

## SETTLEMENT AGREEMENT AND RELEASE

This SETTLEMENT AGREEMENT AND RELEASE (hereinafter "Agreement") is entered into by and between the STATE OF CALIFORNIA AIR RESOURCES BOARD (hereinafter "CARB"), with its principal office located at 1001 I Street, Sacramento, California 95814, and AZ Off-Road & Performance, Inc. (hereinafter "AZ OFFROAD"), with its principal place of business located at 37815 N 9th Place, Phoenix, AZ 85086 (collectively, "The Parties").

### RECITALS

1. Vehicle Code section 27156, subdivision (c) provides that "[n]o person shall install, sell, offer for sale, or advertise any device intended for use with, or as a part of, any required motor vehicle pollution control device or system which alters or modifies the original design or performance of any such motor vehicle pollution control device or system."
2. Vehicle Code section 27156, subdivision (h) provides, in pertinent part, that this section shall not apply to an alteration, modification, or modifying device found by resolution of the State Air Resources Board to either not reduce the effectiveness of any required motor vehicle pollution control device or result in emissions from any such modified or altered vehicle that are at levels that comply with existing state or federal standards for the model year of the vehicle being modified or converted.
3. California Code of Regulations, title 13, section 2222, subdivision (b)(2) provides, in pertinent part, that "no person or company doing business in interstate commerce shall advertise in California any device, apparatus, or mechanism which alters or modifies the original design or performance of any required motor vehicle pollution control device or system and not exempted from Vehicle Code section 27156 unless each advertisement contains a legally adequate disclaimer..." (Aftermarket Parts Regulation).
4. Pursuant to California Code of Regulations, title 13, section 1900, subdivision (b)(3), an "Emissions-related part" is "any automotive part, which affects any regulated emissions from a motor vehicle which is subject to California or federal emission standards. This includes, at a minimum, those parts specified in the 'Emissions-Related Parts List,' adopted by the State Board on November 4, 1977, as last amended June 1, 1990."
5. If the Executive Officer finds that any manufacturer, distributor, retailer, or installer is manufacturing, supplying, distributing, offering for sale, selling, advertising, or installing an emissions-related part for use on highway vehicles or motorcycles in California in violation of the Aftermarket Parts Regulation, he or she may enjoin said manufacturer, distributor, retailer, or installer from any further manufacture,

supply, distribution, offer for sale, sale, advertisement, or installation pursuant to section 43017 of the Health and Safety Code and California Code of Regulations, title 13, section 2225. The Executive Officer may also assess civil penalties to the extent permissible under Division 26, Part 5 of the Health and Safety Code.

6. In addition, California Code of Regulations, title 13, section 2225, subdivision (a) provides, in pertinent part, that the Executive Officer may seek fines for violations of Vehicle Code section 27156 or other laws or regulations, as applicable.
7. Vehicle Code section 38391 provides that “[n]o person shall install, sell, offer for sale, or advertise any device, apparatus, or mechanism intended for use with, or as a part of, any required off-highway motor vehicle pollution control device or system which alters or modifies the original design or performance of any such motor vehicle pollution control device or system.”
8. Vehicle Code section 38395 provides in pertinent part that section 38391 “shall not apply to an alteration, modification, or modifying device, apparatus, or mechanism found by resolution of the State Air Resources Board either: (a) To not reduce the effectiveness of any required off-highway motor vehicle pollution control device; or (b) To result in emissions from any such modified or altered off-highway vehicle which are at levels which comply with existing state or federal standards for that model year of the vehicle being modified or converted.”
9. California Code of Regulations, title 13, section 2472, subdivision (a) provides that “[n]o person shall install, sell, offer for sale, or advertise any device, apparatus, or mechanism intended for use with, or as a part of, any required off-road vehicle, engine, or equipment pollution control device or system which alters or modifies the original design or performance of any such pollution control device or system.”
10. California Code of Regulations, title 13, section 2472, subdivision (c) provides that “[t]his section shall not apply to an alteration, modification, or modifying device, apparatus, or mechanism found by resolution of the State Air Resources Board to do either of the following: (1) Not reduce the effectiveness of any required off-road vehicle, engine, or equipment pollution control device[; or] (2) To result in emissions from any such modified or altered off-road vehicle, engine, or equipment which are at levels which comply with existing state or federal standards for that model-year of the vehicle, engine or equipment being modified or converted.”
11. California Code of Regulations, title 13, section 2476, subdivision (a) provides, in pertinent parts, that the Executive Officer may seek fines for violations of Vehicle Code Sections 27156 or 38391, California Code of Regulations, title 13, Section 2472, or other laws or regulations, as applicable.

