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CITY OF OAKLAND



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March 15, 2011

HONORABLE CITY COUNCIL
Oakland, California

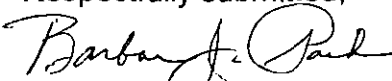
Subject: RESOLUTION APPROVING SETTLEMENT OF SAVE MART SUPERMARKETS V. CITY OF OAKLAND (ALAMEDA SUPERIOR COURT CASE NO. RG08422642, FIRST DISTRICT COURT OF APPEAL CASE NO. A126744), BY FRIENDLY CAB COMPANY'S PAYMENT OF \$45,000 OF \$100,000 ADMINISTRATIVE PENALTY AND ITS COMPLIANCE WITH HAZARDOUS MATERIALS HANDLING OBLIGATIONS (OAKLAND FIRE DEPARTMENT; HAZARDOUS MATERIALS HANDLING REGULATIONS)

Dear President Reid and Members of the City Council:

Pursuant to section 401 of the Charter, and the direction of the Council at its February 15, 2011, closed session, the City Attorney has prepared and requests your approval of a resolution authorizing settlement of the above-entitled lawsuit by Friendly Cab Company's payment of \$45,000 of \$100,000 administrative penalty and its compliance with hazardous materials handling laws.

Attached hereto are the proposed Resolution and Settlement Agreement.

Respectfully submitted,


for JOHN A. RUSSO
City Attorney

Attorney Assigned:
Kevin D. Siegel

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Approved as to Form and Legality


Oakland City Attorney's Office

OAKLAND CITY COUNCIL

Resolution No. _____ C.M.S.

RESOLUTION APPROVING SETTLEMENT OF FRIENDLY CAB COMPANY V. CITY OF OAKLAND (ALAMEDA SUPERIOR COURT CASE NO. RG08422642, FIRST DISTRICT COURT OF APPEAL CASE NO. A126744), BY FRIENDLY CAB COMPANY'S PAYMENT OF \$45,000 OF \$100,000 ADMINISTRATIVE PENALTY AND ITS COMPLIANCE WITH HAZARDOUS MATERIALS HANDLING OBLIGATIONS (OAKLAND FIRE DEPARTMENT; HAZARDOUS MATERIALS HANDLING REGULATIONS)

WHEREAS, in October 2007, Oakland Fire Department (OFD) staff issued an Enforcement Order which directed Friendly Cab Company (Friendly Cab) to comply with hazardous materials handling laws and imposed a fine of \$100,000 for certain violations; and

WHEREAS, Friendly Cab challenged the Enforcement Order at an Administrative Hearing, but the Hearing Officer denied the challenge and issued an Administrative Decision finding Friendly Cab had violated hazardous materials handling laws and confirming the fine of \$100,000; and

WHEREAS, rather than pay the fine, Friendly Cab filed a lawsuit in the Alameda Superior Court seeking to invalidate the Hearing Officer's Administrative Decision—*Friendly Cab Co. v. City of Oakland, California Fire Department* (Alameda Superior Court Case No. RG08422642)—and, after the Superior Court entered Judgment for the City, an appeal to the California Court of Appeal, First District (Appeal No. A126744), which is still pending; and

WHEREAS, in the meantime, Friendly Cab has made significant efforts to comply with hazardous materials handling laws at its East 12th Street facilities, but has yet to achieve complete compliance, including with respect to the spray area; and

WHEREAS, there remains significant time, expense and risk involved in continuing the litigation; and

WHEREAS, on February 15, 2011, the City Council considered whether to approve a settlement of the litigation; and

WHEREAS, consistently with the direction provided by the City Council in closed session, the City Attorney's Office and counsel for Friendly Cab have prepared a Settlement Agreement to resolve the litigation, the form of which is attached hereto; now therefore be it resolved

RESOLVED: The City Administrator, or his or her designee, is authorized to enter the Settlement Agreement, in substantially the same form as attached hereto, subject to final approval by the City Attorney.

IN COUNCIL, OAKLAND, CALIFORNIA,

PASSED BY THE FOLLOWING VOTE:

AYES - BRUNNER DE LA FUENTE, KERNIGHAN, NADEL, QUAN,
BROOKS, REID, KAPLAN, AND PRESIDENT REID

NOES -
ABSENT -
ABSTENTION -

ATTEST:

LATONDA SIMMONS
City Clerk and Clerk of the Council of
the City of Oakland, California

SETTLEMENT AGREEMENT

This Settlement Agreement is made this 15th day of March 2011 (the "Effective Date") by and between Plaintiff and Appellant Friendly Cab Company ("Friendly Cab") and Defendant and Respondent City of Oakland (the "City"), who are collectively referred to as the "Parties."

