

AO 121

To:  <p style="text-align: center;"><b>Register of Copyrights Copyright Office Library of Congress Washington, D.C. 20559</b></p>	<p><b>REPORT ON THE FILING OR DETERMINATION OF AN ACTION OR APPEAL REGARDING A COPYRIGHT</b></p>
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In compliance with the provisions of 17 U.S.C. 508, you are hereby advised that a court action or appeal has been filed on the following copyrights(s):

<input checked="" type="checkbox"/>	ACTION	<input type="checkbox"/>	APPEAL	COURT NAME AND LOCATION
DOCKET NO. <b>2:16-cv-1066-DS</b>		DATE FILED <b>10/18/2016</b>		<b>United States District Court for the District of Utah 351 S West Temple, Room 1.100, Salt Lake City, UT 84101</b>
PLAINTIFF  <b>Derive Power, LLC Derive Systems, Inc.</b>				DEFENDANT  <b>EZ LYNK, SEZC H&amp;S Performance, LLC Thomas Wood, et al</b>
COPYRIGHT REGISTRATION NO.		TITLE OF WORK		AUTHOR OF WORK
<b>1</b> See Copy of Complaint		See Copy of Complaint		See Copy of Complaint
<b>2</b>				
<b>3</b>				
<b>4</b>				
<b>5</b>				

In the above-entitled case, the following copyright(s) have been included:

DATE INCLUDED	INCLUDED BY <input type="checkbox"/> Amendment <input type="checkbox"/> Answer <input type="checkbox"/> Cross Bill <input type="checkbox"/> Other Pleading			
COPYRIGHT REGISTRATION NO.	TITLE OF WORK		AUTHOR OF WORK	
<b>1</b>				
<b>2</b>				
<b>3</b>				

In the above-entitled case, a final decision was rendered on the date entered below. A copy of the order or judgment together with the written opinion, if any, of the court is attached.

COPY ATTACHED <input type="checkbox"/> Order <input type="checkbox"/> Judgment	WRITTEN OPINION ATTACHED <input type="checkbox"/> Yes <input type="checkbox"/> No	DATE RENDERED
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*Attorneys for Plaintiffs Derive Power, LLC  
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**UNITED STATES DISTRICT COURT  
DISTRICT OF UTAH**

DERIVE POWER, LLC; and DERIVE  
SYSTEMS, INC.;

Plaintiffs,

v.

EZ LYNK, SEZC; H&S PERFORMANCE,  
LLC; THOMAS WOOD; LANCE HUNTER;  
TECHIT, LLC; GDP TUNING, LLC; and  
POWER PERFORMANCE ENTERPRISES,  
INC.;

Defendants.

**COMPLAINT**

Case No. 2:16-cv-01066-DS

Judge David Sam

JURY DEMANDED

Plaintiffs Derive Power, LLC and Derive Systems, Inc. (together, “Derive”), through counsel, allege as follows:

**NATURE OF DISPUTE**

1. This case arises from Defendants’ theft, misappropriation, and infringement of Derive’s intellectual property related to its “Bully Dog” brand of products in violation of federal and state law.

2. Derive’s Bully Dog brand is a leading brand in automotive technology products. Through its Bully Dog brand, Derive makes devices commonly called “performance programmers” that can be plugged into a vehicle’s computer system to allow the customization and modification of certain parameters of the vehicle and its performance. Derive sells its products throughout the United States and internationally.

3. Former employees of Derive or its corporate predecessors, including Defendant Wood, founded a new company, Defendant EZ LYNK, which they incorporated in the Cayman Islands. EZ LYNK produces and markets products that compete with Derive’s performance programmers. Wood’s involvement in EZ LYNK, either by himself and/or through Defendant TechIT, LLC, is in violation of his restrictive covenants he made to Derive.

4. EZ LYNK and its principals have also taken Derive software code, removed the markings that indicate that the code belongs to Derive, and reissued the software inside EZ LYNK devices, thus infringing the copyrights that Derive holds on that software. EZ LYNK and its principals also have taken other Derive software code that Derive maintains as a trade secret and EZ LYNK has used those misappropriated trade secrets to support the EZ LYNK devices.

Defendants GDP Tuning, LLC and Power Performance Enterprises, Inc. are similarly complicit in their resale of products that infringe Derive's copyrights.

5. Another entity, Defendant H&S Performance, LLC ("H&S"), has also infringed Derive's copyrights and trade dress and misappropriated Derive's trade secrets. Derive and H&S used to be in a business relationship, but that relationship ended in 2014. After that termination, H&S continued to make and sell performance programmers that incorporated Derive's copyrighted software and that appeared substantially similar to Derive's performance programmers. On information and belief, H&S also supported these devices with Derive's trade secrets. All of these activities have, since 2014, occurred without a license from Derive.

6. Defendants improperly seek to take advantage of Bully Dog's good will, financial investment, and intellectual property for their own benefit. They are infringing or misappropriating Derive's intellectual property, including trade secrets, copyrights, and trade dress. They are also destroying important business goodwill and relationships by using Derive property for illegal emissions-defeating devices. Wood and Hunter have taken the additional step of violating their restrictive covenants and engaging in unfair competition rather than abiding by their obligations to Derive. All of Defendants actions have also caused significant harm to Derive by virtue of disrupting Derive's workplace and employees.

7. Accordingly, this action seeks temporary and permanent injunctive relief to prevent Defendants from using Bully Dog's intellectual property and to enforce Defendant Wood's restrictive covenants, full compensation for Derive's losses, exemplary and punitive damages, and attorney fees.

**PARTIES**

8. Plaintiff Derive Power, LLC (“Derive Power”) is a limited liability company organized under the laws of Delaware and has a primary place of business in Sanford, Florida.

9. Plaintiff Derive Systems, Inc. (“Derive Systems” and, collectively with Derive Power, “Derive”) is incorporated in Delaware and has a primary place of business in Sanford, Florida.

10. Defendant EZ LYNK SEZC (“EZ LYNK”) is incorporated in the Cayman Islands and has a primary place of business at 125 Owen Roberts Dr., George Town, Cayman Islands KY1-1003. EZ LYNK sells products throughout the United States and internationally, including within the State of Utah.

11. Defendant H&S Performance, LLC (“H&S”) is a limited liability company organized under the laws of Utah and has a primary place of business at 4160 South River Road, St. George, Utah 84790. H&S sells products throughout the United States and internationally, including within the State of Utah.

12. Defendant Thomas Wood is an individual who resides in or near St. George, Utah and conducts business within the State of Utah in connection with H&S and other Defendants.

13. Defendant Lance Hunter is an individual who resides in or near Idaho Falls, Idaho, who conducts business within the State of Utah in connection with EZ LYNK, TechIT, and Wood, and who has regular contacts with the State of Utah.

14. Defendant TechIT, LLC (“TechIT”) is a limited liability company organized under the laws of Utah and has a primary place of business at 1174 S. Dixie Dr., St. George, UT. TechIT’s sole function is to support EZ LYNK performance programmers.

15. Defendant GDP Tuning, LLC (“GDP”) is incorporated in Idaho and has its principal place of business in Rexburg, Idaho. On information and belief, GDP operates a warehouse facility in Washington, Utah. GDP is one of two master distributors for EZ LYNK products and sells products throughout the United States, including within the State of Utah.

16. Defendant Power Performance Enterprises, Inc. (“PPEI”) is incorporated, and operates, in Louisiana. PPEI is a master distributor for EZ LYNK products and sells products throughout the United States, including within the State of Utah.

#### **RELATED INDIVIDUALS AND ENTITIES**

17. On information and belief, Payton Hugie is an individual who resides in or near St. George, Utah, and conducts business within the State of Utah in connection with H&S, EZ LYNK, and Wood.

18. On information and belief, Daniel Shirts is an individual who resides in or near St. George, Utah and conducts business within the State of Utah in connection with H&S, EZ LYNK, and Wood.

19. On information and belief, Bentley Hugie is an individual who resides in or near St. George, Utah, and conducts business within the State of Utah in connection with H&S, EZ LYNK, and Wood.

20. On information and belief, Casey Shirts is an individual who resides in or near St. George, Utah, and conducts business within the State of Utah in connection with H&S, EZ LYNK, and Wood.

21. On information and belief, Bradley Gintz is an individual who resides in or near Lake Charles, Louisiana, and conducts business within the State of Utah in connection with EZ

LYNK, and Wood. Mr. Gintz is responsible for many of EZ LYNK's operations, including establishing EZ LYNK as a corporation. On information and belief, Mr. Gintz has a role in EZ LYNK product development and manufacture.

22. On information and belief, Jeremy Pierce is an individual who resides in or near St. George, Utah, and conducts business within the State of Utah in connection with his company Defendant GDP's operations in Washington, Utah, and in connection with H&S, EZ LYNK, and Wood. Mr. Jeremy Pierce is a former H&S employee and a current employee of Defendant GDP.

23. On information and belief, Barry Pierce is an individual who resides in or near Rexburg, Idaho, and conducts business within the State of Utah in connection with his company Defendant GDP, as well as H&S, EZ LYNK, and Wood.

24. On information and belief, Kory Willis is an individual who resides in or near Lake Charles, Louisiana, and conducts business within the State of Utah in connection with his company Defendant PPEI, as well as Defendants H&S, EZ LYNK, and Wood. On information and belief, Mr. Willis has an interest in EZ LYNK, either directly or through other corporate entities located in the Cayman Islands.

#### **JURISDICTION AND VENUE**

25. This Court has federal subject matter jurisdiction pursuant to 28 U.S.C. § 1331 because Plaintiffs have asserted federal claims under the Copyright Act (17 U.S.C. § 101, *et seq.*), the Defend Trade Secrets Act (18 U.S.C. § 1831, *et seq.*), and the Lanham Act (15 U.S.C. § 1051, *et seq.*). Pursuant to 28 U.S.C. § 1367, the Court also has supplemental or pendant

jurisdiction over Plaintiffs' remaining claims insofar as those claims form part of the same case or controversy as the federal question claims under Article III of the United States Constitution.

26. This Court has personal jurisdiction over all of the Defendants under principles of specific and general jurisdiction as each has sufficient contacts with Utah.

27. Venue in the District of Utah is appropriate under 28 U.S.C. § 1391, as a substantial part of the actions giving rise to the claims herein occurred in this District.

### **Background Facts**

28. Plaintiffs are the owners of the "Bully Dog" brand. Between its founding in 1998 and 2014, the Bully Dog brand was owned by Bully Dog Technologies ("BDT"), an independent company. BDT has been a major developer and supplier of hardware and software solutions aimed at improving the performance of automotive vehicles. In 2014, Derive acquired substantially all of the assets of BDT, including the Bully Dog brand. Derive thereafter integrated the Bully Dog brand into the Derive business, which included a new corporate structure and new management.

29. Derive continues to develop and market technology solutions under the Bully Dog brand that offer users ways to maximize vehicle power, improve fuel efficiency, and enable vehicle customization. These solutions include performance programmers that can provide numerous performance benefits to vehicles, as well as the ability to install certain aftermarket products that allow further vehicle customization for particular applications and uses. Derive has registered its on-device software code for copyright protection under U.S. laws. Derive also maintains its support software for those devices as trade secrets.



**I. Relationships Among the Parties.**

**A. Defendant H&S Licenses Software and Hardware from BDT**

30. H&S is a company involved in technology solutions in the automotive space, including performance programmers. In 2008, BDT and H&S entered into a software license agreement, later amended and renamed a Software License and Hardware Purchase Agreement (the “H&S License Agreement”), attached hereto as Exhibit 1. Under the H&S License Agreement, BDT manufactured and sold to H&S “private label” hardware, *i.e.*, the casings, wiring, circuit boards, and display screens used in H&S-branded performance programmer units sold by H&S.

31. The H&S License Agreement also granted H&S a license to BDT’s performance programmer-related firmware. The H&S License Agreement further granted H&S a license to BDT’s trade secrets in the form of support software for the performance programmers, and obligated H&S to take reasonable measures to maintain the confidentiality of these trade secrets. All licenses granted to H&S under the H&S License Agreement were strictly limited to the use of the licensed software in relation to the “private label” hardware supplied to H&S by BDT under the H&S License Agreement. H&S was not authorized to use, upload, or modify the software for any other device. H&S paid BDT a licensing fee for the firmware and support software and a per-device fee for the hardware under the H&S License Agreement.

