

**MUTUAL RELEASE AND SETTLEMENT AGREEMENT**

This Mutual Release and Settlement Agreement (“**Settlement Agreement**” or “**Agreement**”) is effective as of the date of the last signature hereon, and is entered into by and between: (1) Plaintiff SFPP, L.P. (“**Plaintiff**” or “**SFPP**”); and (2) City of Brisbane (“**Defendant**” or the “**City**”). SFPP and City are each sometimes referred to herein as a “**Party**” and are collectively referred to herein as the “**Parties**”. This Agreement is entered into to settle the Action as defined below on the terms and conditions set forth herein.

**I. RECITALS**

1. On or about March 4, 2016, SFPP initiated an action entitled *SFPP, L.P. v. City of Brisbane* in the Superior Court of the County of San Mateo (the “**Court**”), Case No. CIV537659 (the “**Action**”).

2. In the Action, SFPP challenged the legality of the City’s Liquid Fuel Storage Tax (Brisbane Municipal Code section 5.20.011) under which the City assesses liquid fuel storage facilities a business license tax based on the facility’s liquid fuel storage capacity.

3. SFPP owns and operates the Brisbane Terminal, located at 950 Tunnel Ave. in Brisbane, California. SFPP’s Brisbane Terminal is the only liquid fuel storage facility in the City of Brisbane and is the only facility subject to the Liquid Fuel Storage Tax.

4. Brisbane Municipal Code (BMC) section 5.20.011(A) provides that “Any person engaged in the business of operating, leasing, supplying or providing a liquid storage facility shall pay an annual business license tax of up to one hundred fifteen dollars and twenty-eight cents (\$115.28) per year for each one thousand (1,000) cubic feet of liquid storage capacity.”

5. BMC section 5.20.011(B) provides that “The annual amount of liquid storage facilities license tax payable by any person shall be reduced by the amount of sales or use tax received by the city attributable to such person, or sales tax attributable to other persons, based on sales of liquids using the liquid storage facilities as the point-of sale, during the same calendar year.”

6. On June 19, 2014, SFPP protested the implementation of the Liquid Fuel Storage Tax.

7. On December 23, 2014, SFPP paid the City under protest \$135,000 for the 2014 Liquid Fuel Storage Tax, the amount assessed by the City.

8. On January 13, 2016, SFPP paid under protest \$135,000 for the 2015 Liquid Fuel Storage Tax, the amount assessed by the City.

9. On March 14, 2016, SFPP commenced the Action.

10. On December 27, 2016, SFPP paid under protest \$400,000 for the 2016 Liquid Fuel Storage Tax, the amount assessed by the City.

11. SFPP exhausted all administrative remedies challenging the Liquid Fuel Storage Tax and filed claims with the City prior to bringing the Action.

12. Each of the Parties denies all allegations made by any adverse party within the Action. The Parties have, through settlement negotiations, agreed upon the terms and conditions set forth in this Agreement.

13. The Parties wish to settle the Action between them and, subject to certain conditions, release each other from all currently existing liabilities, except those so outlined in this Settlement Agreement, pursuant to the terms of settlement set forth below.

## **II. TERMS OF SETTLEMENT**

In consideration for the settlement of the Action:

1. The City will retain the Liquid Fuel Storage Tax payments previously paid by SFPP.

2. For 2017, the Liquid Fuel Storage Tax rate will be set by the Brisbane City Council (pursuant to BMC 5.20.011) at an amount that is the equivalent of 3.5 cents per barrel of liquid fuel transported through the Brisbane Terminal for delivery at the terminal (“over the rack”). Assuming the volume delivered over the rack for 2016 is at least 7.5 million barrels, the total tax would be \$262,500. SFPP will pay the amount of tax determined pursuant to the City Council resolution setting the amount of the tax at no greater than 3.5 cents per the actual number of “over the rack” barrels transported through the Brisbane Terminal in 2017.

3. For 2018, the Liquid Fuel Storage Tax rate will be set by the Brisbane City Council (pursuant to BMC 5.20.011) at an amount that is the equivalent of 4 and 1/3 cents per barrel over the rack. Assuming the volume delivered over the rack for 2017 is at least 7.5 million barrels, the total tax would be \$325,000. SFPP will pay the amount of tax determined pursuant to the City Council resolution setting the amount of the tax at no greater than 4 and 1/3 cents per the actual number of “over the rack” barrels transported through the Brisbane Terminal in 2018.

4. For 2019, the Liquid Fuel Storage Tax rate will be set by the Brisbane City Council (pursuant to BMC 5.20.011) at an amount that is the equivalent of 5 and 1/3 cents per barrel over the rack. Assuming the volume delivered over the rack for 2018 is at least 7.5 million barrels, the total tax would be \$400,000. SFPP will pay the amount of tax determined pursuant to the City Council resolution setting the amount of the tax at no greater than 5 and 1/3 cents per the actual number of “over the rack” barrels transported through the Brisbane Terminal in 2019.

