

## 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 "ARB"), with its principal office at 1001 I Street, Sacramento, California 95814 and BURGER MOTORSPORTS, LLC (hereinafter "BMS") with its principal place of business at 2235 1<sup>st</sup> Street, suite 122, Simi Valley, California 93065, collectively, "The Parties."

### RECITALS

1. Vehicle Code section 27156(c) provides, in pertinent part that "No 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." Health and Safety Code section 43008.6 provides a penalty of \$1,500 per violation.
2. Vehicle Code section 27156(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 which 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(e) provides, "The executive officer may exempt add-on and modified parts based on an evaluation conducted in accordance with the 'Procedures for Exemption of Add-on and Modified Parts,' adopted by the state board on November 4, 1977, as amended June 1, 1990."
4. In addition, California Code of Regulations, title 13, section 2225(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.
5. Health and Safety Code section 43016 states, in pertinent part, "Any person who violates any provision of this part, or any order, rule, or regulation of the state board adopted pursuant to this part, and for which violation there is not provided in this part any other specific civil penalty or fine, shall be subject to a civil penalty not to exceed five hundred dollars (\$500) per vehicle, portable fuel container, spout, engine, or other unit subject to regulation under this part, as these terms are defined in this division or state board regulations."
6. ARB alleges that, between January 2011 and March 2014, BMS sold, offered for sale, and/or advertised aftermarket performance parts in California (hereinafter "Subject Parts").

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7. ARB alleges that the Subject Parts altered or modified the original design or performance of the motor vehicle pollution control device or system.
8. ARB alleges that the Subject Parts were not exempted by ARB pursuant to California Code of Regulations, title 13, section 2220 *et seq.*
9. ARB alleges that the offers for sale, sales, and installation of the Subject Parts were unlawful and in violation of Vehicle Code section 27156(c) and California Code of Regulations, title 13, section 2220 *et seq.*
10. BMS is a California-based limited liability company.
11. BMS promptly and fully cooperated with ARB throughout its investigation.
12. BMS has operated as a small business since 2008 and has no prior enforcement record with ARB.
13. BMS has documented that although the Subject Parts were sold to a California distributor, the majority of them were delivered to out-of-state customers. Therefore, this subset is unlikely to have ultimately impacted public health, safety, or welfare in California.
14. BMS has taken steps toward future compliance by applying to ARB for exemptions of its MINI JB+ Tuner, Dual Cone Performance Intake, and N55 Tuner and Intake. Although this action does not retroactively exempt the Subject Parts, it does demonstrate BMS' commitment to environmental compliance.
15. Upon receiving a cease and desist letter from ARB, BMS alleges that it immediately halted all performance parts sales and transactions in California and immediately notified all employees and vendors to that effect. BMS also ceased selling performance parts on third-party sites, such as Amazon and eBay.
16. ARB alleges that if the allegations described in recital paragraphs 1-9 were proven, civil penalties could be imposed against BMS as provided in Health and Safety Code sections 43008.6 and 43016.
17. BMS admits the facts in recital paragraphs 1 through 9, but denies any liability arising thereunder.
18. BMS is willing to enter into this Agreement solely for the purpose of settlement and resolution of this matter with ARB. ARB accepts this Agreement in termination of this matter. Accordingly, the parties agree to resolve this matter completely by means of this Agreement, without the need for formal litigation.

### TERMS AND RELEASE

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

1. As a condition of this Settlement Agreement, BMS shall pay the total sum of ninety-one thousand six hundred dollars (\$91,600.00) as a penalty upon execution of this Settlement Agreement. Payments shall be made by cashier's check payable to the California Air Pollution Control Fund and addressed to:

**Please send the signed Settlement Agreement and any future mailings or documents required per the terms of this Settlement Agreement to:**

**Gretchen Ratliff/Air Pollution Specialist  
Air Resources Board, Enforcement Division  
9480 Telstar Avenue, Suite 4  
El Monte, CA 91731**

**Please send a copy of the signed Settlement Agreement and payment using the attached "Settlement Agreement Payment Transmittal Form" (Attachment A) to:**

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

2. BMS agrees to develop and implement a compliance plan to ensure that its distributors, dealers, and customers understand which aftermarket parts are legal or illegal for specific applications, including both street use and for racing vehicles. As part of the compliance plan, BMS has agreed to work with its distributors, dealers, and customers to implement a buyback program of the non-exempted subject parts that were purchased and installed on California vehicles in those cases where (1) the Subject Part was not damaged, (2) the part was not legally purchased for racing use only, (3) the part had not already been removed from the California vehicle (the buyback provision will apply if the part was removed because the vehicle failed smog check), or (4) the part was not installed on an out-of-state vehicle. As part of BMS' buyback program, BMS agrees to mail each end user in California, known or reasonably known to BMS, a Notice (hereinafter "BMS' NOTICE"), which contains the substantive provisions of the attached Notice, which is incorporated by reference herein. In addition, BMS agrees to work with its dealers and distributors in California to contact each owner of a Subject Part by mailing a copy of BMS' Notice.