RECITALS

A. In June 2007, the City of Oakland's Fire Department ("OFD") commenced an Administrative Enforcement Action with respect to Friendly Cab. OFD staff inspected Friendly Cab's facilities, commonly known as 4849 East 12th Street, Oakland, CA (the "East 12th Street Facilities"), and issued a Notice of Violation directing Friendly Cab to remedy several violations of hazardous materials handling laws (e.g., regarding lack of disposal manifests, improper storage, insufficient employee training). Upon re-inspection, OFD staff determined that Friendly Cab had not cured numerous violations. In October 2007, OFD staff issued an Enforcement Order, which further directed Friendly Cab to comply with hazardous materials handling laws and imposed a fine of \$100,000 (the "Fine").

B. In accordance with the rights granted it by the Enforcement Order, Friendly Cab appealed the Enforcement Order to an administrative Hearing Officer. On or about July 10, 2008, the Parties participated in an Administrative Hearing before the Hearing Officer. Following the Administrative Hearing, the Hearing Officer issued an Administrative Decision, which upheld the Enforcement Order and Fine.

C. Following the issuance of the Administrative Decision, Friendly Cab filed a petition for a writ of administrative mandate in Alameda County Superior Court, entitled *Friendly Cab Co. v. City of Oakland, California Fire Department*, Alameda County Superior Court Case No. RG08422642 (the "Writ Proceeding"), which sought to overturn the Hearing Officer's Administrative Decision. Friendly Cab's petition in the Writ Proceeding was heard on July 13, 2009. On September 3, 2009 the Superior Court entered a judgment in the Writ Proceeding denying the petition for a writ of administrative mandate and upholding the Administrative Decision and Fine (the "Judgment"). Friendly Cab appealed the Judgment to the California Court of Appeal, First District, Appeal No. A126744 (the "Appellate Proceeding"). The Appellate Proceeding is still pending as of the Effective Date. The Writ Proceeding and the Appellate Proceeding are collectively referred to herein as the "Litigation".

D. Since the commencement of the Administrative Enforcement Action, Friendly Cab has made significant efforts to comply with hazardous materials handling laws at its East 12th Street Facilities. Attached hereto as Exhibit A, and incorporated herein, is a Friendly Cab Compliance Workplan, revised in December 2010 (the "Workplan"), which identifies violations noted by OFD staff and compliance actions OFD required Friendly Cab to take (the "Compliance Requirements"). Friendly Cab has made significant progress completing these compliance requirements, but it has yet to achieve complete compliance, including with respect to the spray area.

E. The Parties recognize that there remains significant time, expense and risk involved in continuing the Litigation. Thus, the Parties enter this Agreement in to avoid further

litigation and the associated time, expense and risk.

NOW, THEREFORE, based on the recitals above, and the mutual covenants and promises set forth herein, the adequacy of which is expressly acknowledged by Friendly Cab and the City, the Parties do hereby agree as follows:

AGREEMENT

1. The above recitals are incorporated herein.
2. Payment of \$45,000. Within 30 days of the Effective Date, Friendly Cab shall pay and the City shall accept the sum of Forty-Five Thousand Dollars (\$45,000). Payment shall be to the City of Oakland, and payment shall be delivered c/o the Office of the City Attorney.
3. Workplan Compliance. Within 60 days of the Effective Date, Friendly Cab shall complete all the Compliance Requirements identified in the Workplan. OFD shall promptly and diligently take all actions, and provide to Friendly Cab all reasonably needed cooperation and assistance, required of the OFD for Friendly Cab to timely complete the Compliance Requirements. To the extent any unreasonable action and/or omission by OFD delays Friendly Cab's completion of the Compliance Requirements, Friendly Cab's deadline for completing the Compliance Requirements shall be extended by an equal number of days, which extension OFD shall promptly confirm to Friendly Cab in writing. If OFD, in its sole discretion, which is to be reasonably exercised, reasonably determines that Friendly Cab has not fully completed the Compliance Requirements within the time required by this section 3 of the Settlement Agreement, Friendly Cab shall pay and the City shall accept the sum of Sixty-Five Thousand Dollars (\$65,000). Payment of this sum shall be to the City of Oakland, and payment shall be delivered c/o the Office of the City Attorney.
4. Termination of Litigation. Upon and after Friendly Cab's satisfaction of its obligations in paragraphs 2 and 3 above — whether by (a) timely payment of \$45,000 and timely compliance with its obligations to comply with the hazardous materials handling requirements identified in the attached Workplan, or (b) timely payment of the sum of \$45,000 and timely payment of the sum of \$65,000 — the City shall take no further action to enforce the Judgment. Furthermore, within 10 business days of Friendly Cab's satisfaction of its obligations in paragraphs 2 and 3 above — whether by (a) timely payment of \$45,000 and timely compliance with its obligations to comply with the hazardous materials handling requirements identified in the attached Workplan, or (b) timely payment of the sum of \$45,000 and timely payment of the sum of \$65,000 — Friendly Cab shall dismiss the Appellate Proceeding and the City shall file in the Alameda County Superior Court an acknowledgement of full satisfaction of the Judgment.
5. Mutual Release. Except for the obligations specified in this Settlement Agreement, Friendly Cab and the City hereby release and forever discharge each other, together with their employees, officers, agents, representatives, trustees, directors, partners, stockholders, attorneys, successors, assigns, heirs, personal representatives and executors, and all persons, firms, associations, co-partners, co-venturers, insurers, contractors, engineers, subcontractors, subsidiaries, parents, affiliates, or corporations connected therewith, and each of them from any and all claims, debts, liabilities, demands, obligations, costs, expenses, attorneys' fees, actions,

and causes of actions of every nature, character, and description whether known or unknown, directly or indirectly arising out of any matter, fact, and/or allegation related to the Enforcement Order and/or the Litigation.

6. Waiver of California Civil Code Section 1542. The Parties to the releases in paragraph 5 above hereby acknowledge that they are aware of the provisions of section 1542 of the Civil Code, which provides as follows:

A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.

Having been so informed, the parties to the releases in paragraph 5 above hereby elect to and do waive the provisions and benefits of Civil Code section 1542, effective upon the execution of this Settlement Agreement.

7. No Admission of Liability. Nothing herein shall be construed as an admission on the part of any of the Parties of any claims, demands, causes of action, obligations, damages or liabilities asserted by any other Party.

8. Attorneys' Fees and Costs. The Parties to this Agreement agree to bear their own attorneys' fees and costs incurred in resolving the Litigation and reaching this Settlement Agreement.

9. Authorization to Execute. Each Party represents that the individual signing this Settlement Agreement is authorized to bind the party on whose behalf he or she signs.

10. Entire Agreement. As to the matters set forth herein, this Settlement Agreement is the entire, integrated agreement and understanding of the Parties and supersedes any prior discussions, negotiations, commitments, contracts, agreements and understandings, whether written or oral, with respect to the subject matter hereof

11. Modification. This Settlement Agreement may be modified only by a writing signed by the Parties.

12. Severability. If any part of this Settlement Agreement is found to be void, invalid or unenforceable, the remainder shall remain in full force and effect and shall be interpreted to carry out the Parties' intent with respect to their obligations and rights.

13. Drafting of Agreement. The drafting and the negotiation of this Settlement Agreement has been participated in by each of the Parties or their counsel and, for all purposes, this Settlement Agreement shall be deemed to have been drafted jointly by all Parties.

14. Successors and Representatives. This Settlement Agreement shall be binding on and shall inure to the benefit of the successors and assigns of each Party.

15. Informed Consent. Each Party declares that prior to the execution of this Settlement Agreement, it and/or its duly authorized representatives have apprised themselves of sufficient relevant data, either through attorneys, experts or other sources of their own selection, in order to intelligently exercise their judgment in deciding whether to execute, and in deciding the contents of, this Settlement Agreement. Each Party states that this Settlement Agreement is entered into freely and voluntarily, upon the advice and with the approval of its counsel.

16. Applicable Law. This Settlement Agreement shall be interpreted in accordance with California law.

17. Execution in Counterparts. This Settlement Agreement may be executed in counterparts, and photo and fax copies shall constitute good evidence of such execution.

This Settlement Agreement is made as of the Effective Date.