**B. Defendant Tom Wood’s Employment with BDT**

32. BDT engineer Tom Wood was integral in BDT’s relationship with H&S. In this role, Wood had broad access to BDT’s confidential and proprietary information, including the source code for its firmware and trade secret support software. In 2012, Wood signed a new

confidentiality agreement and other restrictive covenants with BDT. In that agreement, Wood committed, for the period of his employment and thereafter, to protect BDT's hardware and software intellectual property, to respect the confidentiality of BDT's business information, not to compete or solicit BDT customers, and not to solicit BDT employees. That agreement is attached hereto as Exhibit 2.

33. During much of his employment with BDT, Wood was working almost exclusively on servicing H&S. He spent large portions of his time at H&S facilities in St. George, Utah.

C. Derive Terminates the "Bully Dog" Relationship with H&S

34. Around the same time that Derive was conducting due diligence for its transaction with BDT, BDT informed Derive that H&S was involved in marketing "defeat devices" and was the target of investigations by both the U.S. Environmental Protection Agency ("EPA") and California Air Resources Board ("CARB"). At that time, BDT and its prior owners told Derive that BDT had become concerned about the relationship between BDT and H&S. BDT and its prior owners also told Derive that BDT had thus ceased all private label hardware sales to H&S and terminated H&S's license rights under the H&S License Agreement.

35. On February 28, 2014, Derive acquired substantially all of the assets of BDT. After the transaction, Derive learned that the former BDT owners did not disclose, and appear to have taken measures to minimize and conceal, the full scope or nature of the continuing relationship between BDT and H&S, and Wood's role and conduct in that relationship. Accordingly, Derive did not begin to learn until after the transaction that the relationship had

continued despite BDT's former owners' representations, and did not begin to learn the full extent of the relationship or the details described herein.

36. Thus, shortly after the February 28, 2014 transaction, and based on information that was not disclosed by the former owners of BDT in connection with the transaction, Derive terminated the relationship with H&S altogether. Thereafter, H&S was no longer authorized to use, upload, or market any Derive or BDT software or hardware.

37. After Derive terminated the relationship with H&S, Wood continued to work on other tasks associated with Derive engineering. On information and belief, Wood also continued to support H&S and its defeat devices without Derive's knowledge.

D. Derive Acquires the "Bully Dog" Brand and Wood Resigns

38. On July 15, 2014, shortly after Derive's acquisition of the "Bully Dog" brand,, Wood resigned. On information and belief, Wood moved to St. George, Utah, living initially in housing owned by H&S. Wood then began working full time for his company, TechIT, which he had incorporated on March 7, 2014, more than three months prior to his resignation from BDT / Derive. On information and belief, Wood's work with TechIT since then has included the servicing of performance programmer products that he supported during his time at BDT and Derive.

E. Derive Becomes Concerned about Defendant Wood's Activities

39. In late 2014, Derive management heard industry rumors that Wood was working to establish a new competitive business through the improper use of Derive's intellectual property. Derive was not aware of this information prior to the transaction. Derive then sent Wood a "cease and desist" letter to stop his competitive activities and to seek assurances that he

had not misappropriated Derive's information. Wood responded through his counsel that he had no role in the development and marketing of performance programmers. He further stated that his only business activities were performed under the name of a new Utah company, TechIT, LLC. That letter is attached hereto as Exhibit 3. The parties eventually entered into a "standstill agreement," in which Wood represented, in writing and under oath, that he had not transferred or used Derive information and devices. Wood also represented that he had returned all Derive information and devices, and reaffirmed his obligations to protect Derive's confidential information. *See* Exhibit 3.

F. Wood Forms EZ LYNK to Develop and Market Competitive, and Illegal, Devices

40. In late 2015, Derive started hearing industry reports about a new defeat device marketed under the name EZ LYNK. This report was confirmed in June 2016, when EZ LYNK launched its products.

41. On information and belief, Wood and various individuals associated with H&S formed EZ LYNK and its affiliated entities on or about July 14, 2014—before Wood had resigned from Derive—incorporating EZ LYNK in the Cayman Islands. On information and belief, and from all appearances, EZ LYNK was created to continue the activities of H&S in the development and marketing of illegal defeat devices.

42. On information and belief, the other EZ LYNK founders that are closely tied to H&S include (a) Payton Hugie, the brother of H&S co-founder Bentley Hugie, (b) Daniel Shirts, the brother of H&S co-founder Casey Shirts, and (c) Brad Gintz, who manages EZ LYNK's operations in the Cayman Islands. Moreover, on information and belief, EZ LYNK's executives include (a) Jeremy Pierce, the owner of Defendant GDP, who has moved individually to St.

George, Utah, the home of H&S; and (b) Kory Willis, the owner of PPEI. On information and belief, GDP and PPEI are the principal distributors of EZ LYNK products, and have close ties to H&S.

43. EZ LYNK's technology centers on a performance programmer device named Auto Agent. That device allows the upload of programs called "tunes" into a vehicle's electronic systems. These tunes allow the modification of how a vehicle operates to improve vehicle performance, to enable the installation of other aftermarket auto parts, or to perform other enhancements. While there are many legal and legitimate uses of this technology, such as those Derive develops and promotes, these tunes can also be used as to facilitate the overriding, removing, or otherwise tampering with control systems in violation of the law. For example, "tunes" can allow a user to bypass legally mandated emissions control systems. Some of the tunes that can be loaded into a car via EZ LYNK's Auto Agent product allow for a "no emissions" feature, a fact that is widely known within the relevant community.

44. On information and belief, EZ LYNK is well aware of the "no emissions" use, of its devices and in fact acts in concert with third parties, including GDP and PPEI, to develop and market such "no emissions" features.

## **II. Derive's Intellectual Property**

45. Derive's intellectual property includes, but is not limited to, (a) performance programmer firmware source code, which is protected by U.S. registered copyrights, (b) performance programmer software support code, which Derive maintains as a trade secret, and (c) Derive's trade dress for its performance programmers.

46. Derive's copyrighted firmware generally operates the hardware of Derive's performance programmer devices and allows the devices to upload and download other software to a vehicle engine control unit (or "ECU"). This firmware is loaded directly on the devices for use by the devices.

47. Derive's trade secret support software is not provided to its customers, but is maintained by Derive for use on a separate device, such as a PC, to support the performance programmer devices and its firmware. This support software includes software to create calibration, or the "tune" files. As indicated above, "tunes" are the specific pieces of code that are uploaded onto a vehicle's ECU by the performance programmer devices to actually make modifications to the vehicle. While these "tune" files are loaded on the device, the software used to create them is not, and the secrecy of the support software is valuable to Derive.

48. Derive promotes a culture of respect for company confidential information and protects its intellectual property, including its software code, trade secrets, confidential and proprietary information, in a number of ways. For instance, Derive requires that all employees, contractors, vendors, and partners sign agreements that contain strict confidentiality provisions. Employees are told about Derive's confidentiality policies and expectations when they begin employment, and are again reminded of their confidentiality obligations through periodic training and through off-boarding procedures when their employment ends.

49. Derive's facilities are closed to the public and require either key fob or fingerprint access to the facilities. Even for employees with key fobs or access by fingerprint, Derive uses schedules to limit employee access to facilities at certain times.

50. Derive's computer systems and servers are password protected. Highly confidential information on computer systems is limited only to employees who have a need to access such information. Derive retains the right to remove company information from personal devices, such as smart phones, at any time.

### **III. Defendants' Theft of Derive Intellectual Property**

#### **A. EZ LYNK Has Copied and Uses Derive's Software Code**

51. In June 2016, Derive purchased an EZ LYNK performance programmer. Derive performed an analysis on the unit to determine whether it operated in any way using Derive's proprietary information, including computer code.

52. Derive's analysis revealed that elements of the software code that operates the EZ LYNK device is Derive's code, down to a complete duplication of Derive's software code. That duplication is obvious upon inspection, which shows identical code, organization, and logic. A comparison of a portion of the Derive and EZ LYNK code is attached hereto as Exhibit 4. The code in devices sold by EZ LYNK also produces the exact same messages that the Derive code produces. *See* Exhibit 5.

53. The only change EZ LYNK made to the Derive's software code was to delete the comment marker in the code that stated, "Copyright Bullydog 2010." These comment markers, which are routinely inserted into computer software programs, are akin to the footer in certain published documents that provide the copyright symbol and the name of the publisher/copyright holder.

54. In addition, a comparison of Derive's copyrighted code to the code used by EZ LYNK shows that EZ LYNK has copied a specific feature present in Derive's code. This feature

is known as “on the fly” shifting, which allows a driver to shift between power modes (or different tunes) while driving the vehicle. A character-by-character analysis of the software code shows that EZ LYNK copied the Derive software that had been licensed to H&S, under the H&S License Agreement, exclusively for use in private-label devices sold to H&S. That license expired, and Derive ceased selling such devices to H&S nearly three years ago.

55. On information and belief, EZ LYNK and Wood have additionally misappropriated Derive’s trade secrets which were unlawfully taken by Wood after his resignation and used in his development of the EZ LYNK devices. The process to create the Derive trade secret support software was extremely complicated and required an enormous number of man-hours, failures, and workarounds to achieve. Derive also designed its trade secret support software to work in concert with the copyrighted firmware on the Derive devices to support those devices.

56. Wood had access to the support software by virtue of his employment at BDT and Derive. EZ LYNK and Wood have also unlawfully incorporated Derive copyrighted firmware into EZ LYNK devices. Therefore, on information and belief, EZ LYNK and Wood have also continued to use the trade secret support software that is designed to work in concert with the copyrighted firmware. On information and belief, EZ LYNK has not independently developed any viable support software on its own, or by using employees who had never been aware of the Derive trade secret support software, which obviously excludes Wood.

**B. H&S’s Improper Use of Derive Hardware and Software.**

57. Contemporaneously with the analysis of EZ LYNK’s software, Derive discovered that H&S has recently been marketing and selling performance programmers built with Derive’s



hardware and operating on software previously licensed to H&S under the H&S License Agreement. These sales activities occurred after the termination of the H&S Agreement. In addition, the performance programmers marketed and sold by H&S after the license termination included emissions-defeating capabilities.

58. Derive obtained samples of H&S devices marketed on various Internet sites and examined them in detail. The hardware in the H&S devices in question contain markings and codes establishing that they had been manufactured by Derive in 2016, long after the termination of the H&S License Agreement.

59. The examined devices had actual Derive parts (LCD screens and printed circuit boards) and embedded software, even though these components were not sold by Derive to H&S. Thus, on information and belief, H&S purchased Derive devices, gutted them, extracted the circuit boards and LCD screens, and then replaced the firmware with the firmware that H&S had previously licensed from BDT under the now-defunct H&S License Agreement in violation of that agreement. On information and belief, H&S then uploaded emissions-defeating software onto the devices and re-packaged the devices in new, low-cost plastic shells. A basic examination shows that those shells are manufactured to look exactly like the original BDT devices, and the current Derive devices, with the same display shape and the same buttons on each side of the device. From those buttons to the LCD screen to the shape of the units to the operating software, these H&S devices were built to be difficult to distinguish from the market-leading Derive products sold under the Bully Dog brand. The duplication of Bully Dog's format and design is shown in Exhibit 6.

60. On information and belief, H&S has additionally misappropriated Derive's trade secrets which were unlawfully acquired and used by H&S after the termination of the H&S License Agreement to support H&S devices. The process to create the Derive trade secret support software was extremely complicated and required an enormous number of man-hours, failures, and workarounds to achieve. Derive also designed its trade secret support software to work in concert with the copyrighted firmware on the Derive devices to support those devices.

61. H&S had access to the support software by virtue of the H&S License Agreement and through its dealings with Wood. H&S has continued the use of Derive copyrighted firmware in H&S devices. Therefore, on information and belief, H&S has also continued to use the trade secret support software that is designed to work in concert with the copyrighted firmware. On information and belief, H&S has not independently developed any such viable support software on its own or by using employees who had never been aware of the Derive trade secret support software.

