

**BORGWARNER TURBO SYSTEMS, INC.**

**and**

**BUNCOMBE COUNTY, NORTH CAROLINA**

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**INCENTIVE AGREEMENT**

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**Dated as of March \_\_, 2014**

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## INCENTIVE AGREEMENT

**THIS INCENTIVE AGREEMENT** is dated as of \_\_\_\_ day of March, 2014 (as supplemented or amended, the "Agreement"), and is between **BORGWARNER TURBO SYSTEMS, INC.**, a Delaware corporation authorized to do business and doing business in the State of North Carolina ("BW"), and **BUNCOMBE COUNTY, NORTH CAROLINA**, a public body politic and a political subdivision of the State of North Carolina (the "County").

### RECITALS:

BorgWarner is a global technology leader in powertrain solutions. BW is developing leading powertrain technologies that improve fuel economy, emissions and performance. Its facilities are located across the globe in order to provide local support of its diverse customer base. The Buncombe County plant focuses on the production and development of vehicle turbo chargers.

The purpose of this Agreement is to describe certain incentives to be provided by the County for the benefit of BW in connection with the expansion of its facility and organization (the "Project") in Buncombe County. The Project promises to bring new capital investments of Fifty-Four Million Nine Hundred Fifty-Six Thousand and No/100 Dollars (\$54,956,000.00) and to create at least 154 new full time jobs paying an average annual wage of \$74,571 excluding benefits.

BW requested that the County provide economic development incentives to induce it to make these capital investments for the Project and for the creation of these new full time jobs in the County.

BW informed the County that if the County did not promise such economic development incentives, then BW may not complete the Project.

**NOW, THEREFORE**, for and in consideration of the mutual promises and covenants contained in this Agreement, the parties hereby agree as follows:

## ARTICLE I

### DEFINITIONS; RULES OF CONSTRUCTION

**1.1 Definitions.** For all purposes of this Agreement, unless the context requires otherwise, the following terms shall have the following meanings:

"Abandonment of Operations" means that for a period in excess of eight (8) weeks BW's level of Full-Time Project Related jobs or Direct Investment goes below twenty percent (20%) of the guaranteed minimum levels of Performance Commitments for either Full-Time Project Related jobs or Direct Investment

"Beneficial Occupancy" means the date on which BW occupies the new Facility for its intended purpose, evidenced by the obtaining of a Certificate of Occupancy.

"Business Day" means any day that is not a Saturday or a Sunday, or a day on which banks in the State of North Carolina are required by law to be closed.

"Closing Date" means the date on which this Agreement is first executed and delivered by the parties.

"Direct Investment" means the increase in tax value attributable to the Project in connection with this Agreement as determined by the Buncombe County Tax Department, regardless of the funding sources for said property.

The number of "Full-Time Project Related Jobs" means the total number of new employees employed by BW in connection with the Project as of December 31 of each year in connection with this Agreement. Such employees may be hired at any time prior to December 31 of the applicable year so long as BW hires the required number of new full time employees specified below being paid at the average wages as identified below.

"Incentive" means the various incentive payments referred to in this Agreement to BW.

"Performance Commitments" means the levels of Full-Time Project Related jobs created by BW at average wage levels indicated below and the levels of Direct Investment to be made by BW in relation to BW's operations in the Facility.

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"Project" has the meaning specified in the Recitals.

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"State" means the State of North Carolina.

**1.2 Rules of Construction.** Unless the context otherwise indicates:

(a) Words importing the singular shall include the plural and vice versa, and words importing the masculine gender shall include the feminine and neuter genders as well;

(b) All references to Articles, Sections or Exhibits are references to Articles, Sections and Exhibits of this Agreement;

(c) All references to officers are references to County officers; and

(d) The headings and Table of Contents herein are solely for convenience of reference and shall not constitute a part of this Agreement nor shall they affect its meanings, construction or effect.

