# 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 NEWSTAR FRESH FOODS, LLC (hereinafter "NEWSTAR"), 900 Work Street, Salinas, California 93901.

## I. RECITALS

(1) California Health and Safety Code sections 39650-39675 (HSC §§ 39650-39675) mandate the reduction of the emissions of substances that have been determined to be toxic air contaminants. In 1998, following an exhaustive ten-year scientific assessment process, ARB identified particulate matter (PM) from diesel-fueled engines as a toxic air contaminant. In-use on-road diesel vehicles are powered by diesel fueled engines that emit toxic PM. On-road vehicles are controlled under the Truck and Bus regulation, as codified in 13 CCR § 2025.

(2) 13 CCR § 2025(x)(2) provides that "Any in-state or out-of-state motor carrier, California broker, or any California resident, who operates or directs the operation of any vehicle subject to this regulation shall verify that each hired or dispatched vehicle is in compliance with the regulation and comply with the record keeping requirement of section 2025(s)(4)."

(3) Failure to comply with the requirements of 13 CCR § 2025 is a violation of state law resulting in penalties. HSC §§ 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.

(4) ARB Enforcement Division has documented that NEWSTAR failed to verify that each hired or dispatched vehicle is in compliance with the Truck and Bus regulation and one such fleet was ultimately determined out of compliance of the Truck and Bus regulation.

(5) Transport Refrigeration Units (TRU) are powered by diesel fueled engines that emit toxic PM. TRUs are regulated under the Airborne Toxic Control Measure for In-Use Diesel-Fueled Transport Refrigeration Units and TRU Generator Sets, and Facilities Where TRUs Operate (TRU ATCM) as codified in 13 CCR § 2477.1 through 2477.21.

(6) 13 CCR § 2477.8 requires that beginning January 1, 2013, freight brokers and freight forwarders that arrange, hire, contract for, or dispatch the transport of perishable goods in TRU-equipped or TRU gen set-equipped trucks, tractor-trailers, shipping containers, or railcars on California highways or railways must require the carriers they hire or contract with for transport of perishable goods, to only dispatch TRU-equipped trucks, trailers, shipping containers, and railcars or

TRU gen sets that comply with § 2477.5(a) if they travel on California highways or railways.

(7) 13 CCR § 2477.10 requires that beginning January 1, 2013, California-based shippers that arrange, hire, contract for, or dispatch the transport of perishable goods in TRU-equipped trucks, trailers, shipping containers, or railcars, or TRU gen sets on California highways or railways must: (a) dispatch TRUs or TRU gen sets that comply with § 2477.5(a) if they travel on California highways or railways or (b) require the carriers they hire or contract with for transport of perishable goods, to only dispatch TRUs or TRU gen sets that comply with § 2477.5(a) if they travel on California highways or railways.

(8) Failure to comply with the requirements of 13 CCR § 2477 is a violation of state law resulting in penalties. HSC § 39674 authorizes civil penalties of up to ten thousand dollars ($10,000) for each day that the violation occurs.

(9) ARB Enforcement Division has documented that NEWSTAR failed to require the carriers it hired or contracted with for transport of perishable goods, to only dispatch compliant TRUs when they traveled on California highways or failed to dispatch compliant TRUs when they traveled on California highways.

(10) In order to resolve these alleged violations, NEWSTAR has taken, or agreed to take, the actions enumerated below under "RELEASE". Further, ARB accepts this Agreement in termination and settlement of this matter.

(11) 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, ARB and NEWSTAR agree as follows:

## II. TERMS AND RELEASE

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

(1) Upon execution of this Agreement, the sum of ten thousand dollars ($10,000.00) shall be paid on behalf of NEWSTAR no later than June 3, 2016, as follows:

- $7,500.00 payable to the **Air Pollution Control Fund**
- $2,500.00 payable to the **Peralta Colleges Foundation**

**Please send the signed Settlement Agreement and any future mailings or documents required per the terms of this Settlement Agreement to:**

**Dr. Xiangyi Li, Ph.D., P.E.**
**Air Resources Engineer**
**California Air Resources Board**
**Enforcement Division**
**9480 Telstar Avenue, Suite 4**
**El Monte, California 91731**

**Please send the payment along with the attached "Settlement Agreement Payment Transmittal Form" (Attachment A) to:**

**California Air Resources Board**
**Accounting Office**
**P.O. Box 1436**
**Sacramento, California 95812-1436**

(2) If the Attorney General files a civil action to enforce this settlement agreement, NEWSTAR shall pay all costs of investigating and prosecuting the action, including expert fees, reasonable attorney's costs, and costs.

