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 Winmar Transportation (hereinafter "WT "), 6403 Elmer Avenue, North Hollywood, California 91606.

I. RECITALS

(1) Health and Safety Code, 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) (E) 1 states "On or before January 31, 2009 (extended to July 31, 2009), owner/operators of all California based TRUs and TRU gen sets subject to this regulation (TRU ATCM) shall apply for an ARB identification number for all California-based TRUs or TRU gen sets operated by the operator..."

(3) CCR, Title 13, Section 2477 (e) (1) (A) requires TRU owner/operators comply with the in-use emission category performance standards on or before the in-use compliance dates set forth in section 2477 (e) (1) (B).

(4) The ARB has documented violations of the in-use performance standard.

(5) Health and Safety Code, 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) California Health and Safety Code (*H&SC*) Section 44011.6 established the Heavy Duty Vehicle Inspection Program (HDVIP). It authorizes ARB to inspect on-road heavy-duty vehicles for excessive smoke emissions and engine tampering and to issue citations, accordingly. The program also requires the vehicle owner to repair its engines that exceed the prescribed ARB smoke opacity standards, perform a post-repair opacity test, and submit proof of repairs and any assessed penalties under the regulations of the Heavy-Duty Smoke Inspection Program, Chapter 3.5, Sections 2180-2188, Title 13, California Code of Regulations (CCR).

(7) *H&SC* Section 43701 provides that ARB shall adopt regulations that require owners or operators of heavy-duty diesel motor vehicles to perform regular inspections of their vehicles for excess smoke emissions.

(8) Title 13, CCR sections 2190 et seq. were adopted under the authority of *H&SC* section 43701 and, with limited exceptions which are not applicable here, apply to all heavy-duty diesel powered vehicles with gross vehicle weight ratings greater than 6,000 pounds which operate on the streets or highways within the State of California.

(9) Title 13, CCR sections 2190 et seq. authorize the Periodic Smoke Inspection Program (PSIP) which requires the owners and operators of California based vehicle fleets of two or more heavy duty diesel motor vehicles with gross vehicle weight ratings greater than 6,000 pounds which operate on the streets or highways within the State of California to conduct annual smoke opacity inspections of their vehicles that are four years older than the model year of the vehicle's engine.

(10) Title 13, CCR section 2192(a) requires inter alia that the owner of the vehicle "[t]est the vehicle for excessive smoke emissions periodically according to the inspection intervals specified in section 2193(a), (b), and (c)", "[m]easure the smoke emissions for each test...", "[r]ecord the smoke test opacity levels and other required test information as specified in section 2194..." and "[k]eep the records specified in section 2194 for two years after the date of inspection."

(11) *H&SC* Section 43016 states, "Any person who violates any provision of this part, or any order, rule, or regulation of the state board adopted pursuant to this part, and for which violation there is not provided in this part any other specific civil penalty or fine, shall be subject to a civil penalty of not to exceed five hundred dollars ($500.00) per vehicle."

(12) The ARB considers testing, measuring, recording, and recordkeeping to be critical components in reducing excessive smoke emissions from these heavy-duty vehicles.

(13) ARB contends WT failed to test, measure, record, and maintain records of smoke emissions from its fleet of heavy duty diesel vehicles for 2008 and 2009 in violation of Title 13, CCR Sections 2190 et seq.

(14) Title 13, CCR section 2183 (c) states, "No 1974 or newer diesel powered heavy-duty commercial vehicle shall operate in California without evidence that, at the time of manufacture, the installed engine met emission standards at least as stringent as applicable federal emission standards for the model year of the engine. The ARB shall base its determination on whether an engine meets the above requirements by inspecting the Emission Control Label (ECL) affixed to the vehicle's engine."

(15) Title 13, CCR section 2185 (a) (2) (B) after the first year from the effective date of the amended regulation, February 15, 2007, the owner shall receive a citation assessing the owner a $300 penalty.

(16) ARB has documented violations of the ECL Program.

(17) ARB contends that if the facts described in recital paragraphs (1) – (16) were proven civil penalties could be imposed against WT, as provided in H&SC sections 39674 and 43016 and Title 13, CCR section 2185 (a) (2) (B).

