



ONE FRANK H. OGAWA PLAZA • 6TH FLOOR • OAKLAND, OA 94612

Office of the City Attorney
John A. Russo
City Attorney

(510) 238-3601
FAX: (510) 238-6500
TDD: (510) 839-6451

February 15, 2011

HONORABLE CITY COUNCIL
Oakland, California


Subject: RESOLUTION APPROVING SETTLEMENT OF SAVE MART SUPERMARKETS V. CITY OF OAKLAND (ALAMEDA SUPERIOR COURT CASE NO. RG10514461), BY PERMITTING THE CITY TO RETAIN TRANSFER TAXES, PENALTIES AND INTEREST IN THE AMOUNT OF \$553,764.61 IN EXCHANGE FOR PLAINTIFF'S DISMISSAL OF LAWSUIT CHALLENGING IMPOSITION OF THE TRANSFER TAXES, PENALTIES AND INTEREST AND THE CITY'S WAIVER OF CLAIMS TO ADDITIONAL PAYMENTS FROM SAVE MART (FINANCE AND MANAGEMENT AGENCY; REAL PROPERTY TRANSFER TAXES)

Dear President Reid and Members of the City Council:

Pursuant to section 401 of the Charter, and the direction of the Council at its January 18, 2011, closed session, the City Attorney has prepared and requests your approval of a resolution authorizing settlement of the above-entitled lawsuit by the entry of a settlement agreement allowing the City to retain **\$553,764.61** in real property transfer taxes, penalties and interest paid by Plaintiff, in exchange for Plaintiff's dismissal of the lawsuit challenging the imposition of said amount and the City's waiver of claims to additional payments from **Save Mart**.

Attached hereto are the proposed Resolution and Settlement Agreement.

Respectfully submitted,


JOHN A. RUSSO for
City Attorney

Attorney Assigned:
Kevin D. Siegel

FILED
OFFICE OF THE CITY CLERK
Approved as to Form and Legality
OAKLAND
2011 FEB 23 BY 528
Oakland City Attorney's Office

OAKLAND CITY COUNCIL

Resolution No. _____ C.M.S.

RESOLUTION APPROVING SETTLEMENT OF SAVE MART SUPERMARKETS V. CITY OF OAKLAND (ALAMEDA SUPERIOR COURT CASE NO. RG10514461), BY PERMITTING THE CITY TO RETAIN TRANSFER TAXES, PENALTIES AND INTEREST IN THE AMOUNT OF \$553,764.61 IN EXCHANGE FOR PLAINTIFF'S DISMISSAL OF LAWSUIT CHALLENGING IMPOSITION OF THE TRANSFER TAXES, PENALTIES AND INTEREST AND THE CITY'S WAIVER OF CLAIMS TO ADDITIONAL PAYMENTS FROM SAVE MART (FINANCE AND MANAGEMENT AGENCY; REAL PROPERTY TRANSFER TAXES)

WHEREAS, on or about **March 30, 2010**, the **Finance and Management Agency** issued a final administrative decision ("**Administrative Decision**") that **Save Mart Supermarkets** ("**Plaintiff**") owed real property transfer taxes, penalties and interest, pursuant to **Oakland Municipal Code Chapter 4.20**, in the amount of **\$553,764.61** (the "**Transfer Taxes**"), by the acquisition of real property in the City commonly known as **6344 Moraga Avenue/1975 Mountain Boulevard** in connection with the acquisitions of **Lucky Stores, Inc.** in 2006 and 2007; and

WHEREAS, **Plaintiff** paid the **Transfer Taxes** under protest and, on or about **May 11, 2010**, filed a **Petition for a Writ of Administrative Mandamus**, in **Alameda Superior Court** (Case No. **RG10514461**, the "**Lawsuit**") seeking to reverse the **Administrative Decision** and to obtain a refund of the **Transfer Taxes**, including on the ground that **Oakland Municipal Code Chapter 4.20** (the "**Real Property Transfer Tax Ordinance**") did not expressly authorize the taxation of the type of transfers at issue; and

