

SETTLEMENT AGREEMENT AND RELEASE

ARB and David Sohmekh, Goel Sohmekh, Jarid Sohmekh and Service Station DAG, Inc. dba A-Z Gas and Smog

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Settlement Agreement and Release

This SETTLEMENT AGREEMENT AND RELEASE ("Agreement") is entered into between the California Air Resources Board ("ARB"), with its principal office at 1001 I Street, Sacramento, California 95814, and David Sohmekh, Goel Sohmekh, Jarid Sohmekh and Service Station DAG, Inc. dba A-Z Gas and Smog ("A-Z") with its principal place of business at 16940 E. Gladstone, Azusa, California 91702, "the Parties" hereinafter.

I. RECITALS

- (1) California Code of Regulations, title 13, section 2281, subdivision (a)(2) provides in pertinent part as follows: Starting June 2006 ... no person shall sell, offer for sale, supply or offer for supply any vehicular diesel fuel having a sulfur content exceeding 15 parts per million by weight.
- (2) Pursuant to Health and Safety Code section 43027, subdivision (c), any person who violates any provision of this part, or any rule, regulation, permit, variance, or order of the state board, pertaining to fuel requirements and standards, exclusive of the documentation requirements specified in subdivision (d), is strictly liable for a civil penalty of not more than thirty-five thousand dollars (\$35,000).
- (3) Health and Safety Code section 43031(b) states, "In determining the amount assessed, ...the state board, in reaching any settlement, shall take into consideration all relevant circumstances, including, but not limited to, all of the following: (1) The extent of harm to public health, safety, and welfare caused by the violation. (2) The nature and persistence of the violation, including the magnitude of the excess emissions. (3) The compliance history of the defendant, including the frequency of past violations. (4) The preventive efforts taken by the defendant, including the record of maintenance and any program to ensure compliance. (5) The innovative nature and the magnitude of the effort required to comply, and the accuracy, reproducibility, and repeatability of the available test methods. (6) The efforts to attain, or provide for, compliance. (7) The cooperation of the defendant during the course of the investigation and any action taken by the defendant, including the nature, extent, and time of response of any action taken to mitigate the violation. (8) For a person who owns a single retail service station, the size of the business."
- (4) On November 29, 2011, at approximately 1100 hours, the Enforcement Division of the Air Resources Board (ARB) obtained diesel fuel sample number 7758 from the A-Z Gas and Smog underground storage tank located at 16940 E. Gladstone in Azusa, California. The diesel fuel sample was analyzed for sulfur content by the Monitoring and Laboratory Division of the ARB; the analysis showed that the diesel fuel had a sulfur content of 35.6 parts per million (ppm), which exceeds the State standard of 15 ppm.

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(5) On December 6, 2011, at approximately 0830 hours, the Enforcement Division of the ARB obtained diesel sample number 7758A from the A-Z Gas and Smog underground storage tank. The diesel fuel sample was analyzed for sulfur content by the ARB; the analysis showed that the diesel fuel had a sulfur content of 67.6 ppm, which exceeds the State standard of 15 ppm.

(6) ARB alleges that the sale, offer for sale, supply and/or offer for supply of the high sulfur diesel was unlawful and in violation of California Code of Regulations, title 13, section 2281, subdivision (a)(2).

(7) ARB contends that if the allegations described in recital paragraphs (1) through (6) hereinabove were proven, penalties could be imposed against A-Z pursuant to Health and Safety Code sections 43027 for each and every violation alleged.

(8) A-Z fully cooperated with ARB in the investigation of offers and sales of all diesel fuel to California customers.

(9) A-Z is a small station that sells diesel fuel in addition to gasoline.

(10) A-Z alleges that it only purchases diesel fuel from one supplier and produced bills of lading and other records to demonstrate this. A-Z alleges that there should not have been any significant amounts of sulfur in the diesel.

(11) A-Z alleges that none of its customers have complained of problems with their trucks, engines, or emission control system as a result of the diesel fuel.

(12) ARB has not received any complaints from A-Z's customers for problems with the customers' trucks, engines, or emission control system as a result of A-Z's diesel fuel.

(13) A-Z has demonstrated a financial hardship.

(14) A-Z admits the facts as alleged in recital paragraphs (1) through (7) above.

(15) A-Z is entering into this Agreement solely for the purpose of settlement and resolution of this matter with ARB. Further, 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.

II. TERMS AND RELEASE

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

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(1) As a condition of this Settlement Agreement, A-Z shall pay the total sum of five thousand dollars (\$5,000) as a penalty to the California Air Pollution Control Fund, payable in accordance with the following schedule:

- a. Two thousand and five hundred dollars (\$2,500) upon execution of this Agreement, and no later than June 15, 2014,
- b. Five hundred dollars (\$500) each month thereafter, due no later than the fifteenth day of the month.

