

## SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release (hereinafter "Agreement") is entered into between the State of California Air Resources Board (hereinafter "ARB"), with its principal office at 1001 "I" Street, Sacramento, California, and Bi-Phase Technologies, LLC, (hereinafter "BI-PHASE") with its principal place of business at 2945 Lone Oak Drive, Suite 150, Eagan, Minnesota 55121. ARB and BI-PHASE may each be referred to as a "Party" or collectively as the "Parties."

### RECITALS

1. California Health and Safety Code ("Health and Safety Code") section 43152 provides, "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."
2. Health and Safety Code section 43153 provides, "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."
3. California Code of Regulations, title 13, section 1956.8 was adopted by ARB pursuant to the authority granted in, inter alia, sections 43100, 43101, 43102, 43104, 43105, 43106, and 43107, all of which are in Chapter 2, Part 5, Division 26 of the Health and Safety Code. Health and Safety Code section 43152 and 43153 are also found in Chapter 2, Part 5, Division 26 of the Health and Safety Code.
4. California Code of Regulations, title 13, section 1956.8(d) provides in pertinent part, "The test procedures for determining compliance with standards applicable to 1987 and subsequent model heavy-duty Otto-cycle engines and vehicles are set forth in ... the "California Exhaust Emission Standards and Test Procedures for 2004 and Subsequent Model Heavy-Duty Otto-Cycle Engines," adopted December 27, 2000, as last amended April 18, 2013..." (Test Procedures).

5. The Test Procedures incorporate, inter alia, the provisions of Subpart A, Part 86, title 40, Code of Federal Regulations ("CFR"), as adopted or amended by the U.S. Environmental Protection Agency, with some exceptions and additions.
6. Paragraph I.23.A of the Test Procedures incorporates CFR, title 40, sections 86.001-23 and 86.007-23 without change.
7. CFR, title 40, section 86.098-23(a), which is incorporated in CFR, title 40, section 86.001-23(c)(2), provides "The manufacturer shall perform the tests required by the applicable test procedures and submit to the Administrator the information described in paragraphs (b) through (m) of this section..."
8. CFR, title 40, section 86.007-23(c)(2) further provides, "The manufacturer shall submit emission data on such engines tested in accordance with applicable emission test procedures of this subpart and in such numbers as specified."
9. Paragraph I.23.B.1 of the Test Procedures provides, "The data derived from testing to determine the exhaust emission deterioration factors shall be submitted to the Executive Officer for review."
10. Paragraph I.23.B.2 of the Test Procedures provides, "In lieu of testing for formaldehyde emissions for certification, a manufacturer may provide a statement in its application for certification that such vehicles comply with the applicable standards. Such a statement must be based on previous emission tests, development tests, or other appropriate information."
11. Paragraph I.30 of the Test Procedures incorporates CFR, title 40, sections 86.004-30 and 86.007-30 without change, both of which provide "The manufacturer shall bear the burden of establishing to the satisfaction of the Administrator that the conditions upon which the certificate was issued were satisfied."
12. Health and Safety Code section 43154(a) states, in pertinent part, "Any person who violates any provision of this article shall be liable for a civil penalty not to exceed five thousand dollars (\$5,000) per vehicle."
13. Executive Orders EO A-360-0015 (model year 2011) and EO A-360-0017 (model year 2012), which were issued to BI-PHASE state "The engine and emission control systems produced by the manufacturer are certified as described below for use in on-road motor vehicles with a manufacturer's GVWR over 14,000 pounds. Production engines shall be in all material respects the same as those for which certification is granted."
14. During the 2011 and 2012 model years, BI-PHASE sold 25 heavy-duty, otto-cycle liquefied petroleum gas (LPG) engines into California that were certified by ARB based on incorrect non-methane hydrocarbon (NMHC) and formaldehyde (HCHO) data submitted by BI-PHASE. For both model years, the applications for certification

submitted by a third party agent reported test results of 0.01 g/bhp-hr for NMHC and 0.0002 g/bhp-hr for HCHO. The correct test results that should have been reported were 0.072 g/bhp-hr and 0.0010 g/bph-hr, respectively.