## **ARTICLE II**

### **BW'S COMMITMENTS**

2.1 In return for the Incentives set forth herein, which are a competitive necessity for BW to increase capacities and operations in the market, BW commits to certain Performance Commitments related to jobs created and incrementally increased taxes in the County. The parties acknowledge and agree that the consideration for the County to enter into this Agreement is the expectation that BW will meet or exceed the Performance Commitments.

Specifically, BW agrees to meet or exceed the following Performance Commitments:



- (a) In connection with the Project, BW will create and maintain in Buncombe County the number of Full-Time Project Related Jobs specified below for a five (5) year period after December 31, 2018 ("**Jobs Retention Period**"). The Jobs Retention Period expires December 31, 2023. BW must also retain the current 588 full-time jobs it has in Buncombe County (collectively, "**Jobs Minimum**"). BW must meet or exceed the applicable Jobs Minimum on or before December 31 of each year during the Jobs Retention Period.

Applicable Year/Required Cumulative Number of Full-Time Project Related Jobs

Year 2014: 39  
Year 2015: 41  
Year 2016: 87  
Year 2017: 121  
Year 2018: 154

- (b) BW agrees that for the length of the Jobs Retention Period, the average wage level of the Full-Time Project Related Jobs specified above shall be at least Seventy-Four Thousand Five Hundred Seventy-One Dollars (\$74,571) per year excluding benefits. The calculation of the average wages for Full-Time Project Related Jobs shall be done as of December 31 of each year during the Jobs Retention Period.

- (c) BW shall make Direct Investments in new construction and improvements to real property as well as new machinery and equipment equal to Fifty-Four Million Nine Hundred Fifty-Six Thousand and No/100 Dollars (\$54,956,000.00). Such Direct Investment shall remain in the County subject to ad valorem tax assessments through the end of the Jobs Retention Period. Such initial Direct Investment, to be considered a basis for incentives covered hereunder, shall be made by not later than December 31 of each year as set forth below.

Applicable Year/Required Direct Investment (in Thousands)

Year 2014: \$16,843  
Year 2015: \$11,497 for a cumulative total of \$28,340  
Year 2016: \$11,178 for a cumulative total of \$39,518  
Year 2017: \$8,850 for a cumulative total of \$48,368  
Year 2018: \$6,588 for a cumulative total of \$54,956

2.2 Confirmations. Confirmations of each BW's attainment of Performance Commitments shall be as follows: (1) the amount of Direct Investment shall be the amount of the new and additional tax value as determined by the Buncombe County Tax Department attributable to Direct Investment related to the Project for property owned by BW in the County as shown on its Business Real and Personal Property Tax Listings for each year that new investments are made; and (2) the creation and retention of the Jobs Minimum attributable to the Project shall be the number shown on filings by BW with the N.C. Employment Security Commission as to unemployment compensation taxes. The County may, subject to the agreement of BW, have access to other documentation to verify the attainment of these Performance Commitments.

2.3 Direct Investment and Jobs Minimum.

- (a) BW will make the Direct Investments on or before the schedule date set forth above. If BW does not make the Direct Investment on or before the scheduled investment date, the amount of the Future Incentive Payments will be adjusted as provided in Article IV.
- (b) On or before the schedule dates set forth above, BW will meet the applicable Jobs Minimum for each year during the Jobs Retention Period. If the Jobs Minimum is not achieved on or before the schedule dates set forth above, the amount of the Future Incentive Payments will be adjusted as provided in Article IV.

**ARTICLE III**

**FUTURE INCENTIVE PAYMENTS**

To induce BW to make the Direct Investment associated with the Project, to locate its new business associated with the expanded employee base at its facilities, and to achieve this Jobs Minimum, the County commits to pay to BW grants in the future ("Future Incentive Payments"). These Future Incentive Payments shall be in the total cumulative amount of One Million Nine Hundred Twenty-Six Thousand Six Hundred and No/100 (\$1,926,600.00) to be paid over a period of five (5) years. The County intends to apportion the Future Incentive Payments equally to Direct Investments (\$963,300) and the Jobs Minimum (\$963,300).

