

## 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 BROTHERHOOD TRUCKING INC. (hereinafter "BTI") 8106 Harding Avenue, Skokie, Illinois 60076.

### I. RECITALS

- (1) 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).
- (2) *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.
- (3) 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.
- (4) 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.
- (5) 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."

- (6) The ARB considers testing, measuring, recording, and recordkeeping to be critical components in reducing excessive smoke emissions from these heavy-duty vehicles.
- (7) ARB contends BTI 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.
- (8) *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."
- (9) *H&SC* Sections 39650-39675 mandate 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. Drayage trucks are powered by diesel fueled engines that emit toxic particulate matter. Drayage trucks are controlled under the Drayage Truck Regulation as codified in Title 13, CCR, Section 2027.
- (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 staff has documented that BTI, as a drayage truck owner, failed to bring all its drayage trucks into compliance, and as a motor carrier, dispatched drayage trucks that are either not compliant with the emission standards set forth in the Drayage Truck Regulation or not registered with the DTR.
- (12) *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) or not to exceed ten thousand dollars (\$10,000) respectively, for each day in which the violation occurs.
- (13) ARB contends that if the facts described in recital paragraphs (1) – (12) were proven civil penalties could be imposed against BTI, as provided in *H&SC* Sections 43016 and 39674.

- (14) BTI 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 ARB not filing a legal action against BTI, for the violations alleged above, ARB and BTI agree as follows:

- (1) Upon execution of this Agreement, BTI shall pay a civil penalty of \$17,617.50. Since BTI has already made a payment of \$1,125 to the California Air Pollution Control Fund to release the registration hold on one of its vehicles, the remaining balance is \$16,492.50. Payment shall be made in check form as described below and the full amount shall be submitted as per agreed payment schedule.
- \$12,088.13 to the **California Air Pollution Control Fund**.
  - \$4,404.38 to the **Peralta Community College District**.

### ARB to receive by:

05/20/2011	First Payment
09/20/2011	Second Payment
01/20/2012	Third Payment
05/20/2012	Fourth Payment
08/20/2012	Fifth Payment
11/20/2013	Sixth Payment
02/20/2013	Seventh Payment
05/20/2013	Eighth Payment

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- First payment is due on May 20, 2011 and shall be made in form of a check payable to the **Peralta Community College District** in the amount of \$2,202.19.
- Second payment is due on September 20, 2011 and shall be made in form of a check payable to the **Peralta Community College District** in the amount of \$2,202.19.
- Third payment is due on January 20, 2012 and shall be made in form of a check payable to the **California Air Pollution Control Fund** in the amount of \$2,014.69.
- Fourth payment is due on May 20, 2012 and shall be made in form of a check payable to the **California Air Pollution Control Fund** in the amount of \$2,014.69.
- Fifth payment is due on August 20, 2012 and shall be made in form of a check payable to the **California Air Pollution Control Fund** in the amount of \$2,014.69.
- Sixth payment is due on November 20, 2012 and shall be made in form of a check payable to the **California Air Pollution Control Fund** in the amount of \$2,014.69.
- Seventh payment is due on February 20, 2013 and shall be made in form of a check payable to the **California Air Pollution Control Fund** in the amount of \$2,014.69.
- Eighth payment is due on May 20, 2013 and shall be made in form of a check payable to the **California Air Pollution Control Fund** in the amount of \$2,014.69.
- All payments and documents shall be sent to the attention of:

Dr. Xiangyi Li, Ph.D., ARE  
Air Resources Board  
Enforcement Division  
9480 Telstar Avenue 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, BTI 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 BTI, 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 BTI, 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 BTI, its subsidiary, or parent company, or a trustee in bankruptcy, custodian, receiver or agent is appointed or authorized to take charge of any of BTI's, its subsidiary, or parent company's properties, or if any deposit account or other property of BTI, 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 BTI, 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 BTI 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 BTI by the ARB arising from the facts described in recital paragraphs (1) – (12) are nondischargeable 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) BTI 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.
- (6) BTI shall have all staff responsible for compliance with the PSIP and the HDVIP attend the California Council on Diesel Education and Technology (CCDET) I & II class, as described on the ARB's webpage at [www.arb.ca.gov/msprog/hdvp/hdvp.htm](http://www.arb.ca.gov/msprog/hdvp/hdvp.htm). This class is conducted by various California Community Colleges and instructs 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, or as provided by BTI, rules, regulations, codes, or ordinances, whichever is longer. In case BTI uses a

contractor to perform the annual smoke opacity testing required under the PSIP, BTI shall obtain proof that the contractor's staff conducting the smoke opacity tests completed the CCDET I & II course within the last four years. This proof of the CCDET I & II completion shall be provided by BTI to the ARB within one year of the date of this settlement and shall also be maintained with the annual PSIP records.