C. GDP and PPEI Are Resellers of the EZ LYNK Devices

62. PPEI and GDP are the two primary dealers that offer custom calibrations for EZ LYNK devices. PPEI and GDP have also jointly marketed the EZ LYNK hardware, and their associated calibrations, to PPEI's and GDP's followers via podcasts, videos, and through social media.

63. PPEI sells EZ LYNK devices and custom calibrations directly off their website, as well as through a network of dealers. PPEI offers for sale, and on information and belief has sold, EZ LYNK devices throughout the United States, including in Utah.

64. GDP is a distributor of EZ LYNK devices to its network of dealers and also offers GDP custom calibrations for the EZ LYNK devices through that network of dealers. GDP offers for sale, and on information and belief has sold, EZ LYNK devices throughout the United States, including in Utah.

65. On information and belief, the custom calibrations sold by PPEI and GDP use the EZ LYNK product to defeat vehicle emissions controls in violation of EPA regulations. On information and belief, EZ LYNK is aware of and encourages this improper conduct by its distributors PPEI and GDP. For example, while EZ LYNK *markets* their device without “tunes,” it intentionally does not *sell* such devices to the consumer. Instead, EZ LYNK distributes the devices to defendants PPEI and GDP. In turn, PPEI and GDP load “tunes” onto the EZ LYNK device that allows a user to disable emissions control systems. On information and belief, EZ LYNK develops, markets, and sells its EZ LYNK devices with full knowledge and of and complicity in PPEI’s and GDP’s actions. Also on information and belief, PPEI and GDP have obtained Derive’s trade secret support software from Wood, EZ LYNK, and/or H&S. On information and belief, PPEI and GDP have used that support software to learn how Derive’s software and firmware operates. This knowledge was used in an improper manner in turn by PPEI and GDP to create the “tunes” used to disable emission control systems.

#### **IV. EZ LYNK and Wood Solicit Derive Employees**

66. Wood had been preparing to compete against Derive for quite some time, even before his resignation. To further that competition, Wood made significant efforts since his resignation in 2014 to recruit Derive employees to work with him, in violation of his non-solicitation-of-employees obligation.

67. On information and belief, Wood's first recruit was Lance Hunter. Wood convinced Hunter to resign his Derive employment and to join Wood in his competitive ventures. Hunter gave notice to Derive and claimed he was leaving the company to start a new chapter of his life as a real estate agent. On information and belief, Hunter's real estate job was a cover story for his plan to join Wood, in violation of his contractual obligations to Derive.

68. In addition, Wood recently reached out to Derive employees to have them join EZ LYNK. Wood explained to these employees that they could make the move, despite non-competition covenants, because they would become employees of Wood's own customer support company, TechIT, without disclosing that they would actually be working for EZ LYNK. These employees declined this solicitation and reported it to Derive.

**COUNT I – COPYRIGHT INFRINGEMENT**  
**(17 U.S.C. § 101, *et seq.*)**  
**(AGAINST DEFENDANTS EZ LYNK, H&S, PPEI, GDP, WOOD, and TECHIT)**

69. Derive re-alleges and incorporates by reference the preceding paragraphs as though fully set forth herein.

70. Derive owns copyrights entitled "Ford 6.7 Liter Download Firmware v1007," registered on September 21, 2016, and "Ford 6.7 Liter Monitor/Datalog/Power Level Adjusting Firmware v1007," registered on September 21, 2016, for its firmware source code used in its performance programmer devices.

71. All Defendants except Hunter have deliberately and intentionally, without Derive's authorization, copied and distributed Derive's copyrighted firmware source code.

72. All Defendants except Hunter have copied and distributed the copyrighted firmware source code in a manner that clearly infringes on Derive's copyrights and, unless these Defendants are enjoined, they will continue to do so.

73. Defendants GDP and PPEI also have deliberately and intentionally, without Derive's authorization, sold and otherwise distributed products that incorporate Derive's copyrighted firmware source code.

74. Defendants H&S, EZ LYNK, Wood, and TechIT are also liable for vicarious and contributory copyright infringement of Derive's copyrighted firmware source code, as they have induced, caused, or materially contributed to the infringing conduct of others, with knowledge of the infringing activity. Defendants H&S, EZ LYNK, Wood, and TechIT have the right and ability to control the infringing activity, and have a direct financial interest in that conduct.

75. The infringing conduct includes, for example, the activities of Defendants GDP and PPEI with respect to EZ LYNK performance programmers. EZ LYNK sells or otherwise forwards its performance programmer devices to its distributors, Defendants GDP and PPEI. GDP and PPEI sell products incorporating the copyrighted firmware source code in a manner that clearly infringes on Derive's copyrights and, unless Defendants EZ LYNK, GDP, and PPEI are enjoined, they will continue to do so.

76. As a direct result of the infringement of Derive's copyrights, Derive has sustained, and will continue to sustain, substantial injury, loss, and damages in an amount to be proven at trial.

77. Derive is entitled to a permanent injunction restraining Defendants and all persons acting in concert with them from engaging in further acts of copyright infringement.

**COUNT II – MISAPPROPRIATION OF TRADE SECRETS**  
**(18 U.S.C. § 1831, *et seq.*)**  
**(AGAINST DEFENDANTS EZ LYNK, H&S, WOOD, TECHIT, GDP, AND PPEI)**

78. Derive re-alleges and incorporates by reference the preceding paragraphs as if fully set forth herein.

79. Derive operates its business and sells its products in interstate and foreign commerce, transacting and doing business with customers, vendors and others throughout the United States and internationally.

80. Derive conceives, designs, and develops trade secrets, as that term is defined under the Defend Trade Secrets Act, 18 U.S.C. § 1836(b), as amended (the “DTSA”).

81. Among other information, Derive’s trade secrets encompass confidential and proprietary intellectual property, including but not limited to the software support code for the current Derive performance programmer devices and the past BDT performance programmer devices, as well as other forms of customer goodwill associated with its customers, prospective customers and vendor relationships.

82. Derive obtains actual and potential economic value from its trade secrets not being generally known or readily ascertainable through proper means by another person or entity who could obtain economic value from the disclosure or use of the information.

83. Derive obtains economic value from its trade secrets though devoting substantial resources, time and investment to creating, developing and using such information.

84. As is detailed in the foregoing allegations, Derive has taken reasonable steps and precautions to safeguard its trade secrets and to limit and restrict others outside of Derive from knowing, readily ascertaining or using its trade secrets.

85. All of the Defendants except H&S and Hunter have willfully and maliciously engaged in various acts of misappropriation regarding Derive's trade secrets, including but not limited to the improper acquisition, disclosure, and use of the Derive software support code for the purpose of producing and delivering EZ LYNK performance programmers.

86. Defendant H&S has willfully and maliciously engaged in various acts of misappropriation regarding Derive's trade secrets, including but not limited to the improper acquisition, disclosure, and use of the Derive software support code for the purpose of producing and delivering H&S performance programmers.

87. As a result of Defendants' improper misappropriation, disclosure and use of Derive's trade secrets, Defendants have violated the DTSA.

88. As a direct and proximate result of Defendants' violations of the DTSA, Derive is entitled to full compensatory and consequential damages, as well as full attorneys' fees, costs and expenses.

89. Because Defendants' DTSA violations have been willful and malicious, Derive is entitled to exemplary damages of twice the amount of damages for any actual loss and any unjust enrichment.

90. Defendants' DTSA violations have caused and will continue to cause Derive irreparable harm that is not adequately remedied at law and that requires preliminary and permanent injunctive relief.

**COUNT III – MISAPPROPRIATION OF TRADE SECRETS**  
**(Utah Code Ann. § 13-24-1, *et seq.*)**  
**(AGAINST DEFENDANTS EZ LYNK, H&S, WOOD, TECHIT, GDP, AND PPEI)**

91. Derive re-alleges and incorporates by reference the preceding paragraphs as if fully set forth herein.

92. Derive operates its business and sells its products in interstate and foreign commerce, transacting and doing business with customers, vendors and others throughout the United States and internationally.

93. Derive conceives, designs, develops and transacts business relating to trade secrets as that term is defined under the Utah Uniform Trade Secrets Act, Utah Code Ann. § 13-24-2(4), as amended (the “UTSA”).

94. Among other information, Derive’s trade secrets encompass Derive’s confidential and proprietary intellectual property, including but not limited to the software support code for the current Derive performance programmer devices and the past BDT performance programmer devices, as well as other forms of customer goodwill associated with its customers, prospective customers and vendor relationships.

95. Derive has and continues to derive actual and potential economic value from its trade secrets not being generally known or readily ascertainable through proper means by another person or entity who could obtain economic value from the disclosure or use of the information.

96. Derive has and continues to derive economic value from its trade secrets through hard work and dedication in which it has devoted substantial resources, time and investment to creating, developing and using such information.



97. As is detailed in the foregoing allegations, Derive has taken reasonable steps and precautions to safeguard, limit and restrict others outside of Derive from knowing, readily ascertaining or using its trade secrets.

98. All of the Defendants except H&S and Hunter have willfully and maliciously engaged in various acts of misappropriation regarding Derive's trade secrets, including but not limited to the improper acquisition, disclosure and use of the Derive support code for the purpose of producing and delivering EZ LYNK performance programmers.

99. Defendant H&S has willfully and maliciously engaged in various acts of misappropriation regarding Derive's trade secrets, including but not limited to the improper acquisition, disclosure and use of the Derive support code for the purpose of producing and delivering H&S performance programmers.

100. As a result of Defendants' improper misappropriation, disclosure and use of Derive's trade secrets, Defendants have violated the UTSA.

101. As a direct and proximate result of Defendants' violations of the UTSA, Derive is entitled to full compensatory and consequential damages, as well as full attorneys' fees, costs and expenses.

102. Because Defendants' UTSA violations have been willful and malicious, Derive is entitled to exemplary damages of more than twice the amount of damages for any actual loss and any unjust enrichment.

103. Defendants' UTSA violations have caused and will continue to cause Derive irreparable harm that is not adequately remedied at law and that requires preliminary and permanent injunctive relief.

**COUNT IV – UNFAIR COMPETITION AS TO BULLY DOG TRADE DRESS  
(15 U.S.C. § 1125(a))  
(AGAINST DEFENDANT H&S)**

104. Derive re-alleges and incorporates by reference the preceding paragraphs as if fully set forth herein.

105. Plaintiffs’ “Bully Dog” trade dress has acquired secondary meaning. Consumers generally perceive the appearance of a Derive “Bully Dog” branded performance programmer as identifying that the product is in fact a Derive “Bully Dog” branded device.

106. Defendant H&S’s unauthorized use, in interstate commerce, of knockoffs, duplicates, or confusingly similar imitations of Derive’s trade dress has caused and is likely to cause confusion, deception, and mistake by creating the false and misleading impression that Defendants’ goods are manufactured or distributed by Derive, or are affiliated, connected, or associated with Derive, or have the sponsorship, endorsement, or approval of Derive.

107. Defendant H&S’s activities have caused and, unless enjoined by the Court, will continue to cause a likelihood of confusion and deception of members of the public and substantial injury to Derive’s goodwill and reputation for which Derive has no adequate remedy at law.

108. Defendant H&S’s actions demonstrate an intentional, willful, and malicious intent to trade on the goodwill established by and associated with Derive’s trade dress to the substantial and irreparable injury of Derive.

109. Defendant H&S’s conduct has caused and is likely to continue causing substantial and irreparable injury to the public and Derive, and Derive is entitled to injunctive relief and to

recover Defendants' profits, actual damages, enhance damages, costs, and reasonable attorneys' fees, pursuant to 15 U.S.C. §§ 1116, 1117, and 1125(a).

**COUNT V – FRAUD  
(AGAINST DEFENDANT WOOD)**

110. Derive re-alleges and incorporates by reference the preceding paragraphs as if fully set forth herein.

111. Defendant Wood, in the standstill agreement, represented in writing and under oath that:

- a. He had not transferred or used any Derive information, including confidential or proprietary information, outside of Derive;
- b. He had returned all Derive information, including confidential or proprietary information, and devices;
- c. He would protect the confidentiality of Derive information, including confidential or proprietary information that he knew or was aware of based on his work at BDT and Derive.