FRIENDLY CAB COMPANY

CITY OF OAKLAND

By: _____

By: _____

Its: _____

Its: _____

dated: _____

dated: _____

APPROVED AS TO FORM:

APPROVED AS TO FORM:

By: _____
Hussein Saffouri, counsel for Friendly Cab

By: _____
Kevin D. Siegel, Deputy City Attorney

Friendly Cab Compliance Workplan



Code Requirements	Compliance Requirements	Compliance Date	Violations Observed
A. Uniform Fire Code/Oakland Municipal Code Inspection			
1. CFC - Chapter 9 Fire Protection Systems	a. 901.5 Occupancy. It is unlawful to occupy a building or structure until the fire detection or alarm system is approved. Provide NFPA 25 certification for sprinkler system located in the spray booth area. Fire sprinkler system shall be inspected monthly and records documenting inspection shall be maintained on site at all times	30 Days	During inspections conducted by Fire Prevention Bureau Inspectors, vehicle painting and maintenance was being performed by staff of the Friendly Cab Company. Records reviewed by staff indicated fire protection system had not been maintained in accordance with this requirement.
2. CFC - Chapter 9 Fire Protection Systems	b. 901.6-901.6.1 Standards Fire Protection systems shall be maintained in accordance with Table 901.6.1 and Chapters 3 and 5, Title 19 California Code of Regulations. Sprinkler control valves shall be in the open position, monitored and secured at all times. Certification of system test shall be affixed to the fire sprinkler system at all times and clearly visible.	30 Days	During inspections by staff, it was observed that the fire protection system control valve (OS&Y) was not secured or monitored as per this requirement.
	b.1 901.6.2 Records. Records for all system inspections, tests and maintenance required shall be maintained on the premises for a minimum of three years and shall be sent to the Fire Department Office of the Fire	30 days	Inspection records for the fire protection system were not readily available for review by Fire Prevention Bureau staff as required by CFC 901.6.2
	b.2 1002. Mount extinguishers where they are readily available, with the top not higher than 5 feet from the floor.	30 days	Extinguishers were observed to be not properly mounted or at improper distance for use by employees.

<p>3. CFC - Chapter 27 Hazardous Materials - General Provisions</p>	<p>a. 2701 Prevention, control, and mitigation of all dangerous conditions as related to the storage, use and handling of hazardous materials shall be in accordance with this chapter. Submit a Hazardous Materials Business Plan (HMBP). Provide and maintain training records for all personnel that handles hazardous waste and materials.</p> <p>b. 2704.2.2 Spill Control and secondary containment for liquid and solid hazardous waste and materials. Prepare and submit for review a spill response plan for all containers over fifty-five gallons. Obtain fire code permit for the storage of flammable liquids over 5 gallons inside of any buildings.</p> <p>c. 2704.2.2.6 Drainage system design. Drainage systems at the premise shall be design and installed in accordance with this section. Outside drainage shall be designed and installed to prevent the release of any oil or hazardous waste from entering into the storm drain system. Provide tests that demonstrate that fluids leaking on the vehicle operations area does not leave the site or contaminate any adjoining property.</p>	<p>60 Days</p> <p>30 Days</p> <p>60 Days</p>	<p>During inspections by OFD staff, it was observed that the Hazardous Materials Business Plan was not current and the training records for Friendly Cab Company staff was not available for review by Fire Bureau staff.</p> <p>Facility did not process a prepared SPCC Plan as required that had been sign by a registered engineer. No fire code permit for the storage and use of flammable liquids was available or had been approved by OFD.</p> <p>Per request by Fire Prevention Bureau staff facility was unable to provide the appropriate documentation to ensure that hazardous waste released on the Friendly Cab site would not enter into the storm drainage system.</p>
<p>5. CFC - Chapter 25 Tire Storage</p>	<p>a. 2501.1 Tire storage shall be in compliance with the requirements of this section of the Fire Code and with NFPA 13 and NFPA 230. Outside storage of tires shall be restricted to individual piles not exceeding 5,000 square feet of continuous area. Piles shall not exceed 10 feet in height.</p> <p>b. 2505.5 Fire Breaks. Storage yard shall be cleared of all combustible ground vegetation for a distance for 40 feet near the outside storage of tires</p>	<p>30 Days</p>	<p>During the inspection by OFD staff, it was observed that the storage of new and used tires did not meet the requirements as outlined in CFC 2501.1</p>

B. Storm Water Release Prevention/ Mitigation

1. Storm Water Prevention Plan

a. Provide a Storm Water Prevention Plan certified by a California registered engineer to address discharges from indoor and outdoor storage of hazardous materials from the maintenance of vehicles 60 Days