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DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA-2012-0133]

Public Hearing to Determine Whether ZAP Has Met Notification and Remedy Requirements

AGENCY: National Highway Traffic Safety Administration (NHTSA), DOT.

ACTION: Notice of public hearing.

SUMMARY: NHTSA will hold a public hearing on whether ZAP,¹ a publicly owned company based in Santa Rosa, California, has reasonably met its obligations to notify owners, purchasers, and dealers of noncompliances with Federal Motor Vehicle Safety Standard (FMVSS) No. 122, Motorcycle brake systems, and to remedy those noncompliances in two recalls involving Model Year (MY) 2008 ZAP Xebra three-wheeled vehicles, which ZAP imported from China.

DATES: The public hearing will be held beginning at 10 a.m. ET on October 9, 2012 in the Oklahoma City room of the U.S. Department of Transportation Conference Center, located at 1200 New Jersey Avenue, SE., Washington, DC 20590. NHTSA recommends that all persons attending the proceedings arrive at least 45 minutes early in order to facilitate entry into the Conference Center. NHTSA cannot ensure that late arrivals will be permitted access to the hearing. Attendees are strongly discouraged from bringing laptop computers to the hearing, as they will be subject to additional security measures. If you wish to attend or speak at the hearing, you must register in advance no later than October 2, 2012 (and September 28, 2012 for non-U.S. citizens), by following the instructions in the PROCEDURAL MATTERS section of this notice. NHTSA will

¹ ZAP also does business as ZAP Jonway. See <http://www.zapworld.com/>.

consider late registrants to the extent time and space allows, but cannot ensure that late registrants will be able to attend or speak at the hearing. To ensure that NHTSA has an opportunity to consider comments, NHTSA must receive written comments by October 2, 2012.

ADDRESSES: You may submit comments to the docket number identified in the heading of this document by any of the following methods:

- Federal eRulemaking Portal: go to <http://www.regulations.gov>. Follow the online instructions for submitting comments.
- Mail: Docket Management Facility, M-30, U.S. Department of Transportation, West Building, Ground Floor, Rm. W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- Hand Delivery or Courier: West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.
- Fax: (202) 493-2251.

Regardless of how you submit your comments, you should mention the docket number of this document.

You may call the Docket at 202-366-9324.

Note that all comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided.

FOR FURTHER INFORMATION CONTACT: For registration to attend or speak at the public hearing: Sabrina Fleming, National Highway Traffic Safety Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590 (Telephone: 202-366-9896)

(Fax: 202-366-3081). For hearing procedures: Kerry Kolodziej, Office of the Chief Counsel, National Highway Traffic Safety Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590 (Telephone: 202-366-5263) (Fax: 202-366-3820).

Information regarding the recalls is available on NHTSA's website:

<http://www.safercar.gov>. To find these recalls: (1) in the drop-down menu under "Safety Recalls," search for a recall by vehicle; (2) select model year 2008; (3) select ZAP as the make; (4) select Xebra as the model; and (5) click "Retrieve Recalls." Once information on the recalls is displayed, clicking on the "Document Search" buttons will display recall-related documents.

SUPPLEMENTAL INFORMATION: Pursuant to 49 U.S.C. 30118(e) and 30120(e), and 49 CFR 557.6(d) and 557.7, NHTSA has decided to hold a public hearing on whether ZAP has reasonably met its obligations under the National Traffic and Motor Vehicle Safety Act, as amended (Safety Act), to provide notifications regarding the MY 2008 ZAP Xebra's noncompliances with FMVSS No. 122, Motorcycle brake systems (49 CFR 571.122), and to remedy those noncompliances. The noncompliances are the subject of two recall campaigns, Recall Nos. 09V-177/12V-230 and 09V-385/12V-363.

I. Initiation of a Recall

A manufacturer of a motor vehicle that decides in good faith that the vehicle does not comply with an applicable FMVSS must notify NHTSA by submitting a Defect and Noncompliance Information Report, commonly referred to as a Part 573 Report. 49 U.S.C. 30118(c); 49 CFR 573.6. A Part 573 Report shall be submitted not more than 5 working days after a noncompliance with a FMVSS has been determined to exist. 49 CFR 573.6(b). The manufacturer must subsequently file quarterly reports with NHTSA

containing information including the status of the manufacturer's recall notification campaign and the number of vehicles that have been remedied. 49 CFR 573.7.

Pursuant to the Safety Act, a "manufacturer" of a motor vehicle includes both a person manufacturing or assembling motor vehicles, and a person importing motor vehicles for resale. 49 U.S.C. 30102(a)(5). Both the importer of a motor vehicle and the vehicle's fabricating manufacturer are responsible for any noncompliance determined to exist in the vehicle. 49 CFR 573.5(a). As to imported motor vehicles, compliance with recall regulations by either the fabricating manufacturer or the importer of the vehicle shall be considered compliance by both. 49 CFR 573.3(b).