112. Defendant Wood's representations concerned material facts. The confidential nature of the information and Derive's interests in maintaining the confidentiality of that information is integral to its business.

113. Defendant Wood's representations were false. Starting through Wood's work at TechIT for H&S, and continuing through Wood's work at EZ LYNK, Defendant Wood transferred and used Derive information, including confidential or proprietary information, outside of Derive.

114. Defendant Wood knew his representations were false when made, or were made recklessly, due to his conduct.

115. Defendant Wood made said representations, in the standstill agreement, for the purpose of inducing Derive to enter the said standstill agreement, and therefore causing Derive to not take further action, including pursuing legal action, to protect their property, good will, and reputation.

116. Relying on Defendant Wood's fraudulent representations, Derive executed the standstill agreement and ceased any further action, including pursuing legal action, to protect their property, good will, and reputation.

117. Derive acted reasonably and in good faith based on and in ignorance of the falsity of Defendant Wood's representations.

118. As a result of Defendant Wood's fraudulent representations in the standstill agreement, Derive has been injured and incurred substantial damages.

**COUNT VI – BREACH OF CONTRACT  
(AGAINST DEFENDANT H&S)**

119. Derive re-alleges and incorporates by reference the preceding paragraphs as if fully set forth herein.

120. Defendant H&S entered into the valid H&S License Agreement, permitting H&S to use BDT software and hardware for certain limited purposes. In particular, H&S's use was strictly limited to the upload of BDT software onto BDT devices and the use of BDT support software to support BDT devices; H&S was not authorized to use it, upload it, or modify it for any other device.

121. Defendant H&S has materially breached the H&S License Agreement by using BDT software received pursuant to the H&S License Agreement in H&S devices, rather than in BDT devices, and by using BDT support software received pursuant to the H&S License Agreement to support H&S devices, rather to support BDT devices.

122. As a result of H&S's breaches of the H&S License Agreement, Derive has been injured irreparably.

123. Derive is entitled to full compensatory and consequential damages, as well as full injunctive relief.

**COUNT VII – BREACH OF CONTRACT  
(AGAINST DEFENDANT WOOD)**

124. Derive re-alleges and incorporates by reference the preceding paragraphs as if fully set forth herein.

125. Defendant Wood signed valid agreements under Idaho law during his employment with BDT. Those agreements impose valid and enforceable obligations on Wood, including obligations during their employment and for periods of time thereafter, to protect BDT's hardware and software trade secrets, to respect the confidentiality of BDT's business information, not to prepare to compete, compete or solicit BDT customers, and not to solicit BDT employees.

126. Defendant Wood has materially breached these agreements by among other things: (1) preparing to compete with Derive during his employment and during the restricted period thereafter; (2) competing with Derive by producing and selling rival products; (3) soliciting Derive employees to terminate their employment relationship with Derive; and (4) misappropriating and misusing Derive's confidential proprietary information and trade secrets.

127. As a result of Wood's breaches of his non-competition, non-solicitation, and confidentiality obligations, Derive has been injured irreparably.

128. Derive is entitled to full compensatory and consequential damages, as well as full injunctive relief.

**COUNT VIII – BREACH OF CONTRACT  
(AGAINST DEFENDANT HUNTER)**

129. Derive re-alleges and incorporates by reference the preceding paragraphs as if fully set forth herein.

130. Defendant Hunter signed valid agreements under Idaho law during his employment with BDT. Those agreements impose valid and enforceable obligations on Wood, including obligations during his employment and for a period of time thereafter, to protect BDT's hardware and software trade secrets, to respect the confidentiality of BDT's business information, not to prepare to compete, compete or solicit BDT customers, and not to solicit BDT employees.

131. Defendant Hunter has materially breached these agreements by among other things: (1) preparing to compete with Derive during his employment and during the restricted period thereafter; and (2) competing with Derive by joining Defendant Wood in the production and sale of rival products.

132. As a result of Hunter's breaches of his non-competition, non-solicitation, and confidentiality obligations, Derive has been injured irreparably.

133. Derive is entitled to full compensatory and consequential damages, as well as full injunctive relief.

**COUNT IX – BREACH OF DUTY OF LOYALTY  
(AGAINST DEFENDANT WOOD)**

134. Derive re-alleges and incorporates by reference the preceding paragraphs as if fully set forth herein.

135. As an employee of BDT and Derive, Defendant Wood had a duty of loyalty not to compete or interfere with BDT's and Derive's legitimate business interests.

136. Defendant Wood breached his duty of loyalty by competing with BDT and Derive while still employed by BDT and, later, Derive.

137. As a result of Wood's breaches of duty, Derive has been injured irreparably.

138. Derive is entitled to full compensatory and consequential damages, as well as full injunctive relief.

**COUNT X – TORTIOUS INTERFERENCE WITH CONTRACT  
(AGAINST DEFENDANTS WOOD, TECHIT, AND EZ LYNK)**

139. Derive re-alleges and incorporates by reference the preceding paragraphs as if fully set forth herein.

140. Derive has valid and enforceable agreements with its employees, including but not limited to Lance Hunter, that contain covenants that restrict the activities in which employees can engage during and after their employment.

141. Defendants EZ LYNK, TechIT, and Wood were at all relevant times aware of these contractual obligations.

142. Defendants Wood, TechIT, and EZ LYNK intentionally interfered with Derive's agreements with Lance Hunter by causing him to leave his employment with Derive, to violate his restrictive covenants by competing against Derive, and to take steps to conceal his violations.

143. Defendants interfered with these agreements through improper means, namely subterfuge and violations of established standards of the trade.

144. As a result of Defendants' tortious interference with Derive's contracts, Derive has been injured irreparably.

145. Derive is entitled to full compensatory and consequential damages.

**COUNT XI – CONSPIRACY  
(AGAINST ALL DEFENDANTS)**

146. Derive re-alleges and incorporates by reference the preceding paragraphs as if fully set forth herein.

147. Defendants combined and conspired with the purpose to infringe and misappropriate Derive's intellectual property.

148. As described above, through this conspiracy, Defendants did infringe on Derive's copyright and trade dress, and misappropriated Derive's trade secrets.

149. As a result of this conspiracy, Derive has sustained, and will continue to sustain, substantial injury, loss, and damages in an amount to be proven at trial.

**COUNT XII – UNFAIR COMPETITION  
(AGAINST ALL DEFENDANTS)**

150. Derive re-alleges and incorporates by reference the preceding paragraphs as if fully set forth herein.

151. Defendants engaged in unlawful intentional business practices by infringing Derive's intellectual property. Defendant H&S additionally violated the H&S License Agreement in its use of Derive intellectual property.



152. Defendants' unlawful business practices have led to a diminution in value of Derive's intellectual property and Derive has sustained, and will continue to sustain, substantial injury, loss, and damages in an amount to be proven at trial.

**COUNT XIII – UNJUST ENRICHMENT  
(AGAINST ALL DEFENDANTS)**

153. Derive re-alleges and incorporates by reference the preceding paragraphs as if fully set forth herein.

154. Defendants have benefited from the improper, unfair, and unauthorized use of Derive's intellectual property.

155. Defendants knew, or should have known, that their actions were improper and fully appreciated the benefits received as a result of its improper actions.

156. Defendants would be unjustly enriched if they were permitted to retain the benefits obtained from such actions.

157. Equity requires that Defendants be required to account for, and pay to Derive, an amount equal to the value of the benefits conferred upon them.

**REQUEST FOR RELIEF**

Derive respectfully requests that this Court enter judgment in Derive's favor, granting the following relief against the Defendants:

- a) issuing a preliminary and permanent injunction restraining all Defendants and anyone associated with EZ LYNK or H&S from acquiring, using or disclosing Derive's intellectual property, including its copyrights, trade dress, trade secrets and other confidential documents, data or information;
- b) issuing a preliminary and permanent injunction requiring all Defendants and anyone associated with EZ LYNK or H&S to account for and return to Derive all Derive intellectual property, including its copyrights, trade dress, trade secrets or

other confidential documents, data or information in their possession, custody or control, including any copies thereof;

- c) issuing a preliminary and permanent injunction requiring Defendants Wood and Hunter to abide fully by the confidentiality, non-compete and non-solicitation covenants they agreed to during their employment with BDT;
- d) issuing a preliminary and permanent injunction requiring Defendant H&S to abide fully by the H&S License Agreement;
- e) entering judgment in Derive's favor and awarding full compensatory and consequential damages to Derive and against all Defendants jointly and severally, in an amount to be determined at trial, factoring in all interest, costs and expenses;
- f) awarding Derive exemplary and punitive damages;
- g) awarding Derive its reasonable attorneys' fees and costs incurred in bringing and having to pursue this action; and
- h) providing Derive with such other and further relief as the Court may deem just and proper.

**DEMAND FOR JURY TRIAL**

- i) Derive hereby demands a trial by jury as to all issues.

DATED this 18<sup>th</sup> day of October, 2016.

Respectfully submitted,

By: /s/ Phillip J. Russell

Brent O. Hatch

Phillip J. Russell

HATCH, JAMES & DODGE, P.C.

Mark A. Klapow

Michael J. Songer

CROWELL & MORING LLP

# **EXHIBIT 1**

**Amended & Restated**  
**Software License and Hardware Purchase Agreement**  
**between**  
**Bully Dog Technologies, LLC**  
**and**  
**H&S Performance, LLC**

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**AMENDED AND RESTATED  
SOFTWARE LICENSE AND HARDWARE PURCHASE AGREEMENT**

THIS AMENDED AND RESTATED SOFTWARE LICENSE AND HARDWARE PURCHASE AGREEMENT (this "*Agreement*") is made as of the 1<sup>st</sup> day of January, 2012 (the "*Effective Date*"), by and between Bully Dog Technologies, LLC, an Idaho limited liability company ("*Bully Dog*"), and H&S Performance, LLC, a \_\_\_\_\_ limited liability company ("*H&S*").

**RECITALS**

A. Bully Dog is a leader in the diesel performance automotive aftermarket industry, and has the capabilities to develop certain software to allow users to access electronic control units and download software programs onto them.

B. In 2008, H&S and Bully Dog entered in a Software License Agreement whereby Bully Dog developed and H&S licensed such software from Bully Dog to assist H&S in downloading their proprietary software programs onto electronic control units. H&S also retained Bully Dog to provide maintenance and support systems for such software.

C. H&S and Bully Dog now desire to amend and restate such agreement on the terms and conditions provided herein.

NOW THEREFORE, in consideration of the mutual promises and covenants herein contained, the parties agree as follows:

**AGREEMENT**

**Section 1. Definitions**

Whenever used in this Agreement, the following terms will have the following specified meanings:

"*Affiliate*" means, with respect to any Party, any Person that, directly or indirectly (e.g., through any number of successive tiers), controls (e.g., a parent organization), is controlled by (e.g., a subsidiary organization), or is under common control with (e.g., a brother/sister organization) such Party.

"*Bully Dog Indemnitees*" has the meaning set forth in Section 10.2.

"*Change of Control Event*" has the meaning set forth in Section 11.5.

"*Confidential Information*" has the meaning set forth in Section 8.1.

"*Damages*" has the meaning set forth in Section 10.2.

"*Discloser*" has the meaning set forth in Section 8.2.

**“Documentation”** means all documents and materials supplied by Bully Dog to H&S to aid in the use and operation of the Software, and all modifications to such documents or materials that are made by or on behalf of Bully Dog from time to time, which may include: (i) functional, technical, design and performance specifications, (ii) installation, configuration, administration, operation and maintenance procedures and instructions, and (iii) training guides and user manuals.

**“Hardware”** means the hardware used in connection with the H&S Software. All IPR related to the Hardware (other than H&S software) is owned by Bully Dog.

**“Hardware Shortfall”** means the difference between the Minimum Hardware Order and the Hardware pieces purchased by H&S in the applicable month.

**“H&S Software”** means any computer program that H&S Makes or licenses that uses, or whose use is enabled by, the Software, and is for download by consumers onto electronic control units.

