

Resolution No. 2014-08-12-1601

STOCKTON CITY COUNCIL

RESOLUTION APPROVING AN OFFICE AND INDUSTRIAL SALES TAX INCENTIVE AGREEMENT BETWEEN THE CITY OF STOCKTON AND DIESEL DIRECT WEST INCORPORATED AND AMENDING THE OFFICE AND INDUSTRIAL SALES TAX INCENTIVE PROGRAM GUIDELINES

The Stockton City Council identified economic development and fiscal sustainability as two key goals for the City; and

On June 24, 2014, the Council approved Resolution No. 2014-06-24-1505 authorizing the Office and Industrial Sales Tax Incentive Program which provides financial incentives to businesses that generate net new sales tax revenue to the City of Stockton;

In accordance with the Office and Industrial Sales Tax Incentive Program guidelines, each incentive agreement is subject to a public hearing and must be approved by the City Council; and

City staff has been negotiating with Diesel Direct West, Inc., in expanding and relocating its headquarters to Stockton and desires to enter into a Sales Tax Incentive Agreement with Diesel Direct West, Inc.; and

In order to prevent businesses currently located within the unincorporated areas of San Joaquin County, as well as local jurisdictions within San Joaquin County with the exception of the City of Stockton, from participating in the program, an amendment to the Office and Industrial Sales Tax Incentive Program guidelines is necessary; now, therefore,

BE IT RESOLVED BY THE COUNCIL OF THE CITY OF STOCKTON, AS FOLLOWS:

1. The City Council hereby finds that the public will receive a direct benefit from the execution of the Sales Tax Incentive Agreement between the City of Stockton and Diesel Direct West, Inc., in that it will generate net new sales tax revenue for the City of Stockton as well as additional job opportunities.
2. The City Council hereby approves the Office and Industrial Sales Tax Incentive Agreement between the City of Stockton and Diesel Direct West, Inc., attached hereto as Exhibit 1 and incorporated by this reference.
3. The City Council hereby approves the amendment to the Office and Industrial Sales Tax Incentive program guidelines attached hereto as Exhibit 2 and incorporated by this reference.

4. The City Manager is hereby authorized and directed to take all necessary and appropriate action to carry out the purpose and intent of this Resolution.

PASSED, APPROVED, and ADOPTED August 12, 2014



ANTHONY SILVA, Mayor
of the City of Stockton

ATTEST:


BONNIE PAIGE, City Clerk
of the City of Stockton



AGREEMENT BY AND BETWEEN THE CITY OF STOCKTON, A MUNICIPAL CORPORATION AND DIESEL DIRECT WEST, INC., A CALIFORNIA CORPORATION

This Agreement is made as of the date last written below by and between the City of Stockton, a municipal corporation (the "City") and Diesel Direct West, Inc., a California corporation ("Diesel Direct"), hereinafter collectively referred to individually as "party" and collectively as "Parties" herein, with reference to the following facts, purposes, and understandings.

RECITALS

- A. Capitalized terms used herein are defined in Article 1 of this Agreement.
- B. The City has adopted an Economic Development Strategy which includes efforts to generate new revenue, attract new business, and create additional jobs throughout Stockton.
- C. The Office and Industrial Sales Tax Incentive Program will serve as an additional tool in the City's economic development efforts by providing financial incentives to eligible businesses that are looking to locate in office or industrial facilities within Stockton city limits.
- D. The Office and Industrial Sales Tax Incentive Program will be used to attract and retain businesses meeting the following criteria:
 - 1. Generate net new annual gross taxable sales of \$25 million or more.
 - 2. Generate sales tax to the City of Stockton corresponding with the gross sales tax amount.
 - 3. Create a minimum of 10 full-time equivalent (FTE) jobs.
 - 4. Make a capital investment within the City of \$50,000 (this is based on office lease rate of \$12/s.f./year for 5,000 s.f. building/lease rate of 20,000 s.f. industrial building at \$4.50/s.f./year is \$90,000) or more (may be an aggregate of lease or purchase of facility, tenant improvements, off-site improvements, or other similar investment).
 - 5. Must have a physical presence within Stockton city limits.
- E. In order to be eligible for the incentive, the City must demonstrate that there is a direct benefit to the public, which may include but is not limited to the following:
 - 1. Net new sales tax revenue received by the City of Stockton
 - 2. Creation of jobs
 - 3. Capital Investment by the business
- F. Diesel Direct is a company headquartered in 4412 Harlin Drive, Sacramento, CA 95826, which is in the business of providing diesel mobile refueling services and fuel management services.