WHEREAS, on **January 18, 2011**, the **City Council** considered whether to approve a settlement of the **Lawsuit**; and

WHEREAS, consistently with the direction provided by the **City Council** in closed session, the **City Attorney's Office** and counsel for **Plaintiff** have prepared

a Settlement Agreement to resolve the Lawsuit, the form of which is attached hereto; now therefore be it resolved

RESOLVED: The City Administrator, or his 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 and Mutual Release

This Settlement Agreement and Mutual Release (“Agreement”) is entered into this ___ day of February, 2011 by and between the City of Oakland (“the City”) and Save Mart Supermarkets, (“Save Mart”). The City and Save Mart are collectively referred to herein as “the Parties.”

WHEREAS, the City has asserted that Save Mart’s acquisition of an entity called Lucky Stores, Inc. in 2007 (“the 2007 Transaction”) included transfers of real property in the City of Oakland for which real property transfer taxes are owed pursuant to City of Oakland Municipal Code Chapter 4.20;

WHEREAS, the City has also asserted that Cerberus Group’s prior acquisition of Lucky Stores, Inc. in 2006 (“the 2006 Transaction”) also included transfers of real property in the City of Oakland for which real property transfer taxes are owed pursuant to City of Oakland Municipal Code Chapter 4.20;

WHEREAS, in July 2009 and in August 2009, the City issued real property transfer tax assessments with regard to both the 2006 Transaction and the 2007 Transaction. On March 30, 2010, the City issued final assessments totaling \$553,764.61 in taxes, penalties, and interest in connection with the 2006 and 2007 Transactions regarding the City’s assertion that the transactions included transfers of real property in the City commonly known as 6344 Moraga Avenue/1975 Mountain Boulevard (“the Original Assessments”);

WHEREAS, on or about April 14, 2010, Save Mart paid the City a total of \$553,764.61 in satisfaction of the Original Assessments; in its transmittal letter enclosing the payment, Save Mart expressly reserved its right to challenge the propriety of the assessment;

WHEREAS, on or about May 11, 2010, Save Mart filed a Petition For A Writ of Administrative Mandamus in Alameda County Superior Court. The matter is known as *Save Mart Supermarkets v. The City of Oakland* (Case No. RG-10-514461) (“the Litigation”).

WHEREAS, subsequent to the commencement of the Litigation, the City issued new assessments relating to the 2006 and 2007 Transactions re: real property located in the City (237 East 18th Street, 3100 East 9th Street, and 4055 MacArthur Boulevard) and owned by Lucky Stores, Inc. that was not subject to the Original Assessments. In these new assessments, the City seeks a total of \$1,707,706.50 in additional taxes, penalties, and assessments (“the New Assessments”).

WHEREAS, the Parties desire to resolve all of their disputes relating to the 2006 and 2007 Transactions and both the Original Assessments and the New Assessments;

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

1. In exchange for the promises and covenants contained herein, the City hereby agrees to withdraw the New Assessments. The City further agrees to abandon any and all efforts to collect the payment for the New Assessments from Save Mart.

2. In exchange for the promises and covenants contained herein, Save Mart agrees that it will abandon and disclaim all efforts to obtain reimbursement or refund for the sums it paid in satisfaction of the Original Assessments. In addition, within ten days of the full execution of this Agreement, Save Mart shall file a request for the dismissal of Case No. RG-10-514461 *with prejudice*. Save Mart shall cause its counsel to serve a conformed copy of the request for dismissal on counsel for the City within ten days of the filing of the request for dismissal.

