# 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 the Motorrad Division of BMW of North America, LLC ("Motorrad") with its principal place of business at 200 Chestnut Ridge Road, Bldg. 150, Woodcliff Lake, New Jersey, 07677-7731, "the Parties" hereinafter.

## I. RECITALS

(1) California Health and Safety Code (HSC) 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) HSC 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) HSC 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) HSC 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. HSC sections 39042 and 43156 define a new motor vehicle as a vehicle that has an

odometer reading of less than 7,500 miles.

(5) HSC section 43154 provides that anyone who violates the above referenced HSC sections shall be subject to a civil penalty not to exceed five thousand dollars ($5,000) per vehicle.

(6) Motorrad, through its dealer network, offered for sale, and/or sold in California approximately 23 motorcycles with the engine family CBMXCO.80K7X (the "subject vehicles") 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. The subject vehicles were not certified by ARB as meeting California emissions standards. These actions on the part of Motorrad violated HSC sections 43151-43153. Motorrad did obtain a certification on March 9, 2012 (California Executive Order M-006-0170-1).

(7) Motorrad self-reported the violations to ARB and fully cooperated with ARB in the investigation.

(8) Motorrad has not committed these or similar violations within the last three years.

(9) 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.

(10) Motorrad admits the facts in recital paragraphs (1) through (9) above.

(11) 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 Motorrad for the violations referred to above, ARB and Motorrad agree as follows:

(1) Motorrad shall pay ninety two thousand dollars ($92,000) as a penalty to the California Air Pollution Control Fund, payable within 10 business days of the execution of this Agreement.

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

Erin Blanton
Air Resources Board, Enforcement Division
PO Box 2815
Sacramento, California 95812

(2) It is agreed that if Motorrad at any time becomes insolvent, or makes an assignment for the benefit of creditors or similar action adversely involving Motorrad, 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 Motorrad, or a trustee in bankruptcy, custodian, receiver or agent is appointed or authorized to take charge of any of Motorrad's properties, or if any deposit account or other property of Motorrad be attempted to be obtained or held by writ of execution, garnishment, attachment, condemnation, levy, forfeiture or other legal process, or Motorrad takes any action to authorize any of the foregoing, the entire remaining balance becomes immediately due and payable without notice or demand.

(3) It is agreed that the penalty described in terms and release paragraph (1) is punitive in nature, rather than compensatory. Furthermore, the penalty is intended to deter and punish Motorrad for violations of state environmental statutes, and this penalty is payable to and for the benefit of ARB, a governmental unit. Therefore, it is agreed that this penalty imposed on Motorrad by ARB arising from the facts described in recital paragraphs (1) – (9) are nondischargeable 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.

(4) Motorrad agrees that it will not violate California Code of Regulations, title 13, section 1958 or HSC sections 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, or any other nonpreempted application.

(5) This Agreement shall apply to and be binding upon Motorrad and its principals, officers, directors, receivers, trustees, employees, successors and assignees, 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 BMW in the amount of ninety two thousand dollars ($92,000) to the California Air Pollution Control Fund,

ARB hereby releases Motorrad and its principals, officers, agents, employees, shareholders, subsidiaries, predecessors and successors from any and all claims for past violations of California Code of Regulations, title 13, section 1958 and HSC sections 43150 *et seq*. ARB may have based on the events described in paragraphs (1) - (9) of the Recitals.

(7) The undersigned represent that they have the authority to enter this Agreement.

(8) This Agreement constitutes the entire agreement and understanding between ARB and Motorrad 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 Motorrad concerning these claims.

(9) 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.

(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 affect 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) Health and Safety Code Section 39619.7 (enacted by 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. H&SC section 39619.7 (a) (1).**

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 HSC section 43024.

The statutory penalty in this case for strict liability violations is a maximum of $5,000 per vehicle (HSC section 43154). The penalty imposed in this Agreement is approximately $4,000 per vehicle for approximately 23 vehicles.

This penalty amount reflects the facts that this was an unintentional, first time violation; Motorrad's unusually diligent efforts to detect and self-report the violations 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; and the limited magnitude or absence of excess emissions.

**The provision of law the penalty is being assessed under and why that provision is most appropriate for that violation. H&SC section 39619.7 (a) (2).**

The penalty provision being applied is this case, HSC section 43154, is appropriate because Motorrad put non certified motorcycles into commerce in California in violation of HSC section 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. H&SC section 39619.7 (a) (2).**

The provisions cited above do not prohibit emissions above a specified level. The vehicles were not certified for sale in California, therefore emissions attributable to them are illegal.

(17) Motorrad acknowledges that ARB has complied with HSC sections 39619.7 and 43024 in this case. Specifically, ARB has considered all relevant facts, including those listed in HSC sections 39619.7 and 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 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 a self-reported violation and the violator made diligent efforts to comply and to cooperate with the investigation. Penalties in future cases might be smaller or larger on a per unit basis.

(19) The penalty in this case was also based on confidential settlement communications between ARB and Motorrad that ARB does not retain in the ordinary course of business. The penalty also reflects ARB's assessment of the relative strength of its case against Motorrad, the desire to avoid the uncertainty, burden and expense of litigation, obtain swift compliance with the law and remove any unfair advantage that Motorrad may have secured from its actions.

**California Air Resources Board**

By: _____
Name: ~~James N. Goldstene~~ Ellen M. Peter
Title: ~~Executive Officer~~ Chief Counsel
Date: 6/15/2012

**Motorrad, a division of BMW of North America LLC**

By: _____
Name: Tom Baloga
Title: Vice President-Engineering
Date: 5/18/12

By: _____
Name: Hans Blesse
Title: Vice President-Motorcycles
Date: 5.14.12