

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 THX TRANSPORT, LLC (hereinafter "THX"), 1151 La Media Rd, San Diego, CA, 92154.

I. RECITALS

- (1) HSC section 39650-39675 mandates the reduction of the emission of substances that have been determined to be toxic air contaminants (TACs). In 1998, following an exhaustive 10-year scientific assessment process, the ARB identified particulate matter (PM) from diesel-fueled engines as a toxic air contaminant. Truck and Bus Regulation is codified under section 2025 and the Drayage Regulation is codified under section 2027.
- (2) Title 13 CCR, section 2025(e)(1)(B) states: "Starting January 1, 2012, for all vehicles with GVWR greater than 26,000 lbs, excluding school buses, fleets must meet the requirements of section 2025(g) or fleets that report may instead comply with the phase-in option of section 2025(i)."
- (3) THX have elected to utilize the phase-in option provided for in title 13 CCR, section 2025(i).
- (4) Title 13 CCR, section 2025(i)(1), phase-in option, requires that owners of diesel vehicles with a GVWR greater than 26,000 lbs meet the PM BACT requirements by phasing in 30 percent of their fleet by January 1, 2012 and 60 percent of their fleet by January 1, 2013.
- (5) The ARB has documented that THX failed to have 30 percent of their fleet meet the PM BACT requirements by January 1, 2012 and 60 percent of their fleet by January 1, 2013.
- (6) Title 13 CCR, section 2025(r) sets forth the requirements for reporting all vehicles with engines subject to the regulation if the owner of a fleet has elected to utilize the compliance options of section 2025(f)(4), 2025(g)(3), 2025(g)(4), 2025(h), 2025(i), the credits of section 2025(j), and the agricultural provisions of section 2025(m), single-engine and two-engine street sweeper provisions of section 2025(n), extension or exemptions for vehicles used exclusively in NOx exempt areas of section 2025(p)(1), and the extension for low-mileage construction trucks of section 2025(p)(2).

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- (7) Title 13 CCR, section 2025(e)(8) states: "All information specified in section 2025(r) must be reported to the Executive Officer within specified time frames."
- (8) The ARB has documented THX failed to report information as required in title 13 CCR, section 2025(e)(8) within the specified time frames.
- (9) Title 13 CCR, section 2027 (d)(3)(A) requires drayage truck owners meet all applicable emission requirements and deadlines set forth in Phases 1 and 2 detailed in Section 2027 (d).
- (10) Title 13 CCR, section 2027 (d)(5)(A)(2) requires drayage truck motor carriers only dispatch drayage trucks that meet emission standards and compliance deadlines set forth in Phases 1 and 2 in Section 2027 (d). Section 2027 (d)(5)(A)(3) requires motor carriers only dispatch drayage trucks that are registered and in good standing with the Drayage Truck Registry (DTR).
- (11) The ARB Enforcement Division has documented that THX, as a drayage truck owner, failed to bring all drayage trucks in its fleet into compliance by the deadlines set forth in the Drayage Truck Regulation. The ARB Enforcement Division has also documented that THX, as a motor carrier, dispatched drayage trucks that are either not compliant with the emissions standards set forth in the Drayage Truck Regulation or not registered with the DTR.
- (12) Failure to comply with the requirements of title 13 CCR, section 2025 and 2027 is a violation of state law resulting in penalties. California HSC 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) or ten thousand dollars (\$10,000), respectively, for each day in which the violation occurs.
- (13) The ARB, has documented that THX failed to provide evidence that their vehicles have emission control labels (ECL) attached to the engines of some of their heavy-duty diesel vehicles in its fleet in violation of HSC, section 44011.6, and title 13 CCR section 2183, *et seq.* Civil penalties for violation of the regulation covering emission control labels have been set per title 13 CCR, section 2185 (a)(2)(B) at \$300 per vehicle per violation.
- (14) In order to resolve these alleged violations, THX has taken, or agreed to take, the actions enumerated below under "TERMS and RELEASE". Further, the ARB accepts this Agreement in termination and settlement of this matter.

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- (15) 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 violations, and voluntarily agree to resolve this matter by means of this Agreement. Specifically, the ARB and THX agree as follows:

II. TERMS AND RELEASE

In consideration of the ARB not filing a legal action against THX for the alleged violations referred to above, and THX's payment of the penalties set forth in Section 1 below, the ARB and THX agree as follows:

- (1) Upon execution of this Agreement, THX shall pay a civil penalty of \$50,000. Payment shall be made in check form as described below, and payments shall be made in 3 installments beginning on 3/7/13.