II. Notification Requirements

In addition to its notification to NHTSA, if the manufacturer of a motor vehicle decides in good faith that the vehicle does not comply with an applicable FMVSS, the manufacturer must notify owners, purchasers, and dealers of the vehicle of the noncompliance. 49 U.S.C. 30118(c); see 49 CFR Part 573; 49 CFR Part 577.²

The manufacturer must send a notification of the noncompliance, by first class mail, to each person registered under State law as the owner of the vehicle and whose name and address are reasonably ascertainable by the manufacturer through State records or other available sources. 49 U.S.C. 30119(d); 49 CFR 577.7(a)(2)(i).³ If the owner cannot be reasonably ascertained, the manufacturer shall notify the most recent purchaser known to the manufacturer. 49 U.S.C. 30119(d); 49 CFR 577.7(a)(2)(i). As explained in

² A manufacturer is required to furnish NHTSA with a copy of each communication involving a recall that the manufacturer issued to, or made available to, more than one dealer, distributor, lessor, lessee, other manufacturer, owner, or purchaser, no later than five working days after the end of the month in which it is issued. 49 CFR 579.5.

³ Among other things, the notification to owners must contain a clear description of the noncompliance, an evaluation of the risk to motor vehicle safety reasonably related to the noncompliance, the measures to be taken to obtain a remedy of the noncompliance, and the earliest date on which the noncompliance will be remedied without charge. 49 U.S.C. 30119(a); see 49 CFR Part 577.

NHTSA's Safety Recall Compendium: "It is critically important that owners be informed promptly of unreasonable risks to their safety and failures of their products to meet minimum safety standards, and even in those cases where the manufacturer may not have perfected its free remedy or may not have sufficient parts to be able to remedy all the recalled products for all owners immediately. Accordingly, it is expected that manufacturers issue their owner notification letters within 60 days of making a safety defect or noncompliance decision."⁴

Additionally, a manufacturer must send notifications to dealers and distributors, as specified by 49 CFR 577.13. These notifications must be sent within a reasonable time after the manufacturer first decides that a noncompliance exists. 49 U.S.C. 30119(c); 49 CFR 577.7(a). The notifications must include an advisory that it is a violation of Federal law for a dealer to deliver a new motor vehicle covered by the notification under a sale or lease until the noncompliance is remedied. 49 CFR 577.13; see 49 U.S.C. 30112(a)(1) (prohibiting a person from selling or offering for sale a vehicle that does not comply with an applicable FMVSS).

On its own motion or on petition of any interested person, NHTSA may conduct a hearing to decide whether a manufacturer has reasonably met its notification requirements. 49 U.S.C. § 30118(e). If NHTSA decides that the manufacturer has not reasonably met the notification requirements, it shall order the manufacturer to take specified action to meet those requirements and may take any other action authorized by the Safety Act, including assessing civil penalties. See 49 U.S.C. 30118(e), 30165(a)(1). A person that violates the Safety Act, including the notification requirements, or

⁴ NHTSA, Safety Recall Compendium at 7-8, <http://www-odi.nhtsa.dot.gov/cars/problems/recalls/documents/recompendium.pdf>.

regulations prescribed thereunder, is liable to the United States Government for a civil penalty of not more than \$6,000 for each violation. A separate violation occurs for each motor vehicle and for each failure to perform a required act. The maximum penalty for a related series of violations is \$17,350,000. 49 U.S.C.

30165(a)(1); 49 CFR 578.6.

III. Remedy Requirements

A manufacturer of a noncomplying motor vehicle is required to remedy the vehicle without charge. 49 U.S.C. 30120(a). The manufacturer may remedy the noncompliance by repairing the vehicle, by replacing the vehicle with an identical or reasonably equivalent vehicle, or by refunding the purchase price, less a reasonable allowance for depreciation. 49 U.S.C. 30120(a). If a manufacturer decides to repair a noncomplying motor vehicle and the repair is not done adequately within a reasonable time, the manufacturer shall replace the vehicle without charge with an identical or reasonably equivalent vehicle, or refund the purchase price, less a reasonable allowance for depreciation. 49 U.S.C. 30120(c).

On its own motion or on application by any interested person, NHTSA may conduct a hearing to decide whether a manufacturer has reasonably met the remedy requirements. 49 U.S.C. 30120(e). If NHTSA decides that the manufacturer has not reasonably met the remedy requirements, it shall order the manufacturer to take specified action to meet those requirements, including by ordering the manufacturer to refund the purchase price of the noncomplying vehicles, less a reasonable allowance for depreciation. 49 U.S.C. 30120(a), (c), (e). NHTSA may also take any other action authorized by the Safety Act, including assessing civil penalties. See 49 U.S.C.

30120(e), 30165(a)(1). A person that violates the Safety Act, including the remedy requirements, or regulations prescribed thereunder, is liable to the United States Government for a civil penalty of not more than \$6,000 for each violation. A separate violation occurs for each motor vehicle and for each failure to perform a required act. The maximum penalty for a related series of violations is \$17,350,000. 49 U.S.C. 30165(a)(1); 49 CFR 578.6.

IV. MY 2008 ZAP Xebra

ZAP is the importer of the MY 2008 ZAP Xebra and the registered agent for the fabricating manufacturer, China Qingqi Group Inc./Qingqi Group Motorcycle Co. Ltd. (“Qingqi Group”) of China. The MY 2008 ZAP Xebra is an electric, three-wheeled vehicle with a sedan or truck body style. As a three-wheeled vehicle, the MY 2008 ZAP Xebra is subject to the FMVSSs for motorcycles. See 49 CFR 571.3(b).

