

SETTLEMENT AGREEMENT AND RELEASE

I. PARTIES

This Settlement Agreement and Release ("Settlement Agreement") is entered into between the United States of America, acting through the United States Department of Justice and on behalf of the National Aeronautics and Space Administration ("NASA") and the United States Air Force ("Air Force") (collectively the "United States") and Thermacore, Inc. ("Thermacore") (the United States and Thermacore hereinafter referred to collectively as the "Parties"), through their authorized representatives.

II. PREAMBLE

- a. WHEREAS, Thermacore is a Pennsylvania corporation with its principal place of business in Lancaster, Pennsylvania.
- b. WHEREAS, the United States utilizes a competitive Small Business Innovation Research program (the "SBIR Program") to encourage domestic small businesses to engage in research and development that has the potential for commercialization. Through a competitive awards-based program, SBIR enables small businesses to explore their technological potential and provides the incentive to profit from its commercialization. The SBIR Program is structured in three phases:
 - i. Phase I- The objective of Phase I is to establish the technical merit, feasibility, and commercial potential of the proposed research efforts and to determine the quality of performance of the small business awardee organization prior to providing further Federal support in Phase II.
 - ii. Phase II- The objective of Phase II is to continue the research efforts initiated in Phase I. Funding is based on the results achieved in Phase I and the scientific and technical merit and commercial potential of the project proposed in Phase II. Only Phase I awardees are eligible for a Phase II award.
 - iii. Phase III- The objective of Phase III, where appropriate, is for the small business to pursue commercialization objectives resulting from the Phase I and Phase II research activities. Funding for Phase III may come more directly from specific agencies.
- c. WHEREAS, each agency has specific requirements for its SBIR Programs. Both NASA and the Air Force require, inter alia, that the same or essentially equivalent research may not be funded by more than one agency and that submissions under the SBIR Program must be certified as being non-duplicative. Under the SBIR Program, therefore, it is unlawful to receive funding for essentially equivalent work already funded under any government program or to falsely certify that work is non-duplicative.

- d. WHEREAS, k Technology Corporation (“kTC”) submitted a Phase I proposal to NASA on September 4, 2008 (the “NASA Phase I Proposal”). kTC submitted a Phase I proposal to the Air Force on September 24, 2008 (the “Air Force Phase I Proposal”).
- e. WHEREAS, the United States contends that the NASA Phase I Proposal and the Air Force Phase I Proposal sought funding for the same or essentially equivalent research.
- f. WHEREAS, the United States contends that kTC failed to disclose the duplicative proposals to NASA and the Air Force.
- g. WHEREAS, kTC was awarded both the NASA Phase I Proposal and the Air Force Phase I Proposal. The NASA Phase I award was issued January 22, 2009 and the Air Force Phase I award was issued on February 12, 2009.
- h. WHEREAS, the United States contends that kTC made submissions pursuant to the two Phase I projects which submissions were either identical or substantially similar, or which reflected duplicative efforts by kTC. The United States contends that these submissions, and the attendant certifications, constituted false statements to the Federal government.
- i. WHEREAS, proposals for Phase II were subsequently submitted to both NASA and the Air Force for Phase II awards. kTC submitted a Phase II proposal to NASA on July 22, 2009 (the “NASA Phase II Proposal”).
- j. WHEREAS, on August 7, 2009, Thermacore purchased the assets of kTC and thereafter began to operate the k Technology Division (“kTD”) of Thermacore.
- k. WHEREAS, kTD submitted a Phase II proposal to Air Force on September 2, 2009 (the “Air Force Phase II Proposal”) in which it disclosed the submission of the NASA Phase II Proposal.
- l. WHEREAS, kTD was granted both Phase II awards by NASA and the Air Force. The NASA Phase II award was issued March 2, 2010. The Air Force Phase II award was issued January 25, 2010.
- m. WHEREAS, the United States contends that additional submissions and certifications under the Phase II awards violated the SBIR Program rules and constituted false statements to the Federal government.
- n. WHEREAS, Thermacore contends that it is not liable for any claimed false statements made by kTC prior to Thermacore’s asset purchase of kTC; kTC’s, and later kTD’s, efforts were not duplicative; and/or that NASA and the Air Force were aware of, and did not object to, any duplicative efforts.
- o. WHEREAS, the United States contends that it has certain civil claims against Thermacore that arise from the aforementioned conduct under the four SBIR Projects referenced herein.