SETTLEMENT AGREEMENT AND RELEASE ARB AND THX LLC:

Payment Due Date:		In the Amount of and Paid to:
(1)	3/7/13	\$12,500.00 paid to Peralta Community College District
(2)	5/7/13	\$18,750.00 paid to California Air Pollution Control Fund
(3)	7/7/13	\$18,750.00 paid to California Air Pollution Control Fund

Please submit the signed settlement agreement and checks to:

Ms. Debbi Klossing/Air Pollution Specialist
Air Resources Board, Enforcement Division
9480 Telstar Avenue No. 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, THX 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 THX, 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 THX, 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 THX, its subsidiary, or

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parent company, or a trustee in bankruptcy, custodian, receiver or agent is appointed or authorized to take charge of any of THX, its subsidiary, or parent company's properties, or if any deposit account or other property of THX, 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 THX, 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 THX 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 THX by ARB arising from the facts described in recital paragraphs 1 – 13 are non-dischargeable under 11 United States Code § 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) THX shall not violate HSC sections 43701 *et seq.*, 44011.6 *et seq.*, and title 13 CCR, 13 CCR section 2183, *et seq.*, and, title 13 CCR, section 2027, *et seq.*, and title 13 CCR, section 2025, *et seq.*, or any other provision of law under the jurisdiction of the ARB.

- (6) THX shall comply with one or both of the following options to attend the CCDET II class (Diesel Exhaust After Treatment and Maintenance), described on the ARB's webpage <http://www.arb.ca.gov/enf/hdvip/ccdet/ccdet.htm>. This class is conducted by various California Community Colleges and instructs attendees on California's emission regulations and the proper care and maintenance of diesel exhaust after-treatment systems (DEATS).

(a) THX shall have the fleet maintenance manager (or equivalent) and all staff responsible for maintenance of DEATS attend the CCDET II class. Proof of CCDET II completion shall be provided to ARB within six months of the date of this Agreement and also be maintained in each applicable employee's file for the term of his or her employment.

(b) In case THX uses a contractor for the maintenance of DEATS, in addition to having the fleet maintenance manager (or equivalent) attend the CCDET II course, THX shall obtain proof that the contractor's staff maintaining the DEATS device(s) completed the

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CCDET II course within the last four years. This proof of the CCDET II completion shall be provided by THX to the ARB within six months of the date of this settlement and be maintained with the DEATS installation and maintenance records.

- (7) THX shall instruct all employees who operate diesel-fueled vehicles to comply with the idling regulations set forth in title 13 CCR section 2485, within 45 days of this Agreement.
- (8) THX shall comply with the Truck and Bus regulation as codified in title 13 CCR, section 2025. Within 75 days of the execution of this Agreement, THX shall submit the proof of compliance to Ms. Debbi Klossing, Air Pollution Specialist, ARB Enforcement Division, 9480 Telstar Avenue No 4, El Monte, CA, 91731.
- (9) THX shall not violate the Truck and Bus regulation as codified in title 13 CCR, section 2025.
- (10) THX shall submit a written plan within 30 days outlining future compliance strategy for the Truck and Bus Regulation codified in title 13 section 2025.
- (11) THX shall not dispatch drayage trucks that are not compliant with the emission standards set forth in the Drayage Truck Regulation or trucks that are not registered with the DTR. The ARB reserves the right to audit the dispatch records of THX for compliance with title 13 CCR, Section 2027 (d)(5) any time in the future.
- (12) THX shall not violate the Drayage Truck Regulation, as codified in title 13 CCR, section 2027.
- (13) THX shall complete Low NOx Software Upgrades (reflash) on all applicable heavy-duty diesel engines operating in California and report to the ARB within 45 days of this agreement.
- (14) Each 1974 or newer diesel powered heavy-duty vehicle in the THX fleet shall comply with the emission control label (ECL) requirements set forth in the title 13 CCR section 2183(c). THX shall provide a photograph of each ECL on the engines within 30 days of executing this agreement.
- (15) This Agreement shall apply to and be binding upon THX 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.

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- (16) This Agreement constitutes the entire agreement and understanding between ARB and THX concerning the subject matter hereof, and supersedes and replaces all prior negotiations and agreements between ARB and THX concerning the subject matter hereof.
- (17) 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.
- (18) 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.
- (19) 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.
- (20) 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.
- (21) 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 HSC sections 42403 and 43024.

Truck and Bus Violations

The per unit penalty for the Truck and Bus violations involved in this case is a maximum of \$1,000 per vehicle per day for strict liability violations or \$10,000 per vehicle per day for negligent or intentional violations. This can result in penalties of \$1000 per vehicle per month or more for first time violations.

