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This Agreement [Agreement] is made between the San Diego Tourism Marketing District, a nonprofit mutual benefit Corporation registered with the Secretary of State of the State of California [SDTMD], and Balboa Park Celebration Inc., a nonprofit Corporation registered with the Secretary of State of the State of California [Contractor], hereinafter collectively referred to as the “Parties.”

RECATILS

WHEREAS, on May 22, 2007, the Council of the City of San Diego adopted Ordinance O-19622 N.S. [Ordinance], an ordinance amending Chapter 6, Article 1 of the San Diego Municipal Code [Code] by adding Division 25, the San Diego Tourism Marketing District Procedural Ordinance and on October 6, 2011 the Council adopted Ordinance O-20096 further amending Chapter 6, Article 1; and

WHEREAS, following the procedures included in the Ordinance, the Council initiated the establishment of a Tourism Marketing District [TMD] and held a public hearing on November 27, 2012, wherein a weighted majority of the proposed business assesses were verified as not casting ballots in opposition to the establishment of the TMD; and

WHEREAS, the tourism industry has formed the San Diego Tourism Marketing District Corporation, a non-profit mutual benefit Corporation, for the purposes, among other things, of entering agreements with Contractors to carry out the purposes of the TMD; and

WHEREAS, the Council of the City of San Diego ordered: 1) the levying of assessments on assessed businesses; 2) the establishment of a TMD; and 3) the SDTMD to enter into contracts with Contractors for the provision of TMD services; and

WHEREAS, Contractor is a legally constituted nonprofit corporation; and

NOW, THEREFORE, in consideration of the above recitals and the mutual covenants and conditions set forth in this Agreement, and for good and valuable consideration, the sufficiency of which is hereby acknowledged, the Parties agree as follows:

ARTICLE I: DEFINITIONS

For the purposes of this Agreement, the terms listed below are defined as follows:

1.1. Plan – The Tourism Marketing District Management Plan, developed by the industry proponents of the District, outlining the anticipated operations of the District and establishing a set of budgetary guidelines, including proposed budget line items, for the thirty-nine-and-one-half-year duration of the District. The Plan was approved by the San Diego City Council on November 27, 2012 in Resolution Number R-307843 and is attached hereto and incorporated herein by reference as Exhibit C.
1.2. Tourism Marketing District or District – An area established pursuant to San Diego Municipal Code section 61.2501 et seq., within which businesses pay assessments to fund activities pursuant to section 61.2501 et seq.

1.3. Performance Report – Report prepared by the Contractor, due for submission to SDTMD on or before May 31, 2013, which summarizes the Contractor’s goals, accomplishments, returns on investment, and expenditures for the contracted services.

1.4. Subcontractor – Any entity that furnishes supplies and/or services (other than office space, standard commercial supplies, or printing services) to Contractor in connection with this Agreement. It is anticipated that the Contractor may engage subcontractors for activities undertaken in furtherance of the goals of the District.

1.5. TMD Fund – A City of San Diego fund, established and administered by the City’s Auditor and Comptroller, for the receipt of TMD assessment funds from the City Treasurer and the disbursement of funds to SDTMD for eligible activities.

1.6. Funding Category – A program of services on which TMD funds may be used. Funding Categories A and B are described in detail in the Plan attached as Exhibit C. Funds provided to Contractor must be utilized for programs meeting the requirements of A and B.

1.7. Operating Manual – The Operating Manual for Economic Development Programs, produced by the City of San Diego’s City Planning & Community Investment Department, Economic Division, as amended from time to time. The Operating Manual is attached as Exhibit D.

1.8. Operating Agreement – The agreement entered into by and between the City of San Diego and San Diego TMD Corporation regarding management of TMD funds, with an effective November 26, 2012, which is on file with the City Clerk as document number RR308062, along with the First Amendment to the Operating Agreement. The First Amendment to the Operating Agreement was entered into effective November 26, 2012 and is on file with the City Clerk as document number RR308065. The terms of this Agreement shall be subject to any amendments to the Operating Agreement. The Operating Agreement is attached hereto as Exhibit E. Where there are conflicts between the Operating Manual and the Operating Agreement, the Operating Agreement shall prevail.

1.9. Reimbursement/Reconciliation Packet/Report – A report accounting for the use of District revenue, described in Exhibit A of the Operating Agreement. Reconciliation/reimbursement Reports shall be submitted to the TMD no less than 45 days after the first disbursement and on no less than a monthly basis thereafter.
ARTICLE II: EFFECTIVE DATE, TERM OF AGREEMENT

2.1 Upon the execution of this Agreement by the Parties, this Agreement shall be effective as of July 1, 2013 and continue for one year until June 30, 2014 unless terminated earlier in accordance with the terms of this Agreement. Notwithstanding the foregoing, the Agreement will terminate on disestablishment of the District pursuant to San Diego Municipal Code [Code] section 61.2524.

2.2 Time is of the essence for each provision of this Agreement, unless otherwise specified in this Agreement.

ARTICLE III: LIMIT OF SDTMD’S RESPONSIBILITY, INDEPENDENT CONTRACTOR, ASSIGNMENT, DESIGNATED REPRESENTATIVE

3.1 It is expressly understood and agreed that this Agreement constitutes the entire agreement between Contractor and SDTMD, and that this Agreement supersedes and replaces all other agreements of any kind in relation to the undertaking herein contemplated. In no event shall Contractor be entitled to any compensation, benefits, reimbursements or ancillary services other than as expressly provided in this Agreement.

3.2 Contractor, and any subcontractors employed by Contractor, shall be independent contractors, and not agents or employees of SDTMD. Any provision of this Agreement that may appear to give the SDTMD a right to direct Contractor concerning the details of performing its obligations and/or duties under this Agreement, or to exercise any control over such performance, shall mean only that Contractor shall follow the direction of the SDTMD concerning the end results of the performance. Contractor shall notify all prospective subcontractors of Contractor’s and subcontractor’s independent status. Contractor shall notify subcontractor, with copies to the SDTMD, concerning Contractor’s and subcontractor’s independent status in relation to the SDTMD during the performance of its duties and obligations under this agreement.

3.3 Because this Agreement is entered into by the SDTMD in reliance upon Contractor’s qualifications, experience, and personnel identified, Contractor shall not assign or subcontract any of its rights or obligations under this Agreement, without first obtaining the written consent of the SDTMD. Any assignment in violation of this Section is grounds for immediate termination of this Agreement at the sole discretion of the SDTMD.

3.4 Contractor shall identify a designated representative for the purposes of this Agreement. In the event Contractor changes its designated representative for the purposes of this Agreement, Contractor shall notify the SDTMD of the new designated representative within ten calendar days of the date of such change.
ARTICLE IV: OBLIGATIONS OF CONTRACTOR

4.1 Contractor shall perform the services described in the Scope of Services (Exhibit A), in accordance with the Budget Summary (Exhibit B) and all other terms and conditions of this Agreement.

4.2 Contractor shall not seek funding for acquisition, construction, maintenance or installation of any tangible property, facilities, equipment, programs, or any other items listed specifically in the Plan. Contractor’s obligations are solely to provide the services enumerated in Exhibit A.

