

SETTLEMENT AGREEMENT

This Settlement Agreement (“Agreement”) is made and entered into this ___ day of February 2009, by and between the State of Florida, Office of the Attorney General, Department of Legal Affairs (the “Attorney General”), Ryan E. Phillips, Tate Enterprises, Inc., Fill-Ups Food Stores, Inc., John W. Osburn, and Fill-Ups Food Stores III, Inc. (collectively, the “parties”).

WHEREAS, the Attorney General filed suit against Ryan E. Phillips, Tate Enterprises, Inc., Fill-Ups Food Stores, Inc., and John W. Osburn on May 11, 2006 in Okaloosa County Circuit Court, State of Florida vs. Ryan E. Phillips *et al.*, Case Number 2006 CA 001986 C and against Ryan E. Phillips and Fill-Ups Food Stores III, Inc. on May 24, 2007 in Walton County Circuit Court, State of Florida vs. Ryan E. Phillips *et al.*, Case Number 2007-CA-000379 (collectively, the “Litigation”);

WHEREAS, the Complaints in the Litigation allege that Defendants engaged in several retail gasoline price-fixing conspiracies in and around Crestview and DeFuniak Springs, Florida, in violation of § 542.18, Florida Statutes, by, among other things: (i) orchestrating and entering into agreements to fix retail gasoline prices at competing gasoline stations; (ii) directing each competitor when and to what level retail gasoline prices should be set so as to ensure that the pricing remained the same as Fill-Ups Food Stores, Inc. or Fill-Ups Food Stores III, Inc; and, (ii) communicating with each competitor, in person and/or via the telephone, to discuss the coordination of retail gasoline pricing;

WHEREAS, the Complaints further allege violations of Florida Statute § 501.204(1) through the conduct outlined above and by: (i) calling and meeting with two (2) additional

competitors with the specific intent to discuss and enter into agreements for the noncompetitive pricing of retail gasoline; and, (ii) threatening to instigate and actually instigating a price war in order to punish and drive business away from a noncompliant competitor;

WHEREAS, Defendants specifically deny any and all wrongdoing or liability;

WHEREAS, the parties have determined that it is in their mutual interest to resolve the known claims that were raised or could have been raised in the Litigation against Ryan E. Phillips, Tate Enterprises, Inc., Fill-Ups Food Stores, Inc., John W. Osburn, and Fill-Ups Food Stores III, Inc. in order to avoid further expense, delay, and uncertainty;

NOW THEREFORE, the parties agree as follows:

I. MONETARY PAYMENT

Defendants shall pay the settlement amounts required by the Agreed Judgment and Final Order by certified check or cashier's check made payable to the Department of Legal Affairs and delivered to Patricia A. Conners, Associate Deputy Attorney General, Office of the Attorney General, 107 W. Gaines Street, Tallahassee, Florida 32399. Two hundred thousand dollars (\$200,000.00) shall be paid as civil penalties pursuant to Chapters 542 and/or 501, Part II, Fla. Stat., and the remaining seventy-five thousand dollars (\$75,000.00) shall be paid for the Attorney General's fees and costs incurred in the investigation and Litigation. In addition to this monetary payment, Defendants shall execute the Consent to Entry of Agreed Judgment and Final Order.

II. RELEASE

For the consideration set forth herein, including full compliance with the Agreed Judgment and Final Order, the Attorney General releases, relinquishes, and discharges all known claims against Defendants that were raised or could have been raised in the Litigation. The Attorney General hereby covenants and agrees that it will file a Notice of Voluntary Dismissal in Case Number 2007-CA-000379 within ten (10) business days after its receipt of the initial thirty-five thousand dollar (\$35,000) payment from Defendants. Notwithstanding this release, the Attorney General shall have the option, at its discretion, to declare this Agreement null and void and pursue any appropriate legal action against any and or all of the Defendants if any material obligation under this Agreement and/or the Agreed Judgment and Final Order is breached.

III. MISCELLANEOUS

A. The parties agree that this Agreement contains the entire agreement between them with regard to the matters set forth herein. There are no other understandings or agreements between the parties, verbal or otherwise, except as expressly set forth in this Agreement. Any modifications to this Agreement must be in writing and signed by the parties.

B. The parties agree that the terms of the Agreement were negotiated in good faith and reflect a settlement that was reached voluntarily after consultation with experienced legal counsel.

C. This Agreement shall be binding on, and inure to the benefit of, the parties. The parties expressly disclaim any intention to create rights under this Agreement that may be enforced by any other person under any circumstances.