(18) WT is willing to enter into this Agreement solely for the purpose of settlement and resolution of this matter with ARB. ARB accepts this Agreement in termination of this matter. Accordingly, the parties agree to resolve this matter completely by means of this Agreement, without the need for formal litigation, and therefore agree as follows:

II. TERMS & RELEASE

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

(1) Upon execution of this Agreement, a civil penalty of four thousand, three hundred and fifty dollars ($4,350.00) shall be paid on behalf of WT as follows:

- $3,262.50 to the **California Air Pollution Control Fund**
- $1,087.50 to the **Peralta Community College District**

ARB to receive by:

08/30/2011	First Payment
09/30/2011	Second Payment
10/31/2011	Third Payment
11/30/2011	Fourth Payment
12/30/2011	Fifth Payment
01/31/2012	Sixth Payment
02/29/2012	Seventh Payment
03/30/2012	Eighth Payment

- First payment is due on August 30, 2011, and shall be made in form of check payable to the **Peralta Community College District** in the amount of $543.75.

- Second payment is due on September 30, 2011, and shall be made in the form of a check payable to the **Peralta Community College District** in the amount of $543.75.

- Third payment is due on October 31, 2011, and shall be made in the form of a check payable to the **California Air Pollution Control Fund** in the amount of $543.75.

- Fourth payment is due on November 30, 2011, and shall be made in the form of a check payable to the **California Air Pollution Control Fund** in the amount of $543.75.

- Fifth payment is due on December 30, 2011, and shall be made in the form of a check payable to the **California Air Pollution Control Fund** in the amount of $543.75.

- Sixth payment is due on January 31, 2012, and shall be made in the form of a check payable to the **California Air Pollution Control Fund** in the amount of $543.75.

- Seventh payment is due on February 29, 2012 and shall be made in the form of a check payable to the **California Air Pollution Control Fund** in the amount of $543.75.

- Eighth payment is due on March 30, 2012, and shall be made in the form of a check payable to the **California Air Pollution Control Fund** in the amount of $543.75.

- Checks with the signed settlement agreement shall be sent to:

  Mr. Aldo Chaney, Air Pollution Specialist
  Air Resources Board, Enforcement Division
  9480 Telstar Ave., Suite 4
  El Monte, CA 91731

(2) Effect of Untimely Payment or Performance. 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, WT shall pay all costs of investigating and prosecuting the action, including expert fees, reasonable attorney's fees, and costs.

(3) It is agreed that if WT, 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 WT, 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 WT, its subsidiary, or parent company, or a trustee in bankruptcy, custodian, receiver or agent is appointed or authorized to take charge of any of WT, its subsidiary, or parent company's properties, or if any deposit account or other property of WT, 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 WT, 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 WT for violations of state environmental statutes, and these penalties are payable to and for the benefit of ARB, a governmental unit. Therefore, it is agreed that these penalties imposed on WT by ARB arising from the facts described in recital paragraphs 1 – 16 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) WT shall have all staff responsible for compliance with the Periodic Smoke Inspection Program (PSIP) and the Heavy Duty Vehicle Inspection Program (HDVIP) attend the California Council on Diesel Education and Technology (CCDET) I & II classes, as described on the ARB's webpage at www.arb.ca.gov/msprog/hdvip/hdvip.htm.These classes are conducted by various California Community Colleges and instruct attendees on compliance with the PSIP and the HDVIP. Proof of CCDET I & II completion shall be provided to ARB within one year of the date of this Agreement and shall also be maintained in each applicable employee's file for the term of his or her employment. In case WT uses a contractor to perform the annual smoke opacity testing required under the PSIP, WT shall obtain proof that the contractor's staff conducting the smoke opacity tests completed the CCDET I & II courses within the last four years. This proof of the CCDET I & II completion shall be provided by WT to the ARB within one year of the date of this settlement and shall also be maintained with the annual PSIP records.

(6) WT shall provide copies of all PSIP compliance records for the 2011, and 2012 to ARB by January 31 of the following year. Copies shall be addressed to the attention of Mr. Aldo Chaney, Air Pollution Specialist, ARB Enforcement Division, 9480 Telstar Avenue, Suite 4, El Monte, CA 91731. The ARB reserves the right to visit any WT fleet location at any time to conduct compliance audits for the HDVIP and PSIP, or any other applicable ARB program.

(7) WT shall complete Low NOx Software Upgrades (reflash) on all applicable heavy duty diesel engines operating in California and report back to the ARB, within 45 days of this Agreement.

(8) Each 1974 or newer diesel powered heavy-duty commercial vehicle in the WT fleet shall comply with the emission control label (ECL) requirements set forth in the CCR, Title 13, Section 2183 (c), within 45 days of this Agreement.

(9) WT shall instruct all employees who operate diesel fueled commercial vehicles to comply with the idling regulations set forth in CCR, Title 13, Section 2485, within 45 days of the execution of this agreement.

(10) WT shall comply with the TRU in-use performance standards set forth in Title 13, CCR, Section 2477 (e) (1) (A). Within 45 days of the execution of this Agreement, WT shall submit the proof of compliance with the TRU ATCM to Mr. Aldo Chaney, Air Pollution Specialist, ARB Enforcement Division, 9480 Telstar Avenue, Suite 4, El Monte, CA 91731.