A. NHTSA’s Investigation of the MY 2008 ZAP Xebra

In late 2008, NHTSA tested a NHTSA-owned MY 2008 ZAP Xebra for compliance with FMVSS No. 122, Motorcycle brake systems, at Transportation Research Center Inc. (TRC) in East Liberty, Ohio.⁵

NHTSA identified multiple apparent noncompliances with FMVSS No. 122. Two of the apparent noncompliances related to the stopping distance requirements of FMVSS No. 122. First, the vehicle did not comply with the first effectiveness requirement of FMVSS No. 122, S5.2.1, Service brake system, because the service brakes were not capable of stopping the motorcycle from 30 m.p.h. within 54 feet during NHTSA’s testing. Second, following the burnishing procedure specified in the Standard,

⁵ See NHTSA, Safety Compliance Testing for FMVSS 122, Final Report No. 122-TRC-10-004 (Nov. 8, 2010). The test report is publicly available by searching on <http://www.nhtsa.gov/cars/problems/comply/>.

the vehicle did not comply with FMVSS No. 122, S5.3, Service brake system—second effectiveness, because the service brakes were not capable of stopping the motorcycle from 30 m.p.h. within 43 feet during NHTSA’s testing. Due to these apparent noncompliances with the stopping distance requirements, NHTSA terminated its testing of the vehicle after the second effectiveness test.

At various times, NHTSA also observed three additional apparent noncompliances with other requirements of FMVSS No. 122. First, the vehicle did not comply with FMVSS No. 122, S5.1.2.1, Master cylinder reservoirs, because it did not have a separate reservoir for each brake circuit with each reservoir filler opening having its own cover, seal, and cover retention device. Second, the vehicle did not comply with FMVSS No. 122, S5.1.2.2, Reservoir labeling, because the label was not correctly worded and some of the letters were not at the minimum required height. Finally, the vehicle did not comply with FMVSS No. 122, S5.1.3.1, Failure indicator lamp, because the vehicle did not have a failure indicator lamp (which is required to activate for pressure failure, low fluid, and momentarily when the ignition switch is turned to the “on” or “start” position).

NHTSA notified ZAP of the apparent noncompliances with the stopping distance and reservoir labeling requirements on April 9, 2009.⁶ NHTSA notified ZAP of the apparent noncompliance with the master cylinder reservoir requirement on August 21, 2009.⁷ NHTSA notified ZAP of the apparent noncompliance with the failure indicator lamp requirement on approximately June 9, 2010.⁸

B. ZAP’s Notifications to NHTSA of FMVSS No. 122 Noncompliances

⁶ Letter from H. Thompson, NHTSA to G. Starr, ZAP (Apr. 9, 2009).

⁷ Email from S. Seigel, NHTSA to J. Long, ZAP (Aug. 21, 2009).

⁸ Phone call log of S. Seigel, NHTSA (June 9, 2010).

1. Initial Recall Campaigns (Recall Nos. 09V-177 and 09V-385)⁹

ZAP first notified NHTSA that the MY 2008 ZAP Xebra was noncompliant with the FMVSS No. 122 stopping distance requirements by submitting to NHTSA a Part 573 Report prepared on May 18, 2009.¹⁰ NHTSA assigned Recall Number 09V-177 to this recall campaign.

In a second Part 573 Report, prepared on September 30, 2009, ZAP notified NHTSA of its decision that the MY 2008 ZAP Xebra does not comply with FMVSS No. 122, S1.2.1, Master cylinder reservoirs.¹¹ NHTSA assigned Recall Number 09V-385 to this recall campaign. ZAP subsequently submitted an untimely petition for inconsequential noncompliance, see 49 CFR 556.4(c), which NHTSA denied on November 25, 2009.¹² ZAP then submitted an amended Part 573 Report, prepared on December 9, 2009, for this noncompliance.¹³

Most recently, ZAP reported that there are 691 vehicles subject to the recalls.¹⁴

2. Renewed Recall Campaigns (Recall Nos. 12V-230 and 12V-363)

At NHTSA's request, ZAP initiated renewed recall campaigns for these FMVSS No. 122 noncompliances. After several months of delay,¹⁵ ZAP submitted a new

⁹ The Part 573 Reports and other documents relevant to the recalls are available at www.safercar.gov.

¹⁰ Recall No. 09V-177, Part 573 Report (prepared May 18, 2009). Although ZAP submitted the Part 573 Report to NHTSA, it stated that Qingqi Group decided on April 27, 2009 that the noncompliance existed. Compliance with recall regulations by either the fabricating manufacturer or the importer of a vehicle is considered compliance by both. 49 CFR 573.3(b). Nothing herein limits Qingqi Group's responsibilities and liabilities for the noncompliances of these vehicles.

¹¹ Recall No. 09V-385, Part 573 Report (prepared Sept. 30, 2009). Based on this Part 573 Report, ZAP decided that the noncompliance existed on September 30, 2009.

¹² Letter from C. Harris, NHTSA to J. Long, ZAP (Nov. 25, 2009).

¹³ Recall No. 09V-385, Amended Part 573 Report (prepared Dec. 9, 2009).