4.3 Notwithstanding any and all obligations elsewhere in this Agreement, Contractor shall do the following to the reasonable satisfaction of SDTMD:

a) Assist SDTMD with establishing measurable target outcomes for marketing programs and services, including return-on-investment and other criteria, for funds awarded;

b) Provide information for reviewing and evaluating the success of marketing programs and services and the degree to which these programs and services are of benefit to all assessed businesses;

c) Prepare a Performance Report, summarizing Contractor’s goals, accomplishments, returns-on-investment, compliance with applicable A and B requirements, and expenditures for the contracted services on or before May 31, 2013;

d) Ensure that TMD assessment funds are applied only toward the equivalent of coach airfare, and only when use of public air carrier transport is required in order to perform the Contractor’s obligations under the Plan and this Agreement. TMD assessment funds may not be applied toward any upgrades;

e) Ensure that TMD funds are applied using the U.S General Services Administration rates (GSA rates) per day, per person, for meals, incidentals, and lodging while on official travel (when the provision for travel is required in order to perform the Corporation’s obligations under the Plan and this Agreement). District funds may not be used to pay for any alcoholic beverages. These same limitations shall apply when lodging in San Diego is provided for out-of-town visitors on District business. GSA rates shall be included in reimbursement / reconciliation packet from Contractor.

f) Ensure that, in the event meals are provided to hosted individuals within the scope of business development, or sales and marketing, documentation
of the following shall be included with the quarterly report and reimbursement / reconciliation packets provided to the TMD: (i) the purpose of the meeting, (ii) conformance to the Plan, (iii) the benefit or anticipated benefit to assessed businesses and (iv) a list of hosted individuals. All expenditures for meals shall comply with the approved cost allocation methodology.

g) Ensure that, should Contractor or Contractor’s subcontractors decide to provide financial sponsorship of events, Contractor’s Board makes a determination of the need for the sponsorship, that the amount of the sponsorship is a just and reasonable expenditure of TMD funds at the time it is authorized, approved or ratified, that the expenditure is in conformance with the Plan, and that the benefit or anticipated benefit to assessed businesses is identified and documented. SDTMD acknowledges that from time to time there may arise a business requirement of event sponsorships by Contractor and Contractor’s subcontractors in order to market San Diego as a tourist destination in a highly competitive market. If alcoholic beverages are consumed during event sponsorships, they may not be paid for with TMD assessment funds;

h) Ensure that, should Contractor’s subcontractors request reimbursement from TMD funds for travel, meals, the hosting of meals, out-of-town and in-town lodging and sponsorships, as discussed herein, these costs shall have been anticipated in any scope of work, statement of activities or budget materials submitted to Contractor prior to the execution of a subcontract. All pre-authorized subcontractor expenditures are limited in the same manner as Contractor’s expenditures are limited herein. Should subcontractor express a need to expend TMD funds for travel, meals, hosting lunches, out-of-town or in-town lodging or sponsorships that is outside the scope of work, statement of activities or budget, the subcontractor must apply in writing, in advance of the expenditure, to Contractor for permission to incur such expenses. The application must be approved by the SDTMD Board;

i) Provide on at least a quarterly basis reports to the SDTMD on the target and actual outcomes, (by types of activities, specific marketing initiative and/or by entity funded) along with details of funds expended. Reports for the following quarters shall be due on the indicated dates:

    July 1 - September 30, 2013 - Due November 30, 2013
    October 1 - December 31, 2013 - Due February 28, 2013
    January 1 - March 31, 2014 - Due May 31, 2014
    FY 2012 Annual Report - Due August 31, 2014

j) Ensure that funds are spent on activities which confer exclusive privileges and provide a specific benefit of incremental room night generation
4.4 Contractor shall include the following language on all promotional materials funded pursuant to this Agreement (including, but not limited to, brochures, newsletters, advertising, facts sheets, news releases, and Internet web sites): "Funded in part (or in whole) by the San Diego Tourism Marketing District with City of San Diego Tourism Marketing District Assessment Funds." Such acknowledgment shall be prominently displayed on all such promotional materials. A copy of page or pages, of promotional material displaying required language, or other equivalent proof, is required to be included in the quarterly reports and reimbursement/reconciliation packets.

4.5 To the extent applicable, Contractor shall comply with the provisions of City Administrative Regulation 95.65, as amended from time to time regarding product endorsements. Contractor shall not create any advertisement or writing that identifies or refers to the City or SDTMD as the user of a product or service, without first obtaining the prior written approval of the City or SDTMD.

4.6 Contractor shall comply with the SDTMD Return on Investment (ROI) measurement policy. The ROI measurement policy determines ROI by dividing the TMD hotel room revenue generated and/or supported by the SDTMD funded amount.

4.6.1 TMD hotel room revenue can be reported as a definitive measure, or estimated when actual revenue cannot be measured. Definite measurements of bookings can be captured through mandatory hotel block bookings, online hotel bookings by Online Travel Agencies (OTAs), and hotel booking engines.

4.6.2 When definitive measurement is not possible, TMD hotel consumption may be estimated using valid survey methodologies as approved by the SDTMD. Either of the following two types of survey methodology shall be considered valid and useable, Contractor shall use whichever is most appropriate considering the type of project undertaken:

   a) Visitor Surveys. Contractor can conduct SDTMD approved random intercept surveys of visitors at events or venues or by phone, mail, or email, to estimate district room night revenues for all attendees. A SDTMD approved third-party may be required to conduct the survey.

   b) Campaign Surveys. Contractor can conduct SDTMD approved random sample or online access panel surveys of campaign target markets to measure district hotel consumption of ad aware populations. A SDTMD approved third-party will be required to conduct the survey.

4.6.3 SDTMD will provide survey assistance to Contractor to best measure ROI for SDTMD purposes. SDTMD assistance may include district hotel consumption
questionnaire development, definition of the survey population, and survey administration and reporting. The type and amount of fieldwork, data tabulation, analysis and reporting will be determined by an authorized professional research organization approved by SDTMD.

4.6.4 To balance the cost of data collection against the benefits to be gained, sample sizes will be set to yield a 95% confidence level with a margin of error of ± 5 percentage points on all survey results.

4.6.5 Nothing in this agreement shall prohibit Contractor from conducting additional surveys, in addition to the surveys required in Section 4.6.2 above, to measure event or campaign results. Any additional survey conducted by Contractor shall not be paid for using SDTMD funds, unless approved by the SDTMD Board of Directors in advance.

ARTICLE V: ELIGIBLE EXPENDITURES, ADVANCES, REIMBURSEMENTS

5.1 ELIGIBLE EXPENDITURES

5.1.1 From the TMD assessment revenues funding this Agreement, SDTMD shall reimburse Contractor for expenditures throughout the term of the Agreement upon receipt of proper evidence of expenditures as described herein in amounts not to exceed items specified in the Budget Summary (Exhibit B) and not to exceed a total of $2,335,000. If the SDTMD receives less than projected funds, Contractor will receive its pro rata share of the total allocation of disbursable funds. Contractor shall be paid only for those expenditures related to staffing, general operations, advertising, publicity, promotional activities (including appropriate travel and meetings), research activities, and any other reasonable and appropriate costs associated with Contractor’s activities listed in the Scope of Services and the Budget Summary (Exhibits A and B).

5.1.2 Any expenditures by Contractor which are not within the prescribed limitations of this Agreement, the Plan, the Operating Agreement, the Operating Manual, San Diego Municipal Code sections 61.2501, et seq., and applicable laws, rules, and regulations governing this Agreement, as amended from time to time, are not chargeable to SDTMD and shall be borne solely by Contractor.

5.2 ADVANCES

5.2.1 Upon a written request from Contractor, the SDTMD Board may make a cash advance to Contractor for on-going programs under the conditions specified in this Section. These advances may only be made by SDTMD based on available cash within the SDTMD’s account. The written request shall indicate a vote in the affirmative by the Contractor’s Board to request such an advance and details of the amount, timing, and proposed use of such funds.
Pursuant to the Operating Agreement, the following three conditions must be met for SDTMD to advance funds to Contractor. Contractor and SDTMD agree:

a) SDTMD will submit to the City a signed copy of this Agreement between SDTMD and the Contractor, which includes language specifying the permitted use of such advance, and any other language required by the Operating Agreement; and

b) Contractor and SDTMD hereby authorize the City to audit the use of any advanced funds; and

c) Contractor will provide a full accounting to SDTMD, which SDTMD will verify and submit to the City, of any TMD funds previously advanced to Contractor.

5.2.2 All advances to Contractor shall be returned or accounted for annually, but no later than on or before the expiration of this Agreement (or upon termination, if earlier), or the expiration of the agreement between SDTMD and the City, whichever comes sooner, (or upon termination, if earlier), either as a reduction of the final request for reimbursement, or as a transfer of funds from Contractor to SDTMD. The final accounting for all advances must be completed within sixty (60) days of either the expiration of this Agreement or the occurrence of the funded event, whichever is earlier.