- (7) BTI shall provide copies of all PSIP compliance records for the 2011, 2012 and 2013 to the ARB by January 31 of the following year. Copies shall be addressed to the attention of Dr. Xiangyi Li, Ph.D., ARE, Air Resources Board, Enforcement Division, 9480 Telstar Avenue Suite 4, El Monte, CA 91731. The ARB reserves the right to visit any BTI fleet location at any time to conduct compliance audits for the HDVIP and PSIP, or any other applicable ARB program.
- (8) BTI 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.
- (9) Each 1974 or newer diesel powered heavy-duty commercial vehicle in the BTI fleet shall comply with the emission control label (ECL) requirements set forth in Title 13, CCR, Section 2183 (c).
- (10) BTI shall instruct all employees who operate diesel fueled commercial vehicles to comply with the idling regulations set forth in Title 13, CCR, Section 2485, within 45 days of this Agreement.
- (11) BTI 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 BTI for compliance with Title 13, CCR, Section 2027 (d) (5) any time in the future.
- (12) BTI shall not violate the Drayage Truck Regulation, as codified in Title 13, CCR, Section 2027.
- (13) This Agreement shall apply to and be binding upon BTI, 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 BTI, concerning the subject matter hereof, and

supersedes and replaces all prior negotiations and agreements between ARB and BTI, 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 *H&SC* 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 *H&SC* sections 42403 and 43024.

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 *H&SC* section 39674. The penalty obtained for the drayage owner violations involved in this case is \$75.00 for 1 non-compliant drayage truck owned by BTI, and the penalty obtained for the drayage motor carrier violations involved in this case is \$17,355.00 for 2,314 non-compliant vehicles dispatched by BTI or \$7.50 per violation after considering the

factors specified in *H&SC* section 43024. This penalty was reduced because this was an unintentional, first time violation and the violator took exceptional efforts to come into compliance and cooperate with the investigation, and the violator's extreme financial hardship was taken into consideration.

#### 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 \$187.50 for 5 vehicles for two years of violations or \$37.50 per violation after considering the factors specified in *H&SC* section 43024. This penalty was reduced because this was an unintentional, first time violation and the violator took exceptional efforts to come into compliance and cooperate with the investigation, and the violator's extreme financial hardship was taken into consideration.

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

#### Drayage Violations

The penalty provision being applied for the Drayage Truck Regulation (Title 13, CCR, section 2027) violations in this case is *H&SC* 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 and because BTI, as a drayage truck owner, failed to bring all its drayage trucks into compliance, and as a motor carrier, dispatched drayage trucks that were either not compliant with the emission standards set forth in the Drayage Truck Regulation or not registered with the DTR.

#### PSIP Violations

The penalty provision being applied to the PSIP violations is *H&SC* section 43016 because BTI 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 5 vehicles. 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 the applicable penalty provision.



**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 opacity or level of g/hp-hr. 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.

- (20) BTI 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 H&SC 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.
- (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, and the potential costs and risk associated with litigating these particular violations. The penalty was discounted based on the fact that the drayage violations were first time violations and the violator made unusually diligent efforts to comply and to cooperate with the investigation. The penalty was also discounted based on the violator's extreme financial hardship. Penalties in future cases might be smaller or larger on a per unit basis.
- (22) The penalty was based on confidential settlement communications between ARB and BTI 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 BTI and reflects ARB's assessment of the relative strength of its case against BTI, the desire to avoid the uncertainty, burden and expense of litigation, obtain swift compliance with the law and remove any unfair advantage that BTI may have secured from its actions.
- (23) Now, therefore, in consideration of the payment by BTI, in the amount of seventeen thousand six hundred seventeen dollars and fifty cents (\$17,617.50), ARB hereby releases BTI and its principals, officers, directors, agents, subsidiaries, predecessors, and successors from any and all claims that ARB may have based on the facts and allegations described in recital paragraphs (1) – (12) above. The undersigned represent that they have the authority to enter into this Agreement.

**California Air Resources Board**

By: Ellen M. Peter

Name: Ellen M. Peter

Title: Chief Counsel

Date: 5/24/2011

**Brotherhood Trucking Inc.**

By: Scott Lisitzer

Name: Scott Lisitzer

Title: President

Date: 5/11/11