Payment shall be made by check payable to the California Air Pollution Control Fund and addressed to:

Duong Trinh
Air Resources Board
Enforcement Division
9460 Telstar Avenue
El Monte, California 91731

(2) Effect of Untimely Payment. If a payment installment is not made within 5 days of the date specified above, the entire remaining balance, plus an additional late fee of \$15,000 as liquidated damages, shall become immediately due and payable without notice or demand. A-Z agrees to pay any fees or charges, including administrative late fees, charges, and assessments. The charges for late payment and nonpayment are liquidated damages intended to be a reasonable advance estimate of ARB's costs resulting from late payments or non-payments by A-Z, which costs will not be readily ascertainable, and will be difficult to predict or calculate, at the time that such administrative late fee(s) and related charges are set because it would be difficult to know in advance: (a) whether A-Z will pay on a timely basis, (b) if A-Z does pay late, when it will actually pay, if ever, and (c) what costs ARB will incur because of A-Z's late payment or non-payment. A-Z agrees that this additional late fee is a genuine pre-estimate of the loss, excluding the costs in Release paragraph (3), likely to be suffered as a result of any breach of contract.

(3) In addition, if the Attorney General files a civil action to enforce this settlement agreement, A-Z shall pay all costs of investigating and prosecuting the action, including expert fees, reasonable attorney's fees, and costs.

(4) It is agreed that if A-Z at any time becomes insolvent, or makes an assignment for the benefit of creditors or similar action adversely involving A-Z, 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 A-Z, or a trustee in bankruptcy, custodian,

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receiver or agent is appointed or authorized to take charge of any of A-Z's properties, or if any deposit account or other property of A-Z be attempted to be obtained or held by writ of execution, garnishment, attachment, condemnation, levy, forfeiture or other legal process, or A-Z takes any action to authorize any of the foregoing, the entire remaining balance becomes immediately due and payable without notice or demand.

(5) It is agreed that the penalty described in terms and release paragraph (1) is punitive in nature, rather than compensatory. Furthermore, the penalty is intended to deter and punish A-Z for violations of state environmental statutes, and this penalty is payable to and for the benefit of ARB, a governmental unit. Therefore, it is agreed that this penalty imposed on A-Z by ARB arising from the facts described in recital paragraphs (1) – (7) 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.

(6) A-Z agrees that it will not violate California Code of Regulations, title 13, section 2281 *et seq.* with respect to the delivery, sale, offer to sell, supply or offer to supply in California of diesel fuel that does not meet ARB's regulations found at California Code of Regulations, title 13, section 2281 *et seq.*

(7) This Agreement shall apply to and be binding upon A-Z and its principals, officers, directors, receivers, trustees, employees, successors and assignees, subsidiary and parent corporations, dealers, distributors, and upon ARB and any successor agency that may have responsibility for and jurisdiction over the subject matter of this Agreement.

(8) Now therefore, in consideration of the payment on behalf of A-Z in the amount of five thousand dollars (\$5,000) to the California Air Pollution Control Fund, ARB hereby releases A-Z and its principals, officers, agents, employees, shareholders, subsidiaries, predecessors and successors from any and all claims for past violations of California Code of Regulations, title 13, section 2281 ARB may have based on the events described in paragraphs (1) - (7) of the Recitals. The undersigned represent that they have the authority to enter this Agreement.

(9) This Agreement constitutes the entire agreement and understanding between ARB and A-Z concerning the claims and settlement in this Agreement, and this Agreement fully supersedes and replaces any and all prior negotiations and agreement of any kind or nature, whether written or oral, between ARB and A-Z concerning these claims.

(10) No agreement to modify, amend, extend, supersede, terminate, or discharge this Agreement, or any portion thereof, shall be valid or enforceable unless it is in writing and signed by all parties to this Agreement.

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(11) Advice of Counsel. Each Party to this Agreement has reviewed the Agreement independently, has had the opportunity to consult counsel, is fully informed of the terms and effect of this Agreement, and has not relied in any way on any inducement, representation, or advice of any other Party in deciding to enter into this Agreement.

(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) 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.

(14) Waiver. The failure of any Party to enforce any provision of this Agreement shall not be construed as a waiver of any such provision, nor prevent such Party thereafter from enforcing such provision or any other provision of this Agreement. The rights and remedies granted all Parties herein are cumulative and the election of one right or remedy by a Party shall not constitute a waiver of such Party's right to assert all other legal remedies available under this Agreement or otherwise provided by law.