D. Defendants each warrant that they have reviewed their own financial situations and that each, as of the date of this Agreement, is solvent within the meaning of 11 U.S.C. §§547(b)(3) and 548(a)(1)(B)(ii)(I), and shall remain solvent following payment to the Attorney General of the monetary relief under the Agreed Judgment and Final Order. Further, the parties warrant that, in evaluating whether to execute this Agreement, they (i) have intended that the mutual promises, covenants, and obligations set forth constitute a contemporaneous exchange for new value given to Defendants within the meaning of 11 U.S.C. §547(c)(1); and, (b) conclude that these mutual promises, covenant, and obligations do, in fact, constitute such a contemporaneous exchange. Further, the parties warrant that the mutual promises, covenants, and obligations set forth herein are intended to and do, in fact, represent a reasonably equivalent exchange of value that is not intended to hinder, delay or defraud any entity to which Defendants were or became indebted to on or after the date of this transfer, within the meaning of 11 U.S.C. §548(a)(1)(A).

E. This Agreement shall be governed by, construed, and enforced in accordance with the laws of the State of Florida, without regard to its conflict of law principles.

F. The parties represent and warrant that the person executing this Agreement on behalf of each party has the authority to bind that party to the terms of this Agreement.

IN WITNESS THEREOF, the parties have entered this Agreement by affixing the signatures of their authorized representatives below.

BILL McCOLLUM

Attorney General

Patricia A. Conners
Associate Deputy Attorney General
Director, Antitrust Division
Russell S. Kent
Special Counsel for Litigation
Lizabeth A. Leeds
Senior Assistant Attorney General
Office of the Attorney General
Antitrust Division
PL-01, The Capitol
Tallahassee, Florida 32399-1050
(850)414-3300




Ryan E. Phillips

Fill-Ups Food Stores, Inc.

By: 

Fill-Ups Food Stores III, Inc.

By: 

Tate Enterprises, Inc.

By: 



John W. Osburn

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT
IN AND FOR OKALOOSA COUNTY, FLORIDA

STATE OF FLORIDA,
OFFICE OF THE ATTORNEY GENERAL,
DEPARTMENT OF LEGAL AFFAIRS,

Plaintiff,

v.

Case No. 2006 CA 001986 C

RYAN E. PHILLIPS,
FILL-UPS FOOD STORES, INC.,
TATE ENTERPRISES, INC.,
and JOHN W. OSBURN,

Defendants.

CONSENT TO ENTRY OF AGREED JUDGMENT AND FINAL ORDER

The parties, by and through their respective undersigned counsel, hereby stipulate to the settlement of this action upon the terms and conditions described below:

1. The parties agree and consent to the entry of an Agreed Judgment and Final Order, the form of which is attached hereto and incorporated herein.
2. The parties waive the entry of findings of fact and conclusions of law in the Agreed Judgment and Final Order.
3. Defendants agree they will not oppose the enforcement of the Agreed Judgment and Final Order on the grounds that it fails to comply with Florida Rule of Civil Procedure 1.610(c) and hereby waive any objection they may have based thereon.
4. The parties agree that this Consent to Entry of Judgment and Final Order shall be incorporated into the Agreed Judgment and Final Order by reference.

5. The parties agree that the attached Agreed Judgment and Final Order along with this Consent to Entry of Judgment and Final Order may be presented to the Court for signature and entry at any time after notice to opposing counsel.

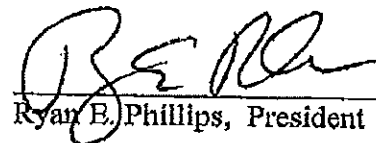
6. The parties agree that this Court retains jurisdiction over the parties and the subject matter for the purpose of implementing and enforcing the Agreed Judgment and Final Order.

Respectfully submitted, this ___ day of February 2009.

BILL MCCOLLUM
Attorney General

Patricia A. Conners, Esq.
Associate Deputy Attorney General
Florida Bar No. 361275
Russell S. Kent
Special Counsel for Litigation
Florida Bar No. 20257
Office of the Attorney General
Antitrust Division
PL-01, The Capitol
Tallahassee, Florida 32399-1050
Telephone: (850) 414-3300
Facsimile: (850) 488-9134

Counsel for Plaintiff



Ryan E. Phillips, President

Counsel for Defendants,
Ryan E. Phillips,
Fill-Ups Food Stores, Inc., and
Tate Enterprises, Inc.

Counsel for Defendant,
John W. Osburn

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT
IN AND FOR OKALOOSA COUNTY, FLORIDA

STATE OF FLORIDA,
OFFICE OF THE ATTORNEY GENERAL,
DEPARTMENT OF LEGAL AFFAIRS,

Plaintiff,

v.