5. At the 2019 general municipal election, Brisbane voters will be asked to approve an ordinance changing the manner in which the Liquid Fuel Storage Tax is calculated. The proposed ordinance will provide that the Liquid Fuel Storage Tax will be up to 6 cents per barrel delivered over the rack in the preceding calendar year, with the exact rate to be determined each year by the Brisbane City Council, but the revenue generated by the Liquid Fuel Storage Tax each year will not be more than \$400,000 in any event.

6. The Liquid Fuel Storage Tax for subsequent years would be subject to the 2019 ordinance as approved by the voters.

7. Documentation regarding barrels delivered over the rack must include access to raw data, not just a report from SFPP. SFPP will provide on an annual basis a Bill of Lading Report that will show all over-the-rack deliveries by barrels at the Brisbane Terminal and which the City can audit by reviewing the original bills of lading at the Brisbane Terminal, as more fully described in **Attachment A** to this agreement.

8. SFPP will extend the City’s lease of the corporation yard at the Brisbane Terminal for 10 years from its 2027 expiration date at the current rent of \$1 per year if the proposed

ordinance changing the manner in which the Liquid Fuel Storage Tax is calculated is approved by the voters and provided that the maximum Liquid Fuel Storage Tax rate of 6 cents per barrel, for a maximum of \$400,000 annually, remains in effect during the term of the lease or any extension period.

9. While the parties are awaiting the outcome of the election in 2019, the pending Action will be stayed. If the voters do not approve the proposed ordinance in 2019, the Action will resume.

### **III. RELEASES**

(a) Except to the extent of the obligations existing as set forth in this Settlement Agreement, in consideration of the mutual releases and promises contained in this Agreement, and other sufficient and valuable consideration, the Parties, to the full extent of their legal standing to do so, do hereby specifically release and forever discharge each other, and any and all of their respective officers, directors, agents, servants, employees, employers, partners, members, lenders, affiliates, predecessors, successors, decedents, ancestors, dependents, heirs, executors, administrators, assigns, assignors, insurers, and attorneys of and from any and all demands, liens, claims, assignments, contracts, covenants, actions, suits, causes of action, obligations, costs, expenses, attorney fees, damages, losses, controversies, judgments, orders, and liabilities of whatsoever kind and nature, in law, at equity, or otherwise, whether now known, suspected or unsuspected, and whether or not concealed or hidden, which may have existed, or which do exist, or which hereinafter can, shall, or may exist which arise out of facts presently existing at the time of the signing of this Agreement, including those alleged in the

pending Action. This release shall not apply to any future acts of the Parties that take place after the signing of this Agreement.

(b) It is the intention of the Parties hereto that the foregoing release from liability (section III(a)) shall be effective between them to include all demands, liens, assignments, contracts, covenants, actions, suits, causes of action, obligations, costs, expenses, attorney fees, damages, losses, claims, controversies, judgments, orders, and liabilities of whatsoever character, nature and kind, known or unknown, suspected or unsuspected, that arise out of currently existing facts. In furtherance of this intention, the Parties to this Agreement expressly, knowingly, and voluntarily waive any and all rights and benefits conferred upon them by the provisions of California Civil Code section 1542, which provides as follows:

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

#### **IV. REPRESENTATIONS, WARRANTIES, AND ACKNOWLEDGEMENTS**

(a) The Parties warrant that they have not transferred or assigned and will not transfer or assign any known or unknown claims of any kind related to the Action.

(b) All Parties acknowledge that they have read all of this Agreement, including the above Civil Code section 1542, and that they fully understand the Agreement and such Civil Code section. Other than the obligations set forth in this Settlement Agreement, all Parties waive any benefits and rights granted to them pursuant to Civil Code section 1542.

**V. NO ADMISSION OF LIABILITY**

It is expressly understood, acknowledged, and agreed upon by the Parties that none of them admits, expressly or impliedly, any fact or liability of any type or nature with respect to the Action or any claims therein, and that this Agreement is entered into solely for reason of compromise and settlement.

**VI. SUCCESSORS**

The provisions of this Agreement shall be deemed to obligate, extend, and inure to the benefit of the successors, assigns, transferees, guarantees and indemnitees of the Parties.

**VII. INDEPENDENT COUNSEL**

Each of the Parties to this Agreement acknowledges and represents that it has been represented by independent counsel of his or its own choice throughout all negotiations which preceded the execution of this Agreement, and that such Party has freely and voluntarily executed this Agreement with the advice of independent counsel. Each of the Parties to this Agreement further acknowledges and represents that they have read this Agreement.