(11) WT shall not violate Health and Safety Code Sections 43701 et seq. and 44011.6 et seq., Title 13, CCR, Sections 2180 et seq., 2190 et seq., and 2485 et seq.

(12) WT shall not violate the TRU ATCM, as codified in CCR, Title 13, Section 2477.

(13) This Agreement shall apply to and be binding upon WT, and its officers, directors, receivers, trustees, employees, successors and assignees, subsidiary and parent corporations and upon ARB and any successor agency that may have responsibility for and jurisdiction over the subject matter of this Agreement.

(14) This Agreement constitutes the entire agreement and understanding between ARB and WT concerning the subject matter hereof, and supersedes and replaces all prior negotiations and agreements between ARB and WT concerning the subject matter hereof.

(15) 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.

(16) 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.

(17) 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.

(18) 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.

(19) **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 Health and Safety Code section 42403 and 43024.

TRU Violations

The per unit penalty for the TRU violations involved in this case is a maximum of $1,000 per unit per day for strict liability violations or $10,000 per unit per day for negligent or intentional violations pursuant to H&SC section 39674. The penalty obtained for the TRU violations involved in this case is $750.00 per unit for 4 non-compliant units for a penalty of $3,000.00 after considering all factors specified in 43024. The penalty reflects the fact that these were unintentional first time violations and that WT cooperated with the investigation.

PSIP Violations

The per vehicle penalty for the PSIP violations involved in this case is a maximum of $500 per vehicle per violation per year. The penalty obtained for the PSIP violations involved in this case is $375.00 per violation for 3 PSIP violations for a penalty of $1,125.00 after considering all factors specified in 43024.

The penalty reflects the fact that these were unintentional first time violations and that WT cooperated with the investigation.

ECL Violations

The per vehicle penalty for the labeling violations involved in this case is a maximum of $300 per vehicle per violation. The penalty obtained for the ECL violation involved in this case is $225.00 per violation for 1 ECL violation for a penalty of $225.00 after consideration all factors specified in 43024. The penalty reflects the facts that these were unintentional first time violations and that WT cooperated with the investigation.

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

TRU Violations

The penalty provision being applied for the TRU ATCM (Title 13, CCR, section 2477) violations in this case is H&SC section 39674 because the TRU ATCM is a Toxic Air Contaminant Control Measure adopted pursuant to authority contained in H&SC section 39002, et seq., 39650-39675 and because WT failed to bring TRUs in its fleet into compliance by the deadlines set forth in the TRU ATCM.

PSIP Violations

The penalty provision being applied to the PSIP violations is H&SC section 43016 because WT failed to test, measure, record and maintain records of smoke emissions from its fleet of heavy duty diesel vehicles for years 2008 and 2009 in violation of the PSIP regulation in Title 13, CCR sections 2190 et seq. for 3 violations. Since the PSIP regulation was adopted pursuant to authority granted in Part 5 of Division 26 of the H&SC and since there is no specific penalty or fine provided for PSIP violations in Part 5, H&SC section 43016 is applicable penalty provision.

ECL Violations

The penalty provision being applied for the ECL Program (Title 13, CCR, section 2180 et seq.) violations is Health and Safety Code section 44011.6 because WT failed to affix emission control labels as required by Title 13, CCR section 2183 (c).

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.

TRU Violations

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

PSIP Violations

The provisions cited above do prohibit emissions above a specified opacity level. However, since the hours of operation of the non-compliant trucks involved and their individual emission rates are not known, it is not practicable to quantify the excess emissions.

ECL Violations

The penalty is not being assessed under a provision of law that prohibits the emission of pollution at a specified level.

(20) WT 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 TRUs and trucks involved and their individual emission rates are not known, it is not practicable for ARB to quantify the excess emissions.

(21) 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.

(22) The penalty in this case was based in part on confidential business information provided by WT 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 WT 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 WT, the desire to avoid the uncertainty, burden and expense of litigation, obtain swift compliance with the law and remove any unfair advantage that WT may have secured from its actions.

(23) Now therefore, in consideration of the payment by WT, in the amount of four thousand, three hundred and fifty dollars ($4,350.00), ARB hereby releases WT 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) – (16) above. The undersigned represent that they have the authority to enter into this Agreement.

California Air Resources Board

By: _____

Name: James Ryden
Title: Chief Enforcement Division
Date: 9/2/11

Winmar Transportation

By: _____

Name: Margurite Murillo
Title: Co owner
Date: 8/30/2011