- p. WHEREAS, Thermacore denies the contentions of the United States as set forth above and denies any liability in connection with the aforementioned conduct.
- q. WHEREAS, this Settlement Agreement addresses and settles any civil claims that the United States has or may have against Thermacore related to the aforementioned conduct described in paragraphs “d” through “p” above (the “Covered Conduct”).
- r. WHEREAS, this Settlement Agreement is neither an admission of liability of any kind by Thermacore, nor a concession by the United States that its claims are not well founded.
- s. WHEREAS, to avoid the delay, uncertainty, inconvenience, and expense of protracted litigation, the Parties hereby reach a full and final settlement pursuant to the Terms and Conditions below.

III. TERMS AND CONDITIONS

- a. **Settlement Amount**- Thermacore agrees to a total settlement of nine-hundred-sixty-five-thousand dollars (\$965,000.00) (the “Settlement Amount”) allocated as follows: Five-hundred-thousand dollars (\$500,000.00) to be paid to the United States in five installments. Thermacore shall pay the United States one-hundred-thousand dollars (\$100,000.00) per year for the next five years, beginning with an initial payment concurrent with the execution of this Settlement Agreement. The remaining payments shall be made on September 1 of the years 2015, 2016, 2017, and 2018.
- b. **Compliance**- Thermacore agrees to allocate four-hundred-sixty-five-thousand dollars (\$465,000.00) to be used for the compliance efforts described herein which include, at minimum, the retention of the below-described Contract Administrator. Those compliance efforts include:
 - i. A commitment to retain a Contract Administrator for, at minimum, the five-year time period over which the Settlement Payment is being made at a cost of \$93,000.00 per year, inclusive of salary, benefits, and associated payroll taxes. The Contract Administrator shall have responsibilities for, inter alia: participating in the government contracting process; verifying outgoing bids and proposals as well as associated documentation and paperwork to complete the contract package; and ensuring that annual representations and certifications required by prime contractors and the government are up to date, accurate, and signed by the appropriate company official.

- ii. Any additional funds not used to compensate the Contract Administrator shall be used for the continuation of the Ethics and Compliance Program upgrades that were communicated to the United States Attorney's Office for the Eastern District of Pennsylvania ("U.S. Attorney's Office") by counsel for Thermacore and which Thermacore represents have already begun being implemented. Thermacore shall fund these efforts independently of the compliance fund as necessary. Thermacore's internal controls shall include: maintaining a written code of business ethics and conduct; a hotline or other mechanism for reporting suspected improper conduct; and disciplinary action for any incidences of violations of the ethics code. Thermacore shall notify the U.S. Attorney's Office, via counsel, of any substantive deviation from the compliance plan previously communicated.
- c. Ongoing Reporting to the U.S. Attorney's Office- Concurrent with payment of the second and third portions of the Settlement Amount (due on September 2, 2015, and September 1, 2016 respectively), Thermacore shall provide a comprehensive report to the U.S. Attorney's Office detailing its compliance efforts, training, and hotline reports in the foregoing year. It shall, in this report, forecast any compliance efforts projected to occur during the subsequent year. In this report, Thermacore shall also report as to the allocation of the compliance fund amounts identified in Section III.b. Such reporting may be either directly from Thermacore or through Thermacore's counsel. This reporting requirement does not prevent the United States or any of its agencies from independently investigating Thermacore's compliance efforts.
- d. Form of Payment- Thermacore shall pay the Settlement Amount by electronic funds transfer pursuant to written instructions to be provided by the U.S. Attorney's Office.
- e. United States' Release of Thermacore- Subject to the exclusions below, and conditioned upon the payment in full of the Settlement Amount, the United States releases Thermacore and its current and former parents, direct and indirect subsidiaries, divisions, predecessors, agents, directors, officers, employees, successors, assigns, shareholders, beneficiaries, transferees, investors, creditors, and debtors (collectively, the "Thermacore Releasees") from any claims the United States has for the Covered Conduct, including claims under the False Claims Act, 31 U.S.C. § 3709-3733, and common law theories of breach of contract, underpayment, payment by mistake, and unjust enrichment. The United States

