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 WEST COAST REFRIGERATED TRUCKING, INC. (hereinafter "WCRT"), P.O. Box 6464, Oxnard, California 93031.

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 WCRT failed to test, measure, record, and maintain records of smoke emissions from part of 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* 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. Transport Refrigeration Units (TRUs) are powered by diesel fueled engines that emit toxic particulate matter. TRUs are controlled under the TRU Airborne Toxic Control Measure (ATCM) as codified in Title 13, CCR, Section 2477.

(10) Title 13, CCR, Section 2477 (e) (1) (A) requires TRU owner/operators comply with the in-use emission category performance standards on or before the in-use compliance dates set forth in Section 2477 (e) (1) (B).

(11) The ARB Enforcement Division staff has documented that WCRT failed to bring all TRUs in its fleet into compliance by the deadlines set forth in the TRU ATCM.

(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 WCRT, as provided in *H&SC* Sections 43016 and 39674.

(14) WCRT 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 WCRT, for the violations alleged above, ARB and WCRT agree as follows:

(1) Upon execution of this Agreement, WCRT shall pay a civil penalty of $15,750.00. Payment shall be made in the check form as described below:

- $11,812.50 to the **California Air Pollution Control Fund.**
- $3,937.50 to the **Peralta Community College District.**

ARB to receive by:

04/27/2011	First Payment
08/27/2011	Second Payment
12/27/2011	Third Payment
04/27/2012	Fourth Payment

- First payment is due on April 27, 2011 and shall be made in form of a check payable to the **Peralta Community College District** in the amount of $3,937.50.
- Second payment is due on August 27, 2011 and shall be made in form of a check payable to the **California Air Pollution Control Fund** in the amount of $3,937.50.
- Third payment is due on December 27, 2011 and shall be made in form of a check payable to the **California Air Pollution Control Fund** in the amount of $3,937.50.
- Fourth payment is due on April 27, 2012 and shall be made in form of a check payable to the **California Air Pollution Control Fund** in the amount of $3,937.50.
- 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, WCRT 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 WCRT, 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 WCRT, 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 WCRT, its subsidiary, or parent company, or a trustee in bankruptcy, custodian, receiver or agent is appointed or authorized to take charge of any of WCRT's, its subsidiary, or parent company's properties, or if any deposit account or other property of WCRT, 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 WCRT, 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 WCRT 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 WCRT 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) WCRT 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) WCRT 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 classes, as described on the ARB's webpage at www.arb.ca.gov/msprog/hdvip/hdvip.htm. These classes are 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 WCRT, rules, regulations, codes, or ordinances, whichever is longer. In case WCRT uses a contractor to perform the annual smoke opacity testing required under the PSIP, WCRT shall obtain proof that the contractor's staff conducting the smoke opacity tests completed the CCDET I & II courses within the last four years. This proof of the CCDET I & II completion shall be provided by WCRT to the ARB within one year of the date of this settlement and shall also be maintained with the annual PSIP records.

(7) WCRT 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 WCRT fleet location at any time to conduct compliance audits for the HDVIP and PSIP, or any other applicable ARB program.

(8) WCRT 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 WCRT fleet shall comply with the emission control label (ECL) requirements set forth in Title 13, CCR, Section 2183 (c).

(10) WCRT 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) WCRT shall comply with the TRU in-use performance standards set forth in Title 13, CCR, Section 2477 (e) (1) (A). Within 45 days of the execution of this Agreement, WCRT shall submit the proof of the compliance with

the TRU ATCM to: Dr. Xiangyi Li, Ph.D., ARE, Air Resources Board, Enforcement Division, 9480 Telstar Avenue Suite 4, El Monte, CA 91731.

(12) WCRT shall not violate the TRU ATCM, as codified in Title 13, CCR, Section 2477.

(13) This Agreement shall apply to and be binding upon WCRT, 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 WCRT, concerning the subject matter hereof, and supersedes and replaces all prior negotiations and agreements between ARB and WCRT, 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.

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 unit per day for negligent or intentional violations pursuant to *H&SC* section 39674. The penalty obtained for the TRU violations involved in this case is $10,500.00 for 14 units or $750 per violation after considering the factors specified in *H&SC* section 43024.

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 $5,250.00 for 14 violations over two years or $375 per violation after considering the factors specified in *H&SC* section 43024.

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

TRU Violations

The penalty provision being applied for the TRU ATCM (Title 13, CCR, section 2477) violations in this case is *H&SC* section 39674 because the TRU ATCM is a Toxic Air Contaminant Control Measure adopted pursuant to authority contained in *H&SC* section 39660, et seq. and because WCRT failed to bring TRUs in its fleet into compliance by the deadlines set forth in the TRU ATCM.

PSIP Violations

The penalty provision being applied to the PSIP violations is *H&SC* section 43016 because WCRT 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 inTitle13, CCR sections 2190 et seq. for 14 violations. 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 and TRUs involved and their individual emission rates are not known, it is not practicable to quantify the excess emissions.

(20) WCRT 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 TRU violations were first time violations and the violator made unusually diligent efforts to comply and to cooperate with the investigation. 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 WCRT 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 WCRT and reflects ARB's assessment of the relative strength of its case against WCRT, the desire to avoid the uncertainty, burden and expense of litigation, obtain swift compliance with the law and remove any unfair advantage that WCRT may have secured from its actions.

(23) Now, therefore, in consideration of the payment by WCRT, in the amount of fifteen thousand seven hundred and fifty dollars ($15,750.00), ARB hereby releases WCRT 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: _____

Name: Ellen M. Peter
Title: Chief Counsel
Date: 5/25/2011

West Coast Refrigerated Trucking, Inc.

By: _____

Name: Albert Cabral
Title: President
Date: 5/2/11