

RESOLUTION NO. 2023-9209

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF SAN MARCOS, CALIFORNIA APPROVING AN EMPLOYMENT AGREEMENT ESTABLISHING SALARY AND BENEFITS FOR MICHELLE BENDER IN THE POSITION OF CITY MANAGER

WHEREAS, on August 7, 2023, the City Council voted to appoint then-Assistant City Manager Michelle Bender to the position of Acting City Manager; and

WHEREAS, on August 24, 2023, the City Council voted to appoint Ms. Bender to the position of City Manager, subject to the negotiation of a mutually acceptable agreement; and

WHEREAS, the Mayor and Deputy Mayor were designated to serve as the negotiators for that contracting process, and a proposed draft agreement has been presented for consideration by the City Council; and

WHEREAS, the City Council of the City of San Marcos (City) desires to approve said agreement with Michelle Bender to establish salary, benefits, and other terms and conditions of her employment as City Manager.

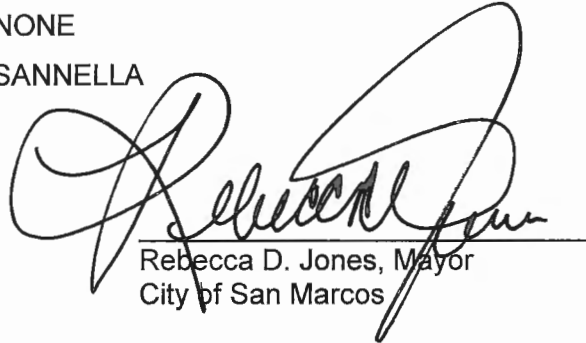
NOW, THEREFORE, the City Council of the City of San Marcos, California, does hereby resolve and order as follows:

Section 1. The foregoing recitals are true and correct and are hereby incorporated by reference into this Resolution

Section 2. The Employment Agreement attached hereto as Exhibit A and incorporated herein by this reference is hereby approved effective as of September 15, 2023, setting Ms. Bender's annual salary at \$275,000, together with an additional amount in deferred compensation at \$19,500 annually, and the Mayor is authorized to execute said Employment Agreement on the City's behalf. All other benefits accruing to Ms. Bender shall be as provided in the Employment Agreement, and in accordance with the current and updated benefits offered to the City's executive management employees.

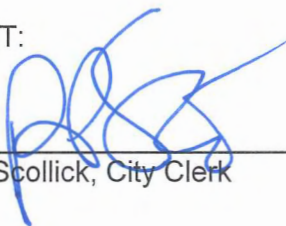
PASSED, APPROVED AND ADOPTED by the City Council of the City of San Marcos, California, at a regular meeting held on this 12th day of September 2023, by the following roll call vote:

AYES: COUNCILMEMBERS: JENKINS, MUSGROVE, NUÑEZ, JONES
NOES: COUNCILMEMBERS: NONE
ABSENT: COUNCILMEMBERS: SANNELLA



Rebecca D. Jones, Mayor
City of San Marcos

ATTEST:



Phillip Scollick, City Clerk

**EMPLOYMENT AGREEMENT BETWEEN
THE CITY OF SAN MARCOS, CALIFORNIA
AND
MICHELLE BENDER**

This employment agreement ("AGREEMENT") is made effective as of September 15, 2023 ("EFFECTIVE DATE") and is entered into by and between the City of San Marcos, California ("CITY"), a municipal corporation of the State of California, and Michelle Bender ("EMPLOYEE"), an individual. Under this AGREEMENT, the CITY offers, and EMPLOYEE accepts, employment as City Manager of the CITY.

SECTION 1. TERM

EMPLOYEE's term as City Manager for CITY is four (4) years from the EFFECTIVE DATE. Such employment shall be on the terms set forth hereinafter. Except as otherwise provided for in this AGREEMENT, EMPLOYEE's employment with the CITY shall be on an at-will basis, and will continue until expiration or termination as provided in this AGREEMENT.

SECTION 2. DUTIES

(A) CITY agrees to employ EMPLOYEE as City Manager to perform the functions and duties specified in Chapter 2.20 of the San Marcos Municipal Code and the California Government Code and to perform other legally permissible and proper duties and functions as assigned by the CITY, subject to any limitations set forth in this Section. EMPLOYEE shall not be required to accept CITY's assignment of any duties outside of the scope of those customarily performed by persons holding the role of City of San Marcos manager in the absence of EMPLOYEE's express written consent to such assignment. CITY may not reassign EMPLOYEE to another position in the absence of EMPLOYEE's express written consent to such assignment. CITY shall not unreasonably interfere with EMPLOYEE's performance of such duties.

(B) EMPLOYEE shall be the chief executive officer of the CITY and faithfully perform EMPLOYEE's lawfully prescribed and assigned duties with reasonable care, diligence, skill, and expertise in compliance with all applicable, lawful governing body directives; state, local, and federal laws; and CITY policies, rules, and ordinances as they exist or may hereafter be amended.

(C) Except as may be provided otherwise by applicable law, regulation, or CITY's agreement with any other person, EMPLOYEE shall have the ultimate supervisory and managerial authority and responsibility to hire, direct, assign, reassign, evaluate, change the terms and conditions of employment, and terminate the employment of all other employees of CITY consistent with the policies of the governing body and the ordinances and charter of the CITY, which authority may be delegated by EMPLOYEE to such other employees as EMPLOYEE deems appropriate.

(D) Except as may be provided otherwise by applicable law, regulation, or CITY's agreement with any other person, EMPLOYEE shall have the authority to establish

internal regulations, rules, and procedures which the EMPLOYEE deems necessary for the efficient and effective operation of the CITY.

(E) EMPLOYEE shall attend and be permitted to attend, whether personally or through a designee of EMPLOYEE's choosing, all meetings of CITY's governing body, both public and closed, with the exception of those closed meetings devoted to the subject of this Agreement, or any amendment thereto, or the EMPLOYEE's evaluation, unless otherwise provided by applicable law, regulation, or CITY's agreement with any other person.

(F) CITY agrees to promptly communicate and provide EMPLOYEE a reasonable opportunity to cure all substantive criticisms, complaints, and suggestions with respect to EMPLOYEE's performance of services pursuant to this Agreement.

(G) Except as may be provided otherwise by applicable law, regulation, or this Agreement, EMPLOYEE shall carry out CITY's lawful policy directives, goals, and objectives, as communicated to EMPLOYEE by CITY's governing body, while presenting information and recommendations that allow for fully informed policy decisions that both address immediate needs and anticipate future conditions.

SECTION 3. ICMA CODE OF ETHICS

The CITY and EMPLOYEE acknowledge that EMPLOYEE is or will become a member of the International City Management Association ("ICMA"). The CITY and EMPLOYEE mutually desire that EMPLOYEE be subject to and comply with the ICMA Code of Ethics. EMPLOYEE commits to comply with the ICMA Code of Ethics. The CITY and the City Council agree that neither the City Council nor any of its members will give EMPLOYEE any order, direction, or request that would require EMPLOYEE to violate the ICMA Code of Conduct.

SECTION 4. DEVOTION TO CITY BUSINESS

The City Manager position is considered a full-time position. Therefore, EMPLOYEE shall not engage in any outside business, educational, professional, charitable, or other activities, whether for compensation or otherwise, that would conflict or materially interfere with performance of EMPLOYEE's City Manager duties, without written prior approval by the City Council.

SECTION 5. PERFORMANCE EVALUATION

The City Council shall conduct an annual review and evaluation of EMPLOYEE's performance in her position as City Manager. Any such review will be duly noticed as required by law and shall take place at or around the date of this Agreement. During such Performance Evaluation, the City Council may establish employee performance goals and objectives to be met by EMPLOYEE during the following year. In addition, the City Council may elect to conduct an evaluation of the EMPLOYEE's progress towards her performance goals and objectives at the six-month point in any evaluation cycle, or more frequently, at the City Council's discretion.

SECTION 6. TERMINATION OF EMPLOYMENT

(A) It is understood and agreed that EMPLOYEE's employment with the CITY shall be on an at-will basis, and that the City Council may terminate this AGREEMENT at any time, with or without notice, as determined by the affirmative votes of a majority of the members of the City Council at a meeting of the City Council.

(B) Notwithstanding Section 6(A), above, EMPLOYEE shall not be removed during the 180-day period preceding or following the certification of any CITY election results for membership on the City Council, or during the 180-day period following the effective date of any change in membership of the City Council, except upon unanimous vote of the City Council.

(C) If the CITY elects to terminate this AGREEMENT such that the termination date would occur before the end of the original four-year term, and the EMPLOYEE delivers to the CITY an executed copy of the Separation and Release Agreement in the form attached hereto as Exhibit A within thirty (30) days of her termination, then the CITY shall:

- (1) Pay EMPLOYEE a lump sum severance payment in the amount of twelve (12) months of EMPLOYEE's then base salary ("severance payment") in compliance with and subject to any limitation in Government Code Section 53260, and;
- (2) Pay EMPLOYEE's "COBRA" premiums to continue her medical benefits coverage for herself and her dependents, if any, for twelve (12) months, or until she obtains subsequent employment offering medical benefits coverage, whichever occurs sooner. However, the CITY shall only be required to pay EMPLOYEE's premiums if she qualifies for and elects to continue her medical benefits coverage under the Consolidated Omnibus Reconciliation Act ("COBRA").
- (3) Pay EMPLOYEE the cash value of her accrued and unused executive, vacation, and sick leaves, or, at EMPLOYEE's election, deposit the cash value of the leaves into her Retiree Health Savings plan (RHS).

(D) Notwithstanding Section 6(C), above, EMPLOYEE shall not be eligible for any severance benefits, including the severance payment described in Section 6(C)(1) or the COBRA payments described in Section 6(C)(2), if EMPLOYEE engages in any of the following conduct:

- (1) A breach of the terms of this AGREEMENT;
- (2) Conviction of, or plea of guilty or *nolo contendere* to any crime or offense (other than minor traffic violations or similar offenses) which is likely to have a material adverse impact on the CITY;
- (3) Failure of the EMPLOYEE to observe or perform any of the City Manager duties and obligations if such failure continues for a period of not less than thirty (30) business days from the date of City Manager's receipt of notice from the City Council specifying the acts or omissions deemed to constitute that failure;

- (4) Conviction of any crime involving an “abuse of office or position,” as that term is defined in Government Code Section 53243.4;
- (5) Failure to carry out a lawful directive or lawful directives of the City Council made by the City Council as a body at a Brown Act-compliant meeting;
- (6) Any grossly negligent action or inaction by EMPLOYEE that materially and adversely: (a) impedes or disrupts the operations of the CITY or its organizational units; (b) is detrimental to CITY employees or public safety; or (c) violates the CITY’s established rules or procedures; or
- (7) Conduct unbecoming the position of the City Manager or likely to bring discredit or disrepute to the CITY.

(E) If EMPLOYEE elects to resign or to terminate this AGREEMENT, then the EMPLOYEE may terminate this AGREEMENT at any time upon thirty (30) days’ written notice to the Mayor of the CITY. EMPLOYEE’s resignation shall be deemed accepted upon delivery to the Mayor. In the event that EMPLOYEE voluntarily terminates this AGREEMENT prior to the end date of the AGREEMENT, no severance pay shall be payable to EMPLOYEE. The parties may consider the option to enter into a release and settlement agreement in the event of EMPLOYEE’S resignation and upon mutual agreement.

(F) EMPLOYEE shall not be entitled to any compensation upon termination except as set forth in Sections 6 (C) and as otherwise required by law;

(G) Upon termination of this AGREEMENT, the CITY shall pay EMPLOYEE an amount equal to the value of the EMPLOYEE’s earned, but unpaid salary and EMPLOYEE’s accumulated, but unpaid and unused Vacation Leave and Executive Leave.

SECTION 7. COMPENSATION

(A) EMPLOYEE’s annual base salary is Two Hundred Seventy-Five Thousand dollars (\$275,000) (“SALARY”), which the CITY shall pay in equal bi-weekly payments.

(B) The City Council may, at its discretion, and from time to time, amend this AGREEMENT in accordance with Section 14, below to, inter alia, increase EMPLOYEE’s base salary. In addition, to the extent permitted by law, whenever the City Council exercises its discretion to authorize cost of living increases across the board for all other CITY employees, EMPLOYEE’s salary shall automatically be adjusted by an equal percentage.

(C) Any compensation paid to EMPLOYEE under this Agreement shall be subject to deductions and withholding of any and all sums required for federal or state income tax, pension contributions, and all other taxes, deductions or withholdings required by state, federal or local law.

SECTION 8. BENEFITS

(A) PERS RETIREMENT BENEFITS

EMPLOYEE shall be eligible for the following retirement benefits:

- (1) CITY shall provide EMPLOYEE the California Public Employees' Retirement System (CalPERS) retirement benefit formula known as 2.7% @ 55. EMPLOYEE shall pay the statutorily required CalPERS member contribution. In addition, EMPLOYEE shall contribute an additional percentage of her compensation towards the City's required contribution to CalPERS under Government Code section 20516(f) as set forth in the CITY's July 1, 2022 Amendment to Contract with CalPERS's Board of Administration, which shall be subject to future amendments. The CITY shall have no obligation to contribute any amount on behalf of EMPLOYEE towards her PERS contribution or to bear any portion thereof.
- (2) Credit for Unused Sick Leave (Government Code Section 20965).
- (3) Military Service Credit as Public Service (Government Code Section 21024).

Pursuant to Government Code section 53244, if convicted of a felony for conduct arising out of the performance of her official duties, EMPLOYEE shall forfeit rights to retirement rights and benefits to which he would otherwise be entitled.

(B) SOCIAL SECURITY

The CITY participates in the federal Social Security program ("Social Security"). EMPLOYEE acknowledges that she is required to participate in Social Security, and that she shall contribute the statutorily mandated employee share.

(C) DEFERRED COMPENSATION

EMPLOYEE shall be entitled to participate in the City's voluntary annual 457 deferred compensation contribution plan available to other City management-level employees pursuant to the terms of that plan as it now exists or as it may be changed from time to time. EMPLOYEE shall receive deferred compensation equal to Nineteen Thousand Five Hundred dollars (\$19,500) ("DEFERRED COMPENSATION") per year. EMPLOYEE shall receive a pro-rated amount of Six Thousand Five Hundred dollars (\$6,500) in DEFERRED COMPENSATION for the 2023 calendar year based upon the EFFECTIVE DATE of this Agreement, in equal monthly amounts. Starting in 2024, EMPLOYEE will receive the full amount of DEFERRED COMPENSATION per year, in equal monthly amounts. The CITY will make the first deposit in EMPLOYEE's 457 account with the first full payroll following the City Council's approval of this agreement. Subsequently, the CITY will make monthly deposits in EMPLOYEE's 457 account with the first full payroll of each month. If EMPLOYEE's employment with the CITY ends prior to the end of a calendar year, EMPLOYEE will only be entitled to receive the monthly deposits that the CITY has made prior to the date of EMPLOYEE's separation from employment.

(D) HEALTH INSURANCE AND RETIREE HEALTH SAVINGS PLAN

- (1) EMPLOYEE shall be entitled to participate in the CITY's voluntary medical insurance plan on the same terms and conditions, including any

premium cost sharing, as other City management-level employees, which terms and conditions are subject to change from time to time in the discretion of the City Council.

- (2) EMPLOYEE shall be entitled to participate in the CITY's voluntary retiree health savings plan on the same terms and conditions available to other City employees. The CITY is not responsible for contributing any amount for or on behalf of EMPLOYEE's elective participation in the CITY's retiree health savings plan.

(E) DENTAL INSURANCE

EMPLOYEE is entitled to participate in the CITY's voluntary dental insurance plan on the same terms and conditions available to other CITY employees. The CITY is not responsible for contributing any amount for or on behalf of EMPLOYEE's elective participation in the CITY's dental insurance plan.

(F) VISION INSURANCE

EMPLOYEE is entitled to participate in the CITY's voluntary vision insurance plan on the same terms and conditions available to other CITY employees. The CITY is not responsible for contributing any amount for or on behalf of EMPLOYEE's elective participation in the CITY's dental insurance plan.

(G) LIFE INSURANCE

The CITY shall provide EMPLOYEE with a policy of life insurance and accidental death and dismemberment ("AD&D") coverage in the amount of two times EMPLOYEE's annual salary, up to a maximum of Four Hundred Thousand dollars (\$400,000).

EMPLOYEE shall be entitled to purchase additional life and/or AD&D insurance coverage on the same terms and conditions as other CITY employees. The CITY is not responsible for contributing any amount for or on behalf of EMPLOYEE towards her elective