

## **SETTLEMENT AGREEMENT**

This Settlement Agreement is entered into between the California Air Resources Board (CARB), with its principal location at 1001 I Street, Sacramento, California 95814; and Del Monte Fresh Produce, N.A., Inc. (Del Monte), with its principal location at 241 Sevilla Avenue, Coral Gables, Florida 33134, (collectively, the "Parties," or individually, "Party").

### **LEGAL BACKGROUND**

- (1) Purpose. The California Health and Safety Code mandates the reduction of the emission of toxic air contaminants (TAC). CARB has determined that particulate matter (PM) from diesel-fueled engines is a TAC. (Health & Saf. Code §§ 39650-39675.)
- (2) Regulation. CARB adopted the *Airborne Toxic Control Measure for Auxiliary Diesel Engines Operated On Ocean-Going Vessels At-Berth in a California Port* (At-Berth Regulation) to reduce diesel PM and criteria pollutant emissions from ocean-going vessels. (Cal. Code Regs., tit.17, § 93118.3.)
- (3) Regulatory Provisions. Any person who owns, operates, charters, rents, or leases any United States (U.S.) or foreign flagged container vessel, passenger vessel, or refrigerated cargo vessel that visits a California port is required to meet the operational time limit during 50% of each fleet's visits for 2014-2016 and 70% of visits for 2017-2019, reduce the baseline fleet power generation (BFPG) for each fleet by 50% for 2014-2016 and 70% for 2017-2019, as well as submit statements of compliance by March 1 following each compliance year, and maintain records. (Cal. Code Regs., tit.17, §§ 93118.3(d), and (g).)
- (4) Penalty Provisions. Failure to comply with the regulatory requirements is a violation of state law that may result in penalties up to ten thousand dollars (\$10,000) for strict liability violations for each day in which the violation occurs. (Cal. Code Regs., tit.17, § 93118.3.); Health & Saf. Code §§ 39674, 39675, 42400 et seq., 42402 et seq., and 42410.)

### **CASE BACKGROUND**

- (5) Corporate Entity. At all relevant times, Del Monte was organized under the laws of Florida as a corporation and was authorized to conduct business in the State of California.
- (6) Allegations. This Settlement Agreement resolves Notice of Violation (NOV) RMES102617-SP, which was issued on June 5, 2018. CARB alleges Del Monte violated the At-Berth Regulation by (1) failing to achieve the baseline power reduction requirements and (2) failing to achieve the operational time limit requirements, resulting in 4,383 violations. CARB alleges that if the allegations described in paragraphs 1 through 6 were proven, civil penalties could be imposed against Del Monte for each and every megawatt hour involved in the violations.

- (7) Acknowledgment. Del Monte admits to the facts in paragraphs 1 through 6, but denies any liability resulting from said allegations.
- (8) Consideration. In consideration of the foregoing, and of the promises and facts set forth herein, the Parties desire to settle and resolve all claims, disputes, and obligations relating to the above-listed alleged violations and voluntarily agree to resolve this matter by means of this Settlement Agreement, and without any admission of liability. In order to resolve the violations described herein, Del Monte has taken, or agrees to take, the actions enumerated below within the Terms and Conditions. Further, CARB accepts this Settlement Agreement in termination and full settlement of this matter.

### TERMS AND CONDITIONS

In consideration of CARB not filing a legal action against Del Monte for the alleged violations referred to above in the Legal Background and Case Background, and Del Monte's agreement to complete all terms and conditions set forth below, CARB and Del Monte agree as follows:

- (9) Settlement Amount. Del Monte shall pay, without any admission of liability, a civil penalty of nine hundred ninety-five thousand three hundred twenty-five dollars (\$995,325.00 USD), and agrees to fund a Supplemental Environmental Project (SEP) entitled Marine Vessel Speed Reduction Incentive Program Phase 2 in the amount of nine hundred ninety-five thousand three hundred twenty-five dollars (\$995,325.00 USD), consistent with CARB's SEP Policy, for a total settlement of one million nine hundred ninety thousand six hundred fifty dollars (**\$1,990,650.00 USD**). Del Monte shall make all payments within 30 calendar days from the date CARB notifies Del Monte of the full execution of the Settlement Agreement.
- (10) Civil Penalty Payment Method(s). Del Monte shall pay the civil penalty by check, credit card, wire transfer, or portal, payable to CARB, using instructions provided separately by CARB in a Payment Transmittal Form. Del Monte is responsible for all payment processing fees. Payments shall be accompanied by the Payment Transmittal Form to ensure proper application. CARB shall deposit the civil penalty amount into the Air Pollution Control Fund for the purpose of carrying out CARB's duties and functions to ensure the integrity of its air pollution control programs. Should payment instructions change, CARB will provide notice to Del Monte in accordance with Paragraph 15 (Notices).
- (11) SEP Payment Method(s). Del Monte shall fund the SEP by wire transfer, credit card, or check, payable to the SEP implementer/recipient, Ventura County Air Pollution Control District, using instructions provided separately by CARB in a Payment Transmittal Form. Del Monte is responsible for all payment processing fees. Payments shall be accompanied by the Payment Transmittal Form to ensure proper application. Should payment instructions change, CARB will provide notice to Del Monte in accordance with Paragraph 15 (Notices).