expressly reserves any claims against any entities and individuals other than as named above.

- f. **Exclusions**- Specifically excluded from the scope and terms of this Settlement Agreement are any and all:
1. claims for the delivery of any deficient or defective products for personal injury or property damage or for any consequential damages, and for liability under any express or implied product/service warranties other than those expressly released herein;
 2. claims based on such obligations as are created by this Settlement Agreement;
 3. claims that the United States may have under the Internal Revenue Code, Title 26 of the United States Code;
 4. liability to the United States (or any agencies thereof) for any conduct other than that released herein;
 5. criminal liability; and
 6. any suspension or debarment determinations or actions of any federal agency.
- g. **Limited Waiver of Defenses**- Thermacore waives and will not assert any defenses it may have to any criminal prosecution or administrative action, if any, relating to the Covered Conduct, based in whole or in part on a contention that, under the Double Jeopardy Clause in the Fifth Amendment of the Constitution, or under the Excessive Fines Clause in the Eighth Amendment of the Constitution, this Settlement Agreement bars a remedy sought in such criminal prosecution or administrative action.
- h. **Tax Treatment of the Settlement**- Nothing in this paragraph or any other provision of this Settlement Agreement constitutes an agreement by the United States concerning the characterization of the Settlement Amount for purposes of the Internal Revenue laws, Title 26 of the United States Code.
- i. **Thermacore's Release of the United States**- Thermacore hereby releases any and all claims of whatever kind against the United States relating to the Covered Conduct. Thermacore fully and finally releases the United States, its agencies, officers, agents, employees, and servants, from any claims (including attorney's fees, costs, and expenses of every kind and however denominated) that Thermacore has asserted, could have asserted, or may assert in the future against the United States, its agencies, officers, agents, employees, and servants, related to the Covered Conduct and the United States' investigation and prosecution thereof.
- j. **Costs**- Each Party to this Settlement Agreement shall bear its own legal and other

costs incurred in connection with this matter, including the preparation and performance of this Settlement Agreement.

- k. **Unallowable Costs**- The following costs (as defined in the Federal Acquisition Regulation, 48 C.F.R. § 31.205-47) incurred by or on behalf of Thermacore, and its present or former officers, directors, employees, shareholders, and agents in connection are unallowable for contracting purposes (hereinafter the "Unallowable Costs"). These costs include costs associated with:
- i. the matters covered by this Settlement Agreement;
 - ii. the United States' investigation(s) of the matters covered by this Settlement Agreement;
 - iii. Thermacore's investigation, defense, and corrective actions undertaken in response to the United States' investigation(s) in connection with the matters covered by this Settlement Agreement (including attorney's fees);
 - iv. the negotiation and performance of this Settlement Agreement; and
 - v. the Settlement Amount.
- l. **Future Treatment of Unallowable Costs**- Unallowable Costs will be separately determined and accounted for by Thermacore, and Thermacore shall not charge such Unallowable Costs directly or indirectly to any contracts with the United States. Nothing in this Agreement shall constitute a waiver of the rights of the United States to audit, examine, or reexamine Thermacore's books and records to determine that no Unallowable Costs have been claimed in accordance with the provisions of this Paragraph.
- m. **Integrated Agreement**- This writing constitutes the entire agreement of the Parties with respect to the subject-matter of this Settlement Agreement. There are no other agreements, understandings, representations, warranties, inducements, or considerations, except as expressly stated herein.
- n. **Modification**- This Settlement Agreement may not be modified, amended or terminated except by a written agreement signed by authorized agents of U.S. Attorney's Office and Thermacore specifically referring to this Settlement Agreement.
- o. **Reservation of Rights and Defenses**- The Parties' rights and defenses not expressly released in this Settlement Agreement are reserved.
- p. **Intended Benefit**- This Settlement Agreement is intended to be for the benefit of the United States, including its agencies and departments, and Thermacore. The Parties do not waive, compromise, or release any claims or causes of action not expressly released by this Settlement Agreement.
- q. **Governing law**- This Settlement Agreement is governed by the laws of the United

