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**RE:** Exclusivity of Corporate Partnership Agreement between Deco Bike and the City of San Diego

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**I. Question**

Whether the Corporate Partnership Agreement between the City of San Diego and Deco Bike, LLC grants Deco Bike the exclusive right to be the sole provider of a bikeshare program within the City of San Diego.

**II. Brief Answer**

Subject to the legal and public policy issues discussed herein, the Corporate Partnership Agreement between the City of San Diego (“City”) and Deco Bike, LLC (“Deco”) does not confer an exclusive right to Deco to operate the sole bikesharing program in the City. Upon review of the operative clauses, the Agreement is unambiguous that Deco only has the exclusive right to be designated and referred to as the “Official Bikeshare Provider” of the City and to use said designation in promotional and marketing efforts.

**III. Analysis**

On or about August 14, 2013, the City entered into a Corporate Partnership Agreement with Deco for the Financing, Implementation, Management and Operation of a Self-Service Bikesharing System with City Marketing Rights and Benefits (“Agreement”), which has been interpreted by some City officials as granting Deco an exclusive right to operate a bikeshare program within the City. In the Agreement, the term “exclusive” is only mentioned under the Official Partner clause of the Marketing Rights and Partnership Benefits Section, which states in pertinent part: “DecoBike shall have the exclusive right to be designated and referred to as the ‘Official Bikesharing Provider of the City of San Diego’ and to use said designation in promotional and marketing efforts.”<sup>1</sup> The term “exclusive” does not appear in any other operative section of the Agreement.

Contractual language that is clear and explicit must govern the interpretation of a contract.<sup>2</sup> As such, we must look to the explicit language of Section 10.1 of the Agreement to determine whether Deco was granted an exclusive right to be the sole provider of a bikeshare program in the City. As previously mentioned, the only exclusive right granted to Deco is the designation of “Official Bikeshare Provider.” When determining the plain meaning of a contract, the terms are presumed to have been used in their primary and general acceptance.<sup>3</sup>

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<sup>1</sup> Agreement; Section 10.1

<sup>2</sup> See Cal. Civ. Code §1638; City of El Cajon v. El Cajon Police Officers’ Ass’n, 49 Cal. App. 4<sup>th</sup> 64, 71 (1996).

<sup>3</sup> Cal. Code of Civ. Proc. §1861 (but evidence is nevertheless admissible that they have a local, technical, or otherwise peculiar signification, and were so used and understood in the particular instance, in which case the agreement must be construed accordingly).

Merriam Webster Law Dictionary defines the adjective “official” as fully authorized.<sup>4</sup> Importantly, Webster’s definition of “official” does not include any requirement of exclusivity and the Agreement’s own Definitions section does not define “official” or any other term to include exclusivity.<sup>5</sup> Therefore, according to its generally accepted meaning, Deco’s designation as “official” bikeshare provider does not confer upon Deco the exclusive right to be the sole bikeshare provider to the City.

Notwithstanding the explicit and plain meaning of Section 10.1, a court may consider extrinsic evidence that supports a meaning to which the contract language is “reasonably susceptible” given the transactional context.<sup>6</sup> However, there is no extrinsic evidence that the City intended Deco to have exclusive bikeshare provider rights. For example, City Ordinance 0-20279<sup>7</sup> (“Ordinance”) contains a “whereas” clause (clauses commonly used to provide context and are conclusively presumed to be true as between the parties thereto<sup>8</sup>) which states that Deco, as part of the Agreement, is granted the right to install bikesharing facilities in the public right-of-way<sup>9</sup> without any mention of exclusivity. In fact, of the sixteen “whereas” clauses contained in the Ordinance, there is no evidence that the Agreement granted or intended to grant Deco any exclusive bikeshare operation. Further, both the Ordinance and the City’s website<sup>10</sup> state that the City’s Sponsorship Program (“Program”) provides a “mutually beneficial marketing partnership between the City and a corporation wherein the corporation provides... services to the City in exchange for access to the commercial marketing potential associated with City.” Thus, the City’s own description of the Program and its benefits do not include a grant of exclusive provider rights. Lastly, in the event either party to the Agreement claims an oral understanding that grants Deco exclusive operation rights, the Agreement’s Integration clause<sup>11</sup> would prevent the consideration of such extrinsic evidence.<sup>12</sup>

### **Regardless of Exclusivity, Dockless Bike Share Falls Outside the Description of the Bike Share Program Contemplated in the Agreement**

Even if the Agreement intended to grant Deco the exclusive right to implement the contemplated bikesharing program, such exclusivity would not prevent the City from engaging with a dockless bike share program like Spin because of the fundamental differences between the programs. As described in the Agreement, Deco relies on Kiosks, docking structures, map displays and other fixed infrastructure to implement and operate the Deco program.<sup>13</sup> Further, the implementation of the Deco program requires the identification, analysis, community

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<sup>4</sup> “Official.” *Merriam-Webster.com*, Merriam-Webster, [www.merriam-webster.com/dictionary/official](http://www.merriam-webster.com/dictionary/official). 2017.

<sup>5</sup> Agreement; Section 2

<sup>6</sup> *See* *Winet v. Price*, 4 Cal. App. 4<sup>th</sup> 1159, 1172-73 (1992).

<sup>7</sup> An Ordinance of the Council of the City of San Diego Authorizing Execution of a Corporate Partnership Agreement Between the City of San Diego and Deco Bike LLC for the Financing, Implementation, Management and Operation of a Bikesharing Program (passed July 30, 2013).

<sup>8</sup> Cal. Evid. Code §622

<sup>9</sup> Ordinance; Paragraph 6, Page 3.

<sup>10</sup> *See* Ordinance; Paragraph 1, Page 1; <https://www.sandiego.gov/corporatepartnership>.

<sup>11</sup> *See* Agreement; Section 18.7: “no verbal understanding of the Parties, their officers, agents or employees shall be valid unless made in the form of a written change agreed to by both Parties”

<sup>12</sup> Cal. Code of Civ. Proc. §1856(d)

<sup>13</sup> *See* Agreement; Section 4.

outreach and approval of docking station locations.<sup>14</sup> Unlike the Deco program, dockless bikeshare providers do not require fixed infrastructure and would not require an approval management system for the location of docking stations or other infrastructure. Rather, providers like Spin may only require the granting of a permit or similar license that may be conditioned on adhering to a set of rules and guidelines that may be negotiated by the relevant parties. Therefore, any exclusivity grant by the City in the Agreement would likely not apply to Spin, because of both its lack of infrastructure requirements and ease of City authorization.

### **Interpreting the Agreement as Exclusive Runs Counter to Public Policy**

A grant of exclusive operating rights to a single bike share company also runs counter to the stated goals of the Agreement itself as reflected in the recitals regarding the 2008 San Diego General Plan<sup>15</sup> and the 2010 San Diego’s Regional Planning Agency’s (SANDAG) bicycle plan “Riding to 2050: San Diego Regional Bicycle Plan.”<sup>16</sup> These stated policy goals favor allowing multiple bikeshare programs to operate within the City in order to increase the number of bicycles available to riders, drive competition (ensuring fair and low pricing), and to provide different program options to potential riders.

Any City officials’ interpretation of the Agreement as granting Deco an exclusive right to operate a bikeshare program within the City is not only incorrect pursuant to the foregoing analysis, it is also unfair to the City, its residents, and competing businesses. For example, since the City Attorney’s Office required the Agreement to be non-exclusive, the City is not receiving the degree of lucrative consideration it would have received in exchange for an exclusive operating agreement. Therefore, if this non-exclusive agreement is treated as an exclusive agreement, the city will be in a far worse position it would have been in if it had actually bargained for one. If the City interprets an agreement that was passed by the City Council after public hearing as granting rights it does not actually grant, the City’s marketplace will be stifled by a lack of transparency the city will be conferring rights to DecoBike not contemplated nor granted by City Council. Further, residents will not have the freedom of choice and the benefit of competitive pricing.

### **Permitting Spin to Operate Within the City Does Not Violate Section 10.6 of the Agreement or the City’s Duty of Good Faith and Fair Dealing**

According to the Agreement, the City shall work with and support Deco’s efforts to market and increase ridership of the Bikesharing System *as set forth in Exhibit 10*,<sup>17</sup> which states that the City shall provide Deco with cooperative support for the promotion and marketing of the Bikesharing System, including but not limited to, eight separate promotional and

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<sup>14</sup> See Agreement; Section 5.

<sup>15</sup> Agreement; Page 1, Paragraph 3: “WHEREAS, the City’s mobility, sustainability, health economic, and social goals reflected in the City’s 2008 San Diego General Plan support goals and policies that will help bicycling become a more viable alternative mode of transportation for trips of less than five miles, to connect to transit, and for recreation..”

<sup>16</sup> Agreement; Page 1, Paragraph 4: “WHEREAS, in May 2010, SANDAG adopted its regional bicycle plan, which includes bikesharing as a program recommended for implementation in the region.”

<sup>17</sup> See Agreement; Section 10.6 (emphasis added)

marketing opportunities.<sup>18</sup> Thus, City's obligation to support Deco's efforts to increase ridership is specifically defined as providing cooperative support for Deco's *promotional and marketing activities*, not actively preventing a separate, differentiable bike sharing company from operating within the City. Further, Spin is not requesting that the City provide it any promotional or marketing support, endorsements, or other efforts that may contradict or compete with the City's obligations under Section 10.6 and Exhibit 10.

Permitting Spin to operate within the City also does not violate the implied covenant of good faith and fair dealing. A party to a contract breaches the implied covenant of good faith and fair dealing by interfering with, or failing to cooperate with, the other party in the performance of the contract.<sup>19</sup> As discussed above, the Agreement requires the City to provide Deco with cooperative support for the promotion and marketing of the Bikesharing System, in addition to other allowances for the Bikeshare System to operate. Permitting Spin to operate neither interferes with nor inhibits Deco's promotional and marketing activities or Deco's ability to implement the Bikeshare System because Spin is not requesting any support from the City to promote or market their differentiable bike share program, nor is Spin requesting any rights of way that would interfere with the implementation of the Bikeshare System as contemplated in the Agreement.

#### **IV. Conclusion**

Subject to the legal and public policy issues discussed herein, the Corporate Partnership Agreement between the City and Deco does not confer an exclusive right to Deco to operate the sole bikesharing program in the City. Upon review of the operative clauses, the Agreement is unambiguous that Deco only has the exclusive right to be designated and referred to as the "Official Bikeshare Provider" of the City, not the right to be the sole provider of a bikeshare program. There is no evidence to suggest the Agreement was intended to convey exclusive operating rights, and such exclusivity would run counter to public policy and the stated goals of the City. Further, the City's duties to support Deco's efforts to increase ridership are limited to providing cooperative support for the promotion and marketing of the Bikeshare System and do not require the City to grant Deco an exclusive right to operate a bike share program within the City.

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<sup>18</sup> See Agreement; Exhibit 10

<sup>19</sup> Witkin, Summary of California Law, Contracts, §744 (8th ed.); see also Sutherland v. Barclays American/Mortgage Corp., 53 Cal.App. 4th 299, 314 (1997); Harm v. Frasher, 181 Cal.App. 2d 405, 415 (1960)