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- (12) Prohibition Against Financial Benefit. Del Monte has agreed that by funding the SEP entitled Marine Vessel Speed Reduction Incentive Program Phase 2, Del Monte will not receive any direct or indirect financial benefit, and that if ever Del Monte publicizes or refers to the SEP or the results of the SEP, Del Monte will state that the SEP is being undertaken as part of the settlement of a CARB enforcement action.
- (13) Assignment of Rights. In the event the SEP Recipient/Administrator does not fully implement or complete the SEP in accordance with the terms of the SEP Agreement, CARB shall be entitled to recover the full amount of the SEP from the SEP implementer, less any amount expended on the timely and successful completion of any previously agreed upon interim milestone(s). CARB will deposit any such recovery into the Air Pollution Control Fund. Accordingly, Del Monte assigns any and all rights against the SEP implementer to CARB.
- (14) Documents. Del Monte shall promptly email or mail the signed and dated Settlement Agreement, with copy of proof of payment of the penalty and SEP and a copy of the Payment Transmittal Form(s) to the address or email in Paragraph 15 (Notices).
- (15) Notices. Unless otherwise specified in this Settlement Agreement, whenever notifications, submissions, or communications are required by this Settlement Agreement, they shall be submitted in writing to the address or email below:

As to CARB:

California Air Resources Board  
Enforcement Division / Settlement Agreements  
Field Operations Branch/Railroad and Marine Enforcement Section  
9480 Telstar Avenue, Suite 4  
El Monte, California 91731  
Settlement\_Agreement@arb.ca.gov

As to Del Monte:

Office of the General Counsel  
Del Monte Fresh Produce N.A., Inc.  
241 Sevilla Ave.  
Coral Gables, Florida 33134  
officeofthegeneralcounsel@freshdelmonte.com

As to Del Monte's Legal Representation:

Joseph A. Walsh II  
Collier Walsh Nakazawa LLP  
One World Trade Center, Suite 1860  
Long Beach, California 90831  
joe.walsh@cwn-law.com

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Any Party may, by written notice to the other Parties, change its designated notice recipient or notice address provided above. Notices submitted pursuant to this section shall be deemed submitted upon emailing or mailing.

- (16) Recovery of Costs. If the Attorney General files a civil action to enforce this Settlement Agreement, Del Monte shall pay all costs of investigating and prosecuting the action, including expert fees, reasonable attorneys' fees, and costs.
- (17) Repeat Violations. Del Monte agrees to comply with all regulatory requirements and acknowledges that repeat violations could result in increased penalties in the future.
- (18) Entirety. This Settlement Agreement constitutes the entire agreement and understanding between the Parties concerning the Case Background, and supersedes and replaces any and all prior negotiations and agreements of any kind, whether written or oral, between the Parties concerning the Case Background hereof. This Settlement Agreement consists of 7 pages and 36 paragraphs.
- (19) Binding Effect. This Settlement Agreement binds Del Monte, and any principals, officers, receivers, trustees, successors and assignees, subsidiary and parent corporations and CARB and any successor agency that may have responsibility for and jurisdiction over the subject matter of this Settlement Agreement.
- (20) Effective Date. The effective date shall be the date upon which this Settlement Agreement is fully executed.
- (21) Modification and Termination. No agreement to modify, amend, extend, supersede, terminate, or discharge this Settlement Agreement, or any portion thereof, is valid or enforceable unless it is in writing and signed by all Parties to this Settlement Agreement.
- (22) Severability. Each provision of this Settlement Agreement is severable, and in the event that any provision of this Settlement Agreement is held to be illegal, invalid or unenforceable in any jurisdiction, the remainder of this Settlement Agreement remains in full force and effect.
- (23) Choice of Law. This Settlement 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.
- (24) Non-Discharge. It is further agreed that the penalties described in this Settlement Agreement are non-dischargeable under United States Code, title 11, section 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 the benefit of a governmental unit.