¹⁴ Recall 09V-177, Quarterly Report (dated July 30, 2012); Recall 09V-385, Quarterly Report (dated July 30, 2012). ZAP initially reported there were 738 vehicles subject to the recalls, but has not explained why the number has changed. See Recall No. 09V-177, Part 573 Report II; Recall No. 09V-385, Part 573 Report § II.

¹⁵ See Letter from S. Schneider, ZAP to H. Thompson and S. Seigel, NHTSA (Dec. 10, 2011); Letter from S. Schneider, ZAP to H. Thompson, NHTSA (Apr. 2, 2012).

Part 573 Report, prepared May 18, 2012, addressing the noncompliance with the stopping distance requirements.¹⁶ NHTSA assigned Recall Number 12V-230 to this renewed recall campaign (previously designated as Recall No. 09V-177). ZAP later submitted a new Part 573 Report, prepared on July 18, 2012, for the noncompliance with the master cylinder reservoir requirement.¹⁷ NHTSA assigned Recall Number 12V-363 to this renewed recall campaign (previously designated as Recall No. 09V-385).

3. Other Apparent Noncompliances Identified by NHTSA

As discussed above, NHTSA also identified apparent noncompliances with FMVSS No. 122, S5.1.2.2, Reservoir labeling, and with FMVSS No. 122, S5.1.3.1, Failure indicator lamp. To date, ZAP has not submitted a Part 573 Report to notify NHTSA that it has decided in good faith that the MY 2008 ZAP Xebra does not comply with these aspects of FMVSS No. 122.¹⁸ However, as discussed below, ZAP's repair remedy does purport to address these apparent noncompliances.

C. ZAP's Recall Notifications to Owners, Purchasers, and Dealers

1. Initial Recall Campaigns (Recall Nos. 09V-177 and 09V-385)

ZAP used an internal customer warranty database as its sole source of contact information for its recall notifications to owners and/or purchasers.¹⁹ ZAP repeatedly represented to NHTSA that it was working to obtain information on registered owners.²⁰ However, as of its July 30, 2012 response to a Special Order from NHTSA seeking additional information regarding the recalls, ZAP stated that it still had not obtained

¹⁶ Recall No. 12V-230, Part 573 Report (prepared May 18, 2012).

¹⁷ Recall No. 12V-363, Part 573 Report (prepared July 18, 2012).

¹⁸ ZAP likewise has not notified owners, purchasers, and dealers regarding these apparent noncompliances.

¹⁹ See ZAP, Response to Special Order, Interrogatory No. 6 (July 30, 2012).

²⁰ See Letter from S. Schneider, ZAP to H. Thompson and S. Seigel, NHTSA (Dec. 10, 2011); Letter from S. Schneider, ZAP to H. Thompson, NHTSA (Apr. 2, 2012); Letter from S. Schneider, ZAP to J. Timian, NHTSA (May 28, 2012).

contact information for registered owners of MY 2008 ZAP Xebras, from State records or other available sources.²¹ See 49 CFR 577.7(a)(2)(i).

ZAP provided NHTSA with inconsistent information on when it began notifying purchasers and/or owners of the recalls. In its July 30, 2012 response to the Special Order, ZAP stated that it sent its first owner notification letter for Recall No. 09V-177 on September 21, 2009, and for Recall No. 09V-385 on January 29, 2010.²² However, in quarterly reports, also dated July 30, 2012, ZAP indicated that it began notifying purchasers of both recalls in January of 2010. ZAP's owner letters indicated that owners should contact a dealer as soon as possible to arrange for repair.²³

Despite NHTSA's request in its Special Order to ZAP dated July 13, 2012, ZAP failed to provide NHTSA with a complete list of owners to whom it sent a notification letter for Recall Nos. 09V-177 and 09V-385.²⁴ Therefore, it is not known whether ZAP sent a notification letter to each individual or business listed in its customer warranty database.²⁵ In ZAP's most recent quarterly reports to NHTSA for these recalls, dated July 30, 2012, ZAP did not provide a date that its notification to purchasers was

²¹ See ZAP, Response to Special Order, Interrogatory No. 8 (July 30, 2012). ZAP represented in its Special Order response that it had entered into a contract with R.L. Polk to search for registered owners of the vehicles, and that it would take R.L. Polk approximately a month to complete the work. ZAP, Response to Special Order, Interrogatory No. 8 (July 30, 2012).

²² ZAP, Response to Special Order, Interrogatory No. 6 (July 30, 2012).

²³ ZAP, Response to Special Order, Sch. D-E (July 30, 2012).

²⁴ See NHTSA, Special Order to ZAP, Interrogatory No. 6 (July 13, 2012). NHTSA's regulations require each manufacturer of a motor vehicle to maintain a list of the names and addresses of registered owners, as determined through State motor vehicle registration records or other sources or the most recent purchasers where the registered owners are unknown, for all vehicles involved in a noncompliance notification campaign. The list shall include the VIN for each vehicle and the status of remedy with respect to each vehicle. Each vehicle manufacturer shall also maintain a list of the names and addresses of all dealers and distributors to which a noncompliance notification was sent. 49 CFR 573.8(a).