**“IPR”** means any patent, copyright, trademark, trade secret or other intellectual property right.

**“License”** means the license granted by Bully Dog to H&S under Section 2.1 with respect to the Software.

**“License Term”** means the term of the License as set forth in Section 6.1.

**“Make”** (or such conjugation thereof as the context may require) means to author, create, write, prepare, develop, originate or otherwise make (or such conjugation thereof as the context may require).

**“Party”** means Bully Dog, H&S, or any Person that acquires all of the right, title and interest of Bully Dog or H&S in this Agreement in accordance with Section 11.5.

**“Person”** means any individual, corporation, limited liability company, partnership, trust, estate, association, governmental authority or other entity.

**“Purpose”** means the Making and selling of H&S Software by H&S for lawful purposes in accordance with the terms and conditions of this Agreement.

**“Recipient”** has the meaning set forth in Section 8.2.

**“Software”** means the current version of the software that accompanies the Hardware giving access to a vehicle's computer for uploading and downloading.

**“Third Party”** means any Person other than a Party.

**“Unauthorized Use”** means any unauthorized possession, use, reproduction, copying, marketing, publication, distribution, disclosure or other dealing.



## **Section 2. License**

**2.1 Grant.** Subject to the terms and conditions of this Agreement, Bully Dog hereby grants to H&S a nonexclusive, nontransferable, nonassignable license, with limited sublicense rights as described in Section 2.2 below, during the License Term to (a) install, execute, copy, and otherwise use the Software solely for the Purpose, (b) make reasonable copies of the Software solely for backup and archival purposes, (c) use the Documentation as reasonably required by H&S in connection with H&S's use of the Software, and (d) make a reasonable number of copies of the Documentation for such purpose. As consideration for the License, H&S paid Bully Dog Two Hundred Fifty Thousand Dollars (\$250,000) ("*License Fee*").

**2.2 Limited Sublicense Rights.** Bully Dog grants H&S the limited right to sublicense the Software, as installed on Hardware purchased hereunder *only*, to end-users of the H&S Software solely to the extent required to use the H&S Software on the end-user's vehicle.

**2.3 Restrictions.** H&S acknowledges that the scope of the license granted under this Agreement is limited. H&S agrees that it will not, and will not allow any Third Party to, use the Software except as specifically permitted in this Agreement. Without limiting the foregoing, H&S agrees that it will not (a) sell, lease, rent, lend, assign, sublicense (except as provided in Section 2.2) or otherwise transfer all or any part of the Software, (b) decompile, disassemble, reverse engineer or otherwise attempt to discover any source code or underlying trade secrets to the Software, (c) remove, obscure or alter any copyright notice, restricted rights legend or other notice of proprietary rights that appears or is contained on or in the Software, or (d) customize or modify the Software. H&S will not use the Software, or allow the transfer, transmission, export, or re-export of any Software or portion thereof in violation of any export control laws or regulations administered by the U.S. Commerce Department, OFAC, the U.S. Environmental Protection Agency, or any other government agency.

**2.4 Hardware Requirement.** The Parties agree that all H&S Software will be installed on or otherwise used in conjunction with Hardware.

**2.5 Ownership.** Bully Dog retains all right, title and interest in and to all originals and copies of the Software and Documentation, including all associated IPR. H&S will have no rights in the Software or Documentation other than the rights expressly granted to H&S in Section 2.1 of this Agreement. H&S hereby assigns to Bully Dog any additional rights it may acquire in the Software or Documentation.

## **Section 3. Maintenance and Support**

During the License Term, Bully Dog will continue to provide customary maintenance and support services for the Software in the ordinary course similar to what they have been doing since the inception of this Agreement.

## **Section 4. Documentation**

Bully Dog has delivered to H&S at least one (1) electronic copy of all Documentation for the Software. H&S acknowledges that the Documentation is sufficient to enable H&S's personnel to use and to understand the use and operation of the Software. Throughout the term

of any maintenance service agreement, Bully Dog will provide copies of any revisions, improvements, enhancements, modifications and updates to the Documentation, at no additional cost. H&S may make a reasonable number of copies of the Documentation for H&S's use consistent with the terms of this Agreement, provided H&S reproduces copyright notices and any other legends of ownership on each copy.

## **Section 5. Hardware Purchase and Sale**

**5.1 Exclusivity Requirement.** H&S agrees that it will purchase directly from, and use Bully Dog as, its exclusive supplier of Hardware during the License Term. In the event that Bully Dog is unable to supply the Hardware to H&S for any reason, then Bully Dog will designate a replacement company in its sole discretion.

**5.2 Forecast.** Each month, H&S will submit to Bully Dog a written forecast of the quantity of Hardware pieces that H&S expects to order during each of the next six (6) months.

**5.3 Payment Terms.** Any and all payments due under this Agreement shall be made by cash, certified check, wire transfer or other immediately available funds upon delivery of any Software or services hereunder. A late charge will apply to any amounts where payment is not received by Bully Dog within the time periods specified in this Agreement. The late charge will be calculated at a rate of one and one-half percent (1.5%) of the unpaid amount per month (18% per annum) and will be due and payable upon invoice by Bully Dog.

**5.4 Taxes.** The fees set forth in this Section 5 do not include any taxes now or hereinafter enacted, or any other amounts payable to governmental authorities. In the event that Bully Dog is required to pay any tax or duty under this Agreement (other than taxes on its net income), H&S will reimburse Bully Dog therefor.

## **Section 6. Term and Termination**

**6.1 Term of License.** H&S's right to use the Software will begin upon the delivery of the Software by Bully Dog, and will continue until termination in accordance with this Section 6.

**6.2 Breach.** Either Party may terminate the License Term upon thirty (30) days prior written notice if the other Party materially breaches a material term of this Agreement and does not cure such breach within thirty (30) days following receipt of notice specifying the breach (in which case the License Term will terminate at the end of such period); provided, however, that Bully Dog may terminate the License Term in a shorter period of time if Bully Dog determines that such action is reasonably necessary to avoid liability, and that Bully Dog may terminate the License Term immediately if H&S breaches Section 2, Section 5.1, Section 8, Section 10, Section 11.1 or 11.5.

**6.3 Effect of Termination.** Upon termination of the License Term for any reason, all license rights under this Agreement will terminate, and H&S will (a) immediately cease using the Software and the Documentation, (b) remove all copies of the Software from its computer(s) and/or server(s), and (c) deliver to Bully Dog a certificate executed by an officer of H&S certifying that it no longer has any copies of the Software or Documentation in its possession or control. H&S's rights under this Agreement automatically terminate upon termination of the

License Term. Bully Dog will have the right to audit the computer systems and files of H&S to ensure compliance with this Section.

**6.4 Survival.** The rights and obligations contained in Section 2.3, Section 2.5, Section 2.5, Section 7, Section 8, Section 9, Section 10, and Section 11 will survive any expiration or termination of the License Term for any reason.

## **Section 7. Injunctive Relief**

H&S acknowledges and agrees that due to the unique nature of Bully Dog's Confidential Information and IPR, there can be no adequate remedy at law for any breach of its obligations hereunder, that any such breach may allow H&S or Third Parties to unfairly compete with Bully Dog resulting in irreparable harm to Bully Dog, and therefore, that upon any such breach or threat thereof, Bully Dog shall be entitled to injunctions and other appropriate equitable relief in addition to whatever remedies it may have at law.

## **Section 8. Confidentiality**

**8.1 Definition.** "*Confidential Information*" means all discoveries, developments, designs, improvements, inventions, concepts, works of authorship, derivative works, blueprints, products, structures, software, processes, computer programs, know how, data, techniques, systems, formulas, marketing and business plans and outlines, strategies, budgets, forecasts, projections, financial statements, costs, fee schedules, client and supplier lists, client and prospective client databases, access codes and similar security information and procedures, techniques, methodologies and performance strategies, and all patents, copyrights, maskworks, trade secrets and other proprietary rights thereto.

**8.2 No Disclosure of Use of Confidential Information.** Each Party ("*Recipient*") agrees to retain in confidence any Confidential Information provided to it by the other Party ("*Discloser*") and shall not disclose any Confidential Information to any other entity or person or use, disseminate, or otherwise distribute any Confidential Information for its own benefit or for the benefit of another, except for the limited purpose performing its obligations under this Agreement. Recipient shall take all reasonable safeguards to prevent disclosure of the Confidential Information and shall disclose the Confidential Information to its employees on a "need to know" basis only. Recipient shall inform all its employees who have access to the Confidential Information that such Confidential Information is confidential and proprietary to Discloser.

**8.3 Exceptions.** The obligations of Recipient in the preceding paragraphs of this Section 8 shall not apply to Confidential Information that: (a) is publicly known at the time of its disclosure; (b) after disclosure, has become publicly known other than through breach of this Agreement; (c) Recipient can show by tangible evidence was known to Recipient prior to disclosure by Discloser; (d) Recipient can show by tangible evidence was developed independently by Recipient without reference to the Confidential Information disclosed by Discloser; or (e) is required to be disclosed by the Recipient by law, regulation, court order or other legal process; provided, however, that in such event Recipient shall legally resist disclosing

the Confidential Information and shall notify Discloser of such disclosure in writing not less than thirty (30) days in advance of any disclosure or planned disclosure.

**8.4 Return of Materials.** Recipient promptly will return all tangible material embodying or derived from Confidential Information of the Discloser (in any form and including, without limitation, all summaries, copies and excerpts of such Confidential Information) upon the earlier of (a) the completion or termination of this Agreement or (b) the Discloser's written request.

## **Section 9. Warranties; Limitation of Liability**

**9.1 Warranty by Bully Dog.** EXCEPT AS SPECIFICALLY PROVIDED IN THIS AGREEMENT, THERE ARE NO WARRANTIES, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. NO AFFIRMATION OF FACT, INCLUDING BUT NOT LIMITED TO STATEMENTS REGARDING SUITABILITY FOR USE OR PERFORMANCE OF THE SOFTWARE OR ANY OTHER LICENSED PROGRAMS WILL BE OR BE DEEMED TO BE A WARRANTY OF BULLY DOG FOR ANY PURPOSE. H&S's sole and exclusive remedy in the event of a defect is expressly limited to the restoration of the Software to good working condition.

**9.2 No Consequential Damages; Limitation of Liability.** IN NO EVENT WILL BULLY DOG BE LIABLE FOR INDIRECT, SPECIAL, OR CONSEQUENTIAL DAMAGES, INCLUDING LOSS OF PROFITS, ARISING OUT OF ANY UNAUTHORIZED USE OF THE SOFTWARE OR ANY BREACH OF THIS AGREEMENT. BULLY DOG WILL NOT BE LIABLE FOR ANY LOSS OR DAMAGE IN CONNECTION WITH OR ARISING OUT OF THE INTERRUPTION OR LOSS OF USE OF THE SOFTWARE OR ANY OTHER LICENSED PROGRAMS OR SERVICES PROVIDED BY BULLY DOG. BULLY DOG'S TOTAL LIABILITY OVER THE TERM OF THIS AGREEMENT FOR ALL LOSSES ARISING HEREUNDER, IN TORT, CONTRACT OR OTHERWISE, WILL NOT EXCEED THE LICENSE FEE. ANY UNAUTHORIZED USE, MODIFICATION, ALTERATION, OR REVISION OF ALL OR ANY PORTION OF THE SOFTWARE OR ANY OTHER LICENSED PROGRAMS OR SERVICES WHICH ARE THE SUBJECT OF THIS AGREEMENT WILL CAUSE ANY WARRANTY DESCRIBED IN THIS AGREEMENT TO BE NULL AND VOID AND H&S WILL BE RESPONSIBLE FOR ANY AND ALL COSTS ASSOCIATED WITH THE REPAIR OF THE SOFTWARE. BULLY DOG, ITS AFFILIATES, SUBSIDIARIES, REPRESENTATIVES, AND AGENTS MAKE NO OTHER WARRANTY, EXPRESS OR IMPLIED, ORAL OR WRITTEN, IN FACT, BY OPERATION OF LAW OR OTHERWISE, EXCEPT AS SET FORTH IN THIS AGREEMENT.

