



June 17, 2013

San Diego Lodging Businesses Subject to TMD Assessment:

Ladies and Gentlemen:

As you know, the TMD Corporation entered into a First Amendment to the Operating Agreement between TMD Corporation and the City of San Diego which allows the City to withhold from TMD Corporation assessments paid by hotels which do not sign the Unilateral Agreement to Waive Refund of Assessments and to Provide Indemnification and Defense ("the Unilateral Agreement"). I write to clarify two promises the TMD Corporation makes for your benefit.

Accordingly, on behalf of the TMD Corporation, I provide these further assurances which will be part of our agreement if you execute the Unilateral Agreement:

1. TMD Corporation will defend, at its cost, any litigation filed against the City of San Diego or any other beneficiary of the Unilateral Agreement to challenge San Diego City Council Resolution No. R-307843 to renew the San Diego Tourism Marketing District and to levy the TMD Assessment. By doing so, TMD Corporation reduces the amount the City of San Diego or other beneficiaries of the Unilateral Agreement might claim against the limited indemnity you provide by making the Unilateral Agreement.
2. TMD Corporation will satisfy any claim by the City of San Diego or any other beneficiary of the Unilateral Agreement, to the extent of any and all of TMD Corporation's assets, before the City of San Diego or any other beneficiary of the Unilateral Agreement invokes the limited indemnity you provide by making the Unilateral Agreement. Thus, your indemnity is in third position behind the City's District Fund and TMD Corporation assets.

If you have any questions or concerns about these assurances, please contact TMD Corporation Executive Director Lorin Stewart at the telephone or email shown below.

Very truly yours,



C. Terry Brown
Chair, Board of Directors

c: Board of Directors
Lorin Stewart, Executive Director
John Lambeth, General Counsel

SDTMD Corporation - 8880 Rio San Diego Drive, Suite 800 - San Diego, California 92108 - ph: 619.209.6108



Frequently Asked Questions (FAQs)

Here are a few FAQs regarding the Unilateral Agreement to Waive Refund of Assessments the City of San Diego (City) has asked hotels to sign to release funds to TMD Corp. for collective marketing of the San Diego lodging industry.

1. **WHAT AM I WAIVING?** You are waiving only the right to ask for a refund of assessments your hotel pays to the City, provided those refunds are spent by TMD Corp. pursuant to the TMD Management Plan to market the San Diego lodging industry. Even if the assessment were later struck down and refunds were available, you are giving up the right to get your money back. This will allow TMD to spend it for your benefit.
2. **WHAT AM I INDEMNIFYING?** The City wants an indemnity against the risk that a court will strike down the TMD assessment after its proceeds have been spent. That indemnity — to the extent it survives the limits discussed under question 3 below— would cover (i) any refunds the City must pay, (ii) its costs to defend the litigation, (iii) any judgment or attorney's fees it pays to a successful plaintiff, and (iv) any costs it incurs to administer the Assessment and refunds. However, as explained below, there are many limits on your indemnity.
3. **WHAT ARE THE LIMITS ON MY INDEMNITY?** There are many, as follows:
 - a. You can withdraw your indemnity in the first half of April of each year. Therefore, unless the City gives you written notice that it is invoking your duty to indemnify before you withdraw it, your indemnity cannot be invoked. Your waiver of a refund right under question 1 above will bind you, however. Neither of the two remaining lawsuits challenging the renewal of the TMD is likely to result in liability against the City by April 2014, so hotels which indemnify this year will have opportunity to review the status of litigation before deciding whether to withdraw their indemnity then.
 - b. Your indemnity is capped at the amount of TMD assessment your property paid to the City in the 12 months before the date the City gives you notice that it intends to rely on your indemnity. So, worse case, your exposure is one year's worth of Assessments or 2% of assessable room rents.
 - c. Your indemnity is limited to claims from guests of your property. Claims by hotels or by guests of other properties are not your responsibility.

d. The City is withholding from TMD Corp. assessments from hotels which do not execute the indemnity agreement. In addition, TMD Corp. has a duty to indemnify the City. The funds held by the City and those held by TMD must be fully spent before the City can ask for indemnity from hotels.

4. **WHAT HAPPENS IF I DO NOT SIGN THE WAIVER AND INDEMNITY?** You will still be obligated to make assessment payments to the City, but the City will not release those funds to TMD Corp. to fund marketing. Instead, they will remain on account with the City for a year before being released to TMD Corp. However, the TMD Corp. encourages hotels to provide the indemnity, so that it can obtain sufficient funding to engage in meaningful marketing this year.