²⁵ ZAP's customer warranty database only appears to include contact information related to approximately 116 MY 2008 ZAP Xebras (identified by VIN). Based on its most recent quarterly reports, dated July 30, 2012, there are 691 vehicles subject to these recalls.

completed, instead responding that the notification process was continuing.²⁶ In its response to NHTSA's Special Order, ZAP explained that it plans to send additional notifications once it confirms through vehicle testing that it has an effective repair remedy.²⁷

In October 2011, NHTSA requested that ZAP renotify owners of Recall Nos. 09V-177 and 09V-385.²⁸ See 49 U.S.C. § 30119(e). In its Special Order, NHTSA asked ZAP to provide a list including name, address, and date for each owner to whom ZAP sent a renotification letter for these recalls.²⁹ ZAP failed to respond.³⁰ Thus, it appears that ZAP has not sent out any renotification letters, despite repeatedly promising to do so.³¹

It also appears ZAP never sent MY 2008 ZAP Xebra dealers the required notification of Recall Nos. 09V-177 and 09V-385. See 49 CFR 577.13. ZAP has not sent NHTSA a representative copy of any dealer notification. Although ZAP's customer warranty database appears to include some dealers, it is not clear whether it includes all MY 2008 ZAP Xebra dealers. Furthermore, as noted above, NHTSA is not aware whether ZAP sent each individual and business listed in that database a notification.³² Moreover, the notifications ZAP sent were addressed to owners and did not include

²⁶ Recall 09V-177, Quarterly Report (dated July 30, 2012); Recall 09V-385, Quarterly Report (dated July 30, 2012).

²⁷ ZAP, Response to Special Order, Interrogatory Nos. 8-9 (July 30, 2012).

²⁸ See, e.g., Letter from R. Willard, NHTSA to S. Schneider, ZAP (Oct. 6, 2011) (Recall No. 09V-177); Letter from R. Willard, NHTSA to S. Schneider, ZAP (Oct. 11, 2011) (Recall No. 09V-385).

²⁹ NHTSA, Special Order to ZAP, Interrogatory No. 6 (July 13, 2012).

³⁰ See ZAP, Response to Special Order, Interrogatory No. 6 (July 30, 2012).

³¹ See Letter from S. Schneider, ZAP to H. Thompson and S. Seigel, NHTSA (Dec. 10, 2011); Letter from S. Schneider, ZAP to H. Thompson, NHTSA (Apr. 2, 2012); see also Letter from J. Timian, NHTSA, to S. Schneider, ZAP (Mar. 9, 2012) (indicating that NHTSA had not received draft renotification letters or evidence of renotification).

³² ZAP's customer warranty database indicates that some vehicles are still for sale, despite the prohibition against offering for sale a motor vehicle that does not comply with applicable FMVSSs. See 49 U.S.C. 30112(a)(1); ZAP, Response to Special Order, Sch. F (July 30, 2012).

information required to be disclosed to dealers, including the advisory regarding sales or leases of noncompliant vehicles.³³ See 49 CFR 577.13. Dealers, including ZAP's wholly owned subsidiary, Voltage Vehicles, have continued to offer for sale and sell MY 2008 ZAP Xebras despite the recalls.³⁴

2. Renewed Recall Campaigns (Recall Nos. 12V-230 and 12V-363)

ZAP has not sent out any notification letters to owners, purchasers, or dealers of the renewed recall campaigns.³⁵ ZAP represented in its July 30, 2012 response to the Special Order that it does not plan to send additional notifications until it confirms through vehicle testing that it has an effective repair remedy.³⁶ ZAP did not indicate any plans to send dealer notifications for the renewed recall campaigns.

D. ZAP's Repair Remedy

ZAP elected the remedy of repairing the FMVSS No. 122 noncompliances subject to the recalls. See 49 U.S.C. 30120(a). However, as of the end of July 2012, ZAP conceded none of the vehicles subject to the recalls has been fully and successfully

³³ ZAP, Response to Special Order, Sch. D-E (July 30, 2012).

³⁴ See, e.g., <http://www.voltagevehicles.com/>; Letter from S. Schneider, ZAP to J. Timian, NHTSA (May 28, 2012) (indicating that ZAP has 9 vehicles "sold – in inventory," which are reserved for certain customers).

³⁵ See ZAP, Response to Special Order, Interrogatory No. 6 (July 30, 2012).

³⁶ See ZAP, Response to Special Order, Interrogatory Nos. 8-9 (July 30, 2012). In its Part 573 Reports initiating the renewed recalls, ZAP indicated that it will send notices to purchasers of the MY 2008 ZAP Xebra sedan once it has confirmed through vehicle testing that it has an effective repair remedy. According to those Part 573 Reports, 337 of the 691 vehicles subject to the recalls are sedans. ZAP did not indicate that it plans to send notifications to owners and purchasers of MY 2008 ZAP Xebra trucks, which are 354 of the 691 vehicles subject to the recalls.

repaired.³⁷ While ZAP previously reported that some vehicles had been remedied, ZAP acknowledged that those vehicles will need to be re-remedied.³⁸

