

# **COPY**

## **SETTLEMENT AGREEMENT AND RELEASE**

This SETTLEMENT AGREEMENT AND RELEASE (hereinafter "Agreement") is entered into between the STATE OF CALIFORNIA AIR RESOURCES BOARD (hereinafter "ARB") 1001 I Street, Sacramento, California 95814, and Valley Fruit & Produce Company, Incorporated (hereinafter "VFPC"), 1601 E. Olympic Blvd. Ste 300, Los Angeles, California 90021.

### **I. RECITALS**

- (1) Health and Safety Code (H&SC), Section 39650-39675 mandates the reduction of the emissions of substances that have been determined to be toxic air contaminants (TACs). In 1998, following an exhaustive 10-year scientific assessment process, the Air Resources Board identified particulate matter (PM) from diesel-fueled engines as a toxic air contaminant. Transport Refrigeration Units (TRUs) are powered by diesel fueled engines that emit toxic particulate matter. TRUs are controlled under section 2477 within chapter 9, division 3, Title 13 of the California Code of Regulations (CCR).
- (2) CCR, Title 13, section 2477 (e) (1) (A) (1) states that no Owner/Operator shall operate a TRU or TRU generator (gen) set in California unless it meets the in-use emission category performance standards.
- (3) CCR, Title 13, section 2477 (e) (1) (E) (1) Requires Owner/Operators of all California based TRUs or TRU gen sets subject to the regulation to apply for an ARB identification number for all California-based TRUs or TRU gen sets.
- (4) The ARB Enforcement Division staff has documented that VFPC failed to bring all TRUs in its fleet into compliance by the deadlines set forth in the TRU Airborne Toxic Control Measure (ATCM).
- (5) H&SC, Sections 39674 (a) and (b) authorize civil penalties for the violation of the programs for the regulation of toxic air contaminants not to exceed one thousand dollars (\$1,000.00) or not to exceed ten thousand dollars (\$10,000.00) respectively, for each day in which the violation occurs.
- (6) ARB contends that if the facts described in recital paragraphs (1) – (5) were proven civil penalties could be imposed against VFPC, as provided in H&SC sections 43016 and 39674.
- (7) In consideration of the foregoing, and of the promises and facts set forth herein, the parties desire to settle and resolve all claims disputed, and obligations relating to the above-listed violations and voluntarily agree to

this matter by means of this Agreement. Specifically, the ARB and VFPC agree as follows:

## II. TERMS & RELEASE

In consideration of the ARB not filing a legal action against VFPC for the violations referred to above, the ARB and VFPC agree as follows:

(1) Upon execution of this Agreement, the sum of eighteen thousand, seven hundred, and fifty dollars (\$18,750.00) shall be paid on behalf of VFPC, as follows:

- \$14,062.50 to the **California Air Pollution Control Fund**.
- \$4,687.50 to the **Peralta Community College District** to fund diesel technology education programs at California Community Colleges.
- The full amount shall be submitted in four payments and all payments shall be submitted in check form.
- First payment is due at time of execution of the agreement and shall be made in form of a check payable to the **Peralta Community College District** in the amount of \$4,687.50.
- Payments 2, 3 and 4 are due at four, eight and twelve months after the date of the execution of the agreement respectively and shall be made in form of a check payable to the **California Air Pollution Control Fund** in the amounts of \$4,687.50 each.
- The payments must be made in the form of checks. The checks with the signed settlement agreement shall be sent to:

Mr. Christopher Patno, Air Resources Engineer  
Air Resources Board, Enforcement Division  
9480 Telstar Ave., Suite 4  
El Monte, CA 91731

(2) Effect of Untimely Payment. If any payment is more than 15 days late, the entire remaining balance becomes immediately due and payable. In addition, if the Attorney General files a civil action to enforce this settlement agreement, VFPC shall pay all costs of investigating and prosecuting the action, including expert fees, reasonable attorney's fees, and costs.

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- (3) It is agreed that if VFPC, including its subsidiary or parent company, at any time becomes insolvent, or makes an assignment for the benefit of creditors or similar action adversely involving VFPC, its subsidiary, or parent company, or a proceeding or petition under any bankruptcy, reorganization, arrangement of debt, insolvency, readjustment of debt, or receivership law or statute is filed by or against VFPC, its subsidiary, or parent company, or a trustee in bankruptcy, custodian, receiver or agent is appointed or authorized to take charge of any of VFPC, its subsidiary, or parent company's properties, or if any deposit account or other property of VFPC, its subsidiary, or parent company be attempted to be obtained or held by writ of execution, garnishment, attachment, condemnation, levy, forfeiture or other legal process, or VFPC, its subsidiary, or parent company takes any action to authorize any of the foregoing, the entire remaining balance becomes immediately due and payable without notice or demand.
- (4) It is further agreed that the penalties described in Terms and Release paragraph 1 are punitive in nature, rather than compensatory. Furthermore, the penalty is intended to deter and punish VFPC for violations of state environmental statutes, and these penalties are payable to and for the benefit of ARB, a government unit. Therefore, it is agreed that these penalties imposed on VFPC by the ARB arising from the facts described in recital paragraphs (1) – (5) are non dischargeable under 11 U.S.C. § 523 (a)(7), which provides an exception from discharge for any debt to the extent such debt is for a fine, penalty or forfeiture payable to and for benefit of governmental unit, and is not compensation for actual pecuniary loss, other than certain types of tax penalties.
- (5) VFPC shall not violate CCR, Title 13, Section 2477.
- (6) VFPC shall update and include all TRUs and TRU gen sets owned by VFPC in the ARB Equipment Registration system database.
- (7) VFPC shall comply with the TRU in-use performance standards set forth in Title 13, CCR, Section 2477 (e) (1) (A). Within 180 days of the execution of this Agreement, VFPC shall submit the proof of the compliance with the TRU ATCM to: Mr. Christopher Patno, ARE, Air Resources Board, Enforcement Division, 9480 Telstar Avenue Suite 4, El Monte, CA 91731.
- (8) This Agreement constitutes the entire agreement and understanding between ARB and VFPC concerning the subject matter hereof, and