5.3 REIMBURSEMENT REQUESTS AND RECONCILIATIONS

5.3.1 Contractor shall submit to SDTMD its requests for reimbursement and/or reconciliation reports, along with all supporting receipts, invoices, checks, payroll statements, bank statements, and any other records for services performed, in accordance with the procedures described in Section 5.5. Each expenditure submitted for reimbursement must show as cleared on the submitted bank statements. Bank statements, alone, will not be accepted by SDTMD.

5.3.2 All requests for reimbursement shall be accompanied by the following statement: "(Contractor’s Name) hereby certifies that all staff time expended and reimbursements requested are for services performed in accordance with the Agreement between the SDTMD and (Contractor’s Name) for provision of services for the TMD". All reimbursement requests shall be signed by an officer of Contractor (not the Executive Director).

5.3.3 Partial reimbursement requests may be submitted in accordance with the Operating Manual.

5.3.4 Final reimbursement requests must be completed within sixty (60) days of either the expiration of this Agreement or the occurrence of the funded event, whichever
is earlier. The final disbursement to Contractor may be withheld until all outstanding reports are received. Once the final disbursement to Contractor has been made under this Agreement, Contractor shall have 60 days to submit the Final Expenditure Report to SDTMD which accounts for all previously un reconciled disbursements plus the final disbursement and shall include a summary of the activities Contractor has performed pursuant to this Agreement.

5.4 REIMBURSEMENTS / RECONCILIATIONS

5.4.1 SDTMD shall reimburse Contractor for TMD activities, within the limitations specified in Section 5.1.1 of this Agreement upon receipt of proper evidence of Contractor's expenditures and contractual obligations pursuant to this Agreement.

5.4.2 SDTMD shall pay all properly submitted requests for reimbursement to Contractor no later than thirty (30) business days from receipt of Contractor's completed reimbursement request packet. These reimbursements may only be made by SDTMD based on available cash within the SDTMD's account.

5.4.3 Contractor shall not use District assessment funds in its operations, directly or indirectly, during any period of federal, state, or local debarment, suspension, or ineligibility of Contractor, when Contractor has been noticed of such debarment, suspension, or ineligibility.

5.4.4 The final reimbursement to Contractor under this Agreement shall be withheld until all expenditures have been accounted for, and Contractor has submitted a Final Expenditure Report summarizing the activities Contractor has performed pursuant to this Agreement.

5.4.5 Contractor shall submit to the SDTMD Reconciliation Report(s) accounting for the use of the District assessment funds, as described in Exhibit A to the Operating Agreement. The Reconciliation Report(s) shall be submitted to the SDTMD within 45 of the disbursement of funds and no less than monthly thereafter. Failure to timely submit Reconciliation Report(s) may result in, among other things, cessation of future disbursements until such time as the overdue report is received and reviewed by SDTMD staff, and deemed to be in compliance with the requirements of this Agreement. Expenses paid more than sixty (60) days prior to the date of the reconciliation report are not eligible for reimbursement.

5.4.6 District assessment funds may only be used for activities as authorized and approved by the City Council in Plan, Operating Agreement, and the Annual Report of Activities. Any expenditure that is not consistent with the Plan, Operating Agreement, or Annual Report of Activities, or is not supported with proper documentation described herein and in Exhibit A to the Operating
Agreement, shall be considered an ineligible expenditure and may result in, among other things, cessation of future disbursements, reduction of future disbursements, or termination of this Agreement. Nothing in this section shall waive or deny any right or remedy, at law or in equity, existing as of the date of this Agreement or hereinafter enacted or established, that may be available to the SDTMD against Contractor.

5.4.7 Within 60 days of receipt of Reconciliation Reports, SDTMD shall approve the report or request additional information.

5.5 REQUESTS INELIGIBLE FOR TMD RECONCILIATION / REIMBURSEMENT

5.5.1 Contractor and Contractor’s subcontractors shall not use TMD assessment funds for alcoholic beverages. Contractor’s subcontractors shall not use TMD assessment funds for travel, meals, lodging, or entertainment expenses, unless directly attributable to providing District programs and authorized by Contractor in advance, as provided for elsewhere in this Agreement.

5.5.2 If Contractor receives (or has received) additional funding for its activities from a source or sources other than through the SDTMD’s allocation of TMD funds, and the use of said additional funds requires that Contractor make an accounting to, or be subject to, an audit by such other source, then Contractor shall charge the cost of such audit to the appropriate non-District funding source at the time incurred. Any cost incurred in connection with the Contractor which is properly chargeable to, and actually claimed for compensation under, a funding source other than the SDTMD, shall not be allowed as a chargeable cost under this Agreement.

5.5.3 Contractor shall not request reimbursement for, or submit as part of a Reimbursement/Reconciliation Report, any expenditure that has been or may be properly charged to a funding source other than District assessment funds.

5.5.4 Contractor shall not request reimbursement for, or submit as part of a Reimbursement/Reconciliation Report, any expenditure that has been or may be properly charged to a funding agency other than the TMD.

5.5.5 Contractor and Contractor’s subcontractors shall not be paid for any expenditure that has been (or should be) properly charged to a funding source other than the TMD assessment fund, nor paid for expenditures which are ineligible under applicable City policies, the Plan, the Operating Agreement, or this Agreement, unless approved, in writing, by the SDTMD. A payment request that is not consistent with the Contractor’s budget or the Contractor’s Report of Activities, except as provided in this Section, or that is not supported with proper documentation as required in the City’s Operating Manual or the Operating Agreement, shall be considered an ineligible expenditure. Contractor shall not request reimbursement for, or submit as part of a reimbursement/reconciliation report, any expenditure paid over sixty (60) days prior.
5.6 PARTIAL PERFORMANCE. In the event Contractor performs less than all services required under this Agreement in a proper and timely manner, the SDTMD will reimburse Contractor only the reasonable costs of those services actually performed by Contractor during that payment period, as determined by the SDTMD. If the SDTMD has provided an advance to Contractor, Contractor shall return funds associated with services not performed.

5.7 PROJECT INCOME. Should Contractor use TMD assessment revenue to generate Project Income, Contractor may use such income to improve the services performed by Contractor under this Agreement. "Project Income" means revenues generated by Contractor from receipt of assessment funds, including interest income accrued by Contractor on assessment district funds. Contractor shall separately account for any and all Project Income accrued and/or used by Contractor in the account established. In addition, Contractor shall include an accounting of any and all Project Income accrued and/or used by Contractor in its monthly report, and in the annual audit, submitted to the SDTMD.

5.8 PAYMENTS BASED ON SERVICES RENDERED

5.8.1 Upon a written request from Contractor, SDTMD may make a cash payment to a Subcontractor of Contractor for completed programs under the conditions specified in this Section. These payments may only be made by SDTMD based on a program previously authorized by the SDTMD Board of Directors, available cash within the TMD Fund at the time of the request. The written request shall indicate a vote in the affirmative by the Contractor’s Board to request these types of payments.

5.8.2 All requests for payment pursuant to this section shall be accompanied by the following statement:

"(Contractor’s Name) hereby certifies that all staff time expended and reimbursements requested are for services performed in accordance with the Agreement between the SDTMD and (Contractor’s Name) for provision of services for the TMD. (Contractor’s Name) further certifies that the services described have been fully performed by (Subcontractor’s Name) pursuant to an agreement between (Contractor’s Name) and (Subcontractor’s Name)." All payment requests shall be signed by an officer of Contractor (not the Executive Director).

5.8.3 In addition to the requirements of sections 5.8.1 and 5.8.2, all payments by SDTMD pursuant to this section shall be subject to all of the following:

a) receipt by SDTMD of a signed agreement between Contractor and Subcontractor detailing the amount, timing, permitted use of such funds, and any other language required by this Agreement; and
b) receipt by SDTMD of a certification from Contractor and Subcontractor that all of the services performed were for services described in Exhibit A and have been completed as part of a program previously authorized by the Board of Directors of the SDTMD; and

c) request for payment is submitted within 30 days of services being fully rendered and contracted.

