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 FRESHKO PRODUCE SERVICES (hereinafter "FRESHKO"), located at 2155 E. Muscat Ave., Fresno, CA 93725.

I. RECITALS

(1) California Health and Safety Code (HSC) 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, California Code of Regulations (CCR), title 13, chapter 3.5, sections 2180-2188.

(2) HSC 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) CCR, title 13, section 2190 *et seq.* was adopted under the authority of HSC 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 that operate on the streets or highways within the State of California.

(4) CCR, title 13, section 2190 *et seq.* authorizes 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 that 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) CCR, title 13, 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) HSC 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 not to exceed five hundred dollars ($500.00) per vehicle…."

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

(8) ARB contends FRESHKO failed to test, measure, record, and maintain records of smoke emissions from a portion of its fleet of heavy-duty diesel vehicles for year 2011 in violation of CCR, title 13, section 2190 *et seq.*

(9) HSC 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 TAC. Drayage trucks powered by diesel fueled engines emit toxic PM. Drayage trucks are controlled under the Drayage Truck Regulation as codified in CCR, title 13, section 2027.

(10) CCR, title 13, 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).

(11) The ARB has documented that FRESHKO, 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.

(12) CCR, title 13, section 2027(d)(3)(A) requires that drayage truck owners register all trucks traveling into ports and/or intermodal rail yards with the Drayage Truck Registry (DTR) prior to commencing operations.

(13) The ARB has documented that FRESHKO, as a drayage truck owner, failed to register all trucks traveling into ports and/or intermodal rail yards with the DTR prior to commencing operations.

(14) CCR, title 13, section 2027(d)(5)(A)(2) requires that 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 that motor carriers only dispatch drayage trucks that are registered and in good standing with the DTR.

(15) The ARB has documented that FRESHKO, as a motor carrier, dispatched drayage trucks that were not compliant with the emissions standards set forth in the Drayage Truck Regulation and dispatched drayage trucks that were not registered with the DTR.

(16) Transport Refrigeration Units (TRUs) are powered by diesel fueled engines that emit toxic PM. TRUs are controlled under CCR, title 13, section 2477.

(17) CCR, title 13, section 2477(e)(1)(A)(1) states: No owner/operator shall operate a TRU or TRU generator (gen) set in California unless it meets the in-use emission category performance standard by the deadlines set forth in the TRU ATCM.

(18) The ARB Enforcement Division has documented that FRESHKO, failed to bring a portion of their fleet of TRUs in compliance with the in-use performance standard by the deadlines set forth in the TRU ATCM.

(19) HSC sections 39674(a) and (b) authorize civil penalties for the violation of the programs for the regulation of TACs not to exceed one thousand dollars ($1,000) or ten thousand dollars ($10,000), respectively, for each day in which the violation occurs.

(20) FRESHKO 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 AND RELEASE

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

(1) Upon execution of this Agreement, FRESHKO shall pay a civil penalty of three thousand thirty seven dollars and fifty cents ($3,037.50). Payment shall be made in check form as described below and the payment will be made no later than March 29, 2013.

SETTLEMENT AGREEMENT AND RELEASE ARB AND FRESHKO:

- $2,278.13 made out to **California Air Pollution Control Fund**
- $759.37 made out to **Peralta College Foundation**

All payments and documents shall be sent to the attention of:

Ms. Heather Brown, Air Pollution Specialist
Air Resources Board, Enforcement Division
9480 Telstar Ave., No. 4
El Monte, CA 91731

(2) FRESHKO shall not violate HSC sections 43701 *et seq.* and 44011.6 *et seq.*, and CCR, title 13, sections 2180 *et seq.*, 2190 *et seq.*, and 2485 *et seq.*