After recalling the vehicles, ZAP claimed that, in 2009, it developed a successful repair remedy that was over engineered for stopping and not economically feasible.³⁹ ZAP elected not to implement this remedy, and contracted with Wilwood Engineering (Wilwood) to develop a different repair remedy. Wilwood provided ZAP with a report in April 2010 recommending certain modifications for the vehicle to meet the requirements of FMVSS No. 122.⁴⁰ Wilwood's recommendations addressed the stopping distance and master cylinder requirements, which are the subject of the recalls. Additionally, Wilwood recommended that, to meet FMVSS No. 122, the reservoirs or caps need to have a warning statement (FMVSS No. 122, S5.1.2.2), and the indicator on the dash needs to have a legend that reads "Brake Failure" and needs to turn on momentarily when the key is moved to the "on" or "start" position (FMVSS No. 122, S5.1.3.1).⁴¹

After receiving Wilwood's recommendations, between May and December 2010, ZAP purported to repair the NHTSA-owned MY 2008 ZAP Xebra.⁴² Prior to retesting its vehicle, NHTSA made repeated inquiries of ZAP to confirm that ZAP performed its proposed repair remedy on the vehicle. After ZAP was unresponsive to NHTSA's

³⁷ See Recall 09V-177, Quarterly Report (dated July 30, 2012) (indicating "[s]ince we have not successfully passed the Testing, none of the reported vehicles fixed can be reported as successfully completed").

³⁸ See ZAP, Response to Special Order, Interrogatory No. 9 (July 30, 2012). NHTSA has also received complaints from MY 2008 ZAP Xebra owners that their vehicles were not repaired. See www-odi.nhtsa.dot.gov/complaints (NHTSA ODI Nos. 10320166 and 10415384).

³⁹ Letter from S. Schneider, ZAP to H. Thompson, NHTSA (Apr. 2, 2012).

⁴⁰ See ZAP, Response to Special Order, Sch. C (July 30, 2012).

⁴¹ ZAP, Response to Special Order, Sch. C at 6 (July 30, 2012).

⁴² See Letter from H. Thompson, NHTSA, to S. Schneider, ZAP (Nov. 22, 2011).

informal requests,⁴³ NHTSA sent a formal Information Request (IR) to ZAP on November 22, 2011.⁴⁴ ZAP responded on December 10, 2011.⁴⁵ ZAP stated in its response that it was unable to confirm what modifications were made to the NHTSA-owned vehicle and vehicles in the field, and that additional modifications may be necessary to the vehicles to ensure full compliance with FMVSS No. 122. ZAP also indicated that it would use an independent third-party testing facility to confirm that its repair remedy would make the vehicles compliant with FMVSS No. 122.⁴⁶

NHTSA sent a second IR to ZAP on March 9, 2012 to obtain additional information regarding the status of the recalls.⁴⁷ ZAP responded on April 2, 2012.⁴⁸ ZAP stated that it had contracted with KARCO Engineering (KARCO) in January 2012 to test a repaired MY 2008 ZAP Xebra, and that the vehicle failed to meet the FMVSS No. 122 stopping distance requirements based on KARCO's testing. KARCO retested the vehicle in March 2012, and it again failed to meet the stopping distance requirements. ZAP indicated that it had since made additional modifications to the vehicle and would send the vehicle back to KARCO for further testing. ZAP represented that it expected to be able to implement a repair remedy by July 15, 2012.⁴⁹

⁴³ ZAP has also repeatedly failed to file required quarterly reports regarding the recalls. See, e.g., Letter from R. Willard, NHTSA to S. Schneider, ZAP (Oct. 6, 2011) (Recall No. 09V-177); Letter from R. Willard, NHTSA to S. Schneider, ZAP (Oct. 11, 2011) (Recall No. 09V-385).

⁴⁴ Letter from H. Thompson, NHTSA, to S. Schneider, ZAP (Nov. 22, 2011).

⁴⁵ Letter from S. Schneider, ZAP to H. Thompson, NHTSA (Dec. 10, 2011).

⁴⁶ Letter from S. Schneider, ZAP to H. Thompson, NHTSA (Dec. 10, 2011).

⁴⁷ Letter from J. Timian, NHTSA, to S. Schneider, ZAP (Mar. 9, 2012).

⁴⁸ Letter from S. Schneider, ZAP to H. Thompson, NHTSA (Apr. 2, 2012). At that time, ZAP represented that if it has not developed a successful repair remedy by September 30, 2012, it will initiate a repurchase campaign. However, ZAP subsequently claimed to have developed a repair remedy that will bring the recalled vehicles into full compliance with FMVSS No. 122. ZAP, Response to Special Order, Interrogatory No. 1 (July 30, 2012).

⁴⁹ Letter from S. Schneider, ZAP to H. Thompson, NHTSA (Apr. 2, 2012). Although ZAP recognized at that time that it had not yet developed a repair remedy that brings the vehicles into full compliance with FMVSS No. 122, it continued to report to NHTSA that it had remedied vehicles. See Recall No. 09V-177, Quarterly Report (May 7, 2012).