Hotel Waivers Re-launching the San Diego Tourism Marketing District

BACKGROUND:

San Diego's transient occupancy or hotel bed tax (TOT) was adopted in 1965. Part of its revenues were intended to support the visitor industry infrastructure, sales and marketing by organizations such as the Convention and Visitor's Bureau (ConVis), and dedicated events that help draw visitors to San Diego. Over four decades since, TOT collections for San Diego have grown; however, the percentage of TOT revenues reinvested into sales and marketing promotions has diminished due to other pressures on the city's budget. By 2007–2008, ConVis' entire TOT budget to promote San Diego as a destination in international and domestic markets was only \$8.8 million.

Many feared the city's declining investment in the visitor industry would cause a deep and ongoing loss in visitor market share for San Diego, which in turn, would reduce the city's TOT revenues, lodging revenues, jobs, and the broader economy. To mitigate these reductions, the lodging industry and city cooperated to create one of the first, largest Tourism Marketing Districts (TMDs) in California. In December 2007, hotel owners voted to participate in the TMD to enhance destination marketing, grow tourism, and increase hotel room nights. The city imposed an assessment of 2% of gross room rents, which hotels may pass through to their guests. **Expenditures of TMD assessment funds have been and will continue to be approved by a nine-member board of hoteliers elected by the lodging industry.** In January 2008, the SDTMD Corporation (Corporation) was granted an initial, five-year contract with the City of San Diego to operate the TMD. During that time, we used your assessment dollars to fund ConVis and other destination marketing programs, including the Rock 'n Roll Marathon, the San Diego Bay Wine & Food Festival, Bowl Games, and the San Diego Sports Commission.

Our annual budget has been approximately \$25 million and has been spent on very thin administration (we have only one employee) and very robust advertising. The agreement allows the City of San Diego to retain all TOT proceeds for General Fund use, with the TMD assessment funding lodging industry promotion. This allowed the city to return \$10.5 million per year to its general fund for public safety, streets, and other city services. We have required audited return-on-investment-reports for all promotion efforts to make sure we are getting maximum bang for your buck.

ANALYSIS/RECAP:

Overall, the TMD has been a great success! We estimate that the initial, five-year TMD assessment:

- Provided over **\$121 million** between 2008–2013 to fund destination marketing;

- Directly supported production of more than **16 million San Diego room nights**;
- Generated approximately **\$2.25 Billion** in San Diego room night revenue; and
- Achieved an overall ROI of approximately **19:1**.

Since the TMD's inception, 45 other California cities, including our competitors in San Francisco, Los Angeles, and Anaheim have established TMDs to fund their tourism marketing; copying our strategy to compete with us. There are now 76 TMDs in the state, and other states are following suit with 14 TMDs formed so far.

SDTMD RENEWAL:

In November 2010, California voters approved Proposition 26 to limit fees charged to businesses to fund government. Unfortunately, the broad language of this measure, defining most government revenue sources as taxes requiring voter approval, could potentially be argued to require 2/3 voter approval of the TMD assessment. Accordingly, in October 2011 the Corporation retained Michael G. Colantuono, California's leading attorney in Prop 26 arena to help craft the management plan for a renewed TMD to comply with Prop 26.

In November 2012, owners of assessed hotels voted overwhelmingly to renew the SDTMD through 2052. The City Council adopted a resolution to renew with just one dissenting vote. The necessary contracts were signed in May 2013.

In December 2012, two lawsuits were filed against the City to challenge the TMD renewal, arguing 2/3 voter approval was required under Proposition 26: *Melvin Shapiro v. City of San Diego* and *San Diegans for Open Government (SDOG)*. A third lawsuit was filed significantly after the 30-day statute of limitations and not in the required form of a validation action: *Brigitte Browning / Unite HERE v. City of San Diego*.

Mr. Colantuono and his colleagues are representing the Corporation and assisting the city in defending all three suits. San Diego Superior Court Judge Denton dismissed the Shapiro case on April 18, 2013, finding that the assessment is imposed only on hotels and, therefore, only hoteliers have standing to challenge the assessment. **Rather than appeal, Shapiro agreed to settle, and the settlement was executed by all parties on May 7, 2013.** No hotelier is involved in either the SDOG or Browning cases, both of which have been assigned to Judge Denton's courtroom. Mr. Colantuono and the city will renew their arguments that these cases should be dismissed for lack of standing, as well.

On August 2, 2013, the Superior Court will hear the city and SDTMD's demurrers to the SDOG suit and SDTMD's motion to intervene in the *Browning* case. We are cautiously optimistic we will have the same success in these cases that we had in *Shapiro*.

HOTEL WAIVER AND INDEMNITY AGREEMENT FORM DETAILS:

Because these suits are pending, the city is reluctant to spend the proceeds of the TMD assessments. However, as our industry knows well, we cannot stay out of the competition for tourists for the many months that may take. To induce the city to release to SDTMD the assessment funds you are paying so we can spend them on marketing to fill your rooms, we have agreed to ask hotels to waive their right to a refund of any

assessment proceeds spent on marketing if a court should find that SDOG and Browning have standing to challenge the TMD assessment and that refunds must be paid. In addition, the city will only release funds to SDTMD that are paid by hotels which sign the enclosed agreement. If you do not sign the enclosed agreement, your business will still be subject to the assessment, but the funds will remain in a city-controlled bank account until the lawsuits are resolved.