**9.3 Additional Limitations.** Notwithstanding anything else in this Agreement, Bully Dog will not be liable for: (a) misuse, abuse, accidental damage, improper handling, or improper maintenance by anyone other than Bully Dog technicians or others acting under Bully Dog control, or any cause other than ordinary use; (b) damages to the operating system, data files, etc. due to causes external to the equipment, including, but not limited to, power surges, power reductions or failure, defective electrical work, fire, flood, water, wind, lightning or any other

natural phenomena; (c) failure of any Hardware or any other equipment provided by Third Parties; or (d) operator inefficiency or error.

## **Section 10. Indemnification**

**10.1 Mitigation of Damages.** If the Software becomes, or (in Bully Dog's opinion) is likely to become, the subject of any such Third Party claim, then Bully Dog (at its sole cost and expense) may either: (a) procure for the H&S Indemnitee the right to continue using the Software as contemplated hereunder; (b) modify the Software to render it non-infringing (provided such modification does not materially degrade the functionality of the Software; or (c) replace the Software with equally suitable, functionally equivalent, compatible, non-infringing Software. If none of the foregoing are commercially practicable despite Bully Dog using all reasonable efforts, then Bully Dog will be entitled to terminate this Agreement as to all or part of this Software.

**10.2 Indemnity by H&S.** H&S agrees to defend, indemnify and hold Bully Dog and its Affiliates and their officers, directors, managers, employees and representatives (collectively, the "***Bully Dog Indemnitees***") harmless from and against any and all losses, claims, liabilities, costs and expenses (including taxes, fees, fines, penalties, interest, reasonable expenses of investigation and attorneys' fees and disbursements) as incurred (collectively, "***Damages***"), in connection with any claims against the Bully Dog Indemnitees in any way arising out of or related to: (a) H&S's use of the Software or Documentation, including claims based on Unauthorized Use by H&S or actions or omissions of H&S; (b) H&S's negligence or intentional acts, (c) the H&S Software, or (d) any breach of this Agreement. In addition, H&S agrees to indemnify and hold the Bully Dog Indemnitees harmless from and against all losses, damages and expenses, including reasonable attorneys' fees, in connection with any claims brought by its customers against Bully Dog.

**10.3 Indemnification Procedures.** If a Bully Dog Indemnitee seeks indemnification under this Agreement, the Bully Dog Indemnitee will: (a) give prompt notice to the indemnifying party concerning the existence of the indemnifiable event; (b) grant authority to the indemnifying party to defend or settle any related action or claim; and, (c) provide, at the indemnifying party expense, such information, cooperation and assistance to the indemnifying party as may be reasonably necessary for the indemnifying party to defend or settle the claim or action. A Bully Dog Indemnitee's failure to give prompt notice will not constitute a waiver of the Bully Dog Indemnitee's right to indemnification and will affect the indemnifying party's indemnification obligations only to the extent that the indemnifying party's rights are prejudiced by such failure or delay. Notwithstanding anything to the contrary set forth herein, (y) a Bully Dog Indemnitee may participate, at its own expense, in any defense and settlement directly or through counsel of its choice, and (z) the indemnifying party will not enter into any settlement agreement on terms that would diminish the rights provided to the Bully Dog Indemnitee or increase the obligations assumed by the Bully Dog Indemnitee under this Agreement, without the prior written consent of the Bully Dog Indemnitee. If the indemnifying party elects not to defend any claim as is required under this Agreement, the Bully Dog Indemnitee will have the right to defend or settle the claim as it may deem appropriate, at the cost and expense of the indemnifying party, and the indemnifying party will promptly reimburse the Indemnitee for all costs, expenses, settlement amounts and other Damages.

**Section 11. Miscellaneous**

**11.1 Representation of H&S.** In addition to and without any limitation to the restrictions set forth in Section 2.3 or elsewhere herein, H&S represents and warrants that it will not engage in any Unauthorized Use of, and it will only use the Software, in compliance with all federal, state, local, municipal, international, and multinational or other constitution, law, ordinance, principle of common law, code, regulation, rule, statute or orders or judgments of courts or arbitrators that are or were applicable to the use of the Software.

**11.2 Notices.** Any notice, request, instruction or other document to be given hereunder by a Party to the other Party hereto will be in writing, delivered in person, or mailed by certified or registered mail, return receipt requested, or transmitted by facsimile transmission with electronic confirmation of receipt to the addressee's address or facsimile number set forth below (or such other address or facsimile number as the party changing its address specifies in a notice to the other parties):

If to Bully Dog:      Bully Dog Technologies, LLC  
                                  2839 Highway 39  
                                  American Falls, Idaho 83211  
                                  Attention: Daryl Klassen, COO  
                                  Telephone: (208) 226-2500  
                                  Facsimile: (208) 266-2511

With a copy to:      Perkins Coie, LLP  
                                  1111 W. Jefferson Street, Suite 500  
                                  Boise, Idaho 83702  
                                  Attention: Melanie Rubocki, Esq.  
                                  Telephone: (208) 343-3434  
                                  Facsimile: (208) 343-3232

If to H&S:              H&S Performance, LLC  
                                  \_\_\_\_\_  
                                  \_\_\_\_\_  
                                  Attention: \_\_\_\_\_  
                                  Telephone: \_\_\_\_\_  
                                  Facsimile: \_\_\_\_\_

Notices will be deemed to have been given on the date of service, if served personally on the Party to whom notice is to be given, or on the first day after transmission by facsimile transmission, if transmitted by facsimile as set forth above, or on the fifth day after mailing, if mailed as set forth above.

**11.3 No Third-Party Beneficiaries; Exception.** This Agreement is for the benefit of, and will be enforceable by, the Parties only. This Agreement is not intended to confer any right or benefit on any Third Party (including, but not limited to, any employee of any Party). No



action may be commenced or prosecuted against a Party by any Third Party claiming as a third-party beneficiary of this Agreement or any of the transactions contemplated by this Agreement.

**11.4 Nonwaiver.** The failure of either Party to insist upon or enforce strict performance by the other of any of the provisions of this Agreement, or to exercise any right or remedy under this Agreement, will not be interpreted or construed as a waiver or relinquishment to any extent of that Party's right to assert or rely upon any such provisions, rights or remedies in that or any other instance; rather, the same will be and remain in full force and effect.

**11.5 Assignment.** Neither this Agreement nor any of the rights granted herein shall be assignable or transferable by H&S whether voluntarily or involuntarily (by operation of law or otherwise) without the prior written consent of Bully Dog. A change in control of H&S, including, without limitation, a Change of Control Event shall be deemed an assignment hereunder. Nothing in this Agreement shall prohibit Bully Dog from assigning its rights and benefits hereunder, or from transferring this Agreement, in whole or in part. Bully Dog shall provide written notification to H&S of any assignment or transfer of this Agreement not later than the effective date of such assignment or transfer. Subject to the provisions hereof, this Agreement shall be binding upon and inure to the benefit of the parties, their affiliates, successors, heirs, legal representatives and authorized assigns. For purposes of this Agreement, "***Change of Control Event***" shall mean (a) substantially all of the assets of a party are to be sold, (b) a party is to merge or consolidate with or into any other entity and persons who are equity holders of the party prior to such merger or consolidation do not receive, as a result of such merger or consolidation, more than fifty percent (50%) of the voting equity in the surviving entity; or (c) a third person or group of persons, excluding an existing equity owner of the party of more than 20% of the votes that may be cast for the election of directors, becomes the beneficial owner of equity of the party having more than fifty percent (50%) of the total number of votes that may be cast for the election of directors of the party, or is otherwise able to appoint, designate or control, by proxy, agreement or otherwise, the majority of the directors of the party.

**11.6 Severability.** This Agreement will be enforced to the fullest extent permitted by applicable law. If for any reason any provision of this Agreement is held to be invalid or unenforceable to any extent, then:

- (a) such provision will be interpreted, construed or reformed to the extent reasonably required to render the same valid, enforceable and consistent with the original intent underlying such provision;
- (b) such provision will be void to the extent it is held to be invalid or unenforceable;
- (c) such provision will remain in effect to the extent that it is not invalid or unenforceable; and
- (d) such invalidity or unenforceability will not affect any other provision of this Agreement or any other agreement between the parties.

If the invalidity or unenforceability is due to the unreasonableness of the scope or duration of the provision, then the provision will remain effective for such scope and duration as may be determined to be reasonable.

**11.7 Court Venue; Jurisdiction and Arbitration.**

(a) Neither Party will commence or prosecute any suit, proceeding or claim to enforce the provisions of this Agreement, to recover damages for breach of or default under this Agreement, or otherwise arising under or by reason of this Agreement, other than in the state or federal courts located in Power County, State of Idaho.

(b) Each Party hereby irrevocably consents to the jurisdiction of such courts with venue laid in Power County, State of Idaho.

(c) Notwithstanding the above, in the event of any controversy or dispute arising out of this Agreement, Bully Dog (at its sole and absolute option) may commence an arbitration proceeding by serving written notice thereof to H&S, designating the issue(s) to be arbitrated. Such notice may but need not also specify the desired process for conducting such arbitration and H&S hereby consents to the use of a non-AAA arbitrator and accordingly waives any right it may have to object in the future. Arbitration proceedings shall be conducted in accordance with the Commercial Arbitration Rules of the AAA in effect on the date the notice was served, other than as specifically modified herein. The selection of the AAA's Commercial Arbitration Rules shall not preclude use of a non-AAA arbitrator if Bully Dog so elects. Judgment upon the award rendered by the arbitrator(s) shall be final and binding upon the parties and may be entered in any court having jurisdiction thereof.

**11.8 Attorneys Fees.** In any action, suit or other proceeding to enforce any right or remedy under this Agreement or to interpret any provision of this Agreement, the prevailing Party will be entitled to recover its costs and expenses (including, without limitation, attorneys' fees) reasonably incurred in connection with such proceeding, or any appeal thereof.

**11.9 Applicable Law.** THIS AGREEMENT WILL BE INTERPRETED, CONSTRUED AND ENFORCED IN ALL RESPECTS IN ACCORDANCE WITH THE LAWS OF THE STATE OF IDAHO, U.S.A., WITHOUT REFERENCE TO ITS RULES RELATING TO CHOICE OF LAW, EXCEPT TO THE EXTENT PREEMPTED BY THE LAWS OF THE UNITED STATES OF AMERICA WHICH WILL THEN APPLY.

**11.10 Entire Agreement.** This Agreement constitutes the entire agreement, and supersedes any and all prior agreements, between the Parties with regard to the subject matter. No amendment, modification or waiver of any provision of this Agreement will be valid unless set forth in a written instrument signed by the Party to be bound thereby.

*[Remainder of page intentionally blank.]*




IN WITNESS WHEREOF, the Parties have entered into this Agreement as of the date first set forth above.

**H&S:**

H&S Performance, LLC

By: \_\_\_\_\_

Title: \_\_\_\_\_


  
Manager

**Bully Dog:**

Bully Dog Technologies, LLC,  
an Idaho limited liability company

By: \_\_\_\_\_

Title: \_\_\_\_\_

  
COO

## **EXHIBIT 2**

**CONFIDENTIAL INFORMATION, NONCOMPETITION AND  
INVENTION ASSIGNMENT AGREEMENT**

As a condition of my employment with Bully Dog Technologies, LLC., an Idaho Limited Liability Corporation, its subsidiaries, affiliates, successors or assigns (together the "Company"), and in consideration of my employment with the Company and my receipt of the compensation now and hereafter paid to me by Company, I agree to the following:

**1. Nature of Employment.**

(a) **At-Will Employment.** I UNDERSTAND AND ACKNOWLEDGE THAT MY EMPLOYMENT WITH THE COMPANY IS FOR AN UNSPECIFIED DURATION AND CONSTITUTES "AT-WILL" EMPLOYMENT. I ACKNOWLEDGE THAT THIS EMPLOYMENT RELATIONSHIP MAY BE TERMINATED AT ANY TIME, WITH OR WITHOUT GOOD CAUSE OR FOR ANY OR NO CAUSE, AT THE OPTION EITHER OF THE COMPANY OR MYSELF, WITH OR WITHOUT NOTICE.

(b) **Employment Duties** – I shall perform all the duties that are hereafter assigned to me by the Company. This position and the duties associated therewith may be modified or changed by the Company in its sole discretion. I will carry out my duties under the general supervision of the Company. The Company shall have the right to change from time to time the nature and scope of my duties, my title (if any) and the place where such duties shall be performed.