5.9 **Funding Reduction.** In the event that: (1) assessment funds collected are less than anticipated; (2) the City of San Diego, regardless of reason, does not provide the assessment funds collected to the SDTMD Corporation, suspends payments to the SDTMD Corporation, or in any way reduces the amount of assessment funds provided to and available for allocation by the SDTMD Corporation; or (3) a catastrophe occurs which reduces SDTMD's available funding, SDTMD reserves the right to reduce or eliminate funding pursuant to this contract in its discretion. Such catastrophes would include, but shall not be limited to, natural disasters, terrorist attacks, pandemics or epidemics, financial and economic hardships, legal challenges, and other such catastrophic events beyond the control of SDTMD. In the event such a reduction in funding becomes necessary, SDTMD will provide notice to Contractor of the reduction or elimination in funding. The reduction or elimination shall be effective immediately upon the occurrence of the catastrophe, or in the event there is no readily discernable catastrophe date (such as in the case of a pandemic), upon the date of the notice. If the funding reduction to Contractor is due to a reduction in assessment funds received and available for allocation by SDTMD, the reduction in funding will be calculated on a pro rata basis.

**ARTICLE VI: SUSPENSION AND TERMINATION**

6.1 **SUSPENSION OR DISALLOWANCE OF PAYMENTS**

6.1.1 Notwithstanding any other provision of this Agreement, SDTMD may notify Contractor if Contractor fails to comply with any term or condition of this Agreement. Only if Contractor fails to cure within 14 days, SDTMD’s remedies include, without limitation, each of the following:

a) Suspending one or more payments to Contractor, pending correction of the activity or action not in compliance; and/or

b) Disallowing funds for all or part of the cost of the activity or action not in compliance.

6.1.2 If SDTMD notifies Contractor that SDTMD has suspended payments or disallowed funds, Contractor shall not expend any funds related to, or connected with, any area of controversy or conflict that resulted in the suspension or disallowance of funding.
6.2 TERMINATION FOR CURABLE DEFAULT. SDTMD may send written notice (delivered in accordance with the provisions of the Notice section herein) to Contractor if Contractor fails to comply with any term or condition of this Agreement. The written notice shall include a description of Contractor's default. Only if Contractor fails to cure the default within sixty (60) calendar days of the date Contractor receives the written notice, the SDTMD may immediately terminate this Agreement. SDTMD may suspend one or more payments to Contractor during the sixty (60) calendar day notice period.

6.3 TERMINATION FOR INCURABLE DEFAULT. The SDTMD may immediately terminate this Agreement upon written notice (delivered in accordance with the notice provisions herein) to Contractor if:

a) Contractor makes material misrepresentations in regard to information furnished to SDTMD pursuant to this Agreement, regardless of whether Contractor had knowledge or intent with respect to the misrepresentation;

b) Contractor, or any of its officers or directors, engages in conduct that results in Contractor, or any of its officers or directors, being convicted of a felony that materially and adversely affects Contractor's performance of its obligations under this Agreement;

c) Contractor misappropriates funds;

d) Contractor files a voluntary petition in bankruptcy, is adjudicated bankrupt, or makes a general assignment for the benefit of creditors; and/or

e) Contractor is unable or unwilling to comply with any additional terms or conditions concerning the operation of the TMD that may be required by newly enacted (or amended) federal, state, and/or local laws.

6.4 CONTINUING RESPONSIBILITIES

6.4.1 In the event this Agreement is terminated, Contractor shall complete any and all additional work necessary for the orderly filing of documents and closing of Contractor's performance of its obligations and duties under this Agreement. For services rendered in completing the work, Contractor shall be entitled to fair and reasonable compensation for the services performed by Contractor before the effective date of termination. After filing of documents and completion of performance, Contractor shall deliver to the SDTMD all data and records (including, but not limited to, all documents and/or work product) prepared and/or completed directly in connection with, or related to, Contractor's performance under this Agreement. By accepting payment for completion, as well as filing and delivering documents as called for in this Section, Contractor discharges the SDTMD of all of the SDTMD’s payment obligations and liabilities under this Agreement.
6.4.2 Upon the expiration or termination of this Agreement, Contractor shall transfer to SDTMD any TMD assessment funds on hand at the time of the expiration or termination, and any accounts receivable attributable to Contractor’s use of TMD assessment funds.

6.5 RIGHTS AND REMEDIES. SDTMD’s termination of this Agreement shall terminate each and every right of Contractor, and any person claiming any rights by or through Contractor under this Agreement. The rights and remedies of SDTMD enumerated in this Article are cumulative and shall not limit, waive, or deny any of SDTMD’s rights under any other provision of this Agreement. Nor does this Article otherwise waive or deny any right or remedy, at law or in equity, existing as of the Effective Date of this Agreement or hereinafter enacted or established, that may be available to SDTMD against Contractor.

ARTICLE VII: INDEMNIFICATION

7.1 INDEMNIFICATION AND HOLD HARMLESS AGREEMENT
Contractor shall defend, indemnify, protect, and hold harmless the SDTMD, officers, employees, representatives, and agents from and against any and all claims asserted, and any and all matters following a settlement, dismissal, or judgment related thereto, including but not limited to any and all administrative, constitutional or any other challenges, excepting any claim asserted prior to the Effective Date, and liability established, for damages or injuries to any person or property, including without limitation, injury to Contractor’s officers, employees, invitees, guests, agents, and/or Subcontractors, which arise from, or are in any manner directly or indirectly connected with, or are caused, or claimed to be caused, by this Agreement, or by the acts or omissions of Contractor, its officers, employees, representatives, agents, and/or Subcontractors in performing work or services whether or not such work and/or services are required or authorized herein, and all expenses of investigating and defending against same, including, without limitation, attorney fees and costs. Contractor’s obligations under this section shall not include any claims or liability arising from the established sole negligence or sole willful misconduct of SDTMD, officers, employees, representatives, and/or agents. Where comparative negligence is determined to have been contributory, principles of comparative negligence will be followed and each party will bear the proportionate cost of any damage attributable to the negligence of that party, its officers, employees and agents. SDTMD may, at its own election, conduct the defense, or participate in the defense, of any claim related in any way to this indemnification. If SDTMD elects to conduct its own defense, participate in its own defense, or obtain independent legal counsel in defense of any claim related to this indemnification, SDTMD shall consult with Contractor, and Contractor shall pay the SDTMD for all costs related thereto, including without limitation, reasonable fees and costs. For purposes of this Section, SDTMD’s consultation with Contractor does not create an obligation on part of SDTMD, but rather an advisory role on part of Contractor.

7.2 ENFORCEMENT COSTS. Contractor shall pay SDTMD any and all costs SDTMD incurs enforcing the indemnity and defense provisions set forth herein.
ARTICLE VIII: INSURANCE

8.1 CONTRACTOR'S DUTY TO MAINTAIN INSURANCE. At all times during this Agreement, Contractor shall maintain and comply with the insurance requirements set forth in this Article VII. Contractor shall provide to SDTMD insurance certificates reflecting evidence of all insurance coverage required under this article. Notwithstanding any provision of this Agreement to the contrary, Contractor's failure or refusal to obtain, maintain or renew insurance as required by this Agreement, or failure to provide proof of insurance, shall be a default of this Agreement. If a default under this Article occurs, SDTMD shall be permitted to suspend payments during such default period, and Contractor shall be permitted to cure the default, pursuant to Article V herein.

8.2 INSURANCE REQUIREMENTS. Contractor shall deliver to SDTMD a current certificate of insurance for:

8.2.1 Commercial General Liability Insurance, providing coverage for bodily injury, including death, personal injury, and property damage with limits of at least One Million Dollars ($1,000,000) per occurrence, subject to an annual aggregate of at least Two Million Dollars ($2,000,000); and

8.2.2 Automobile Liability Insurance, providing coverage for all bodily injury and property damage, with a limit of at least One Million Dollars ($1,000,000) per occurrence. Such insurance shall cover liability arising out of any vehicle (including owned, hired, and non-owned vehicles) operated on the Premises. Coverage shall be written on ISO form CA 00 01 12 90, or a substitute form providing equivalent liability coverage; and

8.2.3 Workers' Compensation Insurance, as required by the laws of the State of California for all of Contractor's employees who are subject to this Lease, with Employers' Liability coverage with a limit of at least One Million Dollars ($1,000,000).