G. In consideration for the City entering into this Agreement, Diesel Direct will move its headquarters from 4412 Harlin Drive, Sacramento, CA 95826 to 3734 Imperial Avenue, Suite E. Stockton, CA 95215 .

H. Diesel Direct shall use commercially reasonable, good faith efforts to administer its business activities, with the objective of maximizing the amount of Local Sales Tax Revenues generated from Diesel Direct's ongoing business activity within the City of Stockton.

I. The operations of Diesel Direct to be located within the City, will provide significant public benefit to the City, in that the additional Local Sales Tax Revenues to be generated as a result of Diesel Direct's efforts represent a substantial source of additional public revenue for the City.

J. This Agreement will facilitate a business-friendly environment that will allow Diesel Direct to operate a successful business.

K. The City represents and warrants that it is a municipal corporation duly formed, existing, and operating under the laws of the State of California and exercising all governmental functions and rights thereto as a Charter City. The City further represents that entering into this Agreement and the performance of the City's obligations thereunder do not constitute a violation of any state or federal statute or judicial decision to which the city is subject. The City also represents that there are no pending lawsuits which would prevent or impair the timely performance of the City's obligations under this Agreement. The City acknowledges that these representations and warranties are a material consideration to Diesel Direct and that Diesel Direct is relying on these representations in undertaking Diesel Direct's obligations as set forth herein.

L. Diesel Direct represents and warrants that it is a corporation duly formed, existing and operating under the laws of the State of California. Diesel Direct further represents that entering into this Agreement and the performance of the city's obligations thereunder do not constitute a violation of any state or federal statute or judicial decision to which the city is subject. Diesel Direct also represents that there are no pending lawsuits which would prevent or impair the timely performance of Diesel Direct's obligations under this Agreement. Diesel Direct acknowledges that these representations and warranties are a material consideration to the City and that the City is relying on these representations in undertaking the City's obligations as set forth herein.

M. The proposed Office and Industrial Sales Tax Program may foster a growing ecosystem of businesses within the City, thereby promoting business-to-business sales taxes and other similar financial benefits to the City.

N. Due to the benefits of locating Diesel Direct's business in the City as described herein, the Parties propose to enter into this Agreement as reinforcement of their mutually beneficial relationship by establishing an incentive program that will rebate to Diesel Direct a portion of the Sales Tax generated by Diesel Direct's business activities within the City.

O. The City Council has found that the Rebates and other benefits provided to Diesel Direct under this Agreement will advance the public welfare and provide adequate consideration in return to the City as follows:

1. The net financial benefit to the public has the potential to exceed the value of the Rebates provided to Diesel Direct;

2. Diesel Direct will provide a direct public benefit through the provision of jobs; the generation of sales and property taxes; and the provision of other benefits to the City and the San Joaquin County region;

3. The Rebates represent a partial return of the total Sales Taxes that will be realized by Diesel Direct locating its business in the City of Stockton, which shall be paid in arrears, such that the Rebates will not impact the City's current General Fund balance as the Rebates will be based on future, additional revenues to the General Fund; and

4. Rebating a larger percentage of the Sales Tax for higher amounts of Net New Sales Tax Revenue will benefit the public by facilitating the startup of the business, thereby leading to the earlier creation of Jobs and capital investment, which otherwise might be delayed.

P. The Parties now wish to enter into this Agreement setting forth the Parties' understanding and agreement regarding the establishment of Diesel Direct's business in the City of Stockton.

NOW THEREFORE, IN CONSIDERATION of the mutual agreements, obligations, representations and promises herein contained, the Parties agree as follows:

ARTICLE 1

DEFINITIONS

1.1 Definitions. In addition to the capitalized words and phrases that may be elsewhere defined in this Agreement, the following capitalized words and phrases shall have the following meanings under this Agreement:

(a) "Agreement" means this Agreement by and Between the City of Stockton and Diesel Direct for the Establishment of its Business within the City of Stockton.

(b) "Applicable Reporting Period" means, for purposes of determining the Parties' financial obligations hereunder, the Reporting Period applicable to the Fiscal Year for which the financial obligation is being calculated.

(c) "Business Day" means a day which is not a Saturday, Sunday or legal holiday on which banking institutions in the State of California or City are closed.

(d) "City" means the City of Stockton, a municipal corporation organized under the laws of the State of California and all of its agents, successors and assigns.

(e) "Contract Year" means the first full year commencing with the first day of the calendar year following the Execution Date of this Agreement.

(f) "Effective Date" means the date of execution of this Agreement, which is the date of the last signature below.

(g) "Event of Default" means any default by Diesel Direct or The City as provided in Section 5.2, below.

