

## 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 ESW CANADA Inc. (hereinafter "ESWC"), 335 Connie Crescent, Concord, Ontario LK4 5R2 Canada.

### I. RECITALS

- (1) California Vehicle Code (VC) Section 38391 provides that no 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. An exemption from Vehicle Code Section 38391 is required before any add-on or modified part can be sold in California. Aftermarket parts exemptions are regulated under CCR, Title 13, Sections 1900 et seq., 2030-2031, 2047-2048, 2200-2207 and 2220-2225 (Aftermarket Parts Regulations).
- (2) If a Diesel Emission Control Strategy (DECS) or the application it is used in does not meet the conditions specified in the Verification Procedure or the applicable Executive Order (EO), it is a violation of the Verification Procedure, and the DECS is not verified for that application, rendering it an illegal, non-exempt add-on part.
- (3) The ARB Enforcement Division staff, with the cooperation of ESWC, has documented violations of the California Vehicle Code (VC) Section 38391 in California.
- (4) Health and Safety Code, 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.
- (5) In order to resolve these violations, ESWC has taken, or agreed to take, the actions enumerated below under "RELEASE". 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 ESWC agree as follows:



**II. TERMS AND RELEASE**

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

(1) Upon execution of this Agreement, the sum of nine thousand, three hundred, twenty-nine dollars and fifty cents (\$9,329.50) shall be paid on behalf of ESWC as follows:

- \$2,332.38 to the **Peralta Community College District**.
- \$6,997.12 to the **California Air Pollution Control Fund**.

**ARB to receive by:**

11/15/2012	First Payment
03/15/2013	Second Payment
07/15/2013	Third Payment
11/15/2013	Fourth Payment

- First payment is due on November 15, 2012, and shall be made in form of a check payable to the **Peralta Community College District** in the amount of \$2,332.38.
- Second payment is due on March 15, 2013 and shall be made in form of a check payable to the **California Air Pollution Control Fund** in the amount of \$2,332.38.
- Third payment is due on July 15, 2013 and shall be made in form of a check payable to the **California Air Pollution Control Fund** in the amount of \$2,332.38.
- Fourth payment is due on November 15, 2013 and shall be made in form of a check payable to the **California Air Pollution Control Fund** in the amount of \$2,332.38.

The payment must be made in the form of checks. The checks with the signed settlement agreement shall be sent to:

Mr. Christopher Patno, Air Resources Engineer  
Air Resources Board, Enforcement Division



9480 Telstar Ave., Suite 4  
El Monte, CA 91731

- (2) Provided that Miller Blades returns to ESWC the ThermaCat DPF (part Number E145-M008-A) at their expense to the following address:

ESW Group  
200 Progress Drive  
Montgomeryville, PA 18936

And the ThermaCat DPF is returned as a complete unit, containing all components as per the executive order, and is in good condition, and as part of the product return, Miller Blades shall also return if available the installation data sheet (provided from the installer to Miller Blades) and any available maintenance records pertaining to the ThermaCat DPF unit to ESWC. ESWC will inspect within 30 days of receipt of the shipment the ThermaCat DPF and provide Miller Blades with notification of shipment completeness. Miller Blades will be given 30 days after receipt of notification from ESWC to remedy any missing parts.

Should for any reason Miller Blades not be in a position to ship the complete unit back to ESWC, ESWC reserves the right to adjust the reimbursement amount accordingly based on ESWC historical spare parts pricing (ESWC spare parts catalogue, effective Feb 17, 2012 until June 1, 2012). ESWC commits to inspect the returned unit within 60 days from receipt at the ESWC facility and provide a complete inspection report to Miller Blades and ARB respectively.

If the above provisions are met, ESWC shall refund Miller Blades their deposit (less any adjustments) in the amount of \$12,455.28. Miller Blades shall receive 50% of the final amount within 30 days of ESWC establishing the ThermaCat DPF is acceptable. The remaining 50% shall be paid to Miller Blades by May 15, 2013.

The payment must be made in the form of checks. Copies of the checks and the inspection report shall be sent to:

Mr. Christopher Patno, Air Resources Engineer  
Air Resources Board, Enforcement Division  
9480 Telstar Ave., Suite 4  
El Monte, CA 91731

- (3) Effect of Untimely Payment or Performance. If any payment on behalf of ESWC to the California Air Pollution Control Fund, the Peralta Community College District and Miller Blades is more than 15 days late, the entire

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remaining balance becomes immediately due and payable. In addition, if the Attorney General files a civil action to enforce this settlement agreement, ESWC shall pay all costs of investigating and prosecuting the action, including expert fees, reasonable attorney's fees, and costs.