BW shall apply for each Future Incentive Payment on or before March 15 of each year the Future Incentive Payments are to be paid. This written request shall consist of a letter from BW to the County setting forth the increase in the amount of the new and additional tax value as provided above, newly reported property, that there are no Buncombe County ad valorem taxes past due, confirmation that Company has notified the Buncombe County Tax Assessor's Office of the location of any business personal property of third parties related to the Project, and that the Taxes of any and all persons or entities with respect to any real or personal property related to the Project in Buncombe County for the applicable year have been paid in full. The County shall review each application promptly and shall give BW written notice of any deficiency in the application within 15 days after the County receives the application. The County will have 45 days following the receipt of an application that complies with the requirements of this Article III to make the required Future Incentive Payment. If any Future Incentive Payment is denied in full or in part, the County shall provide a written explanation for such denial or partial payment. If BW or such other person or entity subsequently cures the deficiency and submits an application that complies with the requirements of this Agreement, the County will promptly make the previously withheld Future Incentive Payment.

The qualifying Future Incentive Payments will be paid in five (5) equal annual installments no later than by the dates shown below and upon the terms and conditions of this Agreement:

April 30, 2015 - \$385,320.00  
April 30, 2016 - \$385,320.00  
April 30, 2017 - \$385,320.00  
April 30, 2018 - \$385,320.00  
April 30, 2019 - \$385,320.00



Provided however, that if BW does not file its Business Real and Personal Property Tax Listings until on or after March 1 of a particular calendar year, then such Future Incentive Payment for that calendar year will not be payable until May 31 in the year affected.

If the BW is in default on its obligation to pay Taxes to the County, or any other person or entity related to the Project is in default on its obligation to pay Taxes to the County, the County will not be required to make a Future Incentive Payments to BW until BW and such other person or entity pays the amount of such Taxes it owes the County, unless BW is in a bona fide dispute with a governmental taxing authority as to the value of some or all of the Personal Property.

## **ARTICLE IV**

### **REDUCTIONS AND REFUNDS**

(a) If BW does not make the Direct Investment and achieve the Jobs Minimum on or before the schedule dates set forth above in a particular year, or should BW fail to maintain the levels of Direct Investment (excepting depreciation) and the Jobs Minimum throughout the Jobs Retention Period, then BW will pay the County a refund in the amount set forth in this Article IV. The refund formulas described in this Article IV are weighted such that 50% is assigned to the Direct Investment and 50% is assigned to the Jobs Minimum.

(b) Notwithstanding anything to the contrary in this Article IV, BW shall be entitled to the full annual Future Incentive Payment for any given year provided it has met 90% of both its Direct Investment and Jobs Minimum in the preceding year.

(c) Direct Investment. If BW does not make and maintain the Direct Investment in accordance with the schedule set forth above, then the Future Incentive Payment to be paid by County attributable to Direct Investment will be reduced by an amount equal to (i) a pro rata percentage (specified below), multiplied by (ii) the sum of the Future Incentive Payments attributable to Direct Investment that would be due to BW under this Agreement (up to a maximum of \$963,300.00) (iii) divided by 2. The pro rata percentage will be the percentage derived by taking the actual Direct Investment and dividing that figure by the yearly applicable Direct Investment commitment. The pro rata percentage cannot be less than zero. Provided, however, that:

(c1) Should the levels of Direct Investment be withdrawn or be reduced for any business reason, other than depreciation, in 2019 then BW shall repay the County an amount equal to (i) taking 60% of all the Future Incentive Payments made to BW associated with Direct Investment, multiplied by (ii) the percentage of such reduction;

(c2) Should the levels of Direct Investment be withdrawn or be reduced for any business reason, other than depreciation, in 2020 then BW shall repay the County an amount equal to (i) taking 50% of all the Future Incentive Payments made to BW associated with Direct Investment, multiplied by (ii) the percentage of such reduction;