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The total penalty obtained for the Truck and Bus violations involved in this case for failure to meet the requirements of the Phase-In Compliance Schedule is \$47,250. The penalty is broken down as follows:

- (1) \$9,000 or \$750/vehicle for 12 vehicles in 2012.
- (2) \$9,000 or \$750/vehicle for 12 vehicles in 2013.
- (3) \$29,250 or \$375/vehicle for 78 trucks for reporting late.

The penalty was discounted taking into consideration the eight factors outlined in SB 1402, specifically for this case the per vehicle penalty was discounted since these are first time violations, the company cooperated with the investigation and demonstrated financial hardship.

Drayage Violations

The per vehicle penalty for the drayage violations involved in this case is a maximum of \$1,000 per vehicle per day for strict liability violations or \$10,000 per vehicle per day for negligent or intentional violations pursuant to HSC section 39674. The total penalty obtained for the drayage motor carrier violations involved in this case is \$2,075. The penalty is broken down as follows:

- (1) \$1,775 or approximately \$888 per vehicle for 2 noncompliant trucks and
- (2) \$300 or \$100 per dispatch for 3 noncompliant dispatches after considering the factors specified in HSC section 43024.

The penalty was discounted taking into consideration the eight factors outlined in SB 1402, specifically for this case the per vehicle penalty was discounted since these are first time violations, the company cooperated with the investigation and demonstrated financial hardship.

ECL Violations

The per vehicle penalty for the labeling violations involved in this case is a maximum of \$ 225 per vehicle per violation. The penalty obtained for the ECL violations involved in this case is \$ 675 for 3 vehicles.

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The penalty was discounted taking into consideration the eight factors outlined in SB 1402, specifically for this case the per vehicle penalty was discounted since these are first time violations, the company cooperated with the investigation and demonstrated financial hardship.

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

Truck and Bus

The penalty provision being applied for the Truck and Bus regulation (title 13 CCR, section 2025) violations in this case is HSC section 39674 because the Truck and Bus regulation is a Toxic Air Contaminant Control Measure adopted pursuant to authority contained in HSC section 39002 et seq., 39650-39675 and because THX failed to bring their diesel fleet into compliance by the deadlines set forth in title 13 CCR, section 2025(g)(1) and they dispatched noncompliant trucks in violation of section 2025(x)(2).

Drayage Violations

The penalty provision being applied for the Drayage Truck Regulation (Title 13 CCR, section 2027) violations in this case is HSC section 39674 because the Drayage Truck Regulation is a Toxic Air Contaminant Control Measure adopted pursuant to authority contained in H&SC sections 39650 - 39675.

ECL Violations

The penalty provision being applied to the ECL requirements set forth in title 13 CCR, section 2185(a)(2) because THX failed to provide evidence that 3 of their vehicles have ECL labels attached as required.

The penalty provision being applied for the ECL (title 13 CCR, section 2183) violations is HSC section 39674 because the ECL Regulation adopted pursuant to authority contained in HSC Section 39660, et seq. and because THX failed to provide evidence that their vehicles have emission control labels (ECL) attached to the engines of heavy-duty diesel vehicles in 3 vehicles in their fleet.

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 ECL, Drayage, and Truck and Bus provisions cited above do prohibit emissions above a specified opacity or level of g/hp-hr. However, since

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the hours of operation of the non-compliant units involved and their individual emission rate are not known, it is not practicable to quantify the excess emissions.

- (22) THX acknowledge that ARB has complied with Senate Bill 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, 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.
- (23) 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, and the potential costs and risk associated with litigating these particular violations. Penalties in future cases might be smaller or larger on a per unit basis.
- (24) The penalty was based on confidential settlement communications between ARB and THX that ARB does not retain in the ordinary course of business either. The penalty is the product of an arms length negotiation between ARB and THX and reflects ARB's assessment of the relative strength of its case against THX, the desire to avoid the uncertainty, burden and expense of litigation, obtain swift compliance with the law and remove any unfair advantage that THX may have secured from its actions.
- (25) Now therefore, in consideration of the payment on behalf of THX to the California Air Pollution Control Fund and the Peralta Community College District, the ARB hereby releases THX and their principals, officers, agents, predecessors and successors from any and all claims, the ARB may have or have in the future based on the circumstances described in paragraph (1) through (13) of the Recitals. The undersigned represent that they have the authority to enter into this Agreement

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California Air Resources Board

By: Ellen M. Peter
Name: Ellen M. Peter
Title: Chief Counsel
Date: 3/22/2013

THX Transport, LLC

By: Danyel Huerta
Name: Danyel Huerta
Title: President
Date: 3-6-13

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