



UNILATERAL AGREEMENT TO WAIVE REFUND OF ASSESSMENTS AND TO PROVIDE INDEMNIFICATION AND DEFENSE

THIS AGREEMENT (hereinafter referred to as the "Agreement") is made and entered into on the date noted below by [INSERT HOTEL NAME] _____ ("Hotel") for the benefit of the City of San Diego (the "City") and the San Diego Tourism Marketing District Corporation ("TMD Corp.") which are deemed to accept it by taking the actions described below. The City, TMD Corp., and Hotel are collectively referred to herein as the "Parties" or individually as "Party." Hotel executes this Agreement based on the understandings set forth in the following recitals, each of which it affirms to be true and correct.

WHEREAS, on or about November 27, 2012, the City Council of City adopted Resolution No. R-307843, which renewed the San Diego Tourism Marketing District (the "District"), levied assessments upon the assessed businesses for a period of thirty-nine and one-half years (the "Assessment"), and prescribed a method for collection of the Assessment;

WHEREAS, the City Council of City approved a contract (on file with the City in the Office of the City Clerk as Document No. RR-308062), including a first amendment thereto (on file with the City in the Office of the City Clerk as Document No. RR-308065), with the TMD Corp. to administer the District by expending the proceeds of the assessment to provide collective marketing services to Hotel and other lodging businesses in the City of San Diego (collectively, "the 2012 Operating Agreement");

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 Resolution No. R-307843 and its renewal of the District and 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 Brigitte Browning, Sergio Gonzales and UNITE HERE Local 30 filed an apparently untimely lawsuit styled *Browning et al. v. San Diego City Council*, Case No. 37-2013-00036413-CU-WM-CTL and other, apparently untimely, litigation on that issue may follow (collectively, the "District Litigation");

WHEREAS, the District Litigation is currently pending and seeks invalidation of the District and of the Assessment; and

WHEREAS, notwithstanding the District Litigation, the Hotel wishes the City to collect the renewed Assessment under Resolution No. R-307843 and the TMD Corp. to expend Assessment proceeds for Hotel's benefit pursuant to the 2012 Management Plan (on file in the Office of the City Clerk as document number RR-307843) ("2012 Management Plan");

NOW, THEREFORE, in consideration of the mutual promises set forth below, Hotel agrees as follows:

1. To induce the City to collect the Assessment from Hotel and to pay its proceeds to the TMD Corp. and to induce the TMD Corp. to expend those proceeds for Hotel's benefit and the benefit of the San Diego lodging industry under the terms of the District 2012 Management Plan, Hotel, on behalf of itself and its successors, assignees, agents, insurers, employees, directors, officers, owners, partners, shareholders, members, attorneys, and other representatives, hereby irrevocably waives any and all demands, causes of action, obligations, damages, losses, costs, expenses and / or liabilities of any kind or nature whatsoever, which Hotel may now have or may hereafter have or claim to have against the City for a refund of Assessment proceeds paid by Hotel that the City levied and collected or the TMD Corp. spent should a court invalidate Resolution No. R-307843 or order a refund to assessed businesses within the District of such Assessment proceeds, whether due to a final judgment or settlement in the District Litigation or otherwise. City's levy and collection of the Assessment and payment of some or all of its proceeds to TMD Corp. constitutes its acceptance of this Agreement. TMD Corp.'s acceptance of those proceeds and its expenditure of them consistently with the District Management Plan constitute its acceptance of this Agreement.

In executing this Agreement, Hotel specifically waives its rights under California Civil Code section 1542, which provides as follows:

"A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor."

2. To further induce the City to collect the Assessment from Hotel and to pay its proceeds to the TMD Corp. and to further induce the TMD Corp. to expend those proceeds for Hotel's benefit and the benefit of the San Diego lodging industry under the terms of the District 2012 Management Plan, Hotel hereby agrees to hold harmless, indemnify, and defend the City, its elected officials and other officers, employees, agents, and representatives from third-party claims, including attorneys' fees and costs,

if any, as well as the City's defense costs, including reasonable attorneys' fees, if any, arising from or related to any third-party effort (i.e., other than by one or more assessed businesses) to obtain refunds, reimbursements, or relief from the collection of the Assessment. This indemnification is limited as follows:

a. Hotel's monetary obligation is limited to (i) the dollar amount of the Assessment paid by Hotel in the 12 months prior to the date the City gives written demand for performance of this paragraph 2 and (ii) claims arising from guests of Hotel;

b. Hotel's indemnity shall be triggered only after the City's District Fund, as defined in section 1.6 of the 2012 Operating Agreement, in which fund the City retains certain Assessment proceeds, is exhausted by a final judgment or good faith settlement, including attorneys' fees and costs, if any; by unreimbursed City administrative expenses, if any, as allowed by the 2012 Management Plan; by any third-party contractual claims resulting from the District, if any; or by the City's actual defense costs not previously paid by the TMD Corp.;

c. Hotel shall pay its proportionate share of any remainder of such judgment, settlement, administrative or defense costs in common with other hotels which make a similar promise to indemnify the City. Hotel's proportionate share shall be measured by the Assessment paid by Hotel in proportion to the Assessment paid in the aggregate by all hotels which make a promise to indemnify the City in a manner similar to this Agreement.

d. Hotel may withdraw its indemnification obligations under paragraph 2 of this Agreement by delivering a written notice of withdrawal addressed to the City Clerk (with a copy to the City Attorney's Office) during the first 15 days of April of any year, but, should it do so, the City may refrain from releasing further assessment proceeds from Hotel to the TMD Corp. as provided in paragraphs 1 and 2 above until final resolution of the Pending Lawsuits (including any available appeals) in a manner that upholds the validity of the Assessment.

3. This Agreement is not intended as, and shall not constitute, an admission or acknowledgement by any Party that the District and Assessment are invalid or otherwise contrary to law.

4. Except as provided in paragraph 2(d) above, it is expressly understood and agreed that this Agreement may not be altered, amended, modified or otherwise changed in any respect whatsoever except by an executed written agreement signed by all Parties. No Party will make a claim at any time or place that this Agreement has been

orally altered or modified or otherwise changed by oral communication of any kind or character.

5. If for any reason any provision of this Agreement is determined to be invalid, unenforceable or contrary to any existing or future law to any extent, such provision shall be enforced to the extent permissible under the law and such invalidity, unenforceability or illegality shall not impair the operation of or otherwise affect those portions of this Agreement which are valid, enforceable, and legal.

6. Hotel acknowledges it had opportunity to consult counsel of its choice and enters into this Agreement knowingly and voluntarily to induce the City and TMD Corp. to fund marketing services to benefit Hotel. Accordingly, any rule of construction to the effect that any ambiguity is to be construed against the drafting party shall not apply to this Agreement.

7. Each person executing this Agreement represents and warrants for the benefit of the Parties that he or she is actually authorized to enter into this Agreement and to bind Hotel to this Agreement.

8. This Agreement is to be construed, interpreted, and enforced in accordance with California law. Any action to enforce the terms of this Agreement shall be brought in the state courts located in San Diego County, California.

9. Hotel agrees to cooperate with each other Party and to execute such additional documents, papers, and pleadings as may be necessary to give effect to this Agreement. Hotel agrees to provide the City and TMD Corp. with any documentation that may be reasonably necessary to calculate the amount of Hotel's indemnification under paragraph 2(a) of this Agreement.

10. This Agreement may be transmitted by facsimile or other electronic means and the reproduction of signatures by facsimile or other electronic means will be treated as binding as if originals.

HOTEL NAME: _____

HOTEL ADDRESS: _____

By: _____

Name: _____

Title: _____

Date: _____