(h) "Party" means either the City or Diesel Direct, sometimes collectively referred to as the "Parties".

(i) "Diesel Direct" means Diesel Direct West, Inc., a California corporation and its agents, successors, and assigns.

(j) "Rebates" means the Sales Tax Rebate Payment.

(k) "Retail Sales" means the sale of all tangible personal property to any person or entity, which is subject to the Sales Tax Law and which generates Local Sales Tax Revenues.

(l) "Sales Tax" or "Sales Taxes" means sales and use taxes remitted by Diesel Direct to the State of California arising from Diesel Direct's Stockton points of sale pursuant to the Sales and Use Tax Law of the State of California.

(m) "Sales Tax Payment Report" means the periodic reports filed by Diesel Direct with the California Board of Equalization to report and remit Diesel Direct's sales and use taxes due.

(n) "Sales Tax Rebate Payment" means the payments to Diesel Direct by the City pursuant to Section 2.1 of this Agreement.

(o) "Sales Tax Rebate Percentage" shall mean the percentage in the table set forth in Subsection 2.1(c), below.

(p) "Sales Tax Received" means the Sales Tax ultimately received by the City (through remittance from the State of California).

(q) "Sales Tax Received Report" means the quarterly report received by the City by its sales tax consultant, which provides information from the California Board of Equalization that verifies the total amount of Sales Tax received. Such report is prepared in arrears of Sales Taxes paid by Diesel Direct.

(r) "Term" means the term of this Agreement, commencing on the Effective Date of this Agreement and ending on the tenth (10th) anniversary of the first day of the first Contract Year, together with any extension period as provided by Section 2.2, below, or as otherwise agreed to by the Parties in a written amendment to this Agreement.

ARTICLE 2

SALES TAX REBATE

2.1 Sales Tax Rebate. Subject to the terms and conditions of this Agreement, the City shall rebate to Diesel Direct a portion of the Sales Taxes based on the amount of net new Sales Taxes Received by the City and disbursed annually to Diesel Direct, as set forth below. The Sales Tax Rebate is limited to the Bradley-Burns 1% tax only.

(a) Sales Tax Rebate Payment Amount. The amount of the "Sales Tax Rebate Payment" shall be equal to (i) the Sales Tax Received (as calculated below) multiplied by (ii) the Sales Tax Rebate Percentage (as determined below).

(b) Determination of Sales Tax Received. Following the filing of the last Sales Tax Payment Report for a fiscal year, Diesel Direct shall remit to City a copy of all Sales Tax Payment Reports for the fiscal year (the "Fiscal Year Sales Tax Payment Reports"). Upon receipt of each Sales Tax Payment Report and the Sales Tax Received Report, City shall determine the Sales Tax Received.

(c) Determination of Sales Tax Rebate Percentage. The "Sales Tax Rebate Percentage" shall mean the percentage set forth in table below.

Net New Sales Tax Revenue	% of Sales Tax Revenue Paid to DIESEL DIRECT	% of Sales Tax Revenue Retained by City
Less than \$250,000	0%	100%
\$250,000-\$500,000	50%	50%
Above \$500,000	65%	35%

(d) Payment Timing. Sales Tax Rebates shall be paid on an annual basis. Within thirty (30) days after receipt of the Sales Tax Payment Report and the Sales Tax Received Report for the final quarter of the fiscal year, the City shall rebate to Diesel Direct by check or wire transfer the Sales Tax Rebate Payment applicable for the fiscal year and provide a written accounting to Diesel Direct showing the calculation thereof, including the amount of Sales Taxes received per the Sales Tax Received Report and a reconciliation thereof to the Quarterly Sales Tax Reports. In the event of a conflict between the Sales Tax Received Report and the Quarterly Sales Tax Reports, City will inquire with the California Board of Equalization regarding the conflict to try to resolve the conflict, however, if the conflict cannot be resolved with reasonable efforts by the City, City will advise Diesel Direct in writing of the conflict and Diesel Direct shall take all available steps to

resolve the conflict between the two (2) reports. Any adjustment to the amount due shall be made on the next Sales Tax Rebate Payment.

(e) Audits. Either Party shall, upon no less than thirty (30) days prior written notice to the other, make the entirety of its books and records relating to the calculation and determination of the Sales Tax Rebate Payment, available at no cost to the requesting party and/or its designees and shall direct its accountants, consultants and contractors in possession of its books to do likewise. Each party shall bear the costs of its own auditors, experts, and any other consultants it may engage to complete its audit.

