

SETTLEMENT AGREEMENT AND RELEASE

The People of the State of California, by and through San Francisco City Attorney Dennis J. Herrera ("the People") and Fog City Diner, Inc. d/b/a Fog City Diner ("Fog City Diner"), do hereby enter into this Settlement Agreement and Release (the "Agreement"), with reference to the following facts:

Recitals

A. In 2010 and 2011, Fog City Diner charged its customers a Health Care Surcharge.

B. In 2013, Fog City Diner cooperated fully with the City Attorney Office's efforts to ascertain how much of the money Fog City Diner collected from this surcharge was actually spent on health care for its employees. The parties determined that Fog City Diner received more money from imposition of the Health Care Surcharge in 2010 and 2011 than it spent on health care for Covered Employees during those years.

WHEREFORE, in consideration of the promises, covenants, representations and warranties contained herein, and for good and valuable consideration given hereunder, the sufficiency of which is hereby acknowledged, the Parties agree as follows:

1. Effective Date

The effective date of this Agreement will be the date the Agreement is signed by all parties if on the same day or if on different dates then the last day signed by a party.

2. Definitions

All references to years shall mean the relevant calendar year(s).

"Agreement" shall mean this Settlement Agreement and Release.

"Claimants" shall mean employees that were employed by Fog City Diner at any time between April 2010 and March 2011.

"Covered Employees" shall have the definition set forth in Section 14.1(b)(2) of the HCSO.

"Fog City Diner" shall mean Fog City Diner, Inc. d/b/a Fog City Diner and each of its current, former and future parents, affiliates, subsidiaries, divisions, subdivisions, departments, or other organizational units of any kind doing business under their own names or doing business under any other names, any entity now or in the past controlled by, controlling, or under common control with any of the foregoing.

"HCSO" shall mean the San Francisco Health Care Security Ordinance, codified at San Francisco Administrative Code, Chapter 14.

“Health Care Surcharge” shall mean the SF Health surcharge added to Fog City Diner’s customers’ bills in 2010 and 2011.

“Parties” shall mean the People and Fog City Diner.

“People” shall mean the People of the State of California, by and through San Francisco City Attorney Dennis J. Herrera.

3. Payment to Compensate Claimants

3.1 Fog City Diner shall make payments, by check, to the Claimants listed in Exhibit A in the total amount of fourteen thousand, four hundred and eighty-six dollars and twenty-one cents (\$14,486.21) (“Settlement Amount”), to be delivered to Claimants within 30 days of the Effective Date of this Agreement. The payments will be made in the amounts provided in Exhibit A. Fog City Diner shall make the payments in the following manner. For Claimants who are current employees, Fog City Diner may deliver the payments in person or in the same manner that Fog City Diner currently issues itemized pay statements. For Claimants who are former employees, Fog City Diner will send the payments by first class mail.

3.2 At the same time and in the same manner that it makes the payments to the Claimants as set forth in paragraph 3.1 above, Fog City Diner shall also deliver a copy of the letter, attached as Exhibit B, to each Claimant.

3.3 Within ten (10) business days of delivering a payment to each Claimant as set forth in paragraphs 3.1 and 3.2 above, Fog City Diner agrees to provide a copy of each check to Deputy City Attorney Sara Eisenberg at the address set forth below in paragraph 7. Fog City Diner shall permit the Claimants sixty (60) days from the date of the issuance to cash the checks. After this sixty (60) day period, Fog City Diner shall issue a stop-payment order for any uncashed checks.

3.4 Within fifteen (15) days following the sixty (60) day period set forth in paragraph 3.3, Fog City Diner will send via certified first class mail the following to Deputy City Attorney Sara Eisenberg at the address set forth below in paragraph 7:

- a. a copy of the cancelled check for each check that has been cashed or bank statements sufficient to show that the checks have been cashed,
- b. a list of the uncashed checks, and
- c. a check, made payable to the “The City and County of San Francisco” in the total amount of the un-cashed checks less any stop payment fees. The City will use the money to fund the City’s future enforcement of the HCSO and other consumer protection laws.

3.5 If a Claimant is able to cash a check after Fog City Diner has sent the check to the City and County of San Francisco as set forth in 3.4(c), Fog City Diner shall provide Deputy City Attorney Sara Eisenberg with documents establishing that the check has been cashed and that Fog City Diner was required to pay the funds. Within 60 days of receipt of such

documentation, the City Attorney's Office will send Fog City Diner, or cause to be sent to Fog City Diner, a refund of the amount actually paid by Fog City Diner after Fog City Diner sent the check to the City and County of San Francisco as set forth in 3.4(c).

3.6 Nothing in this Agreement shall in any way affect the obligations under state and federal tax laws of Fog City Diner with respect to payment to the Claimants identified in Exhibit A.

4. Good Faith Compliance With the Employer Spending Requirement of the HCSO

4.1 Fog City Diner will ensure that the terms of its Health Reimbursement Accounts ("HRAs") allow employees to receive reimbursement for all medical and dental expenses that qualify for reimbursement under Internal Revenue Code Section 213, for the employee and for all of the employee's qualified dependents. If this requires a change to Fog City Diner's HRA Plan terms, this change will be retroactive to April 1, 2013.

