SECOND AMENDMENT TO
THE OPERATING AGREEMENT BETWEEN THE CITY OF SAN DIEGO AND
THE SAN DIEGO TOURISM MARKETING DISTRICT CORPORATION

This Second Amendment (Second Amendment) is made and entered into by and between the City of San Diego (City) and the San Diego Tourism Marketing District Corporation (Corporation), mutually referred to as the “Parties.”

RECITALS

A. The purpose of this Second Amendment is to set forth a new process for the distribution of assessment funds collected by the City for the San Diego Tourism Marketing District (District).

B. On November 26, 2012, the City Council adopted a resolution renewing the District for a 39.5-year term that commenced January 1, 2013. The express intent of the District and assessment is to fund sales and marketing programs and services that deliver incremental room nights to assessed lodging businesses (Hotels).

C. The City and Corporation entered into a five-year Agreement for operation of the San Diego Tourism Marketing District and administration of District assessment funds, on file with the Office of the City Clerk as Document No. RR-308062 (Operating Agreement).


E. The City and Corporation executed the First Amendment to the Operating Agreement in April 2013, on file with the Office of the City Clerk as Document No. RR-308065 (First Amendment). The First Amendment, among other things, allowed for individual Hotels to waive any right to a refund and to indemnify the City against any third-party claims in order to induce the City to release to Corporation assessment funds collected from those Hotels. Pursuant to the First Amendment, the Corporation collected and the City received waivers and indemnity agreements from Hotels that represent approximately 18 percent of the District assessments. Accordingly, the City released to Corporation all assessment funds collected from January 1, 2013 through June 30, 2013, and has released 18 percent of the net assessment funds and interest collected thereafter.
F. The Corporation now desires to establish a process that would allow more District assessment funds to be disbursed to the Corporation than under the First Amendment because the cessation of District marketing due to the City’s withholding of assessment funds to date potentially damages the tourism industry in San Diego.

G. The City desires to establish a process that reasonably manages the risk associated with the disbursement of assessment funds prior to the resolution of any legal challenge to the District or assessment.

H. It is the intent of the Parties, through this Second Amendment, to preserve the original Operating Agreement as adopted November 26, 2012, particularly the City’s ability under Section 5.1.3 of the Operating Agreement to suspend or reduce one or more payments to Corporation.

NOW, THEREFORE, in consideration of the above recitals and the mutual covenants and conditions set forth in the Operating Agreement and this Second Amendment, the Parties agree as follows:

ARTICLE I
TERM

Upon the execution of the Parties, the term of this Second Amendment is effective as of November 21, 2013 (Effective Date), and expires with the Operating Agreement on November 25, 2017.

ARTICLE II
RE-AFFIRMING THE OPERATING AGREEMENT

The Parties re-affirm all provisions of the Operating Agreement between the City and Corporation approved by the City Council November 26, 2012.

ARTICLE III
RESCINDING THE FIRST AMENDMENT

The Parties hereby rescind the First Amendment in its entirety. Accordingly, as of the effective date of this Second Amendment, all waiver and indemnity agreements received from individual Hotels pursuant to the First Amendment are null and void.

ARTICLE IV
DISBURSEMENT OF ASSESSMENT FUNDS

4.1 Pursuant to the District Reserve and Withholding Schedule attached to this Second Amendment as Attachment 1 (Attachment 1), on November 30, 2013, or as soon thereafter as practical, the City will release to Corporation $6,000,000 of the approximate $10,000,000 of District assessment funds available.
4.2 Beginning on the Effective Date of this Second Amendment, the City will begin releasing District assessment funds to Corporation on a monthly basis pursuant to the process established in Article IV of the Operating Agreement. However, the City will withhold from those monthly disbursements the amounts set forth in Attachment 1 to this Second Amendment.

4.3 Prior to disbursement to Corporation, the District assessment funds to be disbursed must be part of a City Council approved District budget, detailing Corporation's proposed expenditure of those District assessment funds. To the extent known, the District budget should include any anticipated implementation dates of the programs proposed to be funded. The District budget will be prepared and submitted to Council for approval following the procedures set forth in Section 3.6 of the Operating Agreement.