15. ARB alleges that the third party agent submitted NMHC and HCHO data for 2011 and 2012 which were not the correct emission data for the engines tested in accordance with the applicable test procedures. As a result, BI-PHASE's engines for these two model years were not "certified pursuant to this chapter."
16. ARB further alleges that the sales or offers for sale in California of the 2011 and 2012 model year engines were unlawful and in violation of Health and Safety Code sections 43152 and 43153.
17. The incorrect data were inadvertently submitted to ARB due to a clerical error in data entry committed by a third party agent hired by BI-PHASE to support its required submissions.
18. The clerical errors in the submission process did not result in unacceptable emission levels.
19. BI-PHASE promptly and fully cooperated with ARB in the investigation of this matter.
20. BI-PHASE has no prior enforcement record with ARB.
21. ARB alleges that if the facts described in recital paragraphs 1-16 were proven, civil penalties could be imposed against BI-PHASE as provided in Health and Safety Code section 43154.
22. BI-PHASE admits the facts as alleged in recital paragraphs 1-16, but denies any liability arising therefrom.
23. BI-PHASE 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 consideration of ARB not filing a legal action against BI-PHASE for the violations alleged above, and in consideration of the other terms set out below, ARB and BI-PHASE agree as follows:

1. As a condition of this Agreement, BI-PHASE shall pay the total sum of one hundred forty thousand six hundred and twenty-five dollars (\$140,625) as a penalty to the

California Air Pollution Control Fund upon execution of this Agreement. Payment shall be made by check payable to the **California Air Pollution Control Fund**.

2. As a further condition of this Agreement, BI-PHASE shall pay an additional amount of forty six thousand eight hundred and seventy-five dollars (\$46,875) to the School Bus and Diesel Emission Reduction SEP upon execution of this Agreement. Payment shall be made by check to the **"San Joaquin Valley Air Pollution Control District"** and "For School Bus and Diesel Emission Reduction SEP" shall be annotated in the Note or Memo line on the check.
3. Both checks shall be addressed to:  
  

Diane Kiyota  
Air Resources Board  
Office of Legal Affairs  
1001 "I" Street  
Sacramento, California 95814
4. If the Attorney General files a civil action to enforce this Agreement, BI-PHASE shall pay all reasonable and verifiable costs of investigating and prosecuting the action, including expert fees, reasonable attorney's fees, and costs.
5. This Agreement shall apply to and be binding upon BI-PHASE and its principals, officers, directors, receivers, trustees, employees, successors and assignees, subsidiary and parent corporations, 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 by BI-PHASE to the California Air Pollution Control Fund and the San Joaquin Valley Air Pollution Control District in the amounts specified above, ARB hereby fully, completely and forever releases BI-PHASE 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 based on the facts and allegations described in recital paragraphs 1-16, above. The undersigned represent that they have the authority to enter this Agreement.
7. This Agreement constitutes the entire agreement and understanding between ARB and BI-PHASE 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 BI-PHASE 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. Each Party to this Agreement has reviewed the Agreement independently, has had the opportunity to consult legal 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 the 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. 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.
12. 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. 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.
14. This Agreement may be signed in counterparts, and its validity shall not be challenged on that basis. True and correct copies of signed counterparts shall be deemed effective as originals for all purposes.
15. SB 1402 Statement  

Senate Bill 1402 (Dutton, Chapter 413, statutes of 2010, 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 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 maximum per unit penalty in this case is \$5,000 per unit per violation. The penalty obtained in this case is \$3,750.00 per violation, per unit for 25 units and 2 violations for each unit. This reflects the facts that this was an unintentional, first time violation of this type; and BI-PHASE's diligent efforts to comply and to promptly and fully cooperate with the investigation.

**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 BI-PHASE allegedly offered and sold engines in California that were not certified by ARB pursuant to Chapter 2, Part 5, Division 26 of the Health and 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. The misreported NMHC and HCHO emission data, as confirmed by the subsequent confirmation testing, did not exceed the applicable emission standards. However, since the engines were not properly certified for sale in California, emissions attributable to them are illegal. BI-PHASE 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.

16. Penalties were determined based on the unique circumstances of this matter, considered together with 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. Penalties in future cases might be smaller or larger on a per unit basis.
17. The penalty in this case was based in part on confidential business information provided by BI-PHASE 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 BI-PHASE 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 BI-PHASE, the desire to avoid the uncertainty, burden and expense of litigation, and obtain swift compliance with the law.

18. This Agreement contains 7 pages, 23 Recitals, and 19 Terms and Release.

**California Air Resources Board**

By: 

Name: Richard W. Corey

Title: Executive Officer

Date: 5/28/2014

**BI-PHASE TECHNOLOGIES, LLC**

By: 

Name: Brian R. Sattler

Title: Secretary

Date: 5/21/2014