While you should review the waiver and indemnity agreement and may wish to talk to a lawyer about it, here is a summary of its provisions:

The first page summarizes the developments regarding SDTMD discussed in this letter.

- Paragraph 1 waives your hotel's right to a refund of TMD assessments that are spent on collective marketing as directed by the hoteliers elected to the SDTMD Board by the hotel industry.
- Paragraph 2 requires your hotel to indemnify the city (i.e. to pay the City of San Diego) for losses in the *SDOG* and *Browning* lawsuits (Shapiro is mentioned in the agreement, but it has now settled, so there can be no loss to the city). However, there are many significant limits on your indemnity promise:
 - It is limited to the amount your hotel pays in TMD assessments in one year;
 - It is limited to losses the city incurs on claims from guests of your hotel;
 - The city must spend assessment proceeds in its hands first. This will include assessments from hotels which do not sign the agreement and 10% of the assessment withheld from SDTMD pending a closeout audit of each quarter.
 - If your indemnity was called on, you would pay only your proportionate share of any claim.
 - You can withdraw your agreement annually in the first half of April of each year and, if you do so, your waiver of refund claims ends going forward, but your indemnity promise terminates completely.
- Paragraphs 3 – 10 are standard legal provisions (i.e., "boilerplate").

CONCLUSION:

SDTMD has been a great success for all of San Diego and especially the hoteliers who fund it. It is critical to get back into the marketplace and continue selling San Diego and your hotel, but we need your help.

Please sign the enclosed agreement and return it to:

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

If you need any further information, check out our webpage at <http://www.sdtmd.org/>.

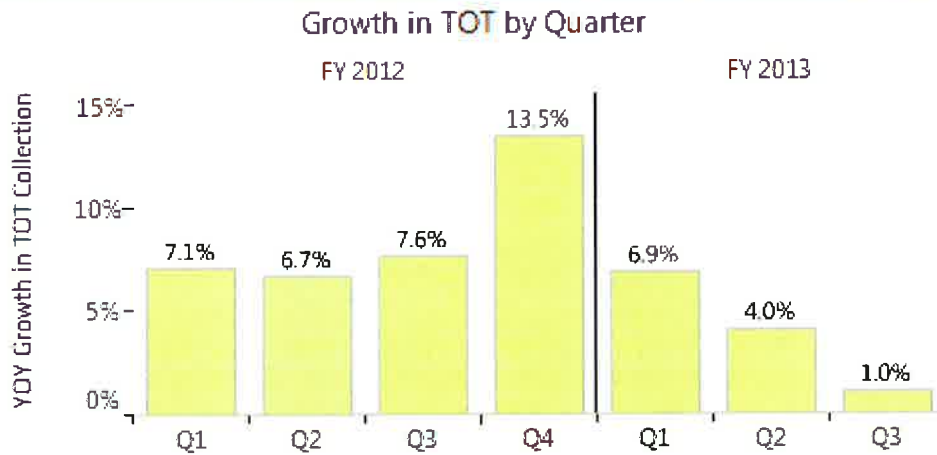
The Future of San Diego's Tourism Economy

Since January, San Diego has seen it's share of hotel visitors decline:

January – April 2013 YOY % Change	San Diego	Anaheim	Los Angeles	San Francisco
Hotel Occupancy	0.21%	4.26%	2.32%	4.24%
ADR	1.98%	6.66%	5.23%	7.04%

Source: STR

City TOT Collections Dropping



Revised Tourism Economy Forecast Based on Market Conditions

San Diego County Lodging Performance	FY 12 Actual	FY 13 Forecast December 2012 Update**	FY 13 Projections June 2012 Update	FY 14 Forecast December 2012 Update**	FY 14 Projections June 2012 Update
Room Demand (millions)	14.9	15.2	14.9	15.5	14.7
YOY Growth		2.1%	0.7%	2.3%	-1.3%
Ave. Daily Rate	\$128.13	\$132.50	\$132.22	\$138.76	\$129.13
YOY Growth		3.4%	3.2%	4.7%	-2.3%
Room Revenue (millions)	\$1,903	\$2,009	\$1,971	\$2,152	\$1,898
YOY Growth		5.5%	3.6%	7.1%	-3.7%
City TOT Budget*	\$151M	\$156M	\$156M	\$171M	\$150M
YOY Growth Rate		3.3%	0.0%	9.4%	-3.7%
Difference vs Budget				\$14M	\$(-20M)

