

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 Malcolm Smith Motorcycles, Inc. ("MALCOLM SMITH MOTORCYCLES"), with its principal place of business at 7599 Indiana Avenue, Riverside, California 92504.

## I. RECITALS

- (1) 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) 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) 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."
- (4) 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. California Health and Safety Code section 39042 and 43156 define a new motor vehicle as a vehicle that has an odometer reading of less than 7,500 miles.
- (5) 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) Prior to January 2010, MALCOLM SMITH MOTORCYCLES removed the emission control devices from two new Aprilia motorcycles that were certified by ARB for use and sale in California. The resulting motorcycles were thus uncertified. MALCOLM SMITH MOTORCYCLES offered for sale, in California, and/or attempted or assisted in such actions, new Aprilia motorcycles (the "subject vehicles") with under 7,500 odometer miles for use or registration in California that were not certified for sale or use in California pursuant to Chapter 2 of Part 5 of Division 26 of the Health and Safety Code in that the subject vehicles were not certified by ARB as meeting California emissions standards and that said actions on the part of MALCOLM SMITH MOTORCYCLES were unlawful and in violation of Health and Safety Code section 43151-43153.

(7) ARB contends that if the allegations described in recital paragraphs (1) through (6) hereinabove were proven, penalties could be imposed against MALCOLM SMITH MOTORCYCLES pursuant to Health and Safety Code section 43154 for each and every violation alleged.

(8) MALCOLM SMITH MOTORCYCLES fully and timely cooperated with ARB in the investigation of offers and sales of Aprilia motorcycles to California customers by self-disclosing the subject vehicles, unlawful acts by MALCOLM SMITH MOTORCYCLES, invoices, and other relevant information. The self-disclosed information could not have been discovered by ARB through traditional investigatory means such as the Department of Motor Vehicles' database and documents.

(9) In selling the subject vehicles, MALCOLM SMITH MOTORCYCLES took fully compliant motorcycles and removed the emission control devices at the request of the customers. MALCOLM SMITH MOTORCYCLES clearly told its customers that the vehicles may only be used for racing purposes and instructed the customers to transport the motorcycles by trailer. MALCOLM SMITH MOTORCYCLES did not intentionally or negligently mislead its customers by misrepresenting the purpose/use of the motorcycles.

(10) The violation (or similar violation) did not occur at the same facility within the past three years.

(11) The violations did not present an imminent or substantial endangerment to, human health or the environment, and did not violate the specific terms of any judicial or administrative order, or consent agreement.

(12) MALCOLM SMITH MOTORCYCLES admits the facts as alleged in recital paragraphs (1) through (6) above.

(13) MALCOLM SMITH MOTORCYCLES 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.

## II. TERMS AND RELEASE

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

- (1) As a condition of this Settlement Agreement, MALCOLM SMITH MOTORCYCLES and Malcolm Smith, jointly and severally, has paid the total sum of two thousand four hundred dollars (\$2,400.00) as a penalty to the California Air Pollution Control Fund.
- (2) MALCOLM SMITH MOTORCYCLES shall not violate Health and Safety Code section 43150 *et seq.* with respect to the importation, delivery, purchase, rental, lease, acquisition, or receipt of any new (defined as less than 7,500 odometer miles) motor vehicle, new motor vehicle engine, or motor vehicle with a new motor vehicle engine for sale, use, or registration in California unless such motor vehicle engine or motor vehicle has been certified by ARB.
- (3) This Agreement shall apply to and be binding upon MALCOLM SMITH MOTORCYCLES 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.
- (4) Now therefore, in consideration of the payment (which has been received) on behalf of MALCOLM SMITH MOTORCYCLES in the amount of two thousand four hundred dollars (\$2,400.00) payable to the California Air Pollution Control Fund, ARB hereby releases MALCOLM SMITH MOTORCYCLES and its principals, officers, agents, employees, shareholders, dealers, distributors, 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.
- (5) This Agreement constitutes the entire agreement and understanding between ARB and MALCOLM SMITH MOTORCYCLES 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 MALCOLM SMITH MOTORCYCLES concerning these claims.
- (6) 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.

(7) 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.

(8) 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.

(9) 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.

(10) 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.

(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) **SB 1402 Statement**

Senate Bill 1402 (Dutton, Chapter 413, statutes of 2010, Health and Safety Code section 39617) 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 \$5000 per unit per strict liability violation. The penalty obtained in this case is \$1,200.00 per unit for 2 units. This reflects the facts that this was an unintentional, first time violation, resulting in a per unit penalty of \$1,200; MALCOLM SMITH MOTORCYCLES's unusually diligent efforts to comply and to promptly and fully cooperate with the investigation; the nature and means of discovery of the violations; the corrective and remedial measures taken; the measures taken to prevent recurrences; the lack of imminent and substantial endangerment to human health or the environment; the lack of violation of any specific

term of any judicial or administrative order or consent agreement; the limited magnitude of excess emissions (since only 2 motorcycles were involved); and the impact of current economic conditions on the cost of purchasing and restoring the motorcycles and the resulting impact on margins in the industry.

**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 provision being applied in this case, Health and Safety Code section 43154, is appropriate because MALCOLM SMITH MOTORCYCLES allegedly acquired, and/or offered for sale the subject vehicles that were not certified by ARB.

**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.**

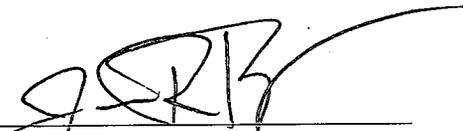
The provisions cited above do not prohibit emissions above a specified level. It is not practicable to quantify these emissions, because the information necessary to do so, such as emission rates and time of use, is not available. There are no testing results available that would indicate how much emissions increased as a result of removal of the emission control devices. However, since the reconfigured vehicles were not certified for sale in California, emissions attributable to them are illegal. The parties had adequate opportunity to conduct such testing, but elected not to do so in the interests of settlement and because of the time and expense involved.

(13) MALCOLM SMITH MOTORCYCLES 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.

(14) 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 for the reasons stated above, including the fact that this was an innocent, first time violation and because MALCOLM SMITH MOTORCYCLES made unusually 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.

(15) The penalty in this case was based in part on confidential business information provided by MALCOLM SMITH MOTORCYCLES 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 MALCOLM SMITH MOTORCYCLES 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 MALCOLM SMITH MOTORCYCLES, the desire to avoid the uncertainty, burden and expense of litigation, obtain swift compliance with the law and remove any unfair advantage that MALCOLM SMITH MOTORCYCLES may have secured from its actions.

**California Air Resources Board**

By:   
Name: James Ryden  
Title: Enforcement Division Chief  
Date: 8/15/11

**Malcolm Smith Motorcycles**

By:   
Name: MALCOLM SMITH  
Title: owner C.E.O.  
Date: 8/1/11