4.2 Nothing in this Agreement shall be construed as precluding Fog City Diner from complying with the employer spending requirement of the HCSO by making payments to the City to fund employee participation in Healthy San Francisco or by purchasing health insurance for its employees.

4.3 The requirements of this section shall remain in effect until Fog City Diner's Plan closes on December 31, 2013.

5. Releases

5.1 In consideration of the payments and promises set forth herein, the People, for themselves and their agents, servants, employees, representatives, assigns, joint venturers, partners and attorneys, and each of them, do hereby absolutely, fully and forever release, relieve, waive, relinquish and discharge Fog City Diner and each of its current, former and future parents, affiliates, subsidiaries, divisions, subdivisions, departments, or other organizational units of any kind doing business under their own names or doing business under any other names, any entity now or in the past controlled by, controlling, or under common control with any of the foregoing, and each of their respective officers, directors, shareholders, members, owners, partners, joint venturers, principals, trustees, creditors, agents, servants, employees, insurers, representatives, predecessors, successors, assigns, and attorneys, of and from any and all actual or potential claims or actions that could have been asserted arising from any alleged violations of California Business and Professions Code Section 17200, *et seq.*, committed by Fog City Diner in connection with its collection of Health Care Surcharges in 2010 and 2011 (the "Released Claims").

5.2 Notwithstanding any of the foregoing, the People do not release any of the following:

- Any municipal or state tax claims or liabilities; and

- Any state or municipal administrative, civil, or government claim or liability not covered by the release set forth in paragraph 5.1.

5.3 In consideration of the promises set forth herein, Fog City Diner and each of its current, former and future parents, affiliates, subsidiaries, divisions, subdivisions, departments, or other organizational units of any kind doing business under their own names or doing business under any other names, any entity now or in the past controlled by, controlling, or under common control with any of the foregoing, and each of their respective officers, directors, shareholders, members, owners, partners, joint venturers, principals, trustees, creditors, agents, servants, employees, insurers, representatives, predecessors, successors, assigns, and attorneys do hereby absolutely, fully and forever release, relieve, waive, relinquish and discharge the City of San Francisco, its constituent departments (including the City Attorney's Office), commissions, agencies, boards, predecessors, successors, subsidiaries, related entities, and current and former officers, directors, trustees, agents, employees and assigns, and each of them, from any and all claims that could have been asserted related in whole or in part, to the City Attorney's investigation of any alleged violations of California Business and Professions Code Section 17200, *et seq.*, committed by Fog City Diner in connection with its collection of Health Care Surcharges in 2010 and 2011.

5.4 The releases set forth in paragraphs 5.1 and 5.3 extend to claims that the Parties do not know or suspect to exist in their favor. The Parties agree that this paragraph constitutes a waiver of Section 1542 of the California Civil Code, which 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.

The Parties acknowledge and agree that this waiver of Section 1542 of the California Civil Code is an essential and material term of this release, and without such waiver the settlement would not have been accepted. The Parties hereby represent that they understand and acknowledge the significance and consequence of this release and of this specific waiver of Section 1542.

The Parties further acknowledge that this release does not in any way relieve the Parties of the obligation to abide by each and every term of this Agreement nor impair their ability to enforce this Agreement as provided in paragraph 8.3. Further, this release does not deprive the Parties from seeking any relief for failure to comply with the terms of this Agreement.

6. Authority

The Parties hereto represent and warrant to each other that the person executing this Agreement on its behalf has full authority and capacity to execute this Agreement and to give the releases and other promises contained herein. If this representation is false or inaccurate, and any claim or matter is asserted against a party by anyone who is the assignee or transferee of such a claim or matter, then the party who assigned or transferred such claim or matter shall fully indemnify, defend, and hold harmless the party against whom such claim or matter is asserted and its successors from and against such claim or matter.

7. Notices

Except as otherwise stated herein, any notice or communication required under this Agreement shall be effective when received and sufficient if given in writing, and shall be addressed as follows:

For the People:

Sara Eisenberg
Office of the City Attorney
1390 Market Street, 7th Floor
San Francisco, CA 94102
Ph. (415) 554-3857

For Fog City Diner:

William Higgins
107 Caledonia Street, Suite E
Sausalito, CA 94965

8. General Provisions

8.1 Attorneys' Fees and Costs: The Parties shall bear their own fees, costs and expenses incurred in connection with the disputes between the Parties which are the subject of, or related to, this Agreement, including without limitation, the negotiation, drafting and consummation of this Agreement.

8.2 Entire Agreement: This Agreement is intended by the Parties as a final expression of their agreement and understanding concerning the subject matter hereof and is intended as a complete statement of the terms and conditions of their settlement, and any and all prior oral or written agreements or understandings between the Parties related hereto are superseded. No representations, oral or otherwise, express or implied, other than those specifically referred to in this Agreement, have been made by any party hereto.

8.3 Choice of Law, Jurisdiction, and Enforcement: This Agreement is being executed in the State of California, and it shall be deemed to be made under, and shall be interpreted in accordance with, the laws of the State of California. Any dispute arising under this Agreement shall be governed by the laws of the State of California and shall be heard in San Francisco Superior Court. The prevailing party in any action for breach of this Agreement shall recover all reasonable costs and attorney's fees.