- (4) It is agreed that if ESWC, including its subsidiary or parent company, at any time becomes insolvent, or makes an assignment for the benefit of creditors or similar action adversely involving ESWC, its subsidiary, or parent company, or a proceeding or petition under any bankruptcy, reorganization, arrangement of debt, insolvency, readjustment of debt, or receivership law or statute is filed by or against ESWC, its subsidiary, or parent company, or a trustee in bankruptcy, custodian, receiver or agent is appointed or authorized to take charge of any of ESWC, its subsidiary, or parent company's properties, or if any deposit account or other property of ESWC, its subsidiary, or parent company be attempted to be obtained or held by writ of execution, garnishment, attachment, condemnation, levy, forfeiture or other legal process, or ESWC, its subsidiary, or parent company takes any action to authorize any of the foregoing, the entire remaining balance becomes immediately due and payable without notice or demand.
- (5) It is further agreed that the penalties described in Terms and Release paragraph 1 are punitive in nature, rather than compensatory. Furthermore, the penalty is intended to deter and punish ESWC for violations of state environmental statutes, and these penalties are payable to and for the benefit of ARB, a government unit. Therefore, it is agreed that these penalties imposed on ESWC by the ARB arising from the facts described in recital paragraphs (1) – (2) are non-dischargeable 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 benefit of governmental unit, and is not compensation for actual pecuniary loss, other than certain types of tax penalties.
- (6) ESWC shall not violate any provision of the California Vehicle Code (VC) Section 38391.
- (7) ESWC shall not violate Aftermarket parts exemption procedures regulated under the California Code of Regulations (CCR), Title 13, Sections 1900 et seq., 2030-2031, 2047-2048, 2200-2207 and 2220-2225.
- (8) ESWC shall not violate the Verification Procedure (CCR, Title 13, Sections 2700-2710).
- (9) ESWC shall make sure that all terms and conditions specified in the applicable Executive Order are met prior to installing, selling, offering for

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sale, or advertising any Diesel Emission Control Strategy (DECS) device in California.

- (10) This Agreement constitutes the entire agreement and understanding between ARB and ESWC concerning the subject matter hereof, and supersedes and replaces all prior negotiations and agreements between ARB and ESWC concerning the subject matter hereof.
- (11) 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.
- (12) 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.
- (13) This Agreement shall be interpreted and enforced in accordance with the laws of the State of California's choice-of-law rules.
- (14) 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.
- (15) **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 Health and Safety Code 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. We are seeking a total penalty from ESWC of \$9,329.50, for 3 non-compliant VDECS units for a per unit penalty of \$3,109.83 over an unspecified number of days of violation. This penalty was calculated by considering all factors specified in Health

and Safety Code section 43024. ESWC has cooperated with the investigation and financial hardship was taken into consideration.

**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 Health and Safety Code section 39674 because ESWC failed to comply with the Air Toxic Control Measure for In-Use Strategies to Control Emissions from Diesel Engines, Title 13, California Code of Regulations sections 2700-2710, which was adopted under authority of Health and Safety Code 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.**

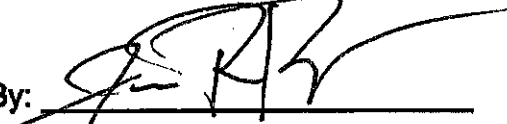
The provisions cited above do prohibit emissions above a specified level. However, since the hours of operation of the non-compliant units involved and their individual emission rates are not known, it is not practical to quantify the excess emissions.

- (16) ESWC 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.
- (17) 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. The penalty was also discounted based on the violator's financial hardship. Penalties in future cases might be smaller or larger on a per unit basis.




- (18) The penalty in this case was based in part on confidential business information provided by ESWC 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 ESWC 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 ESWC, the desire to avoid the uncertainty, burden and expense of litigation, obtain swift compliance with the law and remove any unfair advantage that ESWC may have secured from its actions.
- (19) Now therefore, in consideration of the payment by ESWC, in the amount of nine thousand, three hundred, twenty-nine dollars and fifty cents (\$9,329.50), the refund of the \$12,455.28 deposit (less any adjustments) to Miller Blades and acceptance of the return of the ThermaCat DPF from Miller Blades, ARB hereby releases ESWC and its principals, officers, agents, predecessors and successors from any and all claims that ARB may have based on the facts and allegations described in recital paragraphs (1) – (4) above. The undersigned represent that they have the authority to enter into this Agreement.

California Air Resources Board

By: 

Name: James Ryden  
Title: Chief, Enforcement Division  
Date: 12/13/12

ESW Canada, Inc.

By: 

Name: Praveen Nair  
Title: CFO  
Date: Nov, 21/2012