8.3 Additional Insureds. Pursuant to a separate endorsement [CG2010 (11/85) or equivalent form], "The SDTMD, its officers, employees, representatives, and agents" shall be named as additional insureds in all policies.

8.4 Primary & Non-Contributory. Insurance policies shall be endorsed such that the coverage is primary and non-contributory to any coverage carried or maintained by SDTMD. The policies shall be kept in force for the duration of the Term and any extended use.

8.5 Qualified Insurer(s). All insurance required by the terms of this Agreement must be provided by insurers licensed to do business in the State of California which are rated at least "A-, VI" by the current AM Best Ratings Guide and which are acceptable to SDTMD. Non-admitted surplus lines insurers may be accepted provided they are
included on the most recent list of California eligible surplus lines insurers (LESLI list) and otherwise meet SDTMD requirements.

8.6 **Deductibles/Retentions.** All deductibles and self-insured retentions on any insurance policy are the sole responsibility of Contractor and must be disclosed and acceptable to SDTMD at the time evidence of insurance is provided.

8.7 **Continuity of Coverage.** All policies shall be in effect on or before the first day of the Term. At least thirty (30) days prior to the expiration of each insurance policy, Contractor shall furnish a certificate(s) showing that a new or extended policy has been obtained which meets the requirements of this Agreement.

8.8 **Modification.** To assure protection from and against the kind and extent of risk existing by the obligations under this Agreement, SDTMD, at its discretion, may require the revision of amounts and coverage at any time during the Term by giving Contractor thirty (30) days prior written notice. Contractor shall also obtain any additional insurance required by SDTMD for changed circumstances or SDTMD’s reasonable re-evaluation of risk levels related to Contractor’s obligations under this Agreement.

**ARTICLE IX: COMPLIANCE WITH LAWS AND POLICIES**

9.1 **CONFLICTS OF INTEREST**

9.1.1 Under San Diego Municipal Code [Code] section 61.2504, and in keeping with state law codified in California Streets and Highways Code section 36614.5, the SDTMD is a private entity and may not be considered a public entity for any purpose, nor may its board members or staff be considered to be public officials for any purpose. Nothing in this Section shall be construed to create any additional duties or obligations, on the part of Contractor or SDTMD, beyond those obligations to follow existing law, as updated from time to time during the course of this Agreement.

9.1.2 Contractor shall at all times comply with all federal, state, and local laws, including conflict of interest laws, statutes, ordinances, regulations, and policies of City related to public contracts and procurement practices to the extent applicable.

9.1.3 The Parties are unaware of any financial or economic interest of any public officer or employee of City relating to this Agreement. If such a financial and/or economic interest is determined to exist, the City shall immediately notify Contractor. Contractor and City shall investigate the nature of the interest and Contractor or City shall take all necessary actions to clear the conflict, including initiating action against the officer, employee, or Contractor.

9.1.4 Contractor shall establish, and make known to its agents and employees, appropriate safeguards to prohibit employees from using their positions for a
purpose that is, or that gives the appearance of being, motivated by the desire for private gain for themselves or others, particularly those with whom they have family, business, and/or other relationships.

9.1.5 Contractor Board members and officers are intended and understood to represent and further the economic interest of City’s tourism industry and have a fundamental duty to advance the general welfare of the tourism industry in a manner which may incidentally or indirectly benefit themselves or their business interests. Such incidental or indirect benefits shall not be considered to violate the duties assigned to the Contractor, its Board or officers under the terms of this Agreement.

9.1.6 Contractor’s personnel, employed in performing the obligations and duties under this Agreement, shall not accept gratuities, or any other favors, from any Subcontractor or potential Subcontractor. Contractor shall not recommend or specify any product, supplier, or Contractor with whom Contractor has a direct or indirect financial or organizational interest or relationship that would violate conflict of interest laws, regulations, or policies.

9.1.7 If Contractor violates any conflict of interest law, or any of the provisions of this Section, and SDTMD is aware of the violation, SDTMD may issue a notice to cure. SDTMD and Contractor shall then take actions to cure said violation. Should the Contractor fail to adequately cure the violation, then the SDTMD may immediately terminate this Agreement. Further, any such violation shall subject Contractor to liability to the SDTMD for attorney’s fees and all damages sustained as a result of the violation.

ARTICLE X: DATA AND RECORDS

10.1 GENERAL. Contractor shall maintain all administrative and financial records required in connection with this Agreement (including, but not limited to, all books, accounting records, financial statements, invoices, receipts, payroll records, personnel records, and any other data and records pertaining to all matters covered in this Agreement) during the term of this Agreement.

10.2 ACCOUNTING RECORDS AND AUDITS

10.2.1 Contractor shall maintain, keep or cause to be kept complete and accurate accounting records, books, and financial statements in accordance with Generally Accepted Accounting Practices [GAAP] in the industry. Individual projects funded by the SDTMD must be clearly identified in all required audit reports, as well as the dollar amount allocated to the Project by SDTMD. The Contractor shall provide the SDTMD with full annual audited financial statements within five months after the end of each Fiscal Year.
10.2.2 All audit reports submitted to SDTMD must include cost allocation audits of SDTMD funds as a separate statement.

10.2.3 Contractors receiving $75,000 or more in federal, state, City and/or SDTMD funds shall have Financial Statement Audits prepared in accordance with GAAP and audited by an independent Certified Public Accountant, in accordance with Generally Accepted Auditing Standards [GAAS]. This audit report shall include the following statements:

a) a statement of expenditure of SDTMD funds by program, to be identified in the same expenditure classifications as contained in the final budget and compared with the budgeted amounts;

b) a statement of revenues and expenditures, and a balance sheet of all funds received by Corporation; and

c) a statement certifying compliance with all terms and conditions of the SDTMD’s contract with Contractor, and that all required reports and disclosures have been submitted, completed by an executive officer of Corporation.

Contractor shall provide the SDTMD a copy of the Financial Statement Audit within 150 calendar days of the end of Contractor’s last complete fiscal year. Extensions of up to thirty calendar days to this deadline may be granted by SDTMD, upon written request by Contractor.

10.2.4 If Contractor is subject to an audit from a source other than SDTMD, Contractor shall provide a copy of the audit to SDTMD within thirty calendar days of completion of the audit. The SDTMD, at its sole discretion, may conduct an annual review of any such third party audit(s).

10.2.5 Contractors receiving $10,000 or more, but less than $75,000, in federal, state, City and/or SDTMD funds shall provide SDTMD copies of true, accurate, and complete financial disclosure documentation, evidencing the financial status of Contractor’s last complete fiscal year. Specifically, Contractor shall submit the following:

a) a statement of expenditure of SDTMD funds by program, to be identified in the same expenditure classifications as contained in the final budget and compared with the budgeted amounts; and

b) a statement of revenues and expenditures, and a balance sheet of all funds received by Corporation.

Contractor shall provide SDTMD these documents within ninety calendar days of the end of Contractor’s last complete fiscal year. Extensions of up to thirty
calendar days to this deadline may be granted by SDTMD, upon written request by Contractor.

10.2.6 Contractors receiving less than $10,000 in federal, state, City and/or SDTMD funds shall provide a report of how the funds were used during the contract period. Corporation shall provide SDTMD with a copy of this report within thirty calendar days of the expiration date of this Agreement. If Contractor is also in receipt of an Annual Single Audit or Financial Statement Audit, Contractor shall submit a copy of such audit to SDTMD within fifteen calendar days of Contractor’s receipt of the audit.

10.2.7 If Contractor receives $500,000 or more in federal, state, City and/or SDTMD funds, when that funding represents more than ten percent of Contractor’s annual budget, Contractor shall include in its annual Report of Activities an itemization setting forth the salary and wage ranges for each of Contractor’s job classifications, including actual executive salaries and benefits packages, applicable for the contract period.

10.2.8 Within thirty (30) calendar days of any written request by the SDTMD for accounting records, Contractor shall at its sole cost and expense make available to the SDTMD, for review and audit, all Project-related accounting records, documents, and any other financial data and records. Upon the SDTMD’s request, Contractor shall submit exact duplicates of the originals for all requested records to the SDTMD.

10.2.9 All auditing records and statements must include a statement of expenditures of Contractor funds, certified by an independent Certified Public Accountant, identified in the same expenditure classifications as contained in the Contractor’s approved budget and shall comport to the extent possible with the budget amounts as set forth in the Plan and annual budgets. All statements must also include a statement of compliance with the terms of this Agreement and must be signed by the executive officer of Contractor.

10.2.10 Failure to comply with the requirements of this section could result in suspension of any payments or possible future funding; provided, however, that the SDTMD shall not suspend any current or future payments until it has first given the Contractor written notice in accordance with the Termination for Curable Default section.

10.3 **INSPECTION AND PHOTOCOPYING.** At any time during normal business hours and as often as the SDTMD deems necessary, Contractor shall permit, and require its Subcontractors to permit, the SDTMD, or their authorized agents, to inspect and photocopy, at a reasonable location within the County of San Diego (e.g., the offices of Contractor), all books, accounting records, invoices, receipts, payroll records, personnel records, and any other Project data and records pertaining to all matters covered in this Agreement, for the purposes of auditing, monitoring, and/or evaluating Contractor’s
performance of its obligations and/or duties in connection with the Agreement and Plan. The SDTMD may retain copies of the same, with appropriate safeguards, if such retention is deemed necessary by the SDTMD in its sole discretion.

10.4 STORAGE PERIOD. Contractor shall store all Project data and records for a period of not less than five years after submission of the final expenditure report for the contract period, or five years after submission of the final expenditure report upon earlier termination of this Agreement, or until all audit findings have been resolved, whichever is longest. All such data and records shall be kept at Contractor’s (or relevant Subcontractor’s) regular place of business. At any time during the storage period, Contractor shall permit the SDTMD, or their authorized agents to examine all such data and records, for the purposes described herein. After the storage period has expired, or all audit findings have been resolved, whichever is later, Contractor shall provide SDTMD with thirty (30) calendar days’ written notice of its intent to dispose of any Project data and records. Contractor shall not take any action to dispose of such data and records without the prior written consent of the SDTMD.

10.5 ORIGINAL DOCUMENTS. Notwithstanding the foregoing, upon the termination of this Agreement for any reason, the SDTMD may request that Contractor deliver, and Contractor shall deliver, within fifteen (15) calendar days of any such request by the SDTMD, the originals of all such data and records to the SDTMD. Contractor may retain copies of all data and records delivered to the SDTMD.

10.6 OWNERSHIP OF DOCUMENTS. Once Contractor has received any reimbursement from the SDTMD for Contractor’s performance of its obligations and/or duties under this Agreement, all data and records (including, but not limited to, all documents prepared and/or work product completed directly in connection with, or related to, Contractor’s performance under this Agreement) shall be the property of the SDTMD. The SDTMD’s ownership of such documents includes the use, reproduction, and/or reuse of such documents, as well as all incidental rights, whether or not the work for which the documents were prepared has been performed. This Section shall apply whether the Agreement is terminated by the completion of the Project, the expiration of this Agreement, or upon termination of this Agreement, if earlier, in accordance with the terms of this Agreement. Nothing in this Section shall limit Contractor’s ability to retain copies of any documents over which SDTMD claims ownership, nor shall this Section be applied to original copies of Contractor’s articles of incorporation, bylaws, or any Contractor documents that are not related to Contractor’s performance of obligations and duties under this Agreement and the Plan.

ARTICLE XI: CITY POLICY PROVISIONS

11.1 Nondiscrimination. Contractor shall not discriminate in any manner against any person or persons on account of race, color, religion, gender, sexual orientation, medical status, national origin, age, marital status, or physical disability in Contractor’s activities pursuant to this Agreement, including but not limited to the providing of goods, services,
facilities, privileges, advantages, and accommodations, and the obtaining and holding of employment.

11.2 Compliance with City’s Equal Opportunity Contracting Program. Contractor shall comply with City Council Ordinance No.18173 (San Diego Municipal Code sections 22.2701 through 22.2708, as amended), EQUAL EMPLOYMENT OPPORTUNITY OUTREACH PROGRAM, a copy of which is on file in the Office of the City Clerk and by this reference is incorporated into this Agreement. Contractor and all of its subcontractors are individually responsible to abide by its contents. Contractor shall comply with Title VII of the Civil Rights Act of 1964, as amended; Executive Orders 11246, 11375, and 12086; the California Fair Employment Practices Act; and any other applicable federal and state laws and regulations hereafter enacted. Contractor shall not discriminate against any employee or applicant for employment on any basis prohibited by law. On or before the Effective Date, Contractor shall submit a current Work Force Report or a current Equal Employment Opportunity (EEO) Plan as required by Section 22.2705 of the San Diego Municipal Code, which sets forth the actions Contractor will take to achieve City’s commitment to equal employment opportunities. Contractor shall insert the foregoing provisions in all contracts and subcontracts for any work covered by this Agreement so the provisions will be binding upon each contractor and subcontractor. Compliance with EEO provisions will be implemented, monitored, and reviewed by City’s Equal Opportunity Contracting Program staff. Contractor’s failure to comply with the requirements of this section and/or submitting false information in response to these requirements shall be a default of this Agreement, and City may bar Contractor from participating in City contracts for a period of not less than one (1) year.

11.3 Local Business and Employment. Contractor acknowledges that City seeks to promote employment and business opportunities for local residents and firms in all SDTMD contracts. Contractor shall, to the extent legally possible, solicit applications for employment, and bids and proposals for contracts and subcontracts, for work associated with this Agreement from local residents and firms as opportunities occur. Contractor shall hire qualified local residents and firms whenever feasible.

11.4 Drug-free Workplace. Contractor shall be required to abide by the omnibus drug legislation passed by Congress on November 18, 1988, by adopting and enforcing a policy to maintain a drug-free workplace by doing all of the following:

11.4.1 Publish a statement notifying employees that the unlawful manufacture, distribution, dispensation, possession, or use of controlled substances are prohibited in the workplace and specifying the actions that will be taken against employees for violations of the prohibition; and

11.4.2 Establish a drug-free awareness program to inform employees about all of the following:

a) The dangers of drug abuse in the workplace;
b) Contractor’s policy of maintaining a drug-free workplace;

c) Any available drug counseling, rehabilitation, and employee-assistance programs; and

d) The penalties that may be imposed upon employees for drug abuse violations.

11.4.3 Contractor shall include in each of its contracts related to this Agreement language obligating each contractor and subcontractor to comply with the provisions of this section to maintain a drug-free workplace. Contractor, and each of its contractors and subcontractors, shall be individually responsible for their own drug-free workplace program.

11.5 **Disabled Access Compliance.** Contractor shall at all times comply with the 1990 Americans with Disabilities Act ("ADA") and Title 24 of the California Code of Regulations (commonly known as the "building code") as defined in Section 18910 of the California Health and Safety Code and any other applicable federal, state, or local regulations thereafter enacted protecting the rights of people with disabilities.

11.6 **Living Wage Ordinance.** Contractor may be required to comply, and require each of its Subcontractors to comply, with the provisions of the City’s Living Wage Ordinance, codified in San Diego Municipal Code [Code] sections 22.4201, et seq., in performing its obligations and/or duties under this Agreement. To the extent Contractor believes that it or its Subcontractors may be exempt from compliance pursuant to Code section 22.4215(b)(1), or any other exemption, Contractor may apply to City’s Living Wage Administrator for determination of exemption.

11.7 **Requirement to Post.** Contractor is hereby notified that, pursuant to the Operating Agreement, SDTMD is required to post and maintain on its website public information about grants awarded, including Contractor’s entire application for TMD Corporation funding and any attachments thereto, including Contractor’s two most recent years’ Internal Revenue Service Form 990 “Return of Organization Exempt From Income Tax IRS”, and, for each for-profit recipient, a disclosure of the compensation of the recipient’s employees and independent contractors from TMD funds in substantially the form attached to this Amendment as Exhibit A to the Operating Agreement, which is incorporated herein by reference.

**ARTICLE XII: GENERAL PROVISIONS**

12.1 **Compliance with Law.** Contractor shall at all times comply with all applicable laws, statutes, ordinances, and regulations of City, county, state, and federal governments. Contractor shall comply with all notices issued by City under the authority of all current or future laws, statutes, ordinances, or regulations.
12.2 **Mandatory Disclosure of Business Interests.** Pursuant to section 225 of The City Charter of the City of San Diego, California ("Charter"), Contractor and each of its subcontractors shall make a full and complete disclosure of the name and identity of any and all persons directly or indirectly involved in any transaction pursuant to this Agreement and the precise nature of all interests of all persons therein. Contractor's failure to fully disclose all of the information required by Charter section 225, or Contractor's failure to require each of its subcontractors to fully disclose such information, shall be a default of this Agreement.

12.3 **No Political Activity.** Contractor shall not use and require its subcontractors not to use, any of the funds received pursuant to this Agreement, or any personnel or material paid for with funds pursuant to this agreement, for political activity. The term "political activity" shall mean a communication made to any electorate in support of, or in opposition to, a ballot measure or candidate in any federal, state, or local government election.

12.4 **Operating Manual.** Notwithstanding any other provision in this Agreement, Contractor acknowledges receipt of, and shall comply with the Operating Manual attached hereto as Exhibit D, including without limitation those provisions related to fiscal accountability, eligible and ineligible project expenditures, and procedures for financial management, accounting, budgeting, record keeping, reporting, and other administrative functions. Contractor shall seek and obtain SDTMD's prior written approval of any deviation from the Operating Manual's prescribed practices and procedures.

12.5 **Notices.** Any notice required or permitted to be given under this Agreement shall be in writing and may be served personally or sent via the United States Postal Service, postage prepaid, or reliable overnight courier, addressed to the parties as follows:

If to Contractor:

Mr. Ben Clay  
Co-Chair  
Balboa Park Celebration Inc.  
2131 Pan American Plaza  
San Diego, CA 92101,

If to SDTMD:

Mr. Lorin Stewart  
Executive Director  
San Diego Tourism Marketing District  
8880 Rio San Diego Drive, Suite 800  
San Diego, CA 92108

Any party entitled or required to receive notice under this Agreement may, by like notice, designate a different address to which notices shall be sent. Notice shall be effective upon personal service or five (5) days after deposit with the United States Postal Service.

12.6 **Severability.** If any term, covenant, condition, or provision of this Agreement is found invalid, void, or unenforceable by a court of competent jurisdiction, the remaining provisions shall remain in full force and effect.
12.7 **Unavoidable Delay.** If the performance of any act required of SDTMD or Contractor is directly prevented or delayed by reason of strikes, lockouts, labor disputes, unusual governmental delays, acts of God, fire, floods, epidemics, freight embargoes, or other causes beyond the reasonable control of the party required to perform the act, the obligated party shall be excused from performing that act for the period equal to the period of the prevention or delay. If Contractor or SDTMD claims the existence of a delay, the party claiming the delay shall notify the other party in writing of the fact within ten (10) days after the beginning of the claimed delay.

12.8 **Legal Proceedings.** If any dispute arises out of or relating to this Agreement, the Parties shall first attempt to resolve it by mediation. If any party brings an action or proceeding against another party under this Agreement, the prevailing party shall be entitled to recover from the non-prevailing party all reasonable costs and expenses thereof, including without limitation reasonable attorney fees and costs. The “prevailing party” shall be that party who obtains substantially the result sought, whether by settlement, dismissal, or judgment.

12.9 **Number and Gender.** Words of any gender used in this Agreement shall include any other gender, and words in the singular number shall include the plural, when the tense requires.

12.10 **Captions.** The section headings, and captions for various articles and paragraphs shall not be held to define, limit, augment, or describe the scope, content, or intent of any or all parts of this Agreement. The numbers of the paragraphs and pages of this Agreement may not be consecutive. The lack of consecutive numbers shall have no effect on the enforceability of this Agreement.

12.11 **Entire Understanding.** This Agreement contains the entire understanding of the parties. SDTMD and Contractor, by signing this Agreement, agree that there is no other written or oral understanding between them with respect to the subject matter of this Agreement. Each party has relied on its own advice from its own attorneys, and the terms, covenants, and conditions of the Agreement itself. Each party to this Agreement agrees that no other party, agent, or attorney of any other party has made any promise, representation, or warranty whatsoever which is not contained in this Agreement. The failure or refusal of any party to read the Agreement or other documents and obtain legal or other advice relevant to this transaction constitutes a waiver of any objection, contention, or claim that might have been based on such actions.

12.12 **Drafting Ambiguities.** This Agreement is, in all respects, intended by each party hereto to be deemed and construed to have been jointly prepared by the Parties. The Parties hereby expressly agree that any uncertainty or ambiguity existing in this Agreement shall not be interpreted against either of them. Except as expressly limited by this paragraph, all other applicable rules of contract interpretation intended by law shall apply in full to this Agreement.
12.13 **Modifications.** This Agreement shall not be modified, altered or amended unless the modification, alteration or amendment is in writing and signed by all parties to this Agreement. Any and all amendments to this Agreement require SDTMD approval.

12.14 **Time is of Essence; Provisions Binding on Successors.** Time is of the essence of all of the terms, covenants, and conditions of this Agreement. Except as otherwise provided in this Agreement, all of the terms, covenants, and conditions of this Agreement shall apply to, benefit, and bind the successors and assigns of the respective parties, jointly and individually.

12.15 **Waiver.** SDTMD’s failure to insist upon the strict performance of any of Contractor’s obligations under this Agreement, in one or more instance, shall not be construed as a waiver of any such obligation, and the same shall remain in full force and effect. SDTMD’s waiver of a default shall not be a waiver of any other default. Any waiver of a default must be in a writing executed by SDTMD to constitute a valid and binding waiver. SDTMD’s delay or failure to exercise a right or seek a remedy shall not be deemed a waiver of that or any other right or remedy under this Agreement. The exercise of any particular right or the use of any particular remedy for any default shall not waive the use of any other right or remedy for the same default or for another or later default. SDTMD’s failure to discover a default or take prompt action to require the cure of any default shall not result in an equitable estoppel, but SDTMD may at any and all times require the cure of the default.

12.16 **Survival.** Any obligation which accrues under this Agreement prior to its expiration or termination shall survive the expiration or earlier termination of this Agreement.

12.17 **Governing Law.** This Agreement shall be governed, construed, and enforced in accordance with the laws of the State of California.

12.18 **Counterparts.** This Agreement may be executed in any number of counterparts, each of which when executed shall be deemed an original, but all of which together shall constitute one and the same instrument.

12.19 **Consents, Approvals.** Neither SDTMD nor Contractor may unreasonably withhold or unreasonably delay any consent or approval required by this Agreement.

12.20 **Authority.** Each individual executing this Agreement on behalf of another person or legal entity represents and warrants that he/she is authorized to execute and deliver this Agreement on behalf of such person or entity in accordance with duly adopted resolutions or other authorizing actions necessary and proper and under such legal entity’s articles, charter, bylaws, or other written rules of conduct or governing agreement, and that this Agreement is binding upon such person or entity in accordance with its terms. Each person executing this Agreement on behalf of another person or legal entity shall provide SDTMD with evidence, satisfactory to SDTMD, that such authority is valid, and such entity is a valid, qualified corporation, limited liability company,
partnership, or other unincorporated association in good standing in its home state and that such entity is qualified to do business in California.

12.21 **Public Records.** SDTMD and Contractor understand and acknowledge that documents submitted to the SDTMD shall be subject to the California Public Records Act, Government Code section 6250 et seq.

IN WITNESS WHEREOF, this Agreement is executed to be effective as of the Effective Date:

Date: **8/5/13**

Balboa Park Celebration Inc., a California nonprofit Corporation

**BY:**

Mr. Ben Clay
Co-Chair

Date: **8/12/13**

San Diego Tourism Marketing District, a California non-profit Corporation

**BY:**

Mr. Loren Stewart
Executive Director
### BENEFIT CATEGORY A3
FY13 SDTMD Contract Budget
Draft - Exhibit B

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</tr>
<tr>
<td>Total Direct Expenses</td>
<td>56,721.00</td>
<td>247,508.00</td>
<td>356,194.00</td>
<td>301,181.00</td>
<td>731,271.00</td>
<td>1,692,875.00</td>
<td>642,125.00</td>
<td>2,335,000.00</td>
</tr>
</tbody>
</table>

**Direct Expenses**

- Advertising
- Advertising Agency Fees
- Bid Fees / Team payouts
- Dues / Subscriptions / Memberships
- Entertainment
- Event Registration Fees
- Lead Generation Services
- Marketing Materials & Brochures
- Meals
- Outside Contractors
- Personnel Benefits
- Personnel Salaries and Wages
- Promotional Items
- Rentals - booth space
- Rentals - remote sales office
- Research
- Sales Commissions
- Special Event Production
- Sponsorships
- Trade Show Expenses
- Training
- Travel

**Total TMD Funds**: 2,335,000.00

**Indirect Cost Allocation (from worksheet)**

- Total TMD Expenses: $56,721.00 $247,508.00 $356,194.00 $301,181.00 $731,271.00 $1,692,875.00 $642,125.00 $2,335,000.00

*Draft V 1.7*
ORGANIZATION NAME: Balboa Park Celebration Inc.

TMD Funds: CATEGORY A: $1,692,875
TMD Funds: CATEGORY B: $642,125
TOTAL TMD FUNDS A + B: $2,335,000

ORGANIZATION'S TOTAL ANNUAL BUDGET (TMD + PRIVATE SOURCE): $9,000,000

CATEGORY A
BUDGET NARRATIVE BY SUB-CATEGORY:

A1.1 Hotel Meeting Sales: TMD FUNDS: $56,721
NARRATIVE (of budget line items):

Sales efforts will involve research, prep, and attendance at tradeshows, conferences, and related events. Meetings planners, association and business group clients and other individuals will play a key role in the development of our marketing efforts, which are focused on targeting a broad base of affinity groups and membership that would be most interested in attending specific events throughout the 2015 Celebration.

A1.2 Event Mgmt. / Group Sales Development: TMD FUNDS: $247,508
NARRATIVE (of budget line items):

Funding for event management and group sales development/solicitation will go towards staffing, materials production, and planning for participation in and marketing activities at professional and affinity group conferences, organizational meetings and events, and associations of meeting planners, business group clients, and high value individuals.

A1.3 Tourism Development/Travel Trade: TMD FUNDS: $356,194
NARRATIVE (of budget line items):

Costs associated with this category will include direct marketing as it pertains to regional, national and international outreach, including the establishment and maintenance of relationships with outside marketing organizations such as Brand USA, Visit California, and foreign tourism ministries and organizations. Expenses will go towards training, planning and production of materials related to international events, intended to forge relationships with marketing organizations where co-op advertising will significantly enhance the scope and depth of our outreach efforts.
A1.4 Group Meeting Direct Marketing: TMD FUNDS: $301,181
NARRATIVE (of budget line items):

Group meeting direct marketing funding will assist and extend targeted affinity group advertising, as it pertains to unique identified target markets that 2015 Celebration events will focus on. Programming will be designed to appeal to an inclusive range of ethnic, cultural, intellectual, and professional groups and organizations; targeted marketing to these audiences will involve significant market research and subsequent production and distribution of content to inform these audiences about the specific events that they would be most interested in attending and participating.

A1.5 Consumer Direct Sales & Marketing: TMD FUNDS: $ 731,271
NARRATIVE (of budget line items):

With our strong emphasis on consumer-direct marketing, funding for this category will focus on research, creation, execution and distribution of pay-per-click Online Banner Advertising, dedicated Online Travel Agency campaigns, and a broad base of integrated social/digital marketing tactics designed to market and deliver room nights for TMD lodging businesses. Any and all media buys that require broadcast, radio, print and/or outdoor advertising will be supplemented with private source funding to augment marketing efforts, leveraging the value of the TMD investment.

CATEGORY B
BUDGET NARRATIVE:

B: General TV / Radio Broadcast & Outdoor Media: TMD FUNDS*: $ 642,125

*EXPENSE BREAKDOWN:
  • ADVERTISING FUNDS: $ 496,500
  • ADVERTISING AGENCY FEES: $ 145,625
  • PERSONNEL SALARY & WAGES: $
  • OTHER: $

NARRATIVE (of budget line items):

Media buys will be targeted towards DMA’s that have proven to be good target markets for San Diego tourism based on our analysis of historical TMD events and current market conditions. All advertising tactics will include specific messaging that directs consumers to our website; we will work closely with TMD to ensure that an appropriate link is prominently featured which directs visitors to TMD lodging businesses. Any and all broadcast and supplemental advertising will be supported by private source funding to enhance the value of TMD investment.
### EXHIBIT F

**PERSONNEL SCHEDULE – FY 2014**

#### Page 1 of 2

The purpose of this form is to list the positions being claimed against Tourism Marketing District Funds for the Fiscal Year. An updated copy of this form must be maintained at all times and any adjustments must be reported to the SDTMD. Prior approval is required where changes will impact approved budgets for executed SDTMD agreements. Please round amounts to whole dollars. If the staffing claimed against TMD funds exceeds six employees (6), a separate spreadsheet is to be generated by the applicant that is supported by the applicant’s budget and submitted as “EXHIBIT F”.

<table>
<thead>
<tr>
<th>NO.</th>
<th>POSITION TITLE</th>
<th>B</th>
<th>C</th>
<th>D</th>
<th>E</th>
<th>F</th>
<th>G</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Chief Executive Officer</td>
<td></td>
<td>Job Classification (Sales/Marketing/Admin, Etc.)</td>
<td>For Hourly Employees - Average Total Hrs Per Month (W/TMD Funds)</td>
<td>Average Amount Paid Per Month (W/TMD Funds)</td>
<td>Salary Employees Annual Base Pay (W/TMD Funds)</td>
<td>Bonuses and Commissions (W/TMD Funds)</td>
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<td></td>
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<tr>
<td>6</td>
<td>Program Director – Forum</td>
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<td>Marketing, Sales, Admin</td>
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</table>

**SUB TOTAL TMD FUNDED PAYROLL Pg 1**  $277,650

**TOTAL TMD FUNDED PAYROLL**  (Continued Pg 2)
The purpose of this form is to list the positions being claimed against Tourism Marketing District Funds for the Fiscal Year. An updated copy of this form must be maintained at all times and any adjustments must be reported to the SDTMD. Prior approval is required where changes will impact approved budgets for executed SDTMD agreements. Please round amounts to whole dollars. If the staffing claimed against TMD funds exceeds six employees (6), a separate spreadsheet is to be generated by the applicant that is supported by the applicant’s budget and submitted as “EXHIBIT F”.

<table>
<thead>
<tr>
<th>NO.</th>
<th>POSITION TITLE</th>
<th>JOB CLASSIFICATION (SALES/MARKETING/ ADMIN, ETC.)</th>
<th>FOR HOURLY EMPLOYEES - AVERAGE TOTAL HRS PER MONTH (W / TMD FUNDS)</th>
<th>AVERAGE AMOUNT PAID PER MONTH (W / TMD FUNDS)</th>
<th>SALARIED EMPLOYEES ANNUAL BASE PAY (W / TMD FUNDS)</th>
<th>BONUSES AND COMMISSIONS (W/TMD FUNDS)</th>
<th>ANNUAL AMOUNT FUNDED WITH TMD FUNDS</th>
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</thead>
<tbody>
<tr>
<td>1</td>
<td>Program Director – Celebration Plaza</td>
<td>Marketing, Sales, Admin</td>
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<td>2</td>
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<td>$ 35,000</td>
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<tr>
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<td>Program Director – Parkwide Programs</td>
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<td>$ 35,000</td>
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<tr>
<td>4</td>
<td>Program Director – Centennial Stage</td>
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<tr>
<td>5</td>
<td>Program Coordinator</td>
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<td>$ 30,000</td>
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<tr>
<td>6</td>
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</tbody>
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SUB TOTAL TMD FUNDED PAYROLL Pg 2 $ 170,000

TOTAL TMD FUNDED PAYROLL (Pg 1 + Pg 2) $ 447,650