

## **SETTLEMENT AGREEMENT**

This settlement agreement (the “Agreement”) is made and entered into as of the last date of signature indicated below by and between BNSF Railway Company (“BNSF”) and the County of Fresno (the “County”), by and through its Board of Supervisors. BNSF and the County are referred to collectively and/or interchangeably herein as a “Party” or the “Parties.”

### **Recitals**

WHEREAS, the County levies and collects taxes on BNSF’s unitary property as provided in California Revenue and Taxation Code section 100 (“Section 100”);

WHEREAS, on November 1, 2019 BNSF filed an action (the “Federal Action”) against fifteen California Counties, including the County, asserting that the Defendant Counties’ levy and collection of taxes on BNSF’s unitary property at a tax rate under Section 100 exceeds the maximum tax rate permitted by Section 306 of the Railroad Revitalization and Reform Act of 1976, now codified at 49 U.S.C. § 11501 (“4-R Act”);

WHEREAS, on April 8, 2020, the Court in the Federal Action issued an Order granting BNSF’s Motion for a Preliminary Injunction (the “Preliminary Injunction Order”), enjoining the Defendant Counties from levying or collecting ad valorem property taxes from BNSF on its unitary property based on a tax rate higher than the annual average tax rate of general property taxation calculated and reported for each county by the California State Board of Equalization under Cal. Rev. & Tax. Code §11403;

WHEREAS, the Preliminary Injunction Order effectively prohibited the County from levying or collecting ad valorem property taxes from BNSF as provided in Section 100 when Section 100 provided for a tax rate higher than the annual average tax rate of general property taxation calculated and reported for the County by the California State Board of Equalization under Cal. Rev. & Tax. Code §11403;

WHEREAS, on April 21, 2022, the Court in the Federal Action entered a Final Judgment as to all remaining defendants in the Federal Action, including the County (*BNSF Railway Co. v. Alameda Cnty.*, 4:19-cv-07230 (N.D. Cal.), Dkt. No. 116) (the “Final Judgment”);

WHEREAS, in the Final Judgment, the Court in the Federal Action stated that the Defendant Counties’ levy or collection of ad valorem property taxes on BNSF’s unitary property is unlawful under 49 U.S.C. section 11501, if and to the extent that tax rate is higher than the

annual average tax rate of general property taxation calculated and reported for each county by the California State Board of Equalization under Cal. Rev. & Tax. Code §11403;

WHEREAS, in the Final Judgment, the Court in the Federal Action enjoined the Defendant Counties from levying or collecting ad valorem property taxes from BNSF on its unitary property based on a tax rate higher than the annual average tax rate of general property taxation calculated and reported for each county by the California State Board of Equalization under Cal. Rev. & Tax. Code § 11403;

WHEREAS, the Final Judgment effectively prohibits the County from levying or collecting ad valorem property taxes from BNSF as provided in Section 100 when Section 100 provides for a tax rate higher than the annual average tax rate of general property taxation calculated and reported for the County by the California State Board of Equalization under Cal. Rev. & Tax. Code §11403;

WHEREAS, BNSF timely filed property tax refund claims for the 2015-16, 2016-17, 2017-18, and 2018-19 tax years (the “Refund Claims”), seeking refunds in the amounts of \$26,876.82, \$26,584.74, \$31,531.17, and \$47,571.76, respectively;

WHEREAS, the full aggregate principal amount of the Refund Claims is \$132,564.49 (the “Refund Amount”);

WHEREAS, BNSF sought the Refund Claims on the ground that BNSF’s payment to the County of ad valorem property taxes on unitary property as provided in Section 100 for the years in question was payment of taxes at a rate that exceeded the tax rate generally applicable to commercial and industrial property in the same assessment jurisdiction in violation of the 4-R Act, and to the extent of that exceedance were illegally levied and erroneously and illegally collected;

WHEREAS, prior to the entry of the Final Judgment, the County rejected all four of the Refund Claims;