12. Failure to comply with the provisions set forth above could result in a civil penalty not to exceed five hundred dollars (\$500) for each action if it occurred prior to January 1, 2017, under Health and Safety Code section 43016, and one thousand five hundred dollars (\$1,500) for each violation of Vehicle Code section 27156 under Health and Safety Code section 43008.6(b). The Executive Officer may require the violating manufacturer or distributor to make the product compliant with applicable emission control laws as conditions for the continued sale into California.
13. CARB alleges that between January 2013 and March 2016, AZ OFFROAD sold, offered for sale, and/or advertised aftermarket parts for use on highway and off-highway vehicles in California (hereinafter "Subject Parts") that were not exempted by CARB pursuant to California Code of Regulations, title 13, section 2222 *et seq.* or California Code of Regulations, title 13, section 2472 *et seq.*, and that these Subject Parts altered or modified the original design or performance of the motor vehicle pollution control devices or systems.
14. CARB alleges that the advertisements, offers for sale, and sale of the Subject Parts were unlawful and in violation of Vehicle Code sections 27156 and 38391 and California Code of Regulations, title 13, sections 2222 *et seq.* and 2471 *et seq.*
15. CARB alleges that if the allegations described in recital paragraphs 1-14 were proven, civil penalties could be imposed against AZ OFFROAD as provided in Health and Safety Code sections 43008.6(b) and 43016.
16. AZ OFFROAD admits the facts in recital paragraphs 1-14, but denies any liability arising thereunder.
17. In consideration of the foregoing, and of the promises and facts set forth herein, the Parties desire to settle and resolve all claims, disputes, and obligations relating to the above-listed alleged violations and voluntarily agree to resolve this matter by means of this Agreement, without the need for formal litigation. AZ OFFROAD has taken or agrees to take the actions enumerated below within the Terms and Release for the purpose of settlement and resolution of this matter with CARB. CARB accepts this Agreement in termination and settlement of this matter.

### **TERMS AND RELEASE**

In settlement of any and all claims that CARB has against AZ OFFROAD for the violations alleged above, and in consideration of CARB not filing a legal action as well as the other terms set out below, CARB and AZ OFFROAD agree as follows:

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1. The Parties shall exchange signed copies of this Agreement by **April 30, 2019**. This Agreement may be executed in counterparts. Facsimile or photocopied signatures shall be considered as valid signatures as of the date hereof, although the original signature pages shall thereafter be appended to this Agreement. AZ OFFROAD shall send the original signed Agreement and any future mailings or documents required per the terms of this Agreement to:

Gretchen Ratliff/Air Pollution Specialist  
California Air Resources Board, Enforcement Division  
9480 Telstar Avenue, Suite 4  
El Monte, California 91731  
Gretchen.ratliff@arb.ca.gov

2. AZ OFFROAD shall pay the total sum of ten thousand dollars (**\$10,000.00**) as a penalty by check or wire transfer to the **California Air Pollution Control Fund** as follows:

<b>Payment Due Date:</b>	<b>In the Amount of and Paid to:</b>
(1) April 30, 2019	<b>\$4,000</b> paid to <b>Air Pollution Control Fund</b>
(2) May 31, 2019	<b>\$3,000</b> paid to <b>Air Pollution Control Fund</b>
(3) June 30, 2019	<b>\$3,000</b> paid to <b>Air Pollution Control Fund</b>

Each payment shall be accompanied with the attached "Settlement Agreement Payment Transmittal Form" (Attachment A) and sent to:

California Air Resources Board  
Accounting Office  
P.O. Box 1436  
Sacramento, California 95812-1436

