SETTLEMENT AGREEMENT AND RELEASE

This SETTLEMENT AGREEMENT AND RELEASE (hereinafter "Agreement") is entered into between the STATE OF CALIFORNIA AIR RESOURCES BOARD (hereinafter "ARB") 1001 I Street, Sacramento, California 95814, and CITY SIGHTSEEING (hereinafter "CITY SIGHTSEEING"), located at 2800 Leavenworth, San Francisco, California, 94133.

I. RECITALS

(1) California Health and Safety Code (*H&SC*) Section 44011.6 established the Heavy Duty Vehicle Inspection Program (HDVIP). It authorizes ARB to inspect on-road heavy-duty vehicles for excessive smoke emissions and engine tampering and to issue citations, accordingly. The program also requires the vehicle owner to repair its engines that exceed the prescribed ARB smoke opacity standards, perform a post-repair opacity test, and submit proof of repairs and any assessed penalties under the Regulations of the Heavy-Duty Smoke Inspection Program, Chapter 3.5, Sections 2180-2188, Title 13, California Code of Regulations (CCR).

(2) *H&SC* Section 43701 provides that ARB shall adopt regulations that require owners or operators of heavy-duty diesel motor vehicles to perform regular inspections of their vehicles for excess smoke emissions.

(3) Title 13, CCR sections 2190 *et seq.* was adopted under the authority of *H&SC* section 43701 and, with limited exceptions, which are not applicable here, apply to all heavy-duty diesel powered vehicles with gross vehicle weight ratings greater than 6,000 pounds that operate on the streets or highways within the State of California.

(4) Title 13, CCR sections 2190 *et seq.* authorize the Periodic Smoke Inspection Program (PSIP) which requires the owners and operators of California based vehicle fleets of two or more heavy duty diesel motor vehicles with gross vehicle weight ratings greater than 6,000 pounds that operate on the streets or highways within the State of California to conduct annual smoke opacity inspections of their vehicles that are four years older than the model year of the vehicle's engine.

(5) Title 13, CCR section 2192 (a) requires inter alia that the owner of the vehicle "[t]est the vehicle for excessive smoke emissions periodically according to the inspection intervals specified in section 2193 (a), (b), and (c)", "[m]easure the smoke emissions for each test...", "[r]ecord the smoke test opacity levels and other required test information as specified in section 2194..." and "[k]eep the records specified in section 2194 for two years after the date of inspection."

(6) *H&SC* Section 43016 states, "Any person who violates any provision of this part, or any order, rule, or regulation of the state board adopted pursuant to this part, and for which violation there is not provided in this part any other specific civil penalty or fine, shall be subject to a civil penalty of not to exceed five hundred dollars ($500.00) per vehicle."

(7) The ARB considers testing, measuring, recording, and recordkeeping to be critical components in reducing excessive smoke emissions from these heavy-duty vehicles.

(8) ARB contends CITY SIGHTSEEING failed to test, measure, record, and maintain records of smoke emissions from its fleet of heavy-duty diesel vehicles for 2010 and 2011 in violation of title 13, CCR Sections 2190 *et seq*.

(9) ARB contends CITY SIGHTSEEING failed to provide evidence that their vehicles have emission control labels (ECL) attached to the engines of heavy-duty diesel vehicles in its fleet in violation of H&SC, section 44011.6, and title 13, CCR section 2183, *et seq*. Civil penalties for violation of the regulation covering emission control labels have been set per title 13 CCR, section 2185 (a)(2)(B) at $300 per vehicle per violation.

(10) CITY SIGHTSEEING is willing to enter into this Agreement solely for the purpose of settlement and resolution of this matter with ARB. ARB accepts this Agreement in termination of this matter. Accordingly, the parties agree to resolve this matter completely by means of this Agreement, without the need for formal litigation, and therefore agree as follows:

II. TERMS & RELEASE

In consideration of ARB not filing a legal action against CITY SIGHTSEEING, for the Violations alleged above, ARB and CITY SIGHTSEEING agree as follows:

(1) Upon execution of this Agreement, CITY SIGHTSEEING shall pay a civil penalty of $14,625.00. Payment shall be made in check form as described below and the payment will be made by June 29, 2012.

SETTLEMENT AGREEMENT AND RELEASE ARB AND CITY SIGHTSEEING:

- **$10,968.75** to the **California Air Pollution Control Fund,** and
- **$ 3,656.25** to the **Peralta Community College District.**

All payments and documents shall be sent to the attention of:

Ms. Wendy Maienknecht, Investigator/Air Resources Engineer
Air Resources Board, Enforcement Division
P.O. Box 2815
Sacramento, CA 95812

(2) CITY SIGHTSEEING shall not violate *H&SC* Sections 43701 *et seq.* and 44011.6 *et seq.* and title 13, CCR Sections 2180 *et seq.*, 2190 et seq., and 2485 *et seq.*

(3) CITY SIGHTSEEING shall comply with one or both of the following options to attend the California Council on Diesel Education and Technology (CCDET) class, as described on the ARB webpage at http://www.arb.ca.gov/enf/hdvip/hdvip.htm. This class is conducted by various California Community Colleges and instructs attendees on compliance with the PSIP and the HDVIP.