WHEREAS, on October 20, 2020, the County and BNSF entered into an agreement to toll the statute of limitations under California Revenue and Taxation Code section 5141 for BNSF to file a refund action based on its 2015-16 tax year property tax refund claim, which the County rejected, providing a tolling period that ends 30 days after the Final Judgment in the Federal Action becomes final and unappealable as between the County and BNSF;

WHEREAS, on September 1, 2021, the County and BNSF entered into an agreement to toll the statute of limitations under California Revenue and Taxation Code section 5141 for BNSF to file a refund action based on its 2016-17 tax year property tax refund claim, which the County rejected, providing a tolling period that ends 30 days after the Final Judgment in the Federal Action becomes final and unappealable as between the County and BNSF;

WHEREAS, the statute of limitations under California Revenue and Taxation Code section 5141 for BNSF to file a refund action based on its 2017-18 and 2018-19 tax year property tax refund claims has not yet run;

WHEREAS, the Parties wish to avoid the disruption, inconvenience, uncertainty, and expense associated with further litigation of the Refund Claims;

WHEREAS, to that end, the parties wish to compromise, settle, and resolve the Refund Claims on the terms provided in this agreement.

### **Terms**

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereby agree as follows:

### ***Property Tax Credits***

1. Pursuant to California Revenue and Taxation Code section 5103, the Refund Amount will be treated as a credit against BNSF's future property tax payments to the County.

2. The application of the Refund Amount will be spread across multiple tax years. Starting with the 2022-23 tax year, and in each year until the Refund Amount has been fully credited against BNSF's future property tax payments to the County, an amount equal to the least of the following shall be applied as a credit to offset BNSF's ad valorem unitary property tax liability for that tax year: (a) BNSF's ad valorem unitary property tax liability to the County for that tax year, (b) \$44,188.17 (representing one third of the Refund Amount), or (c) the Refund Amount reduced by the total applications of the Refund Amount toward BNSF's ad valorem unitary property tax liability for prior tax years. No interest shall accrue on the unused portion of the Refund Amount before it is credited to BNSF's ad valorem property tax liability. For the avoidance of doubt, for purposes of the preceding sentence, BNSF's ad valorem unitary property

tax liability for each tax year will be as determined in conformity with the Final Judgment in the Federal Action.

### ***Waiver and Release***

3. Subject to the provisions of this Agreement, BNSF, for itself, its officers, employees, agents, administrators, successors, and assigns, hereby releases the County, its elected and appointed officials, officers, employees, agents, attorneys, administrators, successors, and assigns, from any and all claims, demands, actions, proceedings, liabilities, obligations, and causes of action for interest (including but not limited to interest under California Revenue and Taxation Code sections 5103 and 5151), attorneys' fees and/or costs, related to or arising out of the Refund Claims.

4. Civil Code Section 1542. The Parties intend this Agreement to be and to constitute a full general release and to constitute a full and final accord and satisfaction extending to all claims related to or arising out of the Refund Claims, whether the same are known, unknown, suspected, anticipated, unsuspected, or unanticipated. Accordingly, BNSF, by signing this Agreement, agree and warrant that it as read, understood, and expressly release and waives the provisions of California Civil Code Section 1542, which reads as follows:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR OR RELEASED PARTY.

### ***Additional Terms***

5. Attorneys' Fees and Costs. Each Party will bear its own costs, attorneys' fees, and expenses in connection with this Agreement.

6. Severability. In the event that any of the terms, conditions, or covenants contained in this Agreement are held to be invalid, then any such invalidity shall not affect any

other terms, conditions, or covenants contained herein, which shall remain in full force and effect.

7. Construction. Each Party to this Agreement has had an opportunity to review the Agreement, confer with legal counsel regarding the meaning of the Agreement, and negotiate revisions to the Agreement. Accordingly, neither Party shall rely upon Civil Code Section 1654 in order to interpret any uncertainty in the meaning of the Agreement. The headings and section titles in this Agreement are for convenience only and are not part of this Agreement.

8. Governing Law. This Agreement shall be governed by, and interpreted and construed in accordance with, the laws of the State of California.

9. Authority. The Parties hereby represent, warrant and covenant that each Party has complete and plenary authority to enter into this Agreement.