In May and June 2012, KARCO again tested a MY 2008 ZAP Xebra sent to it by ZAP, and that vehicle also failed to meet the stopping distance requirements of FMVSS No. 122.⁵⁰ KARCO's test report further indicated that the vehicle's brake failure indicator lamp did not meet the minimum height requirement of three-thirty seconds of an inch.⁵¹ See 49 CFR 571.122, S5.1.3.1(d).⁵²

After informally learning that the vehicle failed KARCO's most recent testing, NHTSA sent Special Orders to ZAP and to KARCO on July 13, 2012 to obtain additional information about the recalls and KARCO's testing. ZAP and KARCO each responded on July 30, 2012. ZAP represented in its response, made under oath, that it has developed a repair remedy to bring the MY 2008 Xebra into full compliance with FMVSS No. 122.⁵³ ZAP cited the recommendations provided to it by Wilwood in April 2010 as the basis for its contention that this remedy will bring the vehicles into full compliance.⁵⁴ ZAP did not provide any test results or other information demonstrating that its repair remedy will make the vehicles fully compliant with FMVSS No. 122, and instead indicated that it planned further testing at KARCO to confirm its belief that this

⁵⁰ See KARCO, Response to Special Order, Interrogatory No. 1 (July 30, 2012). According to KARCO, the vehicle initially did not pass the first effectiveness test. ZAP requested that KARCO make modifications to the vehicle; through trial and error modifications, the vehicle subsequently passed the first effectiveness test. However, the vehicle could not pass the second effectiveness test, and testing was terminated. KARCO, Response to Special Order, Interrogatory No. 1 (July 30, 2012).

⁵¹ KARCO, Response to Special Order, Ex. Test Report for ZAP Jonway, 2008 ZAP Xebra at 3, 10 (test date: May 16, 2012-June 27, 2012).

⁵² As of July 30, 2012, KARCO indicated that no further testing was planned. See KARCO, Response to Special Order, Interrogatory No. 3 (July 30, 2012). ZAP, on the other hand, indicated in its July 30, 2012 response to NHTSA's Special Order that it planned to send its mechanic to KARCO between August 6 and 20, 2012 to make further modifications to the vehicle, which would then be retested by KARCO. ZAP, Response to Special Order, Interrogatory Nos. 4, 5 (July 30, 2012). However, as of August 20, 2012, KARCO indicated that ZAP had picked up the vehicle from KARCO's facility.

⁵³ ZAP, Response to Special Order, Interrogatory No. 1 (July 30, 2012). The repair remedy identified by ZAP in response to the Special Order included the heading "Xebra 2008 – Dealer Power Brake Recall Fix – Version 6." See ZAP, Response to Special Order, Sch. B at 3 (July 30, 2012). However, a later version (Version 7) of this document was attached as Exhibit A to ZAP's earlier Part 573 Report for Recall No. 12V-230.

⁵⁴ See ZAP, Response to Special Order, Interrogatory No. 2 (July 30, 2012).

latest repair remedy is effective.⁵⁵ However, according to KARCO's response to NHTSA's Special Order, no further testing was planned.⁵⁶

ZAP's Special Order response also provided contradictory information regarding the substance of its repair remedy. In one portion of its response, ZAP indicated that the repair remedy it contends will make the vehicles fully compliant with FMVSS No. 122 is the same remedy it performed on the vehicle which failed KARCO's testing.⁵⁷ However, another portion of ZAP's response indicated that additional modifications are needed to the vehicle.⁵⁸

ZAP provided a copy of procedures for its repair remedy in response to the Special Order.⁵⁹ The repair remedy purports to address the noncompliances with the stopping distance and master cylinder reservoir requirements, which are the subject of the recalls. The remedy also purports to address the apparent noncompliances NHTSA identified with FMVSS No. 122, S5.1.2.2, Reservoir labeling, and FMVSS No. 122, S5.1.3.1, Failure indicator lamp, despite the fact that ZAP has never submitted a Part 573 Report acknowledging the MY 2008 ZAP Xebra is noncompliant with those provisions. However, ZAP's procedures to address the reservoir labeling and the failure indicator lamp do not satisfy the requirements of FMVSS No. 122.⁶⁰ Moreover, ZAP has failed to

⁵⁵ See ZAP, Response to Special Order, Interrogatory Nos. 4-5 (July 30, 2012).

⁵⁶ See KARCO, Response to Special Order, Interrogatory No. 3 (July 30, 2012).

⁵⁷ Compare ZAP, Response to Special Order, Interrogatory Nos. 1-2 (July 30, 2012), with ZAP, Response to Special Order, Request for the Production of Documents Nos. 1-2 (July 30, 2012).

⁵⁸ See ZAP, Response to Special Order, Interrogatory No. 4 (July 30, 2012).

⁵⁹ ZAP, Response to Special Order, Sch. A-B (July 30, 2012).