(f) Adjustments: Dispute Resolution. If following a Sales Tax Rebate Payment, the City determines that an adjustment is needed to correct an erroneous allocation, including a determination by the Board of Equalization (BOE) that all or a portion of the sales tax revenue received was improperly allocated, the City shall inform Diesel Direct in writing of the amount and basis for the adjustment, and such adjustment shall be applied to the next Sales Tax Rebate Payment, provided that Diesel Direct does not object in writing to the adjustment. If the amount of the next Sales Tax Rebate Payment is insufficient to cover the amount of the adjustment, the City shall notify Diesel Direct in writing and Diesel Direct shall pay the remaining amount owed to the City within thirty (30) days of receiving the City's written notification. If following a Sales Tax Rebate Payment, Diesel Direct determines that the payment is incorrect and Diesel Direct is owed more, Diesel Direct shall inform the City in writing of the amount and basis for the adjustment, and such adjustment and outstanding balance shall be paid to Diesel Direct within thirty (30) days from the date of notice, provided that the City does not object in writing to the adjustment.

If either party objects to the amount of the adjustment, then the Parties will meet and confer within thirty (30) days thereafter in an attempt to resolve the dispute. If the dispute is not resolved within thirty (30) days after the meet and confer, then either Party may request the matter to be resolved by an independent accounting firm mutually agreeable to both Parties. Such engagement shall be by both Parties and shall be limited to calculating the Sales Tax Rebate Payment in accordance with the terms of this Agreement. The fees and expenses of the accounting firm used in such dispute resolution shall be divided between Diesel Direct and the City in proportion to the degree to which the disputed amount of the Sales Tax Rebate Payment was resolved in each Party's favor.

For illustration purposes only, if Diesel Direct's calculation of the Sales Tax Rebate Payment was \$100,000, and the City's calculation of the Sales Tax Rebate Payment was \$80,000, and the dispute resolution process determines the Sales Tax Rebate Payment should have been \$90,000, then the Parties shall bear the accounting fees and expenses equally.

Any adjustments to amounts previously paid or to settle fees and expenses shall be applied to the next due Sales Tax Rebate Payment. If no such payment is expected within ninety (90) days, then settlement shall be made by separate payment by the owing Party. For the avoidance of doubt, each Party will bear its own legal fees and costs, if any, associated with the audit or any audit dispute resolution.

2.2 Term Extension. The Term of this Agreement shall be for ten (10) years from the date the Agreement becomes effective and may be extended by agreement between the parties for two additional five (5)-year periods, for a total of twenty (20) years.

2.3 Disclaimer as to Sales Tax Revenue. Each Party understands and acknowledges that the other Party makes no warranty, representation, covenant, or guaranty, regarding the amount of Sales Tax revenues that may be generated by Diesel Direct's operations in any year. Specifically, but without limiting the foregoing, Diesel Direct acknowledges that the City has informed Diesel Direct that the State of California (acting through the State Legislature or any other State agency having jurisdiction) may revise the manner in which Sales Tax revenues are allocated among cities and counties and other agencies in the State or may reduce or eliminate the Sales Tax rate applicable in the State. Based on the foregoing, Diesel Direct understands and acknowledges that Diesel Direct bears the sole risk that City's Sales Tax revenues generated by Diesel Direct's operations may be reduced or no longer available to the City due to the actions of the State, which could reduce or eliminate the Sales Tax Payments to Diesel Direct. Notwithstanding the foregoing, in the event of a change in the Sales and Use Tax Law that impacts the manner in which Sales Tax is collected and distributed to the City, this Agreement shall be interpreted so as to adjust its provisions to apply the revised Sales and Use Tax Law in the manner most consistent with the Agreement's intent which is to rebate to Diesel Direct the Sales Tax Rebate Percentage of the Sales Taxes remitted by Diesel Direct that are ultimately included in the City's revenues.

ARTICLE 3

CONTINUING OBLIGATIONS

3.1 Point of Sale. As consideration for the City making the Rebates to Diesel Direct under this Agreement, Diesel Direct covenants to establish its business as the principal point of sale in California for the sale of mobile diesel refueling services and fuel management services and shall maintain its business within the City of Stockton as one of its points of sale in California so long as Diesel Direct is selling its services from its facility. For the avoidance of doubt, Diesel Direct may establish other locations at which to market and sell its services but shall not accept any incentives from other governmental entities within California to establish such other locations in violation of California Government Code Section 53083, 53084 or 53084.5.

3.2 Community Support. Diesel Direct acknowledges the importance of Diesel Direct's participation in and support for local organizations, businesses, and community events and may, in its discretion, support or participate in such organizations and events.