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- (25) Not Tax Deductible. For purposes of this Settlement Agreement, Del Monte shall not deduct any monies spent to comply with any provision of this Settlement Agreement in calculating and submitting its federal, state, or local income tax.
- (26) Rules of Construction. Any rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not be applied in interpreting this Settlement Agreement.
- (27) Non-Waiver. The failure to enforce any provision of this Settlement Agreement shall not be construed as a waiver of any such provision, nor prevent such Party thereafter from enforcing such provision or any other provision of this Settlement Agreement. The rights and remedies granted all Parties herein are cumulative and the election of one right or remedy by a Party shall not constitute a waiver of such Party's right to assert all other legal remedies available under this Settlement Agreement or otherwise provided by law.
- (28) Intent to be Bound. The Parties represent that: They have participated fully in the review and drafting of this Settlement Agreement; understand and accept all terms; enter into this Settlement Agreement freely and voluntarily; have had an opportunity to consult with legal counsel; are fully informed of the terms and effect of this Settlement Agreement; have agreed to this Settlement Agreement after independent investigation and agree it was not arrived at through fraud, duress, or undue influence; and knowingly and voluntarily intend to be legally bound by this Settlement Agreement.
- (29) Venue. The Superior Court of California, located in the County of Sacramento, shall hear any dispute between the Parties arising from this Settlement Agreement.
- (30) Counterparts and Electronic Signatures. This Settlement Agreement may be executed in counterparts. Electronic, facsimile or photocopied signatures shall be considered as valid signatures.
- (31) Release. In consideration of the full completion of civil penalty and SEP payment, and all other undertakings above, CARB hereby releases Del Monte, its parent corporations, and its and their holdings and subsidiaries and the principals, officers, receivers, trustees, successors and assignees of each, from any claims CARB may have based on the circumstances described in all paragraphs contained in the Case Background above.
- (32) Authority. The undersigned represents that he or she has full authority to enter into this Settlement Agreement.

### PENALTY BASIS

- (33) Per Unit Penalty. The per unit penalty in this case is a maximum of ten thousand dollars (\$10,000) per violation under Health and Safety Code section 39674, for violations of the At-Berth Regulation. (Cal. Code Regs., tit.17, § 93118.3.) The penalty of \$1,990,650.00 over an unspecified number of days of violation is for 4,383 violations. The per unit penalty in this case is approximately \$454 per violation, although that average figure was not necessarily the basis upon which the parties have resolved this matter.
- (34) Emissions. The provisions cited above do not prohibit emissions above a specified level. Without information on engine usage and emission rates, it is not practicable to quantify the excess emissions. However, since CARB has alleged that the fleet did not meet the regulatory requirements, all of the emissions were presumed excess and illegal.
- (35) Aggravating and Mitigating Factors. The penalties in this matter were determined in consideration of all relevant circumstances, including statutory factors as described in CARB's Enforcement Policy. CARB considered whether the violator came into compliance quickly and cooperated with the investigation; the extent of harm to public health, safety and welfare; nature and persistence of the violation, including the magnitude of the excess emissions; compliance history; preventative efforts taken; innovative nature and the magnitude of the effort required to comply, and the accuracy, reproducibility, and repeatability of the available test methods; efforts to attain, or provide for, compliance prior to violation; action taken to mitigate the violation; financial burden to the violator; and voluntary disclosure. The penalties are set at levels sufficient to deter violations, to remove any economic benefit or unfair advantage from noncompliance, to obtain swift compliance, and the potential costs, risks, and uncertainty associated with litigation. Penalties in future cases might be smaller or larger depending on the unique circumstances of the case.
- (36) Confidential Business Information. CARB based this penalty in part on confidential business information provided by Del Monte and confidential settlement communications, neither of which are retained by CARB in the ordinary course of business.

ACKNOWLEDGED AND ACCEPTED BY:

**California Air Resources Board**

Signature: \_\_\_\_\_ /S/ \_\_\_\_\_

Name: Richard W. Corey \_\_\_\_\_

Title: Executive Officer \_\_\_\_\_

Date: \_\_\_\_\_ 8/24/2020 \_\_\_\_\_

**Del Monte Fresh Produce N.A., Inc.**

Signature: \_\_\_\_\_ /S/ \_\_\_\_\_

Name: Youssef Zakharia \_\_\_\_\_

Title: President & COO \_\_\_\_\_

Date: \_\_\_\_\_ 7/22/2020 \_\_\_\_\_