(a) CITY SIGHTSEEING shall have the fleet maintenance manager (or equivalent) and all staff performing opacity tests for compliance with PSIP and the HDVIP attend the CCDET I class. Proof of CCDET completion shall be provided to ARB within six months of the date of this Agreement and shall be maintained in each applicable employee's file for the term of his or her employment, or as provided by CITY SIGHTSEEING rules, regulations, codes, or ordinances, whichever is longer.

(b) If CITY SIGHTSEEING uses a contractor to perform the annual smoke opacity testing required under the PSIP, in addition to having the fleet maintenance manager (or equivalent) attend the CCDET I course, CITY SIGHTSEEING shall obtain proof that the contractor's staff conducting the smoke opacity tests completed the CCDET course within the past four years. This proof of CCDET completion shall be provided to ARB with PSIP records as required by this Settlement Agreement and shall be maintained with the annual PSIP records.

(4) CITY SIGHTSEEING shall comply with one or both of the following options to attend the CCDET II class (Diesel Exhaust After-Treatment and Maintenance), described on the ARB's webpage http://www.arb.ca.gov/enf/hdvip/ccdet/ccdet.htm. This class is conducted by various California Community Colleges and instructs attendees on California Compliance emission regulations and the proper care and maintenance of Verified Diesel Emission Control Strategies (VDECS).

(a) CITY SIGHTSEEING shall have the fleet maintenance manager (or equivalent) and all staff responsible for maintenance of exhaust after-treatment systems attend the CCDET II class. Proof of CCDET II completion shall be provided to ARB within six months of the date of this Agreement and shall also be maintained in each applicable employee's personnel file for the

term of his or her employment, or as provided by CITY SIGHTSEEING, rules, regulations, codes or ordinance, whichever is longer.

(b) In case CITY SIGHTSEEING uses a contractor for the maintenance of exhaust after-treatment systems, in addition to having the fleet maintenance manager (or equivalent) attend the CCDET II course, CITY SIGHTSEEING shall obtain proof that the contractor's staff maintaining the VDECS completed the CCDET II course within the last four years. This proof of CCDET II completion shall be provided by CITY SIGHTSEEING to the ARB within one year of the date of this settlement and shall also be maintained with VDECS maintenance records.

(5) CITY SIGHTSEEING shall submit copies of all PSIP compliance records for years 2012 and 2013 to the ARB by January 31 of the following year. Copies shall be addressed to the attention of Wendy Maienknecht at the California Air Resources Board, Enforcement Division, P.O. Box 2815, Sacramento, CA 95812. The ARB reserves the right to visit any CITY SIGHTSEEING fleet location at any time to conduct compliance audits for the HDVIP and PSIP, or any other applicable ARB program.

(6) CITY SIGHTSEEING shall complete Low NOx Software Upgrades (reflash) on all applicable heavy-duty diesel engines operating in California and report to the ARB within 45 days of this agreement.

(7) Each 1974 or newer diesel powered heavy-duty vehicle in the CITY SIGHTSEEING fleet shall comply with the emission control label (ECL) requirements set forth in the title 13, CCR section 2183 (c) per the compliance plan submitted by City Sightseeing on June 14, 2012.

(8) CITY SIGHTSEEING shall instruct all employees who operate diesel-fueled vehicles to comply with the idling regulations set forth in title 13, CCR section 2485, within 45 days of this Agreement.

(9) This Agreement shall apply to and be binding upon CITY SIGHTSEEING, and its officers, directors, receivers, trustees, employees, successors and assignees, subsidiary and parent corporations and upon ARB and any successor agency that may have responsibility for and jurisdiction over the subject matter of this Agreement.

(10) This Agreement constitutes the entire agreement and understanding between ARB and CITY SIGHTSEEING, concerning the subject matter hereof, and supersedes and replaces all prior negotiations and agreements between ARB and CITY SIGHTSEEING, concerning the subject matter hereof.

(11) No agreement to modify, amend, extend, supersede, terminate, or discharge this Agreement, or any portion thereof, is valid or enforceable unless it is in writing and signed by all parties to this Agreement.

(12) Severability. Each provision of this Agreement is severable, and in the event that any provision of this Agreement is held to be invalid or unenforceable, the remainder of this Agreement remains in full force and effect.