3.3 Indemnity.

(a) Diesel Direct shall indemnify, defend, and hold the City and its officials, employees, agents, volunteers, and successors (the "Indemnified Parties") harmless against any of the following:

(i) All legal or administrative proceedings, arbitrations, or enforcement actions commenced by a third party or parties for damages, compensation, fines, penalties or other amounts arising out of the failure or alleged failure of Diesel Direct and its contractors and subcontractors to pay prevailing wages pursuant to Labor Code Sections 1720 et seq. or regulations implementing the same or to comply with other applicable provisions of Labor Code Sections 1720 et seq. (or regulations implementing the same) in connection with Diesel Direct's business activities.

(ii) All administrative, legal or equitable actions commenced by a third party or parties challenging the enforceability, validity or legality of: (A) (I) this Agreement; or (II) the power of the City to enter into this Agreement or provide the incentives hereunder based on an alleged violation of California Government Code Sections 53083, 53084 and 53084.5; or (B) the City's issuance of a permit, entitlement, or approval, to the extent such actions pertain to this Agreement, and do not apply to other matters alleged or involved in such third party actions.

(b) Diesel Direct's obligation to indemnify, defend, and hold harmless the Indemnified Parties under this Section 3.3 is subject to the City: (i) promptly notifying Diesel Direct of the initiation of any such claim, action, or proceeding (unless Diesel Direct is already aware of the claim, action, or proceeding), and (ii) giving Diesel Direct the full authority to defend and settle such claim, action, or proceeding at Diesel Direct's expense. The City shall reasonably cooperate with Diesel Direct in the defense of such claim, action, or proceeding and may be represented, at the City's option and expense, by counsel of the City's selection. The City's duty under this Subsection (b) to cooperate with Diesel Direct does not include contributing to or sharing in the cost of such defense.

(c) Notwithstanding anything to the contrary, Diesel Direct's obligations related to the Indemnified Parties shall not apply to any claim or action to the extent arising from the Indemnified Parties' gross negligence or willful misconduct.

ARTICLE 4

ASSIGNMENTS

4.1 Assignments. Except as otherwise provided in Section 4.2, below, Diesel Direct may not assign this Agreement without the prior written consent of the City, which consent shall not be unreasonably withheld, conditioned, or delayed. The City's consent to an assignment by Diesel Direct may be provided by the City's City Manager. Any unpermitted assignment, or any attempt thereof, shall not confer rights upon the purported assignee and shall constitute an immediate material default of this Agreement and City may, only after providing Diesel Direct written

notice – and an opportunity to cure as set forth below in Section 5.2(b)[Default by Diesel Direct], terminate this Agreement.

4.2 Sale or Assignment by Diesel Direct. Section 4.1 notwithstanding, the City's consent shall not be required for any assignment by Diesel Direct: (i) in connection with the sale of all or substantially all of its business operations in Stockton provided that the acquirer agrees to perform and observe, from and after the date of the sale, the obligations, terms and conditions of this Agreement (provided, however, such acquirer shall not be liable for the failure of its predecessor to perform any such obligation); or (ii) to an affiliate of Diesel Direct in connection with a corporate restructuring or other reorganization.

4.3 Breach. In the event of a breach of this Article 4, the sole remedy of the other Party shall be to terminate this Agreement by written notice to the other within thirty (30) days after becoming aware of the breach (in which event it is understood that Diesel Direct's indemnification obligations in Section 3.3 shall survive such termination).

ARTICLE 5

DEFAULT AND REMEDIES

5.1 Application of Remedies. The provisions of this Article shall govern the Parties' remedies for breach of this Agreement.

5.2 Default by City.

(a) City Event of Default. If, after providing the notice and opportunity to cure as provided in Subsection (b) below, the City is in breach of any material provision of this Agreement, such breach shall constitute a "City Event of Default" and a basis for Diesel Direct to take action against the City if left uncured by the City pursuant to Subsection (b) of this Section 5.2.

(b) Notice and Cure Procedure: Remedies. Upon the occurrence of a breach of any material provision of this Agreement by the City, Diesel Direct shall first notify the City in writing of the purported breach, giving the City thirty (30) days from receipt of such notice to cure the breach. In the event the City does not cure the breach within such thirty (30)-day period (or, if the breach is not reasonably susceptible of cure within such thirty (30)-day period, the City fails to commence the cure within such period or fails thereafter to diligently prosecute the cure to completion), then Diesel Direct shall be afforded all of its rights at law or in equity by taking any or all of the following remedies: (i) terminating this Agreement by written notice of termination to the City; (ii) prosecuting an action for damages (excluding punitive damages and consequential damages); or (iii) seeking any other remedy available at law or in equity (excluding punitive damages and consequential damages).

Default by Diesel Direct.