(c) **Best Efforts and Full Devotion of Employee** – I will faithfully at all times, and to the best of my ability, experience and talents, perform all of the duties that are required of me under this Agreement including devoting my full business time to and for the exclusive benefit of the Company and keeping free from conflicting enterprises any other activities which would be detrimental to or interfere with the business of the Company or the devotion of my full business time to the Company. I further agree to use my best efforts to comply with any and all instructions from the Company that the Company may give me from time to time to promote and maintain the success, quality, professionalism and reputation of the Company, including but not limited to policies and procedures defined in the Company employee policy guide. I acknowledge that the Company employee policy guide sets forth various policies, practices and procedures of the Company, that such policy guide may be changed from time to time unilaterally by the Company, and that neither such policy guide nor any of the policies, practices or procedures contained in such policy guide constitute a part of this Agreement or constitute a separate contract between the Company and me relating to my employment by the Company.

**2. Confidential Information; Trade Secret Information.**

(a) **Company Information.** I agree at all times during my employment with the Company and thereafter, to hold in strictest confidence, and not to use, except for the benefit of the Company, any of the Company's Confidential Information and Trade Secret Information (both as defined below) or to disclose to any person, firm or corporation without written

authorization of the Company's CEO, any Confidential Information of the Company. I understand that "Confidential Information" means any proprietary information, technical data, trade secrets or know-how, including, but not limited to, research, product plans, products, methodologies, services, customer lists and customers (including, but not limited to, customers of the Company on whom I called or with whom I became acquainted during my employment), markets, software, developments, inventions, processes, formulas, technology, designs, drawings, engineering, hardware configuration information, marketing, finances or other business information disclosed to me by the Company either directly or indirectly in writing, orally or by drawings or observation of parts or equipment that relates to the Company's business. I further understand that Confidential Information does not include any of the foregoing items which has become publicly known and made generally available through no wrongful act of mine or of others who were under confidentiality obligations as to the item or items involved. I understand "Trade Secret Information" means information, including any document, recording (by means of any storage medium), information, data, list, instrument, that (i) derives independent economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain secrecy. For purposes of this Agreement, "Trade Secret Information" includes both information disclosed to me by the Company and information developed by me in the course of my employment with the Company. The types and categories of the information which the Company considers to be its Trade Secret Information include, without limitation: (a) information concerning the Company's management, financial condition, financial operations, purchasing activities, sales activities, marketing activities and business plans; (b) information acquired or compiled by the Company concerning actual or potential customers, including the identity of such customers and potential customers, customer lists and the like; (c) information concerning the Company's business dealings with its customers; (d) agreements with representatives or potential representatives of The Company; (e) information acquired or compiled by the Company concerning actual or potential sources of supply, including the identity of suppliers and potential suppliers, supplier lists and the like; (f) business arrangements of the Company of any kind whatsoever, including but not limited to costs, prices, and earnings; and (g) all other types and categories of information (in whatever form) with respect to which, under all the circumstances, I know or have reason to know that the Company intends or expects secrecy to be maintained and as to which The Company has made reasonable efforts to maintain its secrecy.

(b) **Third Party Information.** I recognize that the Company has received and in the future will receive from third parties their confidential or proprietary information subject to a duty on the Company's part to maintain the confidentiality of such information and to use it only for certain limited purposes. I agree to hold all such confidential or proprietary information in the strictest confidence and not to disclose it to any person, firm or corporation or to use it except as necessary in carrying out my work for the Company consistent with the Company's agreement with such third party.

(c) **Requests for Clarification.** In the event I am uncertain as to the meaning of any provision of this Agreement or its application to any particular information, item or activity, I will inquire in writing to the CEO of The Company specifying any areas of uncertainty. The Company will respond in writing within a reasonable time and will endeavor to

clarify any areas of uncertainty, including such things as whether it considers particular information to be its Trade Secret Information or whether it considers any particular activity or employment to be in violation of this Agreement, and will explain any provisions of this Agreement.

### 3. **Inventions.**

(a) **Ownership and Assignment of Inventions.** Any Bully Dog or Competitive product, process, technique, creation, or invention that is created by me or improved upon by me while employed at the Company shall become the property of the Company, and I hereby assign all right, title, and interest to the same to the Company. I agree that I will promptly make full written disclosure to the Company, will hold in trust for the sole right and benefit of the Company, and hereby assign to the Company, or its designee, all my right, title, and interest in and to any and all inventions, original works of authorship, developments, concepts, discoveries, processes, computer programs, know-how, ideas, methodologies, improvements or trade secrets, whether or not patentable or registrable under copyright or similar laws, which I may solely or jointly conceive or develop or reduce to practice, or cause to be conceived or developed or reduced to practice, during the period of time I am in the employ of the Company (collectively referred to as "Inventions"). I further acknowledge that all original works of authorship which are made by me (solely or jointly with others) within the scope of and during the period of my employment with the Company and which are protectible by copyright are "works made for hire," as that term is defined in the United States Copyright Act. I understand and agree that the decision whether or not to commercialize or market any Invention developed by me solely or jointly with others is within the Company's sole discretion and for the Company's sole benefit and that no royalty will be due to me as a result of the Company's efforts to commercialize or market any such Invention. I shall not incorporate any Invention, original work of authorship, development, concept, discovery, process, computer program, know-how, ideas, methodology, improvement or trade secret owned, in whole or in part, by any third party into any Invention without the Company's prior written permission.

(b) **Inventions Assigned to the United States.** I agree to assign to the United States government all my right, title, and interest in and to any and all Inventions whenever such full title is required to be in the United States by a contract between the Company and the United States or any of its agencies.

(c) **Maintenance of Records.** I agree to keep and maintain adequate and current written records of all Inventions made by me (solely or jointly with others) during the term of my employment with the Company. The records will be in the form of notes, sketches, drawings, and any other format that may be specified by the Company. The records will be available to and remain the sole property of the Company at all times.

(d) **Patent and Copyright Registrations.** I agree to assist the Company, or its designee, at the Company's expense, in every proper way to secure the Company's rights in the Inventions and any copyrights, patents, mask work rights or other intellectual property rights relating thereto in any and all countries, including the disclosure to the Company of all pertinent information and data with respect thereto, the execution of all applications, specifications, oaths, assignments and all other instruments which the Company shall deem necessary in order to apply

for and obtain such rights and in order to assign and convey to the Company, its successors, assigns, and nominees the sole and exclusive rights, title and interest in and to such Inventions, and any copyrights, patents, mask work rights or other intellectual property rights relating thereto. I further agree that my obligation to execute or cause to be executed, when it is in my power to do so, any such instrument or papers shall continue after the termination of this Agreement. If the Company is unable because of my mental or physical incapacity to secure my signature to apply for or to pursue any application for any United States or foreign patents or copyright registrations covering Inventions or original works of authorship assigned to the Company as above, then I hereby irrevocably designate and appoint the Company and its duly authorized officers and agents as my agent and attorney in fact, to act for and in my behalf and stead to execute and file any such applications and to do all other lawfully permitted acts to further the prosecution and issuance of letters patent or copyright registrations thereon with the same legal force and effect as if executed by me.

(e) **No License.** The terms of this Agreement shall not grant me any license or similar right with respect to any patent, copyright or other property of the Company.

4. **Conflicting Obligations.** I represent and warrant to the Company that I have not entered into any agreements and am not subject to any duties to third parties that are inconsistent with the terms of this Agreement. I agree that, during my employment with the Company, I will not engage in any other employment, occupation, consulting or other business activity directly related to the business in which the Company is now involved or becomes involved during my employment, nor will I enter into any agreements or commitments or engage in any other activities that conflict with my obligations to the Company. I will report immediately any circumstances or situations arising in the future that might involve me or appear to involve me in a conflict of interest. This includes the reporting of any gifts, entertainment, or other personal favors given to or received from anyone with whom The Company has or is likely to have any business dealings which go beyond common courtesies usually associated with accepted business practices.

5. **Returning Company Documents.** I agree that, at the time of leaving the employ of the Company, or at such earlier time as the Company may request, I will deliver to the Company (and will not keep in my possession, re-create, or deliver to anyone else) any and all devices, records, data, notes, reports, methodologies, proposals, lists, correspondence, specifications, drawings blueprints, sketches, materials, equipment, other documents or property, or reproductions of any aforementioned items developed by me pursuant to my employment with the Company or otherwise belonging to the Company, its successors, or assigns. Should my employment with the Company be terminated (for any reason), I shall neither use nor disclose the Trade Secret Information or Confidential Information referred to above except only upon written authorization from the Company, and I shall not take with me any data or information in any form (including documents or copies thereof, notebooks or the like, or optical, electromagnetic or machine readable media, including but not limited to computer diskettes, jump drives and the like) embodying any Trade Secret Information and/or Confidential Information. In the event of the termination of my employment, I agree to sign and deliver the "Termination Certification" attached hereto as Exhibit A. I also agree that I will not destroy or erase any data or information in any form (including documents or copies thereof, notebooks or the like, or optical electromagnetic or machine readable media) located in or stored in the



Company' computers or files located on the Company' premises, nor will I transfer by electronic mail means or otherwise to myself or any third party located away from the Company' premises any data or information stored or recorded in the Company' computers, magnetic or optical media or files.

6. **Notification of New Employer.** In the event that I leave the employ of the Company, I hereby grant consent to notification by the Company to my new employer about my rights and obligations under this Agreement.

7. **Covenant Not to Compete and Non-Solicitation of Company's Customers.**

(a) I agree that during the course of my employment and for (twenty four) 24 months following the termination of my relationship with the Company for any reason, whether with or without good cause or for any or no cause, at the option either of the Company or myself, with or without notice, I will not, without the prior written consent of the Company, (i) serve as a partner, employee, consultant, officer, director, manager, agent, associate, investor (provided, however, that nothing herein will prevent me from being the passive owner of not more than 5% of the outstanding stock of any class of a corporation which is engaged in a competitive business of the Company and which is publicly traded); or (ii) directly or indirectly, own, purchase, organize or take preparatory steps for the organization of; or (iii) build, design, finance, acquire, lease, operate, manage, invest in, work or consult for or otherwise affiliate myself with any business, in competition with or otherwise similar to the Company's business (provided, however, that nothing herein will prevent me from being the passive owner of not more than 5% of the outstanding stock of any class of a corporation which is engaged in a competitive business of the Company and which is publicly traded). I agree I will not perform the same or similar services that I have performed for Bully Dog Technologies for the following companies Edge Products; Super Chips, Inc; Hypertech, Inc; Banks Power; BD Power; TS Performance; TST Products, Inc; TTS, Inc; Diablo Sport; Dr. Performance Diesel Technologies; Pittsburg Power; Granatelli; PPE; Advance Flow Engineering, Inc; Quadzilla; PDQ; RBP Diesel Performance; Diesel Dynamics; Blue Chip Diesel Performance, Inc; NX; Volant Cool Air Intakes; ATS; DynoJet (Power Commander); Dobeck Performance; Boondockers; S&B Filters; K&N; Airraid; H&S Performance; Alien Tech; Vengeance Performance; PDI; Spartan; Schied Diesel; SCT (Super Chips Tuning); Veizu Technologies; Injen or Smarty. The foregoing covenant shall cover my activities in every part of North America.

(b) I acknowledge that my fulfillment of the obligations contained in this Agreement, including, but not limited to, my obligation neither to disclose nor to use the Company's Confidential Information other than for the Company's exclusive benefit and my obligation not to compete contained in subsection (a) above, is necessary to protect the Company's Confidential Information and, consequently, to preserve the value and goodwill of the Company. I further acknowledge the time, geographic, and scope limitations of my obligations under subsection (a) above are reasonable, especially in light of the Company's desire to protect its Confidential Information, and that I will not be precluded from gainful employment if I am obligated not to compete with the Company during the period and within the Territory as described above.