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3. BMS shall not install, sell, offer for sale, or advertise in California any aftermarket part in violation of California Code of Regulations, title 13, section 2220 *et seq.* or Vehicle Code section 27156.
4. This Agreement shall apply to and be binding upon BMS and its principals, officers, directors, agents, receivers, trustees, employees, successors and assignees, subsidiary and parent corporations, predecessors and upon ARB and any successor agency that may have responsibility for and jurisdiction over the subject matter of this Agreement.
5. Now, therefore, in consideration of the payment by BMS to the California Air Pollution Control Fund in the amount specified above, ARB hereby releases BMS and its principals, officers, directors, agents, receivers, trustees, employees, successors and assignees, subsidiary and parent corporations, and predecessors from any and all claims that ARB may have relating to the Subject Parts or based on the allegations described in recital paragraphs 1-9 above. The undersigned represent that they have the authority to enter this Agreement.
6. This Agreement constitutes the entire agreement and understanding between ARB and BMS 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 ARB and BMS concerning these claims.
7. 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.
8. Advice of Counsel. 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.
9. 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.
10. Severability. Each provision of this Agreement is severable, and in the event that any provision of this Agreement is held to be invalid or unenforceable, the remainder of this Agreement remains in full force and effect to the extent necessary to fulfill the Agreement's purpose and the intent of the parties.
11. 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.

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12. Waiver. 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.
13. The parties agree that this Settlement Agreement may be executed by facsimile and in counterparts by the Parties and their representatives, and the counterparts shall collectively constitute a single, original document, notwithstanding the fact that the signatures may not appear on the same page.

### **14. SB 1402 Statement**

Senate Bill 1402 (Dutton, Chapter 413, statutes of 2010, Health and Safety Code section 39619.7) requires the ARB to provide information on the basis for the penalties it seeks. This required information, which is provided throughout this settlement agreement, is summarized here.

#### **The manner in which the penalty amount was determined, including a per unit or per vehicle penalty.**

Penalties must be set at levels sufficient to discourage violations. The penalties in this matter were determined in consideration of all relevant circumstances, including the eight factors specified in Health and Safety Code section 43024.

The per unit penalty in this case is a maximum of \$500 per unit per strict liability violation under Health and Safety Code section 43016 and an additional maximum of \$1,500 per unit per strict liability violation under Health and Safety Code section 43008.6. The penalty obtained in this case is approximately \$344.36 per unit for 266 units.

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

ARB alleges that the penalty provisions being applied in this case, Health and Safety Code section 43016 and 43008.6, are appropriate because BMS sold, and/or offered for sale, and/or advertised the subject non-California certified critical emission control parts that were not exempted pursuant to California Code of Regulations, title 13, section 2222.

#### **Is the penalty 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

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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 critical emission control parts. However, since the critical emission control parts were not certified for sale in California, emissions attributable to them are illegal. In the interests of settlement and because of the time and expense involved, the parties elected not to do such testing.

- 15. BMS acknowledges that ARB has complied with SB 1402 in prosecuting and settling this case. Specifically, ARB has considered all relevant facts, including those listed at Health and Safety Code section 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.
- 16. Penalties were determined based on the unique circumstances of this matter, considered together with the need to remove any economic benefit from noncompliance, the goal of deterring future violations and obtaining swift compliance, the consideration of past penalties in similar case negotiation, and the potential costs and risk 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. Penalties in future cases might be smaller or larger on a per unit basis.
- 17. The penalty in this case was based in part on confidential business information provided by BMS that is not retained by ARB in the ordinary course of business. The penalty in this case was also based on confidential settlement communications between ARB and BMS that ARB does not retain in the ordinary course of business either. The penalty also reflects ARB's assessment of the relative strength of its case against BMS, the desire to avoid the uncertainty, burden and expense of litigation, obtain swift compliance with the law and remove any unfair advantage that BMS may have secured from its alleged actions.