(3) 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 NEWSTAR 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 NEWSTAR by ARB arising from the facts described in recital paragraphs (1) through (9) 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.

(4) NEWSTAR shall verify that each hired or dispatched vehicle is in compliance with the Truck and Bus regulation.

(5) NEWSTAR shall not violate the Truck and Bus regulation as codified in 13 CCR § 2025.

(6) NEWSTAR shall (a) dispatch TRUs or TRU gen sets that comply with 13 CCR § 2477.5(a) if they travel on California highways or railways or (b) require the carriers it hire or contract with for transport of perishable goods, to only dispatch

TRUs or TRU gen sets that comply with 13 CCR § 2477.5(a) if they travel on California highways or railways.

(7) NEWSTAR shall not violate TRU ATCM as codified in 13 CCR § 2477.

(8) This Agreement shall apply to and be binding upon NEWSTAR, 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.

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

(10) 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.

(11) 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.

(12) 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.

(13) 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.

(14) Senate Bill 1402 (Dutton, Chapter 413, statutes of 2010) requires ARB to provide information on the basis for the penalties it seeks (HSC § 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 §§ 42403 and 43024.

Truck and Bus Violation

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.

The penalty obtained for the Truck and Bus violation involved in this case for failure to verify that each hired or dispatched vehicle is in compliance with the Truck and Bus regulation is $5,000.00 for one hired fleet ultimately determined out of compliance with the Truck and Bus regulation or $5,000.00 per hired fleet ultimately determined out of compliance with the Truck and Bus regulation.

The penalty was discounted due to financial hardship and 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 Violation

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 § 39674. The penalty obtained for the TRU violation involved in this case is $5,000.00 for failure to require the hired carrier to only dispatch compliant TRUs or failure to dispatch compliant TRUs, for one hired fleet with noncompliant TRUs or $5,000.00 per hired fleet with noncompliant TRUs.

The penalty was discounted due to financial hardship and 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.**

Truck and Bus Violation

The penalty provision being applied for the Truck and Bus regulation (13 CCR § 2025) violations in this case is HSC § 39674 because the Truck and Bus regulation is an Airborne Toxic Control Measure adopted pursuant to authority contained in HSC §§ 39002 *et seq.*, 39650-39675 and because NEWSTAR failed to verify that each hired or dispatched vehicle is in compliance with the Truck and Bus regulation and one such fleet was ultimately determined out of compliance with the Truck and Bus regulation.

TRU Violation

The penalty provision being applied for the TRU ATCM (13 CCR § 2477) violations is HSC § 39674 because the TRU rule is an Air Toxic Control Measure adopted pursuant to authority contained in HSC §§ 39002 *et seq.*, 39650-39675 and NEWSTAR failed to require the hired carriers to only dispatch compliant TRUs or failed to dispatch compliant TRUs.

**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.**

Truck and Bus Violation

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

TRU Violations

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

(15) NEWSTAR acknowledges 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 § 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.

(16) 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.

(17) The penalty was based on confidential settlement communications between ARB and NEWSTAR that ARB does not retain in the ordinary course of business. The penalty is the product of an arms length negotiation between ARB and

NEWSTAR and reflects ARB's assessment of the relative strength of its case against NEWSTAR, the desire to avoid the uncertainty, burden and expense of litigation, obtain swift compliance with the law and remove any unfair advantage that NEWSTAR may have secured from its actions.

(18) Now therefore, in consideration of the payment on behalf of NEWSTAR to the Air Pollution Control Fund and the Peralta Colleges Foundation, ARB hereby releases NEWSTAR and their principals, officers, agents, predecessors and successors from any and all claims, ARB may have or have in the future based on the circumstances described in paragraphs (1) through (9) of the Recitals. The undersigned represent that they have the authority to enter into this Agreement.

| **California Air Resources Board** | | **NewStar Fresh Foods, LLC** | |
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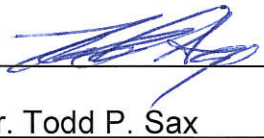
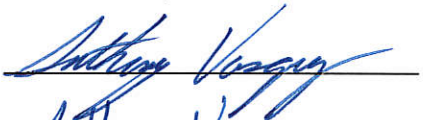
| Signature: |  | Signature: |  |
| Print Name: | Dr. Todd P. Sax | Print Name: | Anthony Vasquez |
| Title: | Chief, Enforcement Division | Title: | President |
| Date: | 6/1/16 | Date: | 05/25/2016 |