(c) If, in any judicial proceeding, a court refuses to enforce any of such separate covenants (or any part thereof), then such unenforceable covenant (or such part) shall be eliminated from this Agreement to the extent necessary to permit the remaining separate covenants (or portions thereof) to be enforced. Alternatively, the undersigned and the Company authorize such Court to eliminate the non-enforceable parts of this Agreement, if any, and re-write them to the maximum extent allowed by law and in accordance with the Court's understanding of the Parties' intent. In the event the provisions of subsection (a) are deemed to exceed the time, geographic, or scope limitations permitted by Idaho law, then such provisions shall be reformed to the maximum time, geographic, or scope limitations, as the case may be, then permitted by such law.

(d) In addition to the foregoing, I agree that I will never solicit any of the customers of the Company that existed at the time of termination of my employment, including, without limitation, past customers who were not conducting regular business with the Company at the time of termination. I understand this covenant and promise not to solicit Company's customers precludes and disallows me from attempting to obtain Company's customers as my own, whether directly or through an agent, affiliate, representative, or other entity, even if all other parameters of the non-competition covenant contained herein are satisfied by the operation of my business and/or by my future employment.

8. **Representations.** I agree to execute any proper oath or verify any proper document required to carry out the terms of this Agreement. I represent that my performance of all the terms of this Agreement will not breach any agreement to keep in confidence proprietary information acquired by me in confidence or in trust prior to my employment by the Company. I have not entered into, and I agree I will not enter into, any oral or written agreement in conflict herewith.

9. **Survival of Employee's Obligations.** To the extent allowed by law, I expressly understand and agree that all of the obligations established by this Agreement with respect to Inventions, Confidential Information, Trade Secret Information, restrictions on competitive employment, and trade secrets, whether patentable or not, shall continue beyond the termination of any services for or on behalf of the Company.

10. **Jury Trial Waiver and Equitable Relief.**

<p>(a) <b><u>JURY TRIAL WAIVER.</u></b> THE EMPLOYER AND THE EMPLOYEE EACH HEREBY IRREVOCABLY WAIVES THE RIGHT TO A TRIAL BY JURY IN ANY AND ALL ACTIONS OR PROCEEDINGS BROUGHT WITH RESPECT TO ANY PROVISION OF THIS AGREEMENT OR THE ENFORCEABILITY THEREOF AND/OR WITH RESPECT TO ANY CLAIMS ARISING OUT OF, OR RELATED TO, THE EMPLOYEE'S EMPLOYMENT WITH THE EMPLOYER, PROTECTION OF THE CONFIDENTIAL INFORMATION DESCRIBED HEREIN, AND THE TERMINATION OF EMPLOYMENT.</p>	<p>TW Initial</p>
<p>(b) <b><u>Equitable Remedies.</u></b> I agree that it would be impossible or inadequate to measure and calculate the Company's damages from any breach of the covenants set forth in Sections 2 through 7 herein. Accordingly, I agree that if I breach any of such Sections, the</p>	<p>TW Initial</p>



<p>Company will have available, in addition to any other right or remedy available, the right to obtain an injunction from a court of competent jurisdiction restraining such breach or threatened breach and to specific performance of any such provision of this Agreement. I further agree that no bond or other security shall be required in obtaining such equitable relief and I hereby consent to the issuance of such injunction and to the ordering of specific performance, with or without notice from the Court or other body issuing the injunction.</p>	
---	--

11. **General Provisions.**

(a) **Governing Law; Consent to Personal Jurisdiction.** This Agreement, including all Exhibits attached hereto, will be governed by the internal substantive laws, but not the choice of law rules, of the State of Idaho. I hereby expressly consent to the personal jurisdiction of the state and federal courts located in Idaho for any lawsuit filed there against me by the Company arising from or relating to this Agreement.

(b) **Entire Agreement.** This Agreement, including all exhibits attached hereto, set forth the entire agreement and understanding between the Company and me relating to the subject matter herein and merges all prior discussions between us. No modification of or amendment to this Agreement, nor any waiver of any rights under this agreement, will be effective unless in writing signed by both the Company and myself. Any subsequent change or changes in my duties, salary or compensation will not affect the validity or scope of this Agreement.

(c) **Severability.** If one or more of the provisions in this Agreement are deemed void by law, then the remaining provisions will continue in full force and effect.

(d) **Successors and Assigns.** This Agreement will be binding upon my heirs, executors, administrators and other legal representatives and will be for the benefit of the Company, its successors, and its assigns.

(e) **Unconditional Obligations.** The obligations of the parties under this Agreement are unconditional and do not depend upon the performance of any agreements, duties, obligations, or terms outside the Agreement. The Company may, in its sole discretion, assign this Agreement or its rights hereunder to any parent, affiliate, shareholder, or successor of The Company, or to any person or entity which purchases substantially all of the assets of The Company. I may not transfer or assign this Agreement or any of my rights or obligations under this Agreement.

12. **I acknowledge and agree to each of the following items:**

(a) I am executing this Agreement voluntarily and without any duress or undue influence by the Company or anyone else; and

(b) I have carefully read this Agreement. I have asked any questions needed for me to understand the terms, consequences and binding effect of this Agreement and fully understand them; and

(c) I sought the advice of an attorney of my choice if I wanted to before signing this Agreement.

AGREED UPON AND EXECUTED on this 21 day of February, 2012.

**EMPLOYEE:**

Tim Wood  
Name (printed)

Tim Wood  
Employee's Signature

**BULLY DOG TECHNOLOGIES, LLC.,**  
an Idaho Limited Liability Corporation

By: [Signature]  
Its: \_\_\_\_\_

## **EXHIBIT 3**

## VEDDER PRICE<sub>®</sub>

ANTHONY J. ASHLEY  
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April 8, 2015

### VIA E-MAIL AND REGULAR MAIL

mspring@clarksondraper.com

Matthew D. Spring, Esq.  
Clarkson Draper & Beckstrom, LLC  
162 North 400 East, Suite A-204  
P.O. Box 1630  
St. George, UT 84771

Re: Tom Wood/Bully Dog

Dear Mr. Spring:

As you know, our client, Bully Dog Acquisition, LLC ("Bully Dog") believes it may have various possible claims and causes of action against your client, Tom Wood, relating to his activities since leaving Bully Dog's employment in 2014. Bully Dog's claims against Mr. Wood were articulated, in part, in a letter to Mr. Wood dated February 10, 2015, from my colleague, Bill Kummerer ("Mr. Kummerer's Letter"). As Mr. Wood's legal counsel, you have denied the validity of the claims asserted in Mr. Kummerer's Letter. Bully Dog's claims and Mr. Wood's denials are referred to below in this letter collectively as the "Dispute."

Through our subsequent correspondence and communications, you and I have negotiated the terms of a standstill agreement related to the Dispute on behalf of our respective clients as follows:

1. Simultaneously herewith, Mr. Wood agrees to execute and deliver to Bully Dog a Declaration in the form of Exhibit A, attached to this letter (the "Declaration").
2. In exchange for Mr. Wood's execution and delivery of the Declaration, Bully Dog agrees not to pursue a legal action against Mr. Wood in regard to the Dispute, and if Bully Dog does initiate litigation against Mr. Wood the applicable Court shall award attorneys' fees to the prevailing party in the Dispute.

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Vedder Price P.C. is affiliated with Vedder Price LLP, which operates in England and Wales, and with Vedder Price (CA), LLP, which operates in California.

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## VEDDER PRICE.

March 26, 2015


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3. Mr. Wood understands, acknowledges and agrees that:
  - (a) Bully Dog's covenant and agreement to refrain from a pursuing legal action (as described in Section 2 of this letter) is expressly conditioned upon the full and complete truth and accuracy of the matters set forth in the Declaration; and
  - (b) if any of the matters asserted by Mr. Wood in the Declaration are not fully and completely true and accurate, Bully Dog's obligations under Section 2 of this letter shall be null, void and of no further force or effect.
4. Nothing in this letter shall be construed as excusing Mr. Wood from any of his obligations or duties under the Bully Dog Agreements (as defined in Mr. Kummerer's Letter) except that Bully Dog acknowledge and agrees that Mr. Wood's participation in the limited activities described in Section 5 of the Declaration shall not be deemed to violate Mr. Wood's non-competition obligations under the Bully Dog Agreements.
5. Mr. Wood hereby:
  - (a) reaffirms and agrees to honor all of his duties and obligations under the Bully Dog Agreements (as modified by Section 4 of this letter) which shall hereafter continue in full force and effect in accordance with their terms and conditions; and
  - (b) understands and agrees that nothing in this letter shall preclude Bully Dog from taking legal action to enforce its rights under the Bully Dog Agreements to the extent (i) any of the assertions made by Mr. Wood in the Declaration are untrue or (ii) Mr. Wood otherwise breaches his duties and/or obligations to Bully Dog.

If you and your client are in agreement with the terms of this letter, please arrange to have Mr. Wood sign this letter in the space provided below and return the signed letter to us along with his signed Declaration. We will simultaneously arrange for an authorized officer of Bully Dog to countersign this letter so we can exchange signed signature pages to complete our agreement.

Sincerely,

Vedder Price P.C.



Anthony J. Ashley

## VEDDER PRICE.

March 26, 2015  
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AJA/cm

AGREED TO AND ACCEPTED BY:

Tom Wood  
Tom Wood

Dated: 4/13/2015

BULLY DOG ACQUISITION, LLC

By: \_\_\_\_\_

Its: \_\_\_\_\_

Dated: \_\_\_\_\_

Dated \_\_\_\_\_



**DECLARATION OF TOM WOOD**

I, Tom Wood, state and depose as follows:

1. I am more than eighteen (18) years of age, of sound mind and memory, and make this Declaration of my own free will.

2. I have personal knowledge of the facts set forth in this Declaration. If called as a witness, I have no legal disabilities and could competently testify about these facts.

3. I am currently not employed and I am not engaged in any business activities that are directly or indirectly competitive with my former employer, Bully Dog Acquisition, LLC ("Bully Dog").

4. Except as specifically provided in Paragraph 5 below, since leaving the employment of Bully Dog, I have not been employed by, consulted to or had any business relationships with H&S Performance, Torque Technologies, Apex Tuning or any of their owners and/or affiliated companies.

5. I am the current owner of TechIT, LLC ("TechIT"), a Utah limited liability company which provides technical support to Apex Tuning customers for products sold by Bully Dog. TechIT was formed in March, 2014, and the business started operating in September, 2014. TechIT operates a 1-800 customer service telephone number for Apex Tuning customers who have purchased Bully Dog products. As owner of TechIT, I do not perform any services at Apex Tuning's facilities, nor do I nor any of my employees personally visit customers to resolve technical issues with Bully Dog products.

6. Shortly after my employment with Bully Dog ended, I returned my Bully Dog laptop in its original condition, with all Bully Dog information intact and contained therein.

7. I do not currently possess any confidential or proprietary information, software, source code, firmware, or other intellectual property of Bully Dog ("Bully Dog IP") and have not been in possession of Bully Dog IP since mid-July 2014.

8. I have not, directly or indirectly, provided Bully Dog IP, before or after my separation with Bully Dog, to any third party and, therefore, I have not received any compensation or remuneration for such. Furthermore, if a third party such as H&S Performance, Torque Technologies or Apex Tuning is in possession of Bully Dog IP, I have no knowledge of how they came to obtain it.

9. I do not have any knowledge of any third party device, software or other work based on any Bully Dog IP being developed by anyone.

10. I do not have knowledge of any prototypes or products that have been developed, created, produced or otherwise derived from Bully Dog IP. Any such product created by any third party has done so without my assistance, expertise or input.

11. In accordance with 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 13, 2015.

A handwritten signature in black ink, appearing to read "Tom Wood", is written over a horizontal line.

Tom Wood



## **EXHIBIT 4**



## **EXHIBIT 5**

Abs Time(Sec)	Description	Network	CAN ID Arb ID	Byte 1 B1	Byte 2 B2	Byte 3 B3	Byte 4 B4	Byte 5 B5	Byte 6 B6	Byte 7 B7	Byte 8 B8	
913.563987	HS CAN \$7E0	HS CAN	7.00E+00	7	BD	2B	0	E9	7	2E	9	Message From Tool (EZ-Link)
913.57473	HS CAN \$7E8	HS CAN	7.00E+08	3	7F	BD	11	0	0	0	0	Response from ECU

## **EXHIBIT 6**

Bully Dog GT



H&S Mini

