lost in respect of the document as a whole; and (b) the Lead Defendants have the opportunity of applying to reinstate the full collateral use restrictions (on the Claimants) within a short, specified period of time. The phrase '*read to or by the court, or referred to, ...*' should not be watered down.
- (7) All other documents designated Red are re-designated Amber, subject to the Lead Defendants' right to redact for relevance, and liberty to apply if a dispute arises.

92. As a result of these determinations, very few (if any) parts of documents which are to be the subject of exploration at trial will not be designated Green or Amber. They will therefore be considered in open court, and their contents are subject to no reporting restrictions. The parties' demonstrated ability to navigate the Court to any relevant documents still designated as confidential in a way that does not breach that confidentiality will no doubt mean that it would be surprising if any part of the PDD Trial will take place behind closed doors or be subject to any reporting restrictions.