(a) Diesel Direct Event of Default. If after providing the notice and opportunity to cure as provided in Subsection (b) below, Diesel Direct is in breach of any material provision of this Agreement, such breach shall constitute a "Diesel Direct Event of Default" and a basis for the City to take action against Diesel Direct if left uncured by Diesel Direct pursuant to Subsection (b) of this Subsection

(b) Notice and Cure Procedure; Remedies. Upon the occurrence of breach of any material provision of this Agreement by Diesel Direct, the City shall first notify Diesel Direct in writing of the purported breach, giving Diesel Direct thirty (30) days from receipt of such notice to cure the breach. In the event Diesel Direct does not cure the breach within such thirty (30)-day period (or if the breach is not reasonably susceptible of being cured within such thirty (30)-day period, Diesel Direct fails to commence the cure within such period or fails thereafter to diligently prosecute the cure to completion), then the City shall be afforded all of its rights at law or in equity by taking any or all of the following remedies: (i) terminating this Agreement by written notice of termination to Diesel Direct; (ii) prosecuting an action for damages (excluding punitive damages and consequential damages); or (iii) seeking any other remedy available at law or in equity (excluding punitive damages and consequential damages).

5.3 Rights and Remedies Cumulative; Waiver of Default. Except as otherwise expressly provided, the rights and remedies of the Parties are cumulative, and the exercise or failure to exercise any right or remedy shall not preclude the exercise, at the same time or different times, of any right or remedy for the same breach or of any other breach. No waiver with respect to any breach or default in the performance of any obligation under the terms of this Agreement shall be deemed to be a waiver with respect to any subsequent breach or default, whether of similar or different nature. Any waiver, permit, consent or approval of any kind or character shall be effective only if made in writing and only to the extent specifically set forth in such writing.

5.4 Limitation on Liability. NEITHER PARTY SHALL BE LIABLE HEREUNDER FOR ANY LOSS OF PROFITS, SPECIAL, INCIDENTAL, CONSEQUENTIAL, EXEMPLARY, PUNITIVE, OR OTHER INDIRECT DAMAGES ARISING HEREUNDER, HOWEVER CAUSED, EVEN IF SUCH PARTY HAS BEEN MADE AWARE OF THE POSSIBILITY OF SUCH DAMAGES.

ARTICLE 6

GENERAL PROVISIONS

6.1 Identity of Diesel Direct. Diesel Direct represents and warrants to the City as of the execution date of this Agreement, as follows:

(a) Organization. Diesel Direct is a corporation, duly organized, validly existing and in good standing under the laws of the State of California, with full power

and authority to conduct its business as presently conducted and to execute, deliver and perform its obligations under this Agreement.

(b) No Conflict. The execution, delivery and performance of this Agreement by Diesel Direct does not and will not conflict with, or constitute a material violation or material breach of, or constitute a material default under: (i) the organizational documents of Diesel Direct; (ii) to Diesel Direct's knowledge, any applicable law, rule or regulation binding upon or applicable to Diesel Direct; or (iii) any other material agreements to which Diesel Direct is a party.

(c) No Litigation. Unless otherwise disclosed in writing to the City, there is no existing or, to Diesel Direct's knowledge, pending or threatened litigation, suit, action or proceeding before any court or administrative agency affecting Diesel Direct and its business activities that would, if adversely determined, materially and adversely affect Diesel Direct's ability to perform its obligations under this Agreement.

6.2 Source of Sales Tax Rebate Payment. Sales Tax Rebate payments shall be payable from any source of legally available funds of the City.

6.3 Notices. All notices and other communications required or permitted to be given under this Agreement shall be in writing and shall be personally served or mailed, certified mail, to the respective parties as follows:

City: City of Stockton
425 N. El Dorado Street
Stockton, CA 95202
Attention: City Manager

With copy to: Office of City Attorney
425 N. El Dorado Street
Stockton, CA 95202

Diesel Direct: William J. McNamara, Jr.
74 Maple Street
Stoughton, MA 02072

With copy to: Diesel Direct West, Inc.
3734 Imperial Avenue, Suite E
Stockton, CA 95215
Attention: Tim Johnson

Notice shall be deemed effective on the date personally delivered or, if mailed, on the date listed on the return receipt.

6.4 Non-Liability of Officials, Employees and Agents. No member, official, officer, director, employee or agent of either Party shall be personally liable to the other Party, or any successor in interest, for: (i) any default or breach of this Agreement, (ii) any amount that may become due under this Agreement, or (iii) any obligation required under this Agreement.