(3) FRESHKO shall comply with one or both of the following options to attend the California Council on Diesel Education and Technology (CCDET I) class, (SAE J1667 Snap Acceleration Smoke Test Procedure for Heavy-Duty Diesel Powered Vehicles) as described on the ARB webpage at http://www.arb.ca.gov/enf/hdvip/ccdet/ccdet.htm. This class is conducted by various California Community Colleges and instructs attendees on compliance with the PSIP, ECL and the HDVIP.

a. FRESHKO shall have the fleet maintenance manager (or equivalent) and all staff performing opacity tests for compliance with PSIP and the HDVIP attend the CCDET I class. Proof of CCDET I completion shall be provided to ARB within six months of the date of this Agreement and be maintained in each applicable employee's file for the term of his or her employment.

b. If FRESHKO uses a contractor to perform the annual smoke opacity testing required under the PSIP, in addition to having the fleet maintenance manager (or equivalent) attend the CCDET I course, FRESHKO shall obtain proof that the contractor's staff conducting the smoke opacity tests completed the CCDET I course within the past four years. This proof of CCDET I completion shall be provided to ARB with PSIP records as required by this Agreement and be maintained with the annual PSIP records.

(4) FRESHKO 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 exhaust after treatment systems (EATS).

a. FRESHKO shall have the fleet maintenance manager (or equivalent) and all staff responsible for maintenance of EATS and 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 FRESHKO uses a contractor for the maintenance of EATS, in addition to having the fleet maintenance manager (or equivalent) attend the CCDET II course, FRESHKO shall obtain proof that the contractor's staff maintaining the EATS device(s) completed the CCDET II course within the last four years. This proof of the CCDET II completion shall be provided by FRESHKO to the ARB within six months of the date of this settlement and be maintained with the EATS installation and maintenance records.

(5) FRESHKO shall submit copies of all PSIP compliance records for years 2012 to the ARB within 30 days of the execution of this Agreement and for 2013 to the ARB by January 31 of the following year. Copies shall be addressed to the attention of Ms. Heather Brown, Air Pollution Specialist, Air Resources Board, Enforcement Division, 9480 Telstar Ave. No. 4, El Monte, CA 91731. The ARB reserves the right to visit any FRESHKO fleet location at any time to conduct compliance audits for the HDVIP and PSIP, or any other applicable ARB program.

(6) FRESHKO 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.

(7) Each 1974 or newer diesel powered heavy-duty vehicle in the FRESHKO fleet shall remain in compliance with the emission control label (ECL) requirements set forth in the CCR, title 13, section 2183(c).

(8) FRESHKO shall instruct all employees who operate diesel fueled commercial vehicles in California to comply with the idling regulations set forth in CCR, title 13, section 2485 within 45 days of the execution of this agreement.

(9) FRESHKO 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 FRESHKO for compliance with CCR, title 13, section 2027(d)(5) any time in the future.

(10) FRESHKO shall not violate the Drayage Truck Regulation, as codified in CCR, title 13, section 2027.

(11) FRESHKO shall not violate the TRU ATCM, as codified in title 13 CCR, section 2477.

(12) FRESHKO shall not violate the Truck and Bus regulation as codified in CCR, title 13, section 2025.

(13) This Agreement shall apply to and be binding upon FRESHKO 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 FRESHKO concerning the subject matter hereof, and supersedes and replaces all prior negotiations and agreements between ARB and FRESHKO 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) **Senate Bill 1402**

Senate Bill 1402 (Dutton, Chapter 413, statutes of 2010) requires the ARB to provide information on the basis for the penalties it seeks (see HSC 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.

- PSIP Violations

  The per vehicle penalty for the PSIP violations involved in this case is a maximum of $500 per vehicle per violation. The penalty obtained for the PSIP violations involved in this case is $375.00 for 1 vehicle, or $375.00 per vehicle per violation. The penalty was discounted based on the fact that this was a first time violation and the violator made diligent efforts to comply and to cooperate with the investigation.

- 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.