(15) Captions. The captions by which the sections and subsections of this Agreement are identified are for convenience only, and shall have no effect whatsoever upon their interpretation.

(16) This Agreement may be executed in multiple counterparts, each of which shall be deemed to be an original, and such counterparts together shall constitute one and the same instrument.

(17) 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.

(18) 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. (Health & Saf. Code § 39619.7.) This information, which is provided throughout this settlement agreement, is summarized here. ARB alleges the following:

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

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specified in Health and Safety Code section 43031, subdivision (b).

The per unit penalty in this case is a maximum of \$35,000 per day per strict liability violation. ARB alleges that high sulfur diesel was sold, offered for sale, supplied and/or offered for supply over a time period of two days. The penalty obtained in this case is \$2,500 per day. This reflects the consideration of a number of facts, including: that this was an unintentional violation, A-Z's diligent efforts to comply and to cooperate with the investigation, A-Z owns a single service station, and the financial hardship imposed on A-Z.

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

The penalty provision being applied in this case is Health and Safety Code section 43027, subdivision (c) because ARB alleges that A-Z sold, offered for sale, supplied, and/or offered for supply diesel fuel in California in violation of California Code of Regulations, title 13, section 2281, subdivision (a)(2) and that such acts were not due to negligence or willful and intentional misconduct.

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 not prohibit emissions above a specified level. ARB alleges that since the fuels did not meet California air pollution standards, any emissions attributable to them are illegal. However, it is not practicable to quantify these emissions because the information necessary to do so is not available.

(19) A-Z acknowledges that ARB has complied with SB 1402 in prosecuting and settling this case. Specifically, ARB has considered all relevant facts, including those listed at Health and Safety Code section 43031, has explained the manner in which the penalty amount was calculated (including a per unit or per vehicle penalty, if appropriate), has identified the provision of law under which the penalty is being assessed and has considered and determined that this penalty is not being assessed under provision of law that prohibits the emission of pollutants at a specified level.

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 reflects violations extending over a certain number of days considered together with the complete circumstances of this case. The penalty was discounted in this matter based in part on

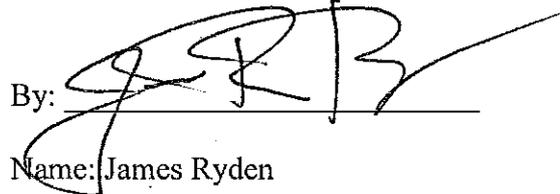
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the fact that A-Z made unusually diligent efforts to comply and to cooperate with the investigation. Penalties in future cases might be smaller or larger on a per day basis. The penalty in this case was based in part on confidential financial information or confidential business information provided by A-Z that has not been retained by ARB in the ordinary course of business. The penalty in this case was also based on confidential settlement communications between ARB and A-Z 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 A-Z and reflects ARB's assessment of the relative strength of its case against A-Z, the desire to avoid the uncertainty, burden and expense of litigation, obtain swift compliance with the law and remove any unfair advantage that A-Z may have secured from its actions.

California Air Resources Board

By: 

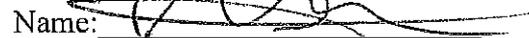
Name: James Ryden

Title: Enforcement Division Chief

Date: 6/4/14

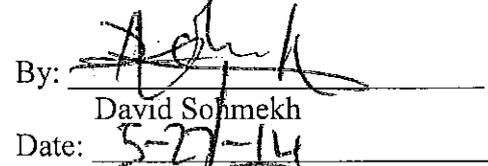
Service Station DAG, Inc. dba A-Z Gas and Smog

By: 

Name: 

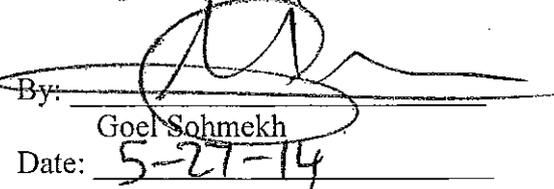
Title: owner

Date: 5-27-14

By: 

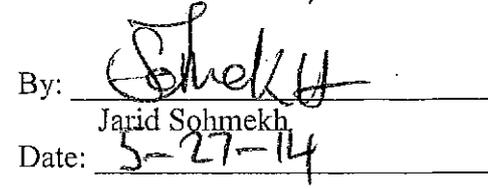
Name: David Sohmekh

Date: 5-27-14

By: 

Name: Goel Sohmekh

Date: 5-27-14

By: 

Name: Jarid Sohmekh

Date: 5-27-14