

## SETTLEMENT AGREEMENT AND RELEASE

This SETTLEMENT AGREEMENT AND RELEASE (hereinafter "Agreement") is entered into between the STATE OF CALIFORNIA AIR RESOURCES BOARD (hereinafter "ARB") 1001 I Street, Sacramento, California 95814, and Thermo King Corporation (hereinafter "TKC"), 314 West 90<sup>th</sup> Street, Minneapolis, MN 55420

### I. RECITALS

- (1) The Verification Procedure, Warranty and In-Use Compliance Requirements for In-Use Strategies to Control Emissions from Diesel Engines ("Verification Procedure," California Code of Regulations (CCR), title 13, sections 2700-2710) provides at section 2704 that if the Executive Officer (EO) of the ARB determines that the Diesel Emission Control Strategy (DECS) is technologically sound and appropriate for the intended application, he may grant a conditional verification for off-road and stationary applications upon completion of 33 percent of the minimum durability period. Where conditional verification is granted, full verification must be obtained by completing durability testing and all other remaining requirements. These requirements must be completed within a year after receiving conditional verification if laboratory testing is chosen and within three years if field testing is chosen. For the aforementioned time periods, conditional verification is equivalent to verification for the purpose of satisfying the requirements of in use emission control regulations.
- (2) The Thermo King Electric Regenerative Diesel Particulate Filter (eDPF) verification letter (Reference No. 08-661-279) dated June 24, 2008 states that the Thermo King eDPF is conditionally verified for a period not to exceed three years from the date of this letter.
- (3) The ARB Enforcement Division staff, with the cooperation of TKC, has alleged certain violations of the Verification Procedure and the applicable verification letters with respect to TKC's DECS that do not conform to the conditions specified in the Verification Procedure and the applicable verification letters. In particular, these alleged violations involve selling approximately 533 of the Thermo King eDPFs from the time period after the conditional verification which expired on June 24, 2011 to August 6, 2012 when full verification was granted.
- (4) Health and Safety Code (HSC), sections 39674 (a) and (b) authorize civil penalties for the violation of the programs for the regulation of toxic air contaminants not to exceed one thousand dollars (\$1,000) or not to exceed ten thousand dollars (\$10,000) respectively, for each day in which the violation occurs.

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- (5) In order to resolve the violations described herein, TKC has taken, or agreed to take, the actions enumerated below under "TERMS AND CONDITIONS." Further, the ARB accepts this Agreement in termination and settlement of this matter.
- (6) 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 violations, and voluntarily agree to resolve this matter by means of this Agreement. Specifically, the ARB and TKC agree as follows:

## II. TERMS AND CONDITIONS

In consideration of the ARB not filing a legal action against TKC for the alleged violations referred to above, the ARB and TKC agree as follows:

- (1) At the time of the execution and delivery of this Agreement, TKC shall pay a civil penalty of \$213,200.00. Payment shall be made by check payable to the **California Air Pollution Control Fund**.

- All payments and documents shall be sent to the attention of:

Mr. Tajinder Gill, Air Resources Engineer  
Air Resources Board  
Enforcement Division-Diesel Program Enforcement Branch  
9480 Telstar Avenue, Suite 4  
El Monte, CA 91731

- (2) TKC shall not sell filters in the future without written approval from the EO.
- (3) TKC shall extend the warranty for filters sold for engine model years (2010, 2011, and 2012) not covered by the verification letters to 3000 hours and notify in writing the end-users.
- (4) TKC shall not violate the Verification Procedure (CCR, title 13, sections 2700-2711) or any executive orders issued by ARB.
- (5) TKC shall ensure that the terms and conditions specified in the applicable executive order are met prior to installing, selling, offering for sale, or advertising any DECS in California.
- (6) TKC shall not violate the system labeling requirements set forth in CCR, title 13, section 2706 (j).

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- (7) TKC shall comply with the DECS warranty requirements set forth in the CCR, title 13, section 2707.
- (8) This Agreement constitutes the entire agreement and understanding between the ARB and TKC concerning the subject matter hereof, and supersedes and replaces all prior negotiations and agreements between the ARB and TKC concerning the subject matter hereof.
- (9) No agreement to modify, amend, extend, supersede, terminate, or discharge this Agreement, or any portion thereof, is valid or enforceable unless it is in writing and signed by all parties to this Agreement.
- (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.
- (11) 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.
- (12) 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.
- (13) SB 1402 Statement

Senate Bill 1402 (Dutton, Chapter 413, statutes of 2010) requires the ARB to provide information on the basis for the penalties it seeks (*see HSC section 39619.7*). This 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 §43024.

The per unit or per vehicle penalty in this case is a maximum of \$1,000 per unit per day for strict liability violations and \$10,000 per unit per day for negligent or intentional violations. The penalty of \$213,200.00 over an unspecified number of days of violation is for 533 non-compliant units. In this case, the per unit penalty is \$400.00. This penalty was calculated by considering all factors specified in HSC section 42403 and 43024,

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including the fact that this is an innocent, first time violation and that TKC has cooperated with the investigation.

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

The penalty provision being applied in this case is HSC section 39674 because TKC failed to comply with the Air Toxic Control Measure for In-Use Strategies to Control Emissions from Diesel Engines, title 13, CCR, sections 2700-2710, which was adopted under authority of HSC section 39600, et seq.

**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 prohibit emissions above a specified level. However, since the hours of operation of the non-compliant units involved and their individual emission rates are not known, it is not practicable to quantify the excess emissions, if any.

- (14) TKC acknowledges that ARB has complied with SB 1402 in prosecuting or settling this case. Specifically, ARB has considered all relevant facts, including those listed at HSC 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 being assessed under a provision of law that prohibits the emission of pollutants at a specified level. However, since the hours of operation of the non-compliant units involved and their individual emission rates are not known, it is not practical for ARB to quantify the excess emissions, if any.
- (15) 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 cases negotiation, and the potential costs and risk associated with litigating these particular violations. The penalty reflects violations extending over a number of days considered together with the complete circumstances of this case. Penalties in future cases might be smaller or larger on a per unit basis.
- (16) The penalty in this case was based in part on confidential business information provided by TKC that is not retained by ARB in the ordinary course of business. The penalty in this case was also based on

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confidential settlement communications between the ARB and TKC 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 TKC, the desire to avoid the uncertainty, burden and expense of litigation, obtain swift compliance with the law and remove any unfair advantage that TKC may have secured from its actions.

- (17) Now therefore, in consideration of the payment on behalf of TKC to the California Air Pollution Control Fund, the ARB hereby releases TKC and their principals, officers, agents, predecessors, dealers, distributors, end users, and successors from any and all claims for past violations of the Verification Procedure and the applicable verification letters alleged in recital paragraph 3. The undersigned represent that they have the authority to enter into this Agreement.

**California Air Resources Board**

By: \_\_\_\_\_

Name: RICHARD W. COREY

Title: Executive Officer

Date: MAY 15, 2013

**Thermo King Corporation**

By: \_\_\_\_\_

Name: MARC MOSS

Title: Assistant Secretary

Date: MARCH 28, 2013