*Source: City of San Diego, Financial Management Department

**Source: Tourism Economics Forecast December 2012

The Tourism Economy Needs an Engine for Growth

The TMD FY 2014 Budget Projections

	TMD Available Funding to Promote San Diego
Projected FY 2014 Revenue	\$28,500,000
Minus fixed expenses:	
City Indemnification (NEW)	(\$2,300,000)
City & TMD Administrative Costs	(\$1,425,000)
TMD Reserve Funds	(\$1,425,000)
TMD Funds Available	\$23,350,000

Fewer Signed Waivers = Reduced Funds for Tourism Promotion = Less TOT

Available TMD Funds are **REDUCED** when waivers are not signed

Percent of Hotels that Sign Waivers	TMD Available Funds (X% times \$23.4M)	90% SDTA Budget Allocation*
60%	\$11,950,000	\$10,755,000 (50% of FY13 budget)
80%	\$17,650,000	\$15,885,000 (70% of FY13 budget)
100%	\$23,350,000	\$21,015,000 (91% of FY13 budget)

*10% is allocated to Balboa Park

60% Sign Scenario = \$10.7 million SDTA Budget
the sales and marketing impacts are significant

MARKETING

- Advertising budget reduced to \$5.1M (\$10M in FY13)
- Less Market Intelligence to guide industry
- Reduced trade representation and public relations efforts in international and domestic markets
- 2 million fewer visitor inquiries (vs 7 million inquires in FY13)

HOTEL SALES

- Sales team would be reduced by 6 positions
- 22 fewer tradeshows to meet clients
- 33 fewer in-market customer events
- Reduced client site inspections supporting conversion
- 200,000 fewer definite room nights booked (vs 700,000 booked in FY13)



Letter of Introduction: TMD Renewal Waiver & Indemnification Agreement

Tourism marketing in San Diego is at risk. Your attention and action is required.

Please read on.

The hard facts are that without marketing resources to compete San Diego has started into a dangerous, downward trend. For the month of March 2013:

- San Diego occupancy was **down** 4.2%, RevPar was **down** 6.7%
- San Francisco occupancy was up 3.3%, RevPar was up 10.9%
- Anaheim occupancy was up 5.1%, RevPar was up 12.9%
- Los Angeles occupancy was up .2%, RevPar was up 3.0%

Without question, the establishment of the San Diego Tourism Marketing District (TMD) in 2008 and its successful operation for the past five years represents a significant achievement in the short history of tourism development in San Diego. **The TMD deserves our continued support.**

For the five years that the initial TMD was in operation, the 2% assessment on room night sales delivered over \$100 million in collections that were invested in tourism marketing and yielded a 19-to-1 audited ROI (hotel room night sales driven by marketing investment). The passage of Prop 26 in 2010 required changes in TMD operations that will, through a more direct benefit realized by member properties, increase the ROI going forward. With overwhelming support from our industry, the new District has been established for 39½ years, through 2052, and began collecting assessments in January 2013. An operating agreement has been signed with the City of San Diego (City). The TMD is prepared to continue driving room nights into all of the lodging establishments throughout the city, but **you must take action!**

Unfortunately, three lawsuits from outside of our industry threaten the long-term viability of the TMD and its short-term ability to drive hotel room nights. The courts have found against one of the legal challengers, who has decided to settle his lawsuit rather than go to the Court of Appeal. We anticipate similar success against the remaining two lawsuits. While these lawsuits are pending, the City requires that TMD member lodging establishments waive their right to a refund and indemnify against additional legal action in order to release TMD revenue for the sales and marketing programs as it was intended. (The Waiver Agreement and briefing summary is included.)

If you do not sign the enclosed waiver, your business will still be subject to the assessment. However, the City will be withholding from the TMD all assessments from hotels that do not sign the waiver/indemnification forms and will be releasing to the TMD

only the assessments from hotels that do sign the form. Therefore, it is crucial that the industry sign the forms, so that there are sufficient funds to promote San Diego and keep the San Diego Tourism Authority (formerly ConVis) in business.

As long time local hotel owners and operators, and members of the San Diego Tourism Marketing District Board of Directors, we have signed the Waiver-Indemnification Agreement.

We urge you to sign the enclosed waiver-indemnification agreement forms and return as soon as possible to:

**SDTMD Corporation
Atten: Mr. Lorin Stewart, Executive Director
8880 Rio San Diego Drive, Suite 800
San Diego, CA. 92108.**

If you have further questions, please call Lorin at (619) 209-6108.

Thank you for your consideration and for your many positive contributions to our industry.

Sincerely,

C. Terry Brown, Chairman
SDTMD Board of Directors

Richard Bartell, Vice Chairman
SDTMD Board of Directors

Bill Evans, Marketing Chair
SDTMD Board Directors

Enclosure (waiver & indemnity agreement)