⁶⁰ The reservoir labeling is not worded as required by FMVSS No. 122, S5.1.2.2. See ZAP, Response to Special Order, Sch. B at 10. It also appears that the labeling may not be permanently affixed, as required. See KARCO, Response to Special Order, Ex. Test Report for ZAP Jonway, 2008 ZAP Xebra at A6 (test date: May 16, 2012-June 27, 2012) (showing peeling label). The failure indicator lamp also does not have the legend "Brake Failure," as required by FMVSS No. 122, S1.3.1(d). See KARCO, Response to Special Order, Ex. KARCO 036-KARCO 037 (July 30, 2010) (photographs produced for "May 2012 Testing"). According to KARCO, the lamp's lettering also does not comply with the height requirements of the

provide notifications to NHTSA and to owners, purchasers, and dealers of these noncompliances as required by 49 U.S.C. 30118 and 49 CFR Parts 573 and 577.⁶¹

Furthermore, ZAP proposes to remedy the vehicles by either sending each customer an installation kit or having the customer send the vehicle to ZAP, to have ZAP complete the installation of the remedy.⁶² Thus, an owner would either need to bring its vehicle to Santa Rosa, California (where ZAP is located), or install the remedy based on ZAP's kit.⁶³ The procedures for the repair remedy are over twenty pages long and require, among other things, placing the vehicle on a car lift and removing all of its wheels, removing and replacing brake reservoirs, removing and replacing brake pressure sensors, replacing brake lines, replacing brake pads, installing a proportioning valve, and rewiring brake sensors and floats.⁶⁴

Over three years has passed since ZAP initially recalled the MY 2008 ZAP Xebra. Although ZAP continues to elect a repair remedy, it has failed to successfully repair any vehicles. Moreover, contrary to its representation, under oath, in response to NHTSA's Special Order, ZAP has provided no evidence that it has developed a repair remedy that would bring the recalled vehicles into full compliance with FMVSS No. 122.

Standard. KARCO, Response to Special Order, Ex. Test Report for ZAP Jonway, 2008 ZAP Xebra at 3, 10 (test date: May 16, 2012-June 27, 2012).

⁶¹ The potential penalty for each violation of such requirements is \$6,000. 49 U.S.C. § 30165(a)(1); 49 CFR 578.6.

⁶² See Recall No. 12V-230, Part 573 Report § VI (prepared May 18, 2012); Recall No. 12V-363, Part 573 Report § VI (prepared July 18, 2012).

⁶³ This conflicts with the notifications sent to owners, which told owners: "Please contact your ZAP/Voltage Vehicles dealer as soon as possible to arrange a service date so the dealer may order the necessary parts for the repair . . . Your ZAP/Voltage Vehicles dealer is best equipped to obtain parts and provide service to ensure that your vehicle is corrected as promptly as possible." ZAP, Response to Special Order, Sch. D-E (July 30, 2012). While there was no mention of a repair kit in the owner letters, ZAP indicated that it sent 56 kits out to customers. See ZAP, Response to Special Order, Interrogatory No. 7 (July 30, 2012).

⁶⁴ ZAP, Response to Special Order, Sch. B (July 30, 2012).

V. Decision to Conduct a Public Hearing

NHTSA has decided that it is necessary to conduct a public hearing to decide whether ZAP has reasonably met the notification and remedy requirements under 49 U.S.C. 30118 and 30120. See 49 U.S.C. 30118(e), 30120(e); 49 CFR 557.6(d), 557.7.

NHTSA will conduct the public hearing in the Oklahoma City room of the U.S.

Department of Transportation Conference Center, located on the first floor of the West Building at 1200 New Jersey Avenue, SE., Washington, DC 20590. Any interested person may make written and/or oral presentations of information, views, and arguments on whether ZAP has reasonably met the notification and/or remedy requirements. There will be no cross-examination of witnesses. 49 CFR 557.7.

NHTSA will consider the views of participants in deciding whether ZAP has reasonably met the notification and/or remedy requirements under 49 U.S.C. 30118 and 30120, and in developing the terms of an order (if any) requiring ZAP to take specified action as the remedy for the noncompliances and/or take other action. 49 U.S.C. 30118(e), 30120(e); 49 CFR 557.8.

PROCEDURAL MATTERS: Interested persons may participate in these proceedings through written and/or oral presentations. Persons wishing to attend must notify Sabrina Fleming, National Highway Traffic Safety Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590 (Telephone: 202-366-9896) (Fax: 202-366-3081), before the close of business on October 2, 2012 (and September 28, 2012 for non-U.S. citizens). Each person wishing to attend must provide his or her name and country of citizenship. Non-U.S. citizens must also provide date of birth, title or position, and passport or diplomatic ID number, along with expiration date. Each person wishing to make an oral

presentation must also specify the amount of time that the presentation is expected to last, his or her organizational affiliation, phone number, and email address. NHTSA will prepare a schedule of presentations. Depending upon the number of persons who wish to make oral presentations and the anticipated length of those presentations, NHTSA may add an additional day or days to the hearing, and/or may limit the length of oral presentations.

The hearing will be held at a site accessible to individuals with disabilities. Individuals who require accommodations, such as sign language interpreters, should contact Ms. Kerry Kolodziej using the contact information in the FOR FURTHER INFORMATION CONTACT section above no later than September 28, 2012. A transcript of the proceedings will be placed in the docket for this notice at a later date.

Persons who wish to file written comments should submit them so that they are received by NHTSA no later than October 2, 2012. Instructions on how to submit written comments to the docket is located under the ADDRESSES section of this notice.

Authority: 49 U.S.C. 30118(e), 30120(e); 49 CFR 557.6(d), 557.7; delegations of authority at 49 CFR 1.95(a), 501.2(a)(1), and 49 CFR 501.8.

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Daniel C. Smith
Senior Associate Administrator
for Vehicle Safety

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