

## SETTLEMENT AGREEMENT AND RELEASE

This SETTLEMENT AGREEMENT AND RELEASE ("Agreement") is entered into between the California Air Resources Board ("ARB"), with its principal office at 1001 I Street, Sacramento, California 95814, and Nemesis Motors ("Nemesis") with its principal place of business at 1891 Market Street, Concord, California 94520, "the Parties" hereinafter.

### I. RECITALS

(1) ARB alleges that California Health and Safety Code section 43151 states, "No person who is a resident of, or who operates an established place of business within this state shall import, deliver, purchase, rent, lease, acquire, or receive a new motor vehicle, new motor vehicle engine, or motor vehicle with a new motor vehicle engine for use, registration, or resale in this state unless such motor vehicle engine or motor vehicle has been certified pursuant to this chapter. No person shall attempt or assist in any such action."

(2) ARB alleges that Health and Safety Code section 43152 states, "No person who is engaged in this state in the business of selling to an ultimate purchaser, or renting or leasing new motor vehicles or new motor vehicle engines, including, but not limited to, manufacturers, distributors, and dealers, shall intentionally or negligently import, deliver, purchase, receive, or otherwise acquire a new motor vehicle, new motor vehicle engine, or vehicle with a new motor vehicle engine which is intended for use primarily in this state, for sale or resale to an ultimate purchaser who is a resident of or doing business in this state, or for registration, leasing or rental in this state, which has not been certified pursuant to this chapter. No person shall attempt or assist in any such act."

(3) ARB alleges that Health and Safety Code section 43153 states, "No person who is engaged in this state in the business of selling to an ultimate purchaser or renting or leasing new motor vehicles or new motor vehicle engines, including, but not limited to, manufacturers, distributors, and dealers, shall intentionally or negligently sell, or offer to sell, to an ultimate purchaser who is a resident of or doing business in this state, or lease, offer to lease, rent, or offer to rent, in this state any new motor vehicle, new motor vehicle engine, or vehicle with a new motor vehicle engine, which is intended primarily for use or for registration in this state, and which has not been certified pursuant to this chapter. No person shall attempt or assist in any such action."

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(4) ARB alleges that Health and Safety Code sections 39018 and 39019 define a motor vehicle as non-California certified if it does not possess an emission control system approved for use in California by ARB. Health and Safety Code sections 39042 and 43156 define a new motor vehicle as a vehicle that has an odometer reading of less than 7,500 miles.

(5) ARB alleges that pursuant to Health and Safety Code section 43154, any person who violates any provision of this part, shall be subject to a civil penalty not to exceed five thousand dollars (\$5,000) per vehicle.

(6) NEMESIS was issued a Notice of Violation on June 16, 2008 for one illegal Non-California certified vehicle. The vehicle was a 2008 Jeep Compass, VIN 1J8FF47W18D691305 with 318 miles on the odometer. The vehicle did not possess an emissions control system approved for use in California by ARB.

(7) NEMESIS admits the facts in recital paragraphs (1) through (6) above.

(8) NEMESIS is willing to enter into this Agreement for the purpose of settlement and resolution of this matter with ARB. ARB accepts this Agreement in termination of this matter. Nemesis is entering into this agreement without admitting fault, but is agreeing to settle in order to avoid the costs of litigation. Accordingly, the parties agree to resolve this matter completely by means of this Agreement, without the need for formal litigation.

## II. TERMS AND RELEASE

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

(1) As a condition of this Settlement Agreement, NEMESIS shall pay the total sum of two thousand dollars (\$2,000) as a penalty to the California Air Pollution Control Fund, payable in accordance with the following schedule:

Payment shall be made by check payable to the California Air Pollution Control Fund and addressed to:

Lisa Zarubick  
Air Resources Board

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Enforcement Division  
9528 Telstar Avenue  
El Monte, California 91731

- (3) In addition, if the Attorney General files a civil action to enforce this settlement agreement, NEMESIS shall pay all costs of investigating and prosecuting the action, including expert fees, reasonable attorney's fees, and costs.
- (4) NEMESIS agrees that it will not violate Health and Safety Code section 43150 *et seq.* with respect to the delivery, rental, lease, sale, offer to sell, or introduction into commerce in California of non-California certified motor vehicles.
- (5) This Agreement shall apply to and be binding upon NEMESIS and its principals, officers, directors, receivers, trustees, employees, successors and assignees, subsidiary and parent corporations, dealers, distributors, and upon ARB and any successor agency that may have responsibility for and jurisdiction over the subject matter of this Agreement.
- (6) Now therefore, in consideration of the payment on behalf of NEMESIS in the amount of two thousand dollars (\$2,000) to the California Air Pollution Control Fund, ARB hereby releases NEMESIS and its principals, officers, agents, employees, shareholders, subsidiaries, predecessors and successors from any and all claims for past violations of Health and Safety Code section 43150 *et seq.* ARB may have based on the events described in paragraphs (1) - (6) of the Recitals. The undersigned represent that they have the authority to enter this Agreement.
- (7) This Agreement constitutes the entire agreement and understanding between ARB and NEMESIS 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 NEMESIS concerning these claims.
- (8) 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.
- (9) 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.

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(10) 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.

(11) **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.

(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) **Captions.** The captions by which the sections and subsections of this Agreement are identified are for convenience only, and shall have no effect whatsoever upon their interpretation.

(14) This Agreement may be executed in multiple counterparts, each of which shall be deemed to be an original, and such counterparts together shall constitute one and the same instrument.

(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) **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. 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 penalty in this case is a maximum of \$5,000 per unit per strict liability violation. The penalty obtained in this case is \$2,000 for one unit. The penalty was reduced because this is an unintentional, first-time violation and because Nemesis cooperated fully with the investigation and disposed of the illegal vehicle out of state.

**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 §43154 because Nemesis offered a vehicle for sale in California in violation of § 43151, 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 not prohibit emissions above a specified level. Since the vehicle was not certified for sale in California, emissions attributable to it are illegal and excess. It is not practicable to quantify these emissions, however, because the information necessary to do so is not available.

(17) NEMESIS 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 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 not being assessed under a provision of law that prohibits the emission of pollutants at a specified level.

(18) 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 the complete circumstances of this case. The penalty was discounted in this matter based on the fact that this was an unintentional, first-time violation and the violator made unusually diligent efforts to comply and to cooperate with the investigation and disposed of the vehicle out of state. Penalties in future cases might be smaller or larger on a per unit basis.

(19) The penalty in this case was based in part on confidential business information provided by Nemesis 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 Nemesis that ARB does not retain in the ordinary course of business either. The penalty also reflects ARB's assessment of the relative strength

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of its case against Nemesis, the desire to avoid the uncertainty, burden and expense of litigation, obtain swift compliance with the law and remove any unfair advantage that Nemesis may have secured from its actions.

California Air Resources Board


By: 

Name: James R. Ryden

Title: Chief, Enforcement Division

Date: 5/23/11

Nemesis Motors

  
Name: Tomasz Skiers

Title: PRESIDENT

Date: 4-13-11