States. The Parties agree that the exclusive jurisdiction and venue for any dispute arising between and among the Parties under this Settlement Agreement is the United States District Court for the Eastern District of Pennsylvania.

- r. **Voluntary Nature of the Settlement Agreement**- The Parties represent that this Settlement Agreement is freely and voluntarily entered into without any degree whatsoever of duress or compulsion. No provision of this Settlement Agreement shall be construed against any party by reason of such party having drafted such provision of this Settlement Agreement. Thermacore warrants that it has reviewed its financial situation and that it currently is solvent within the meaning of 11 U.S.C. §§ 547(b)(3) and 548(a)(1)(B)(ii)(I), and shall remain solvent following payment to the United States of the Settlement Amount.
- s. **Authority**- Each person who signs this Settlement Agreement warrants that he or she is duly authorized to do so, as does the party on behalf of which such person signs.
- t. **Binding Effect**- This Settlement Agreement is binding on Thermacore and its successors, transferees, and assigns.
- u. **Execution in Counterparts**- This Settlement Agreement may be executed in counterparts, each of which constitutes an original and all of which constitute one and the same Settlement Agreement.
- v. **Consent to Disclosure**- All parties consent to the United States' disclosure of this Settlement Agreement, and information about this Settlement Agreement, to the public.
- w. **Effective Date**- This Settlement Agreement is effective on the date of the last signature to it. Facsimiles of signatures shall constitute acceptable, binding signatures for purposes of this Settlement Agreement.

IN WITNESS WHEREOF, the Parties have executed the foregoing Settlement Agreement or counterparts thereof, intending to be bound.

FOR THE UNITED STATES OF AMERICA

BY:



LOUIS D. LAPPEN
First Assistant United States Attorney

Dated:

BY:



MARGARET L. HUTCHINSON
Assistant United States Attorney Chief, Civil Division

Dated:

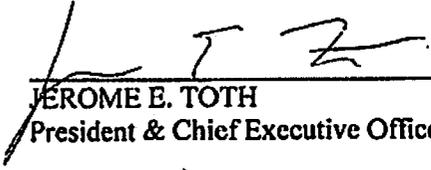


VERONICA J. FINKELSTEIN
Assistant United States Attorney

Dated: 10/9/14

FOR THERMACORE, INC.

BY:

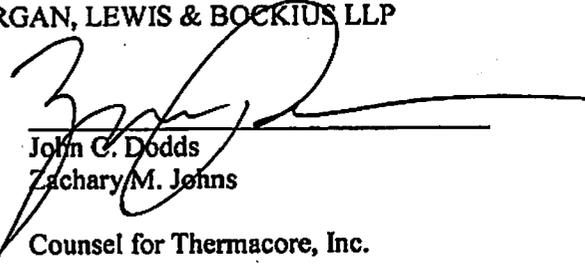


JEROME E. TOTH
President & Chief Executive Officer

Dated: 10/8/2014

MORGAN, LEWIS & BOCKIUS LLP

BY:



John C. Dodds
Zachary M. Johns

Counsel for Thermacore, Inc.

Dated: 10/8/2014