



City Council Report

915 I Street, 1st Floor

Sacramento, CA 95814

www.cityofsacramento.org

File ID: 2019-01001

July 23, 2019

Consent Item 12

Title: Agreement with Misterb&b to Collect City Transient Occupancy Tax on Behalf of Misterb&b Hosts

Location: Citywide

Recommendation: Pass a Motion authorizing the City Manager or City Manager's designee to execute an agreement with Misterb&b to collect the City's Transient Occupancy Tax and remit the same to the City for zero cost.

Contact: Julie Coffeen, Interim Revenue Manager, (916) 808-1259, Department of Finance

Presenter: None

Attachments:

1-Description/Analysis

2-Agreement

Description/Analysis

Issue Detail: In January 2016, City Council adopted a short-term rental program in response to an increasing trend of homeowners renting rooms or their entire residence on a short-term basis. Additionally, the increasing number of online platforms makes it increasingly easier for individuals to make reservations for rooms or residences on a short-term basis.

Short-term rental operators (“hosts”) are required to collect and remit transient occupancy tax (TOT) to the City (see Sacramento City Code section 3.28.030). In an effort to streamline the process and gain compliance, staff recommends that Council authorize the City to enter into an agreement with Misterb&b for its collection of and remittance to the City of TOT on behalf of its hosts that utilize its services.

Policy Considerations: Entering into an agreement with Misterb&b would be consistent with the City’s policy to collect all taxes due the City efficiently and effectively.

Economic Impacts: None.

Environmental Considerations: None.

Sustainability: None.

Commission/Committee Action: None.

Rationale for Recommendation: Hosts offering lodging services on Misterb&b in the City should collect TOT from their guests and remit it to the City. Entering into this agreement with Misterb&b would be the most efficient way for guests, hosts, Misterb&b, and the City to accomplish this. The agreement strengthens the City’s ability to implement the Council policy on the short-term rental program.

Financial Considerations: Misterb&b platform is relatively new to the Sacramento market. Being able to offer this service to their hosts will enable them to be a competitive platform.

Local Business Enterprise (LBE): None.

VOLUNTARY COLLECTION AGREEMENT REGARDING COLLECTION OF THE CITY OF SACRAMENTO TRANSIENT OCCUPANCY TAX

THIS VOLUNTARY COLLECTION AGREEMENT (the “**Agreement**”), is dated May 15, 2019, but becomes effective on the Effective Date (as defined below); and is between **SFO84, INC.**, a Delaware corporation (“**Misterb&b**”), and **the City of Sacramento**. Each party may be referred to as a “**Party**” and collectively as the “**Parties**”.

RECITALS

WHEREAS, **Misterb&b** represents that it provides an **Internet-based platform** (the “**Platform**”) through which **third parties offering accommodations** (“**Hosts**”) and **third parties booking such accommodations** (“**Guests**”) may communicate, negotiate and consummate a **direct booking transactions via the use of the Platform** (“**Booking Transactions**”);

WHEREAS, **Misterb&b** represents that any rental agreement entered into by the Host and the Guest through use of the Platform is between the Host and Guest only, that **Misterb&b** is not a party to such agreement, and that the Host exclusively determines the price to be charged, the dates to book such accommodations, the parties with whom to transact, and all other material terms of such agreement, that only the Host and not **Misterb&b** has the right and ability to accept and book an accommodation;

WHEREAS, **Misterb&b** does not own any real property and does not have any possessory interest in any real property or accommodations offered by Hosts and therefore cannot and does not transfer any possessory interest in any property or accommodation to any person;

WHEREAS, **Misterb&b** represents that third-party payment processors provide a secure payment processing service to permit Hosts to receive payments from Guests electronically. **Misterb&b** represents that when the Host accepts and confirms the Guest’s reservation request, the third-party payment processors process the Guest’s payment;

WHEREAS, **Misterb&b** represents that it is not a proprietor, owner, lessee, sublessee, mortgagee in possession, licensee, or any other possessory agent of any type or character, neither a managing agent, of any room or rooms, or other living space, in a hotel, inn, tourist home or house, motel, or other lodging, and it neither engages until this date in the business of renting, leasing, letting, or granting a license to rent, lease, let, or use any room or rooms, or other living space, in a hotel, inn, tourist home or house, motel, or other lodging in the **incorporated areas of the City of Sacramento** (the “**City**”);

WHEREAS, the **Sacramento Code Title 3 Chapter 3.28** (the “**Uniform TOT Ordinance of the City**”) together with Section 7280 Division 2 Part 1.7 Chapter 1 of the California Revenue and Taxation Code impose a **transient occupancy tax** (“**TOT**”) on any *transient* for the privilege of

occupancy in any *hotel* located in the City (both terms in italics have the same meaning herein than in the Uniform TOT Ordinance of the City);

WHEREAS, the City of Sacramento and Misterb&b enter into this Agreement voluntarily in order to facilitate the prospective collection, reporting and remittance of TOT imposed under the Uniform TOT Ordinance of the City for Booking Transactions completed by Hosts and Guests on the Misterb&b Platform for occupancy of accommodations located within the City, in accordance with this Agreement;

WHEREAS, the City of Sacramento agrees this Agreement is intended to facilitate the collection, reporting, and remittance of the TOT only, and that its provisions may not be extended to any other taxes, even if serving a similar purpose.

NOW THEREFORE, IN CONSIDERATION OF THE MUTUAL COVENANTS, PROMISES AND AGREEMENTS CONTAINED HEREIN, THE PARTIES AGREE AS FOLLOWS:

- (A) The Parties agree and stipulate that the Recitals stated above are accurate and are hereby adopted and incorporated into this Agreement as if fully set forth herein.
- (B) Solely with respect to any Booking Transactions between a Host and Guest made through the Platform for accommodations for which the TOT is applicable (“**Taxable Booking Transactions**”) and solely for pursuant to the terms and conditions of this Agreement and for periods in which this Agreement is effective (as defined below), Misterb&b agrees contractually to assume the duties of an **operator as described in the Uniform TOT Ordinance of the City for the collection and remittance of TOT** (hereinafter referred to as an “**Operator**”).
- (C) The assumption of such duties shall not trigger any other requirements (including, registration requirements) to which Misterb&b is not otherwise subject. The City of Sacramento agrees to assist and cooperate with Misterb&b in the completion of any administration process arising from the assumptions of the duties of an Operator, and to facilitate such process and take further actions as may be required to carry out and give effect to the transactions contemplated by this Agreement, including, but not limited to, considering the business model of Misterb&b.
- (D) Misterb&b agrees to register as an Operator for the reporting, collection and remittance of TOT under this Agreement and will be the registered Operator on behalf of any affiliated parent or subsidiary company collecting TOT. Misterb&b will assume contractually such Operator duties on behalf of any affiliated parent or subsidiary companies collecting TOT. As of the Effective Date, the following entities are including within affiliated entities: Pinklab360 SASU.

PROSPECTIVE COLLECTION OF TOT

- (E) Misterb&b agrees to commence collecting and remitting TOT no later than **March 1st, 2019** (the “**Effective date**”), pursuant to the terms of this Agreement, at the applicable rate, for all Taxable Booking Transactions. For the avoidance of doubt, Misterb&b shall not assume any obligation or liability to collect TOT for, and this Agreement shall not extended to, any period or Booking Transactions prior to the Effective Date or after the termination of this Agreement (except as expressly stated below in Paragraph (V)) or to any user’s transaction completed through any means, method or platform other than the Misterb&b Platform.
- (F) TOT shall be collected and remitted by Misterb&b.

REMITTANCE OF TOT

- (G) Misterb&b shall be deemed to have satisfied the reporting requirements of the TOT by filling report information on **tax return forms prescribed by the Revenue Division (“Tax Forms”)**, including all TOT that are subject to the provisions of this Agreement, and Misterb&b shall remit all TOT collected from Guests in accordance with this Agreement and evidenced on such Tax Forms in the time and manner described in the Uniform TOT Ordinance of the City or as otherwise agreed to in writing.
- (H) The Parties agree the TOT is collected by Misterb&b at time of booking payment made by Guests for the Taxable Booking Transactions. In the event the Taxable Booking Transaction is subsequently **cancelled in part or in its entirety** (a “**Cancellation**”), Misterb&b shall refund the Guest **the prorated or entire amount of TOT initially paid at time of booking payment for the Taxable Booking Transaction**, as the case may be (the “**Refunded Amount**”). Accordingly, Misterb&b is permitted to deduct the Refunded Amount from the total TOT reported on the Tax Form for the reporting period during which a Cancellation occurred.

MISTERB&B LIABILITY

- (I) Pursuant to the terms of this Agreement, Misterb&b agrees contractually to assume liability for any failure to report, collect and/or remit the correct amount of TOT, including, but not limited to, penalties and interests, lawfully and properly imposed in compliance with the Uniform TOT Ordinance of the City. In the event Misterb&b learns of TOT transactions relating to accommodations located in the City participating with Misterb&b (or with any affiliated parent or subsidiary companies), Misterb&b agrees to undertake actions to immediately begin collecting and remitting TOT. Misterb&b shall not be liable for past taxes not collected on these host properties, unless such failure was the result of Misterb&b’s own negligence or willful misconduct.
- (J) Nothing contained herein nor any action taken pursuant to this Agreement shall impair, restrict or prevent Misterb&b from asserting that any TOT and/or penalties, interest, fines or other amounts assessed against it were not due, are the subject of a claim for refund under applicable law or otherwise bar it from enforcing any rights accorded by law.

AUDIT AND INSPECTION OF RECORDS

(K) During any period for which Misterb&b is not in breach of its obligations under this Agreement, with respect to any Taxable Booking Transactions for which TOT are due, the City of Sacramento agrees to audit Misterb&b on the basis of TOT returns and supporting documentation, except that Misterb&b will not be required on the basis of this Agreement to disclose the Host or Guest name or property address at issue. The City of Sacramento agrees to conduct each audit in accordance with the time restrictions included in the Sacramento Code.

(L) The City of Sacramento shall not, directly or indirectly, audit any individual Guest or Host relating to Taxable Booking Transactions unless and until an audit of Misterb&b by the City of Sacramento has been exhausted with the matter unresolved. Nothing in this Agreement prevents the Revenue Division from auditing any individual Misterb&b Host based upon transactions brought to the attention of the City of Sacramento in the form of a complaint or other means independent of this Agreement or independent of data or information provided pursuant to this Agreement.

(M) Upon the City of Sacramento's request in connection with an audit, Misterb&b shall submit all Taxable Bookings Transactions data based on reservation ID, or the type of transaction ID (e.g. anonymous numbered accounts), as maintained by Misterb&b in its ordinary course of business. The Parties agree that, except as otherwise agreed herein or as otherwise validly legally required, now or in the future, Misterb&b shall not be required to produce any personally identifiable information (like names or addresses) relating to any Host of Guest relating to any Booking Transactions in connection with an audit or thewise, without lawfully issued subpoena or other process of comparable legal effect served by the City of Sacramento on Misterb&b with respect to such users. The City of Sacramento agrees it will not audit or issue an assessment against Misterb&b more than once per any consecutive forty-eight (48) months period and that such audit assessment will be limited to a consecutive twelve (12) months period within the forty-eight (48) months period.

GUEST AND HOST LIABILITY

(N) Nothing in this Agreement shall relieve Guests or Hosts from any responsibilities with respect to TOT for transactions completed through any other means, method, device other than on the Platform, or restrict the City of Sacramento from investigating or enforcing any provision of applicable against any such person or entity for such transactions.

(O) Nothing herein shall relieve any Guest or Host of liability for TOT imposed by the Uniform TOT Ordinance of the City, nor limit the City of Sacramento's authority to hold such Guest or Host responsible for any applicable TOT, penalties, and interest for which they may be liable, including, but not limited to, civil and criminal penalties arising from inaccurate, false, or misleading representations made to Misterb&b or to the Revenue Division by such Guest or Host, whether or not such representations were, in fact, relied upon by Misterb&b or the Revenue Division.

WAIVER OF LOOK-BACK

- (P) The City of Sacramento expressly releases, acquits, waives and forever discharges Misterb&b, its current or past affiliated parent or subsidiary companies, directors, shareholders investors, and/or employees and other agents from any all actions, causes of actions, indebtedness, suits, damages or claims arising out of or relating to payment of and/or collection of TOT or other tax indebtedness, including but not limited to penalties, fines, interest or other payments relating to TOT on any Booking Transactions prior to the Effective Date of this Agreement.

NOTIFICATION TO GUESTS AND HOSTS

- (Q) Misterb&b agrees for the purposes of facilitating this Agreement that it will notify: (i) Hosts that TOT will be collected and remitted to the City of Sacramento as of the Effective Date; and (ii) Guests and Hosts of the amount of TOT collected and remitted on each Taxable Booking Transaction.

LIMITATION OF APPLICATION

- (R) This Agreement is solely for the purpose of facilitating the administration and collection of TOT with respect to Taxable Booking Transactions and, except with respect to the rights and liabilities set forth herein, the execution of or actions taken under this Agreement shall not be considered an admission of law or fact or constitutes evidence thereof under the Code or any other provisions of the laws of the United States of America, State of California or subdivision or municipality thereof. By acting pursuant to the terms of this Agreement, including but not limited to collecting and/or remitting TOT, Misterb&b and the City of Sacramento do not waive, and expressly preserve, any and all arguments, contentions, claims, causes of action, defenses, and assertions, without limitation, relating to: (i) the validity of any construction of the Sacramento Code that extends beyond the express terms of the Uniform TOT Ordinance of the City; and (ii) that Misterb&b is an Operator (as defined in the Uniform TOT Ordinance of the City); (iv) that Misterb&b receives, charges, collects, or otherwise comes into possession of taxable “consideration charged for the occupancy of space” in a “hotel” as those terms are used in the Sacramento Code; or (v) that any third party occupies any taxable “any structure, or any portion of any structure” of any kind in a “hotel” or otherwise, as those terms are in used in the Sacramento Code.

MODIFICATIONS

- (S) No modification of this Agreement shall be effective unless any modification is written, agreed and signed by both Parties.

DURATION/TERMINATION

- (T) This Agreement shall apply to Taxable Booking Transactions booked on or after the Effective Date and shall remain in effect unless terminated in accordance with Paragraph (U).

- (U) This Agreement may be terminated by Misterb&b or the Revenue Division for convenience, provided that proper notice is given to the other Party. Proper notice for the purposes of this Paragraph means at least thirty (30) days' prior written notification to the other Party by certified or registered mail. Such termination shall be effective on the first day of the calendar month following the thirty (30) days' written notification to the other Party.
- (V) Any termination under any portion of this Agreement shall not affect the duty of Misterb&b to remit to the City of Sacramento any TOT collected from Guests pursuant to this Agreement up through and including the Effective date of termination, even if not remitted by Misterb&b to the City of Sacramento as of the date of termination.

MISCELLANEOUS

- (W) **CHOICE OF LAW.** This Agreement, its construction and any and all disputes arising out of or relating to, shall be interpreted in accordance with the substantive laws of the State of California without regard to its conflict of law principles. If any dispute between the Parties results from the interpretation, application or execution of this Agreement, the Parties must take reasonable effort in order to settle the dispute amicably, only if they fail to do so the dispute shall be brought before the courts. The Parties agree that any dispute arising out of or relating to this Agreement shall be heard exclusively in the courts of Sacramento and each Party consents to the exclusive jurisdiction of such courts and waives any and all objections to jurisdiction or venue in such courts or any assertion of inconvenient forum.
- (X) **MERGER AND INTEGRATION.** This Agreement contains the entire agreement of the Parties with respect to the subject matter of this Agreement, and supersedes all prior negotiations, agreements and understandings with respect thereto.
- (Y) **COUNTERPARTS.** This Agreement may be executed in any number of counterparts, each of which shall be deemed an original, and all of Agreement, when taken together, shall constitute one and the same instrument. The Agreement shall become effective when a counterpart has been signed, either physically or electronically, by each Party and delivered to the other Party, in its original form or by electronic mail, facsimile or electronic means. The Parties hereby consent to the use of electronic signatures in connection with the execution of this Agreement, and further agree that electronic signatures to this Agreement shall be legally binding with the same force and effect as manually executed signatures.
- (Z) **RELATIONSHIP OF THE PARTIES.** Misterb&b is an independent contractor. This Agreement does not create nor is it intended to create a partnership, franchise, joint venture, agency, fiduciary, or employment relationship between the Parties.
- (AA) **WAIVER AND CUMULATIVE REMEDIES.** No failure or delay by either Party in exercising any right under this Agreement shall constitute a waiver of that right or of any other right. Other than as expressly stated herein, the remedies provided herein are in addition to, and not exclusive of, any other remedies of a Party at law or in equity.

(BB) **FORCE MAJEURE.** Neither Party shall be liable for any failure or delay in performance under this Agreement (other than for delay in the payment of money due and payable hereunder) for causes beyond that Party's reasonable control and occurring without that Party's fault or negligence, including, but not limited to, acts of God, acts of government, flood, fire, civil unrest, acts of terror, strikes or other labor problems (other than those involving Misterb&b employees), computer attacks or malicious, such as attacks on or through the Internet, any Internet service provider, telecommunications or hosting facility. Dates by which performance obligations are scheduled to be met will be extended for a period of time equal to the time lost due to any delay so caused.

(CC) **ASSIGNMENT.** Neither Party may assign any of its rights or obligations hereunder, whether by operation of law or otherwise, without the prior written consent of the other Party. Notwithstanding the foregoing, Misterb&b may assign this Agreement in its entirety without the City of Sacramento's consent in a connection with a merger, acquisition, corporate reorganization, or sale of all or substantially of its assets provided the assignee has agreed to be bound by all of the terms of this Agreement and all TOT and all other sums due at the time of the attempted assignment have been paid in full. Any attempt by a Party to assign its rights or obligations under this Agreement in breach of this Paragraph shall be void and of no effect. Subject to the foregoing, this Agreement shall bind and inure to the benefit of the Parties, their respective successors, and permitted assigns.

(DD) **MISCELLANEOUS.** If any provision of this Agreement is held by a court of competent jurisdiction to be contrary to law, the provision shall be modified by the court and interpreted so as best to accomplish the objectives of the original provision to the fullest extent permitted by law, and the remaining provisions of this Agreement shall remain in effect.

NOTICES

(EE) All notices under this Agreement shall be in writing and shall be deemed to have been given upon: (i) personal delivery; (ii) the third (3rd) business day after class mailing, postage prepaid; sending by overnight mail, by facsimile with telephonic confirmation of receipt; or sending by email. Notices shall be addressed to the attention of the following persons, provided each Party may modify the authorized recipients by providing written notice to the other Party:

To Misterb&b:

Attn: Matthieu JOST, C.E.O.
584, Castro Street
San Francisco, CA 94114
Email: matthieu@misterbandb.com

With a copy to:

PINKLAB360
5, Rue Geoffroy-Marie
PARIS 75009
FRANCE

Email: taxes@misterbandb.com

To the Revenue Division of the City of Sacramento:

915 I Street, Room 1214

SACRAMENTO, CA 95814-2604

Email: jcoffeen@cityofsacramento.org

(Signatures follow on next page)

IN WITNESS WHEREOF, Misterb&b and the City of Sacramento have executed this Agreement effective on the date set forth in the introductory clause.

SFO84, INC., a Delaware Corporation



By: _____
Signature of Authorized Representative

Matthieu JOST, C.E.O.

Name and Title of Authorized Representative

REVENUE DIVISION OF THE CITY OF SACRAMENTO

By: _____
Signature

Name and Title