(c3) Should the levels of Direct Investment be withdrawn or be reduced for any business reason, other than depreciation, in 2021 then BW shall repay the County an amount equal to (i) taking 40% of all the Future Incentive Payments made to BW associated with Direct

Investment, multiplied by (ii) the percentage of such reduction;

(c4) Should the levels of Direct Investment be withdrawn or be reduced for any business reason, other than depreciation, in 2022 then BW shall repay the County an amount equal to (i) taking 20% of all the Future Incentive Payments made to BW associated with Direct Investment, multiplied by (ii) the percentage of such reduction; and

(c5) Should such reduction occur in 2023 then such repayment shall be \$0.0.

(d) Job Creation. If BW has not achieved and maintained the new Full-Time Project Related Jobs on or before the the schedule set forth above, then then the Future Incentive Payment to be paid by County attributable to Job Creation will be reduced by an amount equal to (i) a pro rata percentage (specified below), multiplied by (ii) the sum of the Future Incentive Payments attributable to Jobs Minimum that would be due to BW under this Agreement (up to a maximum of \$963,300.00) (iii) divided by 2. The pro rata percentage will be the percentage derived by taking the actual new Full-Time Project Related Jobs created and dividing that figure by the yearly applicable new Full-Time Project Related Jobs commitment. The pro rata percentage cannot be less than zero. Provided, however, that:

(d1) Should the levels of new Full-Time Project Related Jobs be reduced for any reason in 2019 then BW shall repay the County an amount equal to (i) taking 60% of all the Future Incentive Payments made to BW associated with Job Creation, multiplied by (ii) the percentage of such reduction;

(d2) Should the levels of new Full-Time Project Related Jobs be reduced for any reason in 2020 then BW shall repay the County an amount equal to (i) taking 50% of all the Future Incentive Payments made to BW associated with Job Creation, multiplied by (ii) the percentage of such reduction;

(d3) Should the levels of new Full-Time Project Related Jobs be reduced for any reason in 2021 then BW shall repay the County an amount equal to (i) taking 40% of all the Future Incentive Payments made to BW associated with Job Creation, multiplied by (ii) the percentage of such reduction;

(d4) Should the levels of new Full-Time Project Related Jobs be reduced for any reason in 2022 then BW shall repay the County an amount equal to (i) taking 20% of all the Future Incentive Payments made to BW associated with Job Creation, multiplied by (ii) the percentage of such reduction; and

(d5) Should such reduction occur in 2023 then such repayment shall be \$0.0.

(e) Within 60 days after the schedule dates set forth above, the County will calculate the amount of any refund payment(s) described above and will notify BW in writing setting out in reasonable detail the County's calculations in arriving at the refund amount. BW will pay the amount due pursuant to this Article IV within 60 days after receiving the County's written demand. In the event of such a refund under Sections, (c) Direct Investment and/or (d) Jobs Minimum, there shall be no additional costs, interest, fees or any additions whatsoever imposed on BW above and beyond the refund amount due.



(f) If BW has an Abandonment of Operations in the Facility, the County shall not be obligated to make any Future Incentive Payments from the date of abandonment, and BW shall repay to the County all Future Incentive Payments paid up to that date. In the event of repayment there shall be no additional costs, interest, fees or any additions whatsoever above and beyond the original amount of the Incentive Payment(s). Provided, however, that:

(f1) Should an Abandonment of Operations occur in 2019 then the repayment shall be 60% of the Future Incentive Payments paid;

(f2) Should an Abandonment of Operations occur in 2020 then the repayment shall be 50% of the Future Incentive Payments paid;

(f3) Should an Abandonment of Operations occur in 2021 then the repayment shall be 40% of the Future Incentive Payments paid;

(f4) Should an Abandonment of Operations occur in 2022 then the repayment shall be 20% of the Future Incentive Payments paid; and

(f5) Should an Abandonment of Operations occur in 2023 then the repayment shall be \$0.0.

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(g) Examples. Examples of the operation of the formulas in subparts (c) and (d) above are on Exhibit A attached to this Agreement.