Case No. 2006 CA 001986 C

RYAN E. PHILLIPS,
FILL-UPS FOOD STORES, INC.,
TATE ENTERPRISES, INC.,
and JOHN W. OSBURN,

Defendants.

AGREED JUDGMENT AND FINAL ORDER

THIS CAUSE came before the Court on the parties' Consent to Entry of Agreed Judgment and Final Order. After having reviewed the file, and being otherwise fully advised in the premises, it is hereby ORDERED and ADJUDGED as follows:

I. JURISDICTION

A. The Court finds that it has subject matter jurisdiction over this matter and jurisdiction over the parties pursuant to ss. 501.207 and 542.22, Florida Statutes. The Court shall retain jurisdiction of this action for the purposes of implementing and enforcing the terms and conditions of this Agreed Judgment and for all other purposes.

B. The terms of the Consent to Entry of Agreed Judgment and Final Order are ratified by the Court and incorporated into this Agreed Judgment and Final Order as though fully set out herein and the parties are directed to comply with the terms of said Consent.

II. PERMANENT INJUNCTIVE RELIEF

Defendants,¹ and their respective successors, assigns, officers, directors, members, participants, agents, servants, employees, attorneys, representatives, and all other persons or entities under the direction or control of any of the foregoing and those persons and entities in active concert or participation with them, are hereby permanently enjoined and restrained from either directly or indirectly, or through any corporate or other device, engaging in any or all of the following conduct: (i) seeking to enter into, entering into, or performing any agreement or understanding with any competitor involving retail gasoline prices; (ii) communicating with a competitor for the purpose of coordinating retail gasoline prices; or (iii) taking any action that would result in the non-competitive pricing of retail gasoline anywhere in Florida in contravention of Florida law.

III. COMPLIANCE PLAN

The Court further orders Defendants to implement and maintain an antitrust compliance program for a period of five (5) years from the date of this Agreed Judgment, including but not limited to:

A. making the substantive terms and conditions of this Agreed Judgment known to their present and future managers, officers, directors, and employees with retail gasoline pricing authority within thirty (30) days of entry of this Agreed Judgment or hire;

¹ Fill-Ups Food Stores III, Inc. shall be considered a Defendant for purposes of this Agreed Judgment and Final Order.

B. briefing annually each person described in subsection A on the meaning and requirements of this Agreed Judgment, the penalties for violation thereof, and the nature of the antitrust laws, including potential antitrust concerns;

C. obtaining from each person described in subsection A an annual signed certification that he or she has read, understands, and agrees to abide by this Agreed Judgment;

D. maintaining for inspection by the Attorney General a record of the recipients to whom this Agreed Judgment has been distributed, together with copies of the signed certifications described in subsection C;

E. notifying the Attorney General of all gasoline retailers owned or operated by any of the Defendants within twenty (20) days of entry of this Agreed Judgment; and,

F. notifying the Attorney General within twenty (20) days of any change in the information described in subsection D.

IV. MONETARY RELIEF

A. Defendants shall pay two hundred and seventy five thousand dollars (\$275,000.00) to the Attorney General, as civil penalties, attorneys' fees, and costs, in accordance with the provisions set forth below. In the event that a payment is not made as provided herein, judgment will forthwith be entered in the amount of the entire balance of payments unpaid at that time.

1. Within ten (10) days after the date this Agreed Judgment is entered, Defendants shall pay thirty five thousand dollars (\$35,000.00) to the Attorney General; and,
2. Commencing on April 1, 2009 and continuing on the first day of every month thereafter for twenty-four (24) months, Defendants shall pay the

remaining two hundred and forty thousand dollars (\$240,000.00) to the Attorney General by monthly payments in the amount of ten thousand dollars (\$10,000.00).

3. Except as otherwise provided herein, each party hereby agrees to bear its own costs and attorneys' fees incurred in connection with this action.

V. NOTICE

For the purposes of this Agreed Judgment, Defendants shall, unless otherwise authorized by the Attorney General's authorized representatives, mail all written notifications to the Attorney General to Patricia A. Conners, Esq., Associate Deputy Attorney General, Office of the Attorney General, Antitrust Division, PL-01, The Capitol, Tallahassee, Florida 32399-1050.

DONE AND ORDERED in Chambers, _____, Okaloosa County, Florida, this ____ day of _____ 2009.

WILLIAM F. STONE
Circuit Judge

Conformed copies to all counsel of record