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supersedes and replaces all prior negotiations and agreements between ARB and VFPC concerning the subject matter hereof.

- (9) No agreement to modify, amend, extend, supersede, terminate, or discharge this Agreement, or any portion thereof, is valid or enforceable unless it is in writing and signed by all parties to this Agreement.
- (10) Severability. Each provision of this Agreement is severable, and in the event that any provision of this Agreement is held to be invalid or unenforceable, the remainder of this Agreement remains in full force and effect.
- (11) This Agreement shall be interpreted and enforced in accordance with the laws of the State of California, without regard to California's choice-of-law rules.
- (12) This Agreement is deemed to have been drafted equally by the Parties; it will not be interpreted for or against either party on the ground that said party drafted it.
- (13) SB 1402 Statement

Senate Bill 1402 (Dutton, Chapter 413, statutes of 2010) requires the ARB to provide information on the basis for the penalties it seeks (*see Health and Safety Code section 39619.7*). This information, which is provided throughout this settlement agreement, is summarized here.

### **The manner in which the penalty amount was determined, including a per unit or per vehicle penalty.**

Penalties must be set at levels sufficient to discourage violations. The penalties in this matter were determined in consideration of all relevant circumstances, including the eight factors specified in §43024.

The per unit penalty in this case is a maximum of \$1,000 per unit for strict liability violations pursuant to Health and Safety Code section 39674. The penalty obtained in this case is \$750.00 per unit for 25 units after considering the factors specified in §43024.

### **The provision of law the penalty is being assessed under and why that provision is most appropriate for that violation.**

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The penalty provision being applied in this case is §39674 because VFPC failed to comply with the Air Toxic Control Measure adopted under § 39600 et seq.

**Is the penalty being assessed under a provision of law that prohibits the emission of pollution at a specified level, and, if so a quantification of excess emissions, if it is practicable to do so.**

The provisions cited above do prohibit emissions above a specified level of g/hp-hr. However, since the hours of operation of the non-compliant units involved and their individual emission rates are not known, it is not practical to quantify the excess emissions.

- (14) VFPC acknowledges that ARB has complied with SB 1402 in prosecuting or settling this case. Specifically, ARB has considered all relevant facts, including those listed at HSC section 43024, has explained the manner in which the penalty amount was calculated (including a per unit or per vehicle penalty, if appropriate), has identified the provision of law under which the penalty is being assessed and has considered and determined that this penalty is being assessed under a provision of law that prohibits the emission of pollutants at a specified level. However, since the hours of operation of the non-compliant units involved and their individual emission rates are not known, it is not practical for ARB to quantify the excess emissions.
- (15) Penalties were determined based on the unique circumstances of this matter, considered together with the need to remove any economic benefit from noncompliance, the goal of deterring future violations and obtaining swift compliance, the consideration of past penalties in similar cases negotiation, and the potential costs and risk associated with litigating these particular violations. The penalty reflects violations extending over a number of days considered together with the complete circumstances of this case. The penalty was discounted in this matter based on the fact that this was a first time violation and the violator made unusually diligent efforts to comply and to cooperate with the investigation. Penalties in future cases might be smaller or larger on a per unit basis.
- (16) The penalty in this case was based in part on confidential business information provided by VFPC that is not retained by ARB in the ordinary course of business. The penalty in this case was also based on confidential settlement communications between ARB and VFPC that ARB does not retain in the ordinary course of business either. The penalty also reflects ARB's assessment of the relative strength of its case against VFPC, the desire to avoid the uncertainty, burden and expense of

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litigation, obtain swift compliance with the law and remove any unfair advantage that VFPC may have secured from its actions.

- (17) Now therefore, in consideration of the payment by VFPC, in the amount of eighteen thousand, seven hundred, and fifty dollars (\$18,750.00), ARB hereby releases VFPC and its principals, officers, agents, predecessors and successors from any and all claims that ARB may have based on the facts and allegations described in recital paragraphs (1) – (5) above. The undersigned represent that they have the authority to enter into this Agreement.

**California Air Resources Board**

By: Ellen M. Peter

Name: Ms. Ellen M. Peter

Title: Chief Counsel

Date: 12/5/10

**Valley Fruit & Produce  
Company, Inc.**

By: Douglas Lalonde

Name: Douglas Lalonde

Title: SECRETARY - TREASURER

Date: 11/22/10

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