3. If any payment is more than fifteen (15) days late, the entire remaining balance becomes immediately due and payable. In addition, if the Attorney General files a civil action to enforce this settlement agreement, AZ OFFROAD shall pay all costs of investigating and prosecuting the action, including expert fees, reasonable attorney's fees, and costs.
4. AZ OFFROAD agrees that this penalty imposed on AZ OFFROAD by CARB is nondischargeable under 11 U.S.C § 523 (a)(7), which provides an exception from discharge for any debt to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than certain types of tax penalties.
5. AZ OFFROAD shall not install, sell, offer for sale, or advertise in California any

aftermarket part in violation of Vehicle Code sections 27156 and 38391 and California Code of Regulations, title 13, sections 2222 *et seq.* and 2471 *et seq.*

6. AZ OFFROAD shall advertise each and every non-exempt part in California with one of the following disclaimers in a minimum font size 8, appearing on each page that any non-exempt part appears:

A. "NOT LEGAL FOR SALE OR USE IN CALIFORNIA."

B. "NOT LEGAL FOR SALE OR USE IN CALIFORNIA ON ANY POLLUTION CONTROLLED MOTOR VEHICLE."

C. "LEGAL IN CALIFORNIA ONLY FOR RACING VEHICLES WHICH MAY NEVER BE USED, OR REGISTERED OR LICENSED FOR USE, UPON A HIGHWAY."

D. "FOR CLOSED COURSE COMPETITION USE ONLY. NOT INTENDED FOR STREET USE."

Use of one of the above disclaimers shall be deemed a "legally adequate disclaimer" pursuant to California Code of Regulations, title 13, section 2222(b)(2).

7. This Agreement shall apply to and be binding upon AZ OFFROAD and its principals, officers, directors, agents, receivers, trustees, employees, successors and assignees, subsidiary and parent corporations, predecessors, and upon CARB and any successor agency that may have responsibility for and jurisdiction over the subject matter of this Agreement.

8. Now, therefore, in consideration of the payment by AZ OFFROAD to the California Air Pollution Control Fund in the amounts specified above in Terms and Release paragraph 2, CARB hereby releases AZ OFFROAD and its principals, officers, directors, agents, receivers, trustees, employees, successors and assignees, subsidiary and parent corporations, and predecessors from any and all claims that CARB may have relating to the Subject Parts or based on the allegations described in recital paragraphs 1-14.

9. This Agreement constitutes the entire agreement and understanding between CARB and AZ OFFROAD concerning the claims and settlement in this Agreement, and this Agreement fully supersedes and replaces any and all prior negotiations and agreement of any kind or nature, whether written or oral, between CARB and AZ OFFROAD concerning these claims.

10. The effective date of this Agreement shall be the date upon which it is fully executed.

11. No agreement to modify, amend, extend, supersede, terminate, or discharge this

Agreement, or any portion thereof, shall be valid or enforceable unless it is in writing and signed by all Parties to this Agreement.

12. Each Party to this Agreement has reviewed the Agreement independently, has had the opportunity to consult counsel, is fully informed of the terms and effect of this Agreement, and has not relied in any way on any inducement, representation, or advice of any other Party in deciding to enter into this Agreement.
13. This Agreement shall be interpreted and enforced in accordance with the laws of the State of California, without regard to California's choice of law rules.
14. Each provision of this Agreement is severable, and, in the event that any provision of this Agreement is held to be invalid or unenforceable in any jurisdiction, the remainder of this Agreement remains in full force and effect.
15. This Agreement is deemed to have been drafted equally by the Parties; it will not be interpreted for or against either party on the ground that said party drafted it.
16. The failure of any Party to enforce any provision of this Agreement shall not be construed as a waiver of any such provision, nor prevent such Party thereafter from enforcing such provision or any other provision of this Agreement. The rights and remedies granted all Parties herein are cumulative and the election of one right or remedy by a Party shall not constitute a waiver of such Party's right to assert all other legal remedies available under this Agreement or otherwise provided by law.
17. The terms and conditions set forth in this Agreement will remain valid and enforceable notwithstanding any future violations that may occur.
18. This Agreement shall further serve to toll any statute of limitations until all terms and conditions of this Agreement have been fulfilled.