8.4 Legal Advice and Investigation: Each Party has had the opportunity to consult with independent legal counsel with respect to the advisability of making the settlement provided for herein and of executing this Agreement and all other matters contained herein. The Parties hereby acknowledge that they have read this Agreement and that they are fully aware of the contents of this Agreement and of the legal effect of each and every provision thereof. Each party to this Agreement has made such investigation of the facts pertaining to this Agreement and of all of the matters pertaining thereto as it deems necessary.

8.5 Voluntary Agreement: The Parties each acknowledge that they have relied wholly upon their own judgment, belief and knowledge with respect to the existence, nature and extent of each claim, dispute, demand or cause of action and that they have not been influenced to any extent in entering into this Agreement by any representation or statement regarding such claim, demand, or cause of action made by the other parties other than as set forth in this Agreement. The Parties execute this Agreement voluntarily and with full knowledge of its significance, and with the express intention of effecting the extinguishment of any and all obligations and claims as specified herein.

8.6 Binding on Successors: This Agreement and the covenants and conditions contained herein shall apply to, be binding upon, and inure to the benefit of the respective heirs, administrators, executors, legal representatives, assignees and successors-in-interest of the Parties hereto.

8.7 Waiver, Modification and Amendment: No provision of this Agreement may be waived unless in writing signed by all Parties hereto. Waiver of any one provision shall not be deemed to be a waiver of any other provision hereof. This Agreement may not be altered, amended or otherwise changed or modified, except in writing signed by all of the Parties.

8.8 Merger and Integration: This Agreement constitutes a single, integrated written contract expressing the entire agreement relative to the subject matter hereof. No covenants, agreements, representations or warranties of any kind whatsoever have been made by any party hereto, except as specifically set forth therein. All prior discussions and negotiations, whether written or oral, have been and are merged and integrated into, and are superseded by, such integrated written agreement.

8.9 Severability: If any part of this Agreement is determined by any court to be void or otherwise invalid or unenforceable, such invalid, void or unenforceable portion shall be deemed to be separate and severable from the balance of this Agreement, which shall be given full force and effect as though the void, invalid or unenforceable provision had never been a part of this Agreement.

8.10 Construction: In construing this Agreement, none of the Parties hereto shall have any term or provision, or any uncertainty or ambiguity as to any term or provision herein, construed against such party solely by reason of such party having drafted the same, as a result of the manner of the preparation of this Agreement, or otherwise.

8.11 Execution in Counterparts: This Agreement may be executed in counterparts and all of said counterparts shall collectively constitute one agreement binding on all Parties.

8.12 Signatures: Faxed and/or electronically scanned signatures on this Agreement shall be deemed originals.

8.13 Headings: Headings or captions contained in this Agreement are solely for the convenience of the Parties, are not a part of this Agreement, and are not intended to create any substantive meaning or to modify the terms and clauses either following them or contained in any other provision of this Agreement.

IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed as of the dates set forth below.

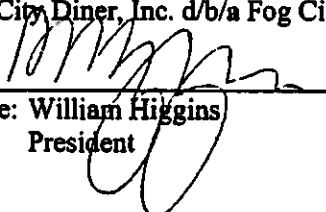
DATED: 5/14/13

People of the State of California, by and through
San Francisco City Attorney Dennis J. Herrera

By: 
Name: Sara Eisenberg
Deputy City Attorney

DATED: 5/14/13

Fog City Diner, Inc. d/b/a Fog City Diner

By: 
Name: William Higgins
President

FOG CITY DINER SETTLEMENT AGREEMENT – EXHIBIT B

[DATE]

Dear current or former employee:

Since 2008, employers in San Francisco have had an obligation to comply with the Health Care Security Ordinance (“HCSO”), which established San Francisco’s groundbreaking universal health care program and imposed an employer spending requirement. Many companies, including Fog City Diner, chose to add a surcharge to their customers’ bills that was described as intended to cover employees’ health care benefits. The San Francisco City Attorney, Dennis Herrera, initiated an investigation to determine whether the funds received from this surcharge may have exceeded the amount Fog City Diner actually spent on employee health care.

City Attorney Dennis Herrera and Fog City Diner reached a voluntary resolution of the investigation. As part of this resolution, we are making the attached payment to you. The amount due to you is a function of the hours you worked in San Francisco between April 2010 and March 2011. This money is for your personal use. **Please be advised that the enclosed check must be cashed within 60 days of the date of this letter or a stop payment order will be placed on the check.**

If you are currently employed by Fog City Diner and “covered” by the HCSO, Fog City Diner is making quarterly health care expenditures on your behalf. If you have any questions about the health care benefits provided by Fog City Diner, please contact [NAME] at [PHONE] or [EMAIL].

For questions about your rights under the HCSO, please visit the OLSE website at www.sfgov.org/olse/hcso, or contact the OLSE at (415) 554-7892 or hcso@sfgov.org.

Sincerely,
[NAME]
[TITLE]