3. In exchange for the covenants and promises set out herein, the City, on behalf of itself, its representatives, employees, agents, attorneys, successors and assigns does hereby release and discharge Save Mart, its representatives, attorneys, officers, directors, employees, parents, subsidiaries, affiliates, predecessors, successors and assigns from any and all claims, actions, causes of action, or suits (including, without limitation, any and all administrative proceedings), in law or in equity, which the City now has or hereafter can, shall, or may have by reason of any matter, cause or thing whatsoever arising out of the 2006 Transaction, the 2007 Transaction, the Original Assessments, and / or the New Assessments, including any and all claims that were brought or could have been brought by the City in the Litigation. The foregoing general release is intended to “wipe the slate clean” and to release all rights, claims, or demands whether known or suspected by the City to exist in its favor against Save Mart, its representatives, attorneys, officers, directors, employees, parents, subsidiaries, affiliates, predecessors, successors and assigns relating to the 2006 Transaction, the 2007 Transaction, the Original Assessments, and / or the New Assessments. The City specifically acknowledges and waives the provisions of Section 1542 of the Civil Code of the State of California, and any similar law of any other state, territory, or jurisdiction. Section 1542 provides:

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.

4. In exchange for the covenants and promises set out herein, Save Mart, on behalf of itself, its representatives, employees, agents, attorneys, successors and assigns does hereby release and discharge the City, its representatives, attorneys, officers, directors, employees, parents, subsidiaries, affiliates, predecessors, successors and assigns from any and all claims, actions, causes of action, or suits (including, without limitation, any and all administrative proceedings), in law or in equity, which Save Mart now has or hereafter can, shall, or may have by reason of any matter, cause or thing whatsoever arising out of the 2006 Transaction, the 2007 Transaction, the Original Assessments, and / or the New Assessments, including any and all claims that were brought or could have been brought by Save Mart in the Litigation. The foregoing general release is intended to “wipe the slate clean” and to release all rights, claims, or demands whether known or suspected by Save Mart to exist in its favor against the City, its representatives, attorneys, officers, directors, employees, parents, subsidiaries, affiliates,

predecessors, successors and assigns relating to the 2006 Transaction, the 2007 Transaction, the Original Assessments, and / or the New Assessments. Save Mart specifically acknowledges and waives the provisions of Section 1542 of the Civil Code of the State of California, and any similar law of any other state, territory or jurisdiction. Section 1542 provides:

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.

5. Each Party represents and warrants that it has not heretofore assigned or transferred, or purported to assign or transfer, any of the claims, demands, grievances, liabilities, debts, accounts, obligations, expenses, liens, actions or causes of action covered by this Settlement Agreement and Mutual Release. Each Party further represents and warrants that it shall indemnify and hold the other party harmless from and against any assertion by a third party that it has been heretofore transferred or assigned any such claim, demand, grievance, liability, debt, account, obligation, expense, lien, action or of action covered by this Settlement Agreement and Mutual Release.

6. It is fully understood and agreed by the Parties that they shall each bear their own attorneys fees and expenses incurred in connection with the Litigation, the administrative proceedings related to the Original Assessments and the New Assessments, and the negotiations that resulted in this Agreement.

7. The Parties understand and acknowledge that this Agreement constitutes a compromise and settlement of disputed claims. No action taken by any Party to this Agreement, either previously or in connection with this Agreement, shall be deemed or construed to be either: (a) an admission of the truth or falsity of any claims heretofore made; or (b) an acknowledgment or admission by any Party hereto of any fault or liability whatsoever to each other or to any third party; or an acknowledgement of any lack of merit of any claim asserted. All such liability or implication is expressly denied by the Parties.

8. This Agreement constitutes the entire agreement of the Parties with respect to the subject matter hereof and supersedes any prior discussions, negotiations, commitments, contracts, agreements and understandings, whether written or oral, with respect to the subject matter hereof.

9. This Agreement shall be governed by the laws of the State of California.

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10. This Agreement may be signed in counterparts, each of which shall be deemed an original. A copy or facsimile signature or emailed PDF copy shall be effective the same as an original.

City Of Oakland

Dated: _____

By: _____
Joseph Yew
Dir. Of Finance & Management
Agency

Save Mart Supermarkets

Dated: _____

By: _____

APPROVED AS TO FORM:

City Of Oakland

Dated: _____

By: _____
Kevin D. Siegel
Deputy City Attorney

Save Mart Supermarkets

Dated: _____

By: _____
Daniel J. Muller
Nixon Peabody, :LLP