6.5 Enforced Delay. In addition to the specific provisions of this Agreement, performance by either Party shall not be deemed to be in default where delays or defaults are due to war; insurrection; strikes; lockouts; riots; floods; earthquakes; fires; casualties; acts of God or other deities; acts of the public enemy; epidemics; quarantine restrictions; moratoria, or other restrictions imposed by governmental entities other than City; freight embargoes; the filing of a lawsuit or action challenging the entitlements or environmental review for the project contemplated hereunder, this Agreement, or Diesel Direct or the City's authority to perform their respective obligations hereunder (which shall be deemed to be a delay of the Parties); or any other similar causes (not including the lack of funds) beyond the control of and without the fault of the Party claiming the inability to perform. An extension of time for any such cause of delay will be deemed granted if notice by the Party claiming the delay is sent to the other within thirty (30) days from the commencement of the cause causing the delay. In no event, however, shall the cumulative delays exceed twelve (12) months, unless otherwise agreed to by the Parties in writing. Where the default is due to a Party's failure or delay in making a payment, such Party shall promptly make the payment following the resolution or termination of the event causing the delay.

6.6 Applicable Law. This Agreement shall be interpreted under and pursuant to the laws of the State of California exclusive of its conflict of law principles.

6.7 Venue. In the event that suit shall be brought by either Party to this Agreement, the Parties agree that venue shall be exclusively vested in the state courts of the County of San Joaquin or, where otherwise appropriate, exclusively in the United States District Court, Eastern District of California, Sacramento, California.

6.8 Severability. If any term, provision, covenant or condition of this Agreement is held in a final disposition by a court of competent jurisdiction to be invalid, void or unenforceable, such provision shall be severed and the remaining provisions of this Agreement shall continue in full force and effect unless the rights and obligations of the Parties have been materially altered or abridged by such invalidation, voiding or unenforceability.

6.9 Attorneys' Fees. In the event of any legal action arising out of or relating to any breach hereof, the Party prevailing in any such action shall be entitled to recover against the non-prevailing Party all reasonable attorneys' fees, expert fees, and costs reasonably incurred by the prevailing Party in such action.

6.10 Binding Upon Successors. This Agreement shall be binding upon and inure to the benefit of the successors in interest and assigns of each of the Parties hereto. Any reference in this Agreement to a specifically named Party shall be deemed to apply to any successor, heir, administrator, executor, successor, or assign of such Party who has acquired an interest in this Agreement or under law.

6.11 City Approval. Whenever City approval or consent is requested, the written approval or consent of the City Manager of the City shall constitute the approval or consent of the City, without further authorization required from the City Council unless, in the opinion of the City Attorney, such approval or consent requires City

Council approval as provided herein or under the law. The City hereby authorizes the City Manager to deliver such approvals or consents as are required or permitted by this Agreement on behalf of the City, subject to the concurrence of the City Attorney. If the City Attorney determines that City Council approval is required, the City Manager shall agendaize the matter for the next regularly-scheduled meeting of the City Council subject to the noticing provisions of the Ralph M. Brown Act (Government Code Sections 54950 et seq.)

6.12 Discretion Retained By City. The City's execution of this Agreement does not constitute approval by the City and in no way limits the discretion of the City to approve, deny, or conditionally approve any permit, entitlement, or approval required for the construction, creation, erection, establishment, or modification of the Improvements.

6.13 Time for Performance. Unless otherwise specified, any reference herein to "days" shall mean calendar days. If the time for performance ends on a Saturday, Sunday, City holiday, or when the City is not open for business, the time for performance shall be extended to the next business day.

6.14 Parties Not Co-Venturers. Nothing in this Agreement is intended to or does establish the Parties as partners, co-venturers, or principal and agent with one another.

6.15 Counterparts. This Agreement may be executed in counterparts and multiple originals.

6.16 Recitals Incorporated. The Recitals set forth above are incorporated into this Agreement and made a part hereof, and except where specifically stated, do not constitute covenants or representations of either Party.

6.17 Standard of Approval. Any consents or approvals required or permitted under this Agreement shall not be unreasonably withheld or made, except where it is specifically provided that a sole discretion standard applies.

6.18 Effectiveness of Agreement. This Agreement shall only become effective on the Effective Date.

6.19 Interpretation. Each Party has reviewed this Agreement and any question of doubtful interpretation shall not be resolved by any rule or interpretation providing for interpretation against the drafting Party. This Agreement shall be construed as if both Parties drafted it. The captions and headings contained herein are for convenience only and shall not affect the meaning or interpretation of this Agreement.

6.20 Signator's Warranty. Each Party warrants to the other Party that he or she is fully authorized and competent to enter into this Agreement in the capacity indicated by his or her signature and agrees to be bound by this Agreement.