(h) Makeup Payment. Notwithstanding the foregoing, if the County reduces one or more Future Incentive Payments pursuant to subparts (c) and/or (d) above, and BW maintains the Direct Investment and the Jobs Minimum for 2019 as of December 31, 2020 and satisfies the other commitments in this Agreement, then the County shall pay BW the largest reduction in a Future Incentive Payment within the time period specified in the second paragraph of Article II.

(i) Refund Cap. In no event will the amount BW may have to refund to County exceed the amount County paid to BW.

## **ARTICLE V**

### **TERMINATION OF AGREEMENT**

(a) BW shall have the option of terminating this Agreement in the event the County fails to make Future Incentive Payments, as provided for in this Agreement.

(b) The County shall have the option of terminating this Agreement upon an Abandonment of Operations by BW, which option shall be executed by giving thirty (30) days written notice to BW.



## **ARTICLE VI**

### **TEMPORARY REDUCTIONS IN PERFORMANCE COMMITMENTS**

Notwithstanding anything herein to the contrary, if BW shall be prevented or delayed from fulfilling, or continuing to fulfill, either or both of the Performance Commitments as set forth in herein, by reason of a:

- (a) government moratorium;
- (b) delay in obtaining any governmental or quasi-governmental approvals, permits or certificates, despite reasonable efforts by BW to obtain same;
- (c) enemy or hostile governmental or terrorist action;
- (d) act of God, including but not limited to hurricane, tornado, snowstorm, windstorm, earthquake or flood, fire or other extreme weather conditions or other casualty;
- (e) strike, lockout or a labor dispute involving entities other than BW which causes BW an inability to obtain labor or materials;
- (f) delay in funding from any state or local government incentive to or for the benefit of BW, or;
- (g) any other event, other than normal business exigencies, which is beyond the reasonable control of BW.

then the Performance Commitments and the Future Incentive Payments for the year(s) in which such event occurred shall be equitably reduced to reflect the effect of such event.

The parties shall negotiate in good faith to make an equitable reduction in the Performance Commitments for any affected year(s). However, if the parties cannot in good faith reach an agreement as to such adjustment, all parties agree to submit this issue to mediation to be conducted in accordance with local rules of the General Court of Justice of Buncombe County, North Carolina.

## **ARTICLE VII**

### **ASSIGNMENTS**

No party shall sell or assign any interest in or obligation under this Agreement without the prior express written consent of both parties. Provided, however, that all or a portion of the rights under this Agreement may be assigned by BW to any entity that is a wholly or partially owned subsidiary of BW, a parent of BW, or an affiliated entity of BW without the consent of the County; further provided that BW will guarantee the performance by any such entity of the obligations due under this Agreement and provide written notice of assignment to the County.

## ARTICLE VIII

### CONTINUING CONTRACT

The parties hereto understand that this Agreement is and shall be construed as a continuing contract pursuant to N.C.G.S. §153A-13.

## ARTICLE IX

### MISCELLANEOUS

**9.1 Governing Law.** The parties intend that this Agreement shall be governed by the law of the State of North Carolina and should any claim or dispute arise between the parties that cannot be resolved amicably then any action to enforce or interpret its terms shall be brought in the General Court of Justice of Buncombe County, North Carolina which shall have venue and jurisdiction over the subject matter and the parties. The Parties hereby agree that this paragraph establishes exclusive and sole jurisdiction for any legal proceeding in Buncombe County, North Carolina.

### **9.2 Notices.**

(a) Any communication required or permitted by this Agreement must be in writing except as expressly provided otherwise in this Agreement

(b) Any communication shall be sufficiently given and deemed given when delivered by hand or three (3) days after being mailed by first-class mail, postage prepaid, and addressed as follows:

(1) If to BW, to:

BorgWarner Turbo Systems  
Sean Maloney  
1849 Brevard Rd  
Arden, NC 28704

(2) If to the County, to:

Jon Creighton  
Assistant County Manager/Planning Director  
46 Valley Street  
Asheville, NC 28801

With copy to:

Michael C. Frue  
Senior Staff Attorney  
59 Woodfin Place  
Asheville, NC 28801

(c) Any addressee may designate additional or different addresses for communications by notice given under this Section to each of the others.