**VIII. ATTORNEY FEES AND COSTS**

(a) Each Party to this Agreement agrees to pay its own attorney fees and any and all costs incurred in or related to the Action and this settlement.

(b) In the event litigation and an arbitration is commenced to interpret or enforce any of the provisions of this Agreement, to recover damages for the breach of any of the provisions of this Agreement, or to obtain declaratory relief in connection with any provisions of this

Agreement, the prevailing party shall be entitled to recover reasonable attorney fees and costs as set forth in Code of Civil Procedure section 1033.5 and all other litigation expenses, including the administrative fees, investigative costs, consultant fees, expert witness fees, computer forensic fees or costs, Federal Express charges, United States postage expenses, document copying charges, fax charges, and all other costs and litigation expenses, excluding those that are part of an attorney's overhead costs.

#### **IX. SEVERANCE**

If any provision of this Agreement is held to be invalid or void by a court of competent jurisdiction, such provision shall be deemed to be severed and deleted and neither such provision nor its severance nor deletion shall affect the validity of the remaining portions.

#### **X. INTEGRATION**

This Agreement and the attached Exhibits will memorialize and constitute the entire agreement and understanding between the Parties and will supersede and replace all prior negotiations, proposed agreements and agreements, whether written or unwritten. Each of the parties to this Agreement acknowledges that no other party, nor any agent or attorney of any other party, has made any promise, representation, inducement or warranty whatsoever, expressed or implied, that is not expressly contained in this Agreement. Each party further acknowledges that it has not executed this Agreement in reliance upon any collateral, promise, representation, inducement or warranty, or in reliance upon any belief as to any fact not expressly set forth in this Agreement.



**XI. AMENDMENT OR MODIFICATION**

This Agreement may be amended or modified only by a writing signed by all Parties to this Agreement, specifically stating that it is an amendment or modification to this Agreement.

**XII. COUNTERPARTS/SIGNATURES**

(a) This Agreement may be executed in two or more counterparts, each of which shall be deemed to be an original, but all of which shall constitute one and the same instrument. Faxed, e-mailed, photocopied, and/or other electronic signatures hereon shall be deemed originals for all purposes.

(b) Each Party warrants and represents that each person executing this Agreement on its behalf is authorized to do so.

**XIII. GOOD FAITH SETTLEMENT**

The Parties warrant, represent, and agree that the settlement has been entered into in good faith and at arm's length without collusion, and that it is the product of the negotiations of adverse interests between the Parties.

**XIV. GOVERNING LAW**

This Agreement shall be construed in accordance with and be governed by the laws of the State of California.

[SIGNATURES ON FOLLOWING PAGE]

SO AGREED:

CITY OF BRISBANE

\_\_\_\_\_  
Date

By: \_\_\_\_\_  
CLAY HOLSTINE, City Manager

\_\_\_\_\_  
Date

SFPP, L.P.

By: \_\_\_\_\_  
\_\_\_\_\_

AGREED AS TO FORM:

ALESHIRE & WYNDER, LLP

\_\_\_\_\_  
Date

\_\_\_\_\_  
June S. Ailin  
Attorney for CITY OF BRISBANE

\_\_\_\_\_  
Date

REED SMITH LLP

By: \_\_\_\_\_  
John Lynn Smith  
Peter B. Kanter  
Phillip H. Babich  
Attorneys for SFPP, L.P.

## **Attachment A to the Mutual Release and Settlement Agreement**

The Bill of Lading Report (“BOL Report”), as discussed in paragraph II.7 of the Mutual Release and Settlement Agreement (“Agreement”) consists of data from the Brisbane Terminal Management System (“TMS”), which records all refined petroleum products, by volume, that are loaded onto trucks via the terminal’s loading racks (i.e. “over-the-rack”). The TMS generates a BOL for each load that the truck driver must sign to confirm the products and amounts loaded.

The BOL Report will list each BOL by its number and will include the date, transportation type, product number, product description, gross gallons\*, net gallons, source tank, loading rack bay, driver identification number, truck identification number, and trailer identification number.

SFPP maintains the BOLs for the current calendar year and the two previous years. To inspect the BOLs, the City will need to contact the Area Manager for the Brisbane Terminal at 950 Tunnel Ave., Brisbane, CA 94005; (415) 467-8107.

**Confidentiality**: The BOL Report and all documents related to the report are “confidential” within the meaning of Government Code § 6254(i) (and any successor statute) and Brisbane Municipal Code § 5.16.040.C. and may not be disclosed to or discussed with any third party unless approved by SFPP or ordered by a court of competent jurisdiction. Also, SFPP reserves the right to redact any information in the BOLs that is barred from disclosure by any applicable federal law.

\* 42 gallons = 1 barrel