

## 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 American Sportworks (hereinafter "ASW") with its principal place of business at 7625 Disalle Boulevard, Fort Wayne, Indiana 46825, collectively, "The Parties." The Effective Date of this Agreement shall be March 27, 2017.

### RECITALS

1. California Code of Regulations, title 13, section 2400(a)(2) states, Every new small off-road engine that is manufactured for sale, sold, or offered for sale in California, or that is introduced, delivered or imported into California for introduction into commerce, and that is subject to any of the standards prescribed in this article must be covered by an Executive Order, issued pursuant to this article."
2. California Code of Regulations, title 13, section 2751(a) states, "no person shall manufacturer for sale or lease for use or operation in California, or sell or lease or offer for sale or lease for use or operation in California, or deliver or import into California for introduction into commerce in California, without an evaporative emission control system that has been certified and labeled pursuant to this article."
3. California Code of Regulations, title 13, section 2753 (a) states, "evaporative emission control systems must be certified annually to the performance-based or system design standards set out in sections 2754 through 2757 by the Air Resources Board. An Executive Order of Certification for such engines or equipment must be obtained prior to the sale or lease, or the offering for sale or lease, for use or operation in California or the delivery or importation for introduction into commerce in California."
4. California 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."
5. American Sportworks conducted an audit, discovered a violation, performed a voluntary and thorough self-disclosure to ARB, and took immediate action both to correct the problem and to create a system to prevent any recurrence.
6. ASW disclosed that although it had obtained an Executive Order for exhaust, and used certified parts for its fuel system, it failed to obtain an overall Executive Order certifying the evaporative control system for 13 small off-road engine families for model years 2011-2014.

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7. Total California sales for all ASW uncertified engine families of small off-road engines during years 2011-2014 were 226 units.
8. ASW promptly and fully cooperated with ARB throughout its investigation.
9. ARB alleges that if the allegations described in recital paragraphs 1-7 were proven, civil penalties could be imposed against ASW as provided in Health and Safety Code section 43016.
10. ASW admits the facts in recital paragraphs 1 through 7, but denies any liability arising thereunder.
11. ASW 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 ASW 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 ASW agree as follows:

1. As a condition of this Agreement, ASW shall pay the total sum of \$11,300 as a penalty by certified check or wire transfer to the California Air Pollution Control Fund upon execution of this Agreement.

The original signed Agreement and any future mailings or documents required per the terms of this Settlement Agreement shall be mailed to:

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

Each check 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**

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

**State of California Air Resources Board  
c/o Bank of America, Inter Branch to 0148  
Routing No. 0260-0959-3 Account No. 01482-80005  
Notice of Transfer: Asha Sharma Fax: (916) 322-9612  
Reference: ARB Case # MSES-14-030**

*Wire Transfer Fee: Vendor is responsible for any bank charges incurred for processing wire transfers.*

Notification of each wire transfer shall be provided to:

**Claira Aramouni  
California Air Resources Board  
Enforcement Division  
Claira.Aramouni@arb.ca.gov  
(626) 459-4327**

2. The penalty described in terms and release paragraph 1 is punitive in nature, rather than compensatory, and is payable to and for the benefit of ARB, a governmental unit. Therefore, it is agreed that this penalty imposed on ASW by ARB is nondischargeable under 11 U.S.C § 523 (a)(7).
3. ASW represents that it understands the legal requirements applicable to selling engines in California and agrees that it will not introduce products to commerce unless ARB certification had first been obtained. ASW agrees that it will not acquire, offer for sale or sell new, non-California certified engines for use or registration in California.
4. This Agreement shall apply to and be binding upon ASW 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 ASW to the California Air Pollution Control Fund in the amounts specified above, ARB hereby releases ASW 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 1-11, above, including any claims under California Code of Regulations, title 13, section 2751 and 2753. The undersigned represent that they have the authority to enter this Agreement.

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6. This Agreement constitutes the entire agreement and understanding between ARB and ASW 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 ASW 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.
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. The Penalty's Basis**

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.

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### **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. The penalty obtained in this case is approximately \$50 per unit for 226 units.

The penalty amount was reduced because this was a self-disclosed, first time violation, that was found through an audit. ASW took immediate corrective action to comply fully and cooperated with the investigation.

In addition, the penalty reflects a demonstration by the company regarding its economic circumstances. Penalties in future cases might be higher or lower on a per unit basis.

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

15. ARB alleges that the penalty provision being applied in this case, Health and Safety Code section 43016, is appropriate because ASW violated a regulation adopted pursuant to Part 5, Division 26 of the Health & Safety Code.

### **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 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 and excess as well. In the interests of settlement and because of the time and expense involved, the parties elected not to do such testing.

16. ASW acknowledges that ARB has complied with Health and Safety Code section 39619.7 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, 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.

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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 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. The penalty was discounted in this matter based on the fact that this was an innocent, first time violation and because ASW made diligent efforts to comply and to cooperate with the ARB's investigation. 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 ASW 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 ASW 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 ASW, the desire to avoid the uncertainty, burden and expense of litigation, obtain swift compliance with the law and remove any unfair advantage that ASW may have secured from its alleged actions.

California Air Resources Board

American Sportworks

By: 

By: 

Name: Dr. Todd P. Sax

Name: Bryan King

Title: Enforcement Division Chief

Title: Sr Director of Engineering

Date: 4/19/17

Date: 3/20/17