  Non-Compliant Drayage Trucks

  The penalty obtained for the drayage truck owner violations involved in this case for non-compliant drayage trucks is $750.00 for 1 vehicle, or $750.00 per vehicle per violation.

  Failure to Register Drayage Trucks

  The penalty obtained for the drayage truck owner violations involved in this case for failing to register drayage trucks is $750.00 for 2 vehicles, or $375.00 per vehicle per violation.

  Dispatching Non-Compliant or Non-Registered Drayage Trucks

  The penalty obtained for the drayage motor carrier violations involved in this case is $225.00 for 3 dispatches of non-compliant vehicles by FRESHKO, or $75.00 per violation, and $187.50 for 5 dispatches of non-registered vehicles by FRESHKO, or $37.50 per violation.

  The penalties were discounted based on the fact that this was a first time violation and the violator made diligent efforts to comply and to cooperate with the investigation.

- 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 vehicle per day for negligent or intentional violations pursuant to HSC section 39674. The penalty obtained for the TRU violation involved in this case is $750.00 for 1 non-compliant TRU

operated by FRESHKO, or $750.00 per unit per violation. The penalty was discounted based on the fact that this was a first time violation and the violator made diligent efforts to comply and to cooperate with the investigation.

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

- PSIP Violations
  The penalty provision being applied to the PSIP violations in HSC section 43016 because FRESHKO failed to test, measure, record, and maintain records of smoke emissions from its fleet of heavy duty diesel vehicles for the year 2011 in violation of the PSIP regulation in CCR, title 13, section 2190 *et seq.*, for 1 vehicle. Since the PSIP regulation was adopted pursuant to authority granted in Part 5 of Division 26 of the Health and Safety Code and since there is no specific penalty or find provided for PSIP violations in Part 5, HSC section 43016 is the applicable penalty provision.

- Drayage Violations

  The penalty provision being applied for the Drayage Truck Regulation (CCR, title 13, 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 and because FRESHKO, as a drayage truck owner, failed to bring all its drayage trucks into compliance and to register all of its drayage trucks with the DTR, and as a motor carrier, dispatched drayage trucks that were not compliant with the emission standards set forth in the Drayage Truck Regulation and were not registered with the DTR.

- TRU Violations

  The penalty provision being applied for the Air Toxic Control Measure for In-Use Diesel-Fueled Transport Refrigeration Unit and TRU Generator Set (CCR, title 13, section 2477 et seq.) violations (including registration and labeling) is HSC section 39674 because the TRU rule is an Air Toxic Control Measure adopted pursuant to authority

contained in HSC sections 39650-39675. FRESHKO, as an owner of TRUs, failed to bring all TRUs in its fleet into compliance by the deadlines set forth in the TRU ATCM.

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.

- PSIP, Drayage, and TRU Violations

  The PSIP, Drayage, and TRU 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 units involved and their individual emission rate are not known, it is not practicable to quantify the excess emissions.

(20) FRESHKO acknowledges that ARB has complied with SB 1402 in prosecuting and settling the 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.

(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.

(22) Penalties in future cases might be smaller or larger on a per unit/vehicle basis.

(23) The penalty was based on confidential settlement communications between ARB and FRESHKO that ARB does not retain in the ordinary course of business either. The penalty is the product of an arm's length negotiation between ARB and FRESHKO and reflects ARB's assessment of the relative strength of its case against FRESHKO, the desire to avoid the uncertainty,

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

(24) Now, therefore, in consideration of the payment by FRESHKO, in the amount of three thousand thirty seven dollars and fifty cents ($3,037.50), ARB hereby releases FRESHKO 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) through (19) above. The undersigned represent that they have the authority to enter into this Agreement.

California Air Resources Board		Freshko Produce Services	
By:		By:	Manuel Robles
Name:	James R. Ryden	Name:	Manuel Robles
Title:	Chief, Enforcement Division	Title:	COO
Date:	4/3/13	Date:	3-18-13