(13) This Agreement shall be interpreted and enforced in accordance with the laws of the State of California, without regard to California's choice-of-law rules.

(14) This Agreement is deemed to have been drafted equally by the Parties; it will not be interpreted for or against either party on the ground that said party drafted it.

(15) Senate Bill 1402 (Dutton, Chapter 413, statutes of 2010) requires the ARB to provide information on the basis for the penalties it seeks (see Health and Safety Code section 39619.7). This information, which is provided throughout this settlement agreement, is summarized here.

The manner in which the penalty amount was determined, including a per unit or per vehicle penalty.

Penalties must be set at levels sufficient to discourage violations. The penalties in this matter were determined in consideration of all relevant circumstances, including the eight factors specified in Health and Safety Code sections 42403 and 43024.

PSIP Violations

The per vehicle penalty for the PSIP violations involved in this case is a maximum of $500 per vehicle per violation. The penalty obtained for the PSIP violations involved in this case is $12,375.00 for 18 vehicles, or $375 per vehicle per violation. The penalty was discounted based on the fact that this was a first time violation and the violator made diligent efforts to comply and to cooperate with the investigation.

ECL Violations

The per vehicle penalty for the labeling violations involved in this case is a maximum of $225.00 per vehicle per violation. The penalty obtained for the ECL violations involved in this case is $2,250.00 for 10 vehicles. The penalty was discounted based on the fact that this was a first time violation and the violator made diligent efforts to comply and to cooperate with the investigation.

The provision of law the penalty is being assessed under and why that provision is most appropriate for that violation.

PSIP Violations

The penalty provision being applied to the PSIP violations is HSC section 43016 because CITY SIGHTSEEING failed to test, measure, record, and maintain records of smoke emissions from its fleet of heavy duty diesel vehicles for the years 2010 and 2011 in violation of the PSIP regulation in title13, CCR sections 2190 *et seq*, for 18 vehicles. Since the PSIP regulation was adopted pursuant to authority granted in Part 5 of Division 26 of the Health and Safety Code and since there is no specific penalty or fine provided for PSIP violations in Part 5, *H&SC* section 43016 is the applicable penalty provision.

ECL Violations

The penalty provision being applied to the ECL requirements set forth in title 13, CCR section 2185(a)(2) because CITY SIGHTSEEING failed to provide evidence that 10 of their vehicles have ECL labels attached as required.

Is the penalty being assessed under a provision of law that prohibits the emission of pollution at a specified level, and, if so a quantification of excess emissions, if it is practicable to do so.

The PSIP and ECL provisions cited above do prohibit emissions above a specified opacity or level of g/hp-hr. However, since the hours of operation of the non-compliant units involved and their individual emission rate are not known, it is not practicable to quantify the excess emissions.

(16) CITY SIGHTSEEING acknowledges that ARB has complied with SB 1402 in prosecuting and settling this case. Specifically, ARB has considered all relevant facts, including those listed at *H&SC* section 43024, has explained the manner in which the penalty amount was calculated, has identified the provision of law under which the penalty is being assessed and has considered and determined that this penalty is being assessed under a provision of law that prohibits the emission of pollutants at a specified level.

(17) Penalties were determined based on the unique circumstances of this matter, considered together with the need to remove any economic benefit from noncompliance, the goal of deterring future violations and obtaining swift compliance, the consideration of past penalties in similar cases, and the potential costs and risk associated with litigating these particular violations. Penalties in future cases might be smaller or larger on a per unit/vehicle basis.

(18) The penalty was based on confidential settlement communications between ARB and CITY SIGHTSEEING that ARB does not retain in the ordinary course of business either. The penalty is the product of an arms length negotiation between ARB and CITY SIGHTSEEING and reflects ARB's assessment of the relative strength of its case against CITY SIGHTSEEING, the desire to avoid the uncertainty, burden and expense of litigation, obtain swift compliance with the law and remove any unfair advantage that CITY SIGHTSEEING may have secured from its actions.

(19) Now, therefore, in consideration of the payment by CITY SIGHTSEEING, in the amount of fourteen thousand six hundred twenty five dollars ($14,625), ARB hereby releases CITY SIGHTSEEING and its principals, officers, directors, agents, subsidiaries, predecessors, and successors from any and all claims that ARB may have based on the facts and allegations described in recital paragraphs (1-9), above. The undersigned represent that they have the authority to enter into this Agreement.

California Air Resources Board

By: _____

Name: James Ryden

Title: Chief, Enforcement Division

Date: 7-9-12

CITY SIGHTSEEING SAN FRANCISCO

By: _____

Name: C Watts

Title: CEO

Date: 6/14/12