10. Complete Agreement; Amendments and Modifications. This Agreement constitutes the entire agreement between the Parties on the subject matter hereof and may not be modified or amended except in writing signed by each of the Parties. There are no understandings, agreements, or representations, express or implied, not specified in this Agreement.

11. Binding Effect. This Agreement shall be binding upon and inure to the benefit of the Parties to this Agreement and any and all of their current and former affiliates, parents, subsidiaries, divisions, agents, insurers, attorneys, representatives, employees, directors, trustees, shareholders, beneficiaries, successors, or assigns, and all parties in active concert or participation with any of the Parties hereto.

12. Counterparts. This Agreement may be executed in counterparts, each of which shall be deemed an original and all of which, taken together, shall constitute one and the same Agreement, binding on each signatory thereto.

13. Electronic Signatures. The Parties agree that this Agreement may be executed by electronic signature as provided in this section.

- a. An “electronic signature” means any symbol or process intended by an individual signing this Agreement to represent their signature, including but not limited to (1) a digital signature; (2) a faxed version of an original handwritten signature; or (3) an electronically scanned and transmitted (for example by PDF document) version of an original handwritten signature.
- b. Each electronic signature affixed or attached to this Agreement (1) is deemed equivalent to a valid original handwritten signature of the person signing this Agreement for all purposes, including but not limited to evidentiary proof in any administrative or judicial proceeding, and (2) has the same force and effect as the valid original handwritten signature of that person.
- c. The provisions of this section satisfy the requirements of Civil Code section 1633.5, subdivision (b), in the Uniform Electronic Transaction Act (Civil Code, Division 3, Part 2, Title 2.5, beginning with section 1633.1).
- d. Each party using a digital signature represents that it has undertaken and satisfied the requirements of Government Code section 16.5, subdivision (a), paragraphs (1) through (5), and agrees that each other party may rely upon that representation.
- e. This Agreement is not conditioned upon the parties conducting the transactions under it by electronic means and either party may sign this Agreement with an original handwritten signature.

14. Notices. Any notice under this Agreement shall be delivered in writing (email or overnight delivery) to the Parties’ legal counsel as follows:

On behalf of BNSF:

Benjamin J. Horwich  
Munger, Tolles & Olson LLP

560 Mission Street, 27th Floor  
San Francisco, CA 94105  
415.512.4066  
ben.horwich@mto.com

and

Munsoor Hussain  
Assistant Vice President of Tax  
BNSF Railway Company  
2301 Lou Menk Drive, GOB 3W  
Fort Worth, TX 76131  
817.352.3413  
munsoor.hussain@bnsf.com

On behalf of the County:

Peter Wall  
Chief Deputy County Counsel  
Fresno County Counsel  
2220 Tulare Street, 5th Floor  
Fresno, CA 93721  
559.600.3479  
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and

Kyle Roberson  
Deputy County Counsel  
Fresno County Counsel  
2220 Tulare Street, 5th Floor  
Fresno, CA 93721  
559.600.3479  
kroberson@fresnocountyca.gov

and


CountyCounselMailbox@fresnocountyca.gov

*(Signature Page Follows)*

IN WITNESS WHEREOF, each of the signatories has read and understood this Agreement, has executed it, represents that he or she is authorized to execute this Agreement on behalf of the Party for whom he or she has signed, has agreed on behalf of his or her respective Party to be bound by its terms, and has entered into this Agreement on behalf of the Party for whom he or she has signed as of the date indicated below.

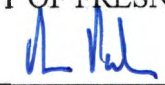
DATED: 4/29/2022

BNSF RAILWAY COMPANY

By:   
Name Mark Liniado  
Title Vice President of Taxes and  
General Tax Counsel

DATED: 5-17-2022

COUNTY OF FRESNO

By:   
Name Brian Pacheco  
Title Chairman of the Board of Supervisors of  
the County of Fresno

Attest:  
Bernice E. Seidel  
Clerk of the Board of Supervisors  
County of Fresno, State of California

By:   
Deputy