**19. Penalty Determination**

Health and Safety Code § 39619.7 requires CARB to provide information on the basis for the penalties it seeks. This required information, which is provided throughout this Agreement, is summarized here.

**The provision of law the penalty is being assessed under and why that provision is most appropriate for that violation.**

The penalty provisions being applied in this case are Health and Safety Code sections 43008.6 and 43016, because AZ OFFROAD sold, offered for sale, and/or advertised the subject non-California certified aftermarket parts that were not exempted pursuant to Vehicle Code sections 27156 and 38391 and California

Code of Regulations, title 13, sections 2222 *et seq.* and 2471 *et seq.*

The penalty provisions of Health and Safety Code sections 43008.6 and 43016 apply to violations of the Aftermarket Parts Regulations because the Regulations were adopted under authority of Health and Safety Code section 43013, which is in Part 5 of Division 26 of the Health and Safety Code.

**The manner in which the penalty amount was determined, including aggravating and mitigating factors and per unit or vehicle basis for the penalty.**

The per unit penalty in this case for violations that occurred prior to January 1, 2017, is a maximum of five hundred dollars (\$500) per unit per strict liability violation. The penalty obtained in this case is approximately forty-three dollars (\$43) per unit for two hundred thirty (230) Subject Parts. This reflects the fact that this was a first time violation for AZ OFFROAD, AZ OFFROAD fully cooperated with the investigation, and AZ OFFROAD was able to substantiate financial hardship circumstances.

**Whether the penalty is being assessed under a provision of law that prohibits the emission of pollution at a specified level, and, if so a quantification of excess emissions, if it is practicable to do so.**

The provisions cited above do not prohibit emissions above a specified level. It is not practicable to quantify these emissions, because the information necessary to do so, such as emission rates and time of use, is not available. There are no testing results available that would indicate how much emissions increased as a result of the use of the uncertified aftermarket parts. However, since the aftermarket parts were not certified for sale in California, emissions attributable to them are illegal and excess as well.

20. AZ OFFROAD acknowledges that CARB has complied with Health and Safety Code section 39619.7 in prosecuting and settling this case. Specifically, CARB has considered all relevant facts, including those listed at Health and Safety Code sections 42403 and 43024; has explained the manner in which the penalty amount was calculated (including a per unit or per vehicle penalty, if appropriate); has identified the provision of law under which the penalty is being assessed; and has considered and determined that this penalty is not being assessed under a provision of law that prohibits the emission of pollutants at a specified level.
21. Penalties were determined based on the unique circumstances of this matter, considered together with the need to remove any economic benefit from noncompliance, proof of financial hardship, the goal of deterring future violations and obtaining swift compliance, the consideration of past penalties in similar case

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negotiations, and the potential costs and risks associated with litigating these particular violations. The penalty reflects violations extending over a certain period of time, considered together with the complete circumstances of this case.

22. The penalty in this case was based in part on confidential business information provided by AZ OFFROAD that is not retained by CARB in the ordinary course of business. The penalty in this case was also based on confidential settlement communications between CARB and AZ OFFROAD that CARB does not retain in the ordinary course of business either. The penalty also reflects CARB's assessment of the relative strength of its case against AZ OFFROAD, proof of financial hardship, and the desire to avoid the uncertainty, burden, and expense of litigation, obtain swift compliance with the law, and remove any unfair advantage that AZ OFFROAD may have secured from its alleged actions. Penalties in other cases may be smaller or larger depending on the unique circumstances of the case.

23. Each of the undersigned represents that he or she has full power and authority to enter this Agreement.

ACKNOWLEDGED AND ACCEPTED BY:

**California Air Resources Board**

**AZ Off-Road & Performance, Inc.**

By: Todd P. Sax FOR  
Name: Todd P. Sax, D.Env.  
Title: Chief, Enforcement Division  
Date: 4/30/2019

By: \_\_\_\_\_  
Name:  
Title:  
Date:



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ACKNOWLEDGED AND ACCEPTED BY:

California Air Resources Board

AZ Off-Road & Performance, Inc.

By: \_\_\_\_\_  
Name: Todd P. Sax, D.Env.  
Title: Chief, Enforcement Division  
Date:

By:   
Name: ROBERT KRESS  
Title: CEO  
Date: 4/23/19