**9.3 Non-Business Days.** If the date for making any payment or the last day for performance of any act or the exercising of any right shall not be a Business Day, such payment shall be made or act performed or right exercised on or before the next preceding Business Day.

**9.4 Severability.** Each provision in this Agreement is severable. If any provision of this Agreement will be determined to be invalid or unenforceable by a court of competent jurisdiction, then: (a) such determination will not invalidate or render unenforceable any other provision of this Agreement; (b) such provision will be construed as closely as possible to the parties' original intent in order to render such provision valid or enforceable, as applicable; and (c) the remaining terms of this Agreement, together with such reconstructed provision, will constitute the parties' entire agreement.

**9.5 Entire Agreement; Amendments.** This Agreement constitutes the entire contract between the parties, and this Agreement shall not be changed except in writing signed by both parties.

**9.6 Binding Effect.** Subject to the specific provisions of this Agreement, this Agreement shall be binding upon and inure to the benefit of and be enforceable by the parties and their respective successors and assigns.

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**9.7 Time.** Time is of the essence in this Agreement and each and all of its provisions.

**9.8 Liability of Officers and Agents.** No officer, agent or employee of the County or BW shall be subject to any personal liability or accountability by reason of the execution of this Agreement or any other documents related to the transactions contemplated hereby. Such officers, agents, or employees shall be deemed to execute such documents in their official capacities only, and not in their individual capacities. This Section shall not relieve any such officer, agent or employee from the performance of any official duty provided by law.

**9.9 Confidentiality.** The County will keep confidential and will not disclose or publish any of BW's trade secrets as defined in Section 132-1.2(1) of the North Carolina General Statutes, will keep all records evidencing such trade secrets marked as "confidential trade secrets", and will keep all such records segregated in the County's files. If the County receives a request, subpoena or court order to disclose any information or records BW or its representatives have provided or provide in the future relating to this Agreement or the project described in this Agreement, the County will give BW prompt written notice of the request, subpoena or court order and will discuss any proposed disclosure of such information or records with BW (and, to the extent possible, give BW the opportunity to contest any disclosure of information or records BW believes should not be disclosed) before making any such disclosure.

**9.10 Counterparts.** This Agreement may be executed in several counterparts, including separate counterparts. Each shall be an original, but all of them together constitute the same instrument.

[SIGNATURE PAGES FOLLOW]



SIGNATURE PAGE 1 OF 2 TO INCENTIVE AGREEMENT BETWEEN  
BW AND BUNCOMBE COUNTY, NORTH CAROLINA

IN WITNESS WHEREOF, the parties have caused this Incentive Agreement to be executed in  
their corporate names by their duly authorized officers, all as of the date first above written.



BORGWARNER TURBO SYSTEMS, INC.

ATTEST:

By: Sharon C. Peek  
Printed Name: SHARON C. PECK  
Title: Financial Analyst

By:

Sean Maloney  
Printed Name: SEAN MALONEY  
Title: DIRECTOR, FINANCE

**SIGNATURE PAGE 2 OF 2 TO INCENTIVE AGREEMENT BETWEEN  
BW AND BUNCOMBE COUNTY, NORTH CAROLINA**

[SEAL]

**BUNCOMBE COUNTY, NORTH CAROLINA**

**ATTEST:**

\_\_\_\_\_  
Kathy Hughes, Clerk to the Board

By: \_\_\_\_\_  
Printed Name: \_\_\_\_\_  
Title: \_\_\_\_\_

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This instrument has been preaudited  
in the manner required by The Local  
Government Budget and Fiscal Control Act

\_\_\_\_\_  
Name: Donna Clark  
Finance Officer, Buncombe County  
North Carolina