6.21 Entire Agreement and Amendments. This Agreement represents the entire understanding of the Parties as to those matters contained herein. No prior oral or written understanding shall be of any force or effect with respect to those matters covered hereunder. This Agreement may only be modified by a written amendment duly executed by the Parties to this Agreement.

WHEREFORE, the Parties have executed this Agreement on the date first noted above.

ATTEST:

BONNIE PAIGE
CITY CLERK

BY _____

CITY OF STOCKTON:

KURT WILSON
CITY MANAGER

BY _____

DATE _____

APPROVED AS TO FORM:
OFFICE OF THE CITY ATTORNEY

BY _____
CITY ATTORNEY

BUSINESS:
DIESEL DIRECT WEST, INC.

BY _____
WILLIAM J. MCNAMARA, JR.
CEO & PRESIDENT

DATE _____

City of Stockton

Office and Industrial Sales Tax Incentive Program

1. Goals and Objectives

The purpose of the Office and Industrial Sales Tax Incentive Program is to serve as an additional tool in the City's economic development efforts to generate new revenue, attract new business, and create additional jobs throughout Stockton. The program provides financial incentives to eligible businesses that are looking to locate or expand in office or industrial facilities within the Stockton city limits. Examples of the type of industries that would qualify for the incentive include: eCommerce, fuel distributors, medical device manufacturers, and business-to-business sales. Traditional retail establishments, such as brick-and-mortar storefronts, dealerships, malls and big box retailers, do not qualify for sales rebates under this program.

2. Program Guidelines

The Office and Industrial Sales Tax Incentive Program will be used to attract and retain businesses meeting the following criteria:

- Generate net new annual gross taxable sales of \$25 million or more
- Generate sales tax to the City of Stockton corresponding with the gross sales tax amount
- Create a minimum of 10 full-time equivalent (FTE) jobs
- Make a capital investment within the City of \$50,000 (based on office lease rate of \$12/sf/year for 5,000 s.f. building / lease rate of 20,000 s.f. industrial building at \$4.50/sf/year is \$90,000) or more (may be an aggregate of lease or purchase of facility, tenant improvements, off-site improvements, or other similar investment)
- Must have a physical presence within Stockton city limits

Businesses currently located within the unincorporated areas of San Joaquin County, as well as local jurisdictions within San Joaquin County with the exception of the City of Stockton, are not eligible for a rebate under this program. The program is not intended to attract business from other San Joaquin County jurisdictions.

An Office and Industrial Sales Tax Incentive Agreement, requiring approval by the City Council, will be executed between the City of Stockton and qualifying business, and include:

- Term of the agreement: 10 years, with two 5-year renewal options
- Tiered rebate proposal:

Net New Sales Tax Revenue	% of Sales Tax Revenue Rec'd by City to Business	% of Sales Tax Revenue Rec'd retained by City
Less than \$250,000	0%	100%
\$250,000-\$500,000	50%	50%
Above \$500,000	65%	35%

Examples of potential rebates:

Net New Sales Tax Revenue	% of Sales Tax Revenue Rec'd by City to Business	% of Sales Tax Revenue Rec'd retained by City
\$200,000	\$0 (0%)	\$200,000 (100%)
\$250,000	\$125,000 (50%)	\$125,000 (50%)
\$550,000	\$357,500 (65%)	\$192,500 (35%)
\$750,000	\$487,500 (65%)	\$262,500 (35%)

- Rebate amount will be based on net new sales tax revenue received by the City and disbursed annually to the business.
- Sales tax rebate would be limited to the Bradley-Burns 1% tax only
- Include recapture clause to protect City should BOE make a determination that all/portion of sales tax revenue received were improperly allocated.
- Provision indemnifying the City against any claim of violation of Government Code Sections 53083, 53084, and 53084.5, and other such claims.
- Must obtain City business license, proper permitting, and comply with all laws and regulations.

In order to be eligible for the incentive, the City must demonstrate that there is a direct benefit to the public, which may include, but is not limited to:

- Net new sales tax revenue received by the City of Stockton
- Creation of jobs
- Capital investment by the business

The details of the financial incentive will be included in the Office and Industrial Sales Tax Incentive Agreement, in a form approved by the City Attorney's Office. Net new sales tax revenue received through the incentive program will be used to further the City's economic development activities. The program will be in effect for a period of 5 years from the date of approval, unless extended by the City Council.

3. City Council Review

Each Office and Industrial Sales Tax Incentive Agreement will be presented to the City Council for review and consideration, based on the findings and guidelines set forth above. Approval of the Incentive Agreements will require a public hearing.