

## SETTLEMENT AGREEMENT AND RELEASE

MTU

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### 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 MTU, (Tognum America, Inc), 39525 MacKenzie Drive, Novi, Michigan 48377.

#### I. RECITALS

- (1) California Code of Regulations, Title 13, Sections 2420(a)(1) and (a)(3) provide that this article shall be applicable to new heavy-duty off-road compression-ignition engines, including all heavy-duty off-road alternate-fueled compression-ignition engines, including those engines derived from existing diesel cycle engines (hereinafter all such engines shall be referred to as compression-ignition engines), produced on or after January 1, 1996, and all other new 2000 model year and later off-road compression-ignition engines, with the exception of all engines and equipment that fall within the scope of the preemption of Section 209(e)(1) of the Federal Clean Air Act (42 U.S.C. 7543(e)(1) and as defined by regulation of the U.S. Environmental Protection Agency.
- (2) California Code of Regulations, Title 13, Section 2424. Emission Control Labels -1996 and Later Off-Road Compression-Ignition Engines. The Air Resources Board recognizes that certain emissions-critical or emissions-related parts must be properly identified and maintained in order for engines to meet the applicable emission standards. The purpose of these specifications is to require engine manufacturers to affix a label (or labels) on each production engine (or equipment) to provide the engine or equipment owner and service mechanic with information necessary for the proper maintenance of these parts in customer use. For engines used in auxiliary power systems which, in turn, are used to comply with the diesel-fueled commercial vehicle idling requirements of title 13, CCR, section 2485(c)(3)(A), additional labeling requirements for the engine or equipment manufacturers apply, as set forth in section 35.B.4 of the "California Exhaust Emission Standards and Test Procedures for 2004 and Subsequent Model Heavy-Duty Diesel Engines and Engine," as incorporated by reference in title 13, CCR, section 1956.8(b).
- (3) California Health and Safety Code section 43016 states, "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 that 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 (\$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. Any

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penalty collected pursuant to this section shall be payable to the State Treasurer for deposit in the Air Pollution Control Fund.”

- (4) On January 24, 2012, ARB representatives discovered that MTU had introduced into the California market mislabeled Stationary Source Engine. The engines were identified during a Portable Equipment Registration Program Registry. The investigation was initiated in March 2012 and included reviewing executive orders issued by ARB, sales data and quarterly reports for Model Year 2009 through Model Year 2012. On June 27, 2012, an inspection of the engine was conducted. The inspection confirmed the mislabeled engine met the requirements of a Stationary Engine, not a Portable Equipment Engine. In addition, the investigation revealed the engine was certified as emergency stationary engine per US EPA 40 CFR Part 60. These engines are not required to be certified to California standards because they are covered under permits issued by local air pollution control districts. However, the label on the engine reads “*This engine conforms to 2011 US EPA and **California** requirements for large non-road stationary compression ignition engines*” which makes it a labeling violation.
- (5) MTU stipulates to the facts and the violations of Title 13, CCR section 2424 as described above.

### TERMS AND CONDITIONS

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

- (1) MTU shall pay the sum of five hundred dollars (\$500) to the California Air Pollution Control Fund. The full payment is due immediately and shall be payable to the California Air Pollution Control Fund and addressed to:
- Martina Diaz  
Air Resources Board  
Enforcement Division  
Vehicle Enforcement Section  
Engine, Parts and Consumer Products Branch  
9528 Telstar Avenue  
El Monte, California 91731
- (2) MTU represents that it understands the legal requirements applicable to these engine in California and agrees that it will ship the correct label to the end user and notify the ARB if any other mislabeled engines in California.
- (3) Now therefore, in consideration of the payment by MTU in the amount of \$500 to the California Air Pollution Control Fund, ARB hereby releases MTU and

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their principals, officers, agents, and successors from any and all claims ARB may have based upon the events described in recital paragraphs (4) and (5) hereinabove, including claims under Title, 13, CCR section 2413. The undersigned represent that they have the authority to enter into this Agreement.

### (1) **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 Health and Safety Code section 43024.

The per vehicle penalty in this case is a maximum of \$500 per unit per strict liability violation. The penalty obtained in this case is approximately \$500 per engine for one engine for a total of \$500.

#### **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 section 43016 because MTU shipped to California mislabeled engines in violation of Title 13, CCR, section 2424 as described above.

#### **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.

- (2) MTU 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, 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

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law that prohibits the emission of pollutants at a specified level.

- (3) 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, and the potential costs and risk associated with litigating these particular violations. Penalties in future cases might be smaller or larger on a per unit basis.
- (4) The penalty was also based on confidential business information provided by MTU that is not retained by ARB in the ordinary course of business. The penalty was also based on confidential settlement communications between ARB and MTU that ARB does not retain in the ordinary course of business either. The penalty is the product of an arms length negotiation between ARB and MTU and reflects ARB's assessment of the relative strength of its case against MTU, the desire to avoid the uncertainty, burden and expense of litigation, obtain swift compliance with the law and remove any unfair advantage that MTU may have secured from its actions.
- (5) MTU represents that it understands the legal requirements applicable to using uncertified engines in California.

California Air Resources Board

MTU

By:   
Name: James R. Ryden  
Title: Division Chief

By:  4/11/13  
Name: Christine F. Ueno ALAN PITTEL  
Title: Manager, Regulatory EMISSION SPECIALIST  
Compliance

Date: 4/29/13

Date: 4/11/13