**California Air Resources Board**

**Burger Motorsports, LLC**

By: Ellen M. Peter

Name: Ellen M. Peter

Title: Chief Counsel

Date: 5/6/2015

By: Terry Burger

Name: Terry Burger

Title: Owner

Date: 4-20-2015

**NOTICE [AVISO]**

See reverse side for Spanish translation [*Consulte el reverso de este aviso para ver la traducción en español*]

Please read this NOTICE carefully. It could affect your rights.

Dear Valued Customer,

The State of California prohibits the offer for sale, sale, or installation of an aftermarket part, which alters or modifies the original design or performance of a motor vehicle's pollution control devices or systems, unless the aftermarket part has first been exempted from the state's anti-tampering laws and been issued an Executive Order (EO) number by the California Air Resources Board (ARB).

Our records indicate that you purchased and installed an aftermarket part, manufactured by Burger Motorsports, LLC, that has not yet been exempted by ARB. Therefore, it is not legal for use in California and may be releasing air pollutants that exceed California emission standards. If pulled over by local law enforcement, your vehicle will fail a vehicle inspection due to the lack of an EO number label and you may consequently be cited.

In addition, California law prohibits the operation of any vehicle that is not properly equipped and requires the Department of Motor Vehicles (DMV) to refuse registration, or renewal or transfer of registration of all vehicles that fail to comply with ARB regulations. Whenever DMV revokes the registration of your vehicle, you must immediately return all documents and other evidence of registration to DMV.

To prevent this from happening, we have instituted a buy-back program to fully reimburse you for your aftermarket part at our expense. Please contact us directly by email at [jon@burgertuning.com](mailto:jon@burgertuning.com) or by mail at 2235 1st Street, suite 122, Simi Valley, California 93065 to begin this process. Failure to do so could also affect your vehicle's coverage under any applicable emission warranty. If you have sold or transferred your vehicle that was equipped with the Burger Motorsports, LLC aftermarket part, we ask that you fill out the enclosed form with the name and address of the new owner.

We thank you for your loyalty as a customer of ours and we trust that our efforts will provide you with the continued satisfaction and performance that you have come to expect from all Burger Motorsports products.

**AVISO [NOTICE]**

Consulte el reverso de este aviso para ver el aviso en inglés [See reverse side for English]

Lea este AVISO detenidamente. Puede afectar sus derechos.

Estimado cliente:

El Estado de California prohíbe la venta, la oferta de venta o la instalación de una pieza de recambio que altere o modifique el diseño original o el rendimiento del sistema o dispositivo de control de la contaminación de un vehículo motorizado, salvo que primero la pieza de recambio haya quedado exenta de las leyes anti adulteración y que la Junta de Recursos del Aire (*Air Resources Board*, ARB) de California haya emitido un decreto ejecutivo (*Executive Order*, EO).

Nuestros registros indican que usted compró e instaló una pieza de recambio, fabricada por Burger Motorsports, LLC, que aún la ARB no ha dejado exenta. Por lo tanto, su uso no es legal en California y puede emitir contaminantes de aire que exceden las normas de emisión de California. Si los agentes de cumplimiento de la ley locales le solicitan detenerse, el vehículo no pasará la inspección debido a la falta de etiqueta con número de EO y, por consiguiente, usted podría recibir una citación.

Además, la ley de California prohíbe el funcionamiento de todo vehículo que no esté adecuadamente equipado y le exige al Departamento de Vehículos Motorizados (*Department of Motor Vehicles*, DMV) que rechace el registro, la renovación o la transferencia del registro de todos los vehículos que no cumplan con las reglamentaciones de la ARB. Siempre que el DMV revoque el registro de su vehículo, usted inmediatamente debe devolver todos los documentos y cualquier otra evidencia de registro al DMV.

Para evitar que esto ocurra, hemos establecido un programa de reembolso que le devolverá de manera total el valor de la pieza de recambio a nuestra cuenta. Para comenzar este proceso, envíe un mensaje de correo electrónico a [jon@burgertuning.com](mailto:jon@burgertuning.com) o una carta a la siguiente dirección: 2235 1st Street, suite 122, Simi Valley, California 93065. El incumplimiento de esta norma puede afectar la cobertura de su vehículo conforme a cualquier garantía de emisión pertinente. Si vendió o transfirió un vehículo equipado con una pieza de recambio de Burger Motorsports, LLC, le solicitamos que complete el formulario adjunto con el nombre y el domicilio del nuevo propietario.

Le agradecemos su lealtad como cliente y confiamos en que nuestros esfuerzos le proporcionarán la satisfacción y el rendimiento constantes que usted espera de los productos Burger Motorsports.