4.4 In the event of a final, non-appealable judgment upholding the validity of the District in the current pending litigation, funds held by the City shall be distributed to the Corporation, subject to Sections 4.3 and 4.5 of this Second Amendment. Nothing in this section shall be construed to limit the City's authority stated in Section 5.1.3 of the agreement adopted by Council November 26, 2012 and Section 4.5 of this Second Amendment.

4.5 Nothing in this Second Amendment shall be interpreted to limit or in any way detract from the City's ability, at the City's sole discretion, to withhold a larger percentage of assessment funds pursuant to Section 5.1.3 of the Operating Agreement. That section provides as follows:

Notwithstanding any other provision of this Agreement, if the validity of the District, District activities, District establishment, District renewal, or this agreement becomes the subject of litigation, City may, at its sole discretion and upon written notice to Corporation, suspend or reduce one or more payments to Corporation, pending final adjudication of the litigation. The written notice from the City shall include the total anticipated amount of District revenue available to be disbursed to Corporation during the period of litigation, including the amount of District revenue available for defense of the litigation, if any, so that Corporation may adjust its budget and Funding Allocations accordingly. During such litigation all District revenue that is collected by the City and not disbursed to Corporation shall remain in the District Fund.

ARTICLE V
CITY'S CONSENT, DISCRETION

Consistent with Section 11.21 of the Operating Agreement, whenever required under the Operating Agreement or this Second Amendment, the City's consent or approval shall mean
the written consent or approval of the Mayor or his or her designee, unless otherwise expressly provided, without the need for further resolution by the City Council. The City’s discretionary acts under the Operating Agreement, including but not limited to Section 5.1.3 of the Operating Agreement, or this Second Amendment shall be made in the Mayor’s discretion, unless otherwise expressly provided. The Mayor’s consent or approval may be given, and Mayor’s discretion may be exercised, either acting in Mayor’s sole authority or upon the direction of the City Council. In the event of a disagreement between the Mayor and City Council, the City Council’s direction shall control.

ARTICLE VI
BINDING EFFECT

Except as amended hereby, the provisions of the Operating Agreement shall remain in full force and effect.

IN WITNESS WHEREOF, this Second Amendment is executed to be effective as of the Effective Date.

Date: 12.4.13

SAN DIEGO TOURISM MARKETING DISTRICT CORPORATION, a California non-profit corporation

BY: C. Terry Brown
Chairman of the Board

Date: 9.26.13

THE CITY OF SAN DIEGO, a California municipal corporation

BY: Scott Chadwick
Chief Operating Officer

APPROVED AS TO FORM AND LEGALITY:

Date: 1/6/14

JAN I. GOLDSMITH City Attorney

BY: Adam Wander
Deputy City Attorney
**ATTACHMENT 1**

**DISTRICT RESERVE AND WITHHOLDING SCHEDULE**

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
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<tr>
<td>Projected District Annual Revenue</td>
<td>$28,500,000</td>
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<tr>
<td>Projected Monthly Revenue</td>
<td>$2,375,000</td>
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<tr>
<td>Less 10% for Admin/Opportunity and</td>
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<td>Catastrophe</td>
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<td><strong>Projected Net per Month</strong></td>
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<td>Desired Reserve</td>
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<td>Amt. available as of Nov. 30, 2013</td>
<td>$10,000,000</td>
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<tr>
<td>Amt. to be released to Corporation on Nov.</td>
<td>$6,000,000</td>
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<tr>
<td><strong>Additional Funding Needed</strong></td>
<td><strong>$26,000,000</strong></td>
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<tr>
<td>FY 2014 Monthly Amount to Withhold (8 months)</td>
<td>$187,500</td>
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<td>FY 2015 Monthly Amount to Withhold</td>
<td>$541,667</td>
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<td>FY 2016 Monthly Amount to Withhold</td>
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<td>FY 2017 Monthly Amount to Withhold</td>
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<td>FY 2014 Additional Withholding</td>
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<td><strong>FY 2014 Ending Reserve</strong></td>
<td><strong>$5,500,000</strong></td>
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<td>FY 2015 Withholding</td>
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<td>FY 2016 Withholding</td>
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<td><strong>FY 2017 Ending Reserve</strong></td>
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RESOLUTION NUMBER R-308588

DATE OF FINAL PASSAGE DEC 09 2013

A RESOLUTION OF THE COUNCIL OF THE CITY OF SAN DIEGO AUTHORIZING THE EXECUTION OF THE SECOND AMENDMENT TO THE TOURISM MARKETING DISTRICT OPERATING AGREEMENT.

WHEREAS, on November 26, 2012, in Resolution No. R-307843, the City Council renewed the San Diego Tourism Marketing District (TMD) for a period of thirty-nine and one-half (39 ½) years commencing January 1, 2013 (Resolution of Formation); and

WHEREAS, on or about December 19, 2012, petitioners Melvin Shapiro and San Diegans for Open Government initiated separate lawsuits in San Diego Superior Court challenging the validity of the TMD and associated assessment, styled Shapiro v. City of San Diego et al., Case No. 37-2012-00087765-CU-MC-CTL, and San Diegans for Open Government v. City of San Diego et al., Case No. 37-2012-00088065-CU-MC-CTL, and on February 25, 2013, Brigette Browning, Sergio Gonzales, and UNITE HERE Local 30 filed a similar lawsuit styled Browning et al. v. San Diego City Council, Case No. 37-2013-00036413-CU-WM-CTL, and other similar lawsuits could be filed (collectively, the District Litigation); and

WHEREAS, the City Council approved an initial five-year operating agreement with the San Diego Tourism Marketing District Corporation (TMD Corporation) in Resolution No. R-308062, effective March 26, 2013 (Operating Agreement), and a First Amendment to the Operating Agreement in Resolution No. R-308065, effective April 23, 2013 (First Amendment); and

-PAGE 1 OF 4-
BE IT RESOLVED, by the Council of the City of San Diego, as follows:

1. The City Council hereby approves the Second Amendment, a copy of which shall be placed on file with the Office of the City Clerk as Document No. RR-308588.

2. The Council President in his capacity under Charter section 265(i), or his designee, is authorized and directed to execute the Second Amendment on behalf of the City.

3. The FY 2014 Report of Activities approved by Council on June 24, 2013 shall satisfy the requirements of Section 4.3 of the Second Amendment to the extent that the TMD Corporation approves disbursements, in whole or in part, for activities and vendors included in the approved FY 2014 Report of Activities.

4. The Chief Financial Officer is authorized to set up appropriate accounting structures as needed to implement the Second Amendment.

APPROVED: JAN I. GOLDSMITH, City Attorney

By
Adam R. Wander
Deputy City Attorney

ARW:mm
11/19/2013 Cor. Copy
Or.Dept: Econ. Devel.
Doc. No. 677598
Passed by the Council of The City of San Diego on **NOV 21 2013**, by the following vote:

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<th>Nays</th>
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<tr>
<td>Marti Emerald</td>
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Date of final passage **DEC 09 2013**

(Please note: When a resolution is approved by the Council President as interim Mayor, the date of final passage is the date the approved resolution was returned to the Office of the City Clerk.)

AUTHENTICATED BY:

TOOOGGLORIA, COUNCIL PRESIDENT  
as interim Mayor of The City of San Diego, California.

ELIZABETH S. MALAND  
City Clerk of The City of San Diego, California.

(Seal)

By ____________, Deputy

Office of the City Clerk, San Diego, California

Resolution Number R-____308588__
Passed by the Council of The City of San Diego on November 21, 2013 by the following vote:

YEAS: LIGHTNER, FACULCONER, GLORIA, COLE, KERSEY, ZAPF, SHERMAN, EMERALD.

NAYS: ALVAREZ.

NOT PRESENT: NONE.

VACANT: NONE.

RECUSED: NONE.

AUTHENTICATED BY:

TODD GLORIA, COUNCIL PRESIDENT
as Interim Mayor of The City of San Diego, California

ELIZABETH S. MALAND
City Clerk of The City of San Diego, California

(Seal)

By: Peggy Rogers, Deputy

I HEREBY CERTIFY that the above and foregoing is a full, true and correct copy of RESOLUTION NO. R-308588 approved by the Council of the City of San Diego, California on November 21, 2013, and approved pursuant to Charter section 265 (i) on December 9, 2013.

ELIZABETH S. MALAND
City Clerk of The City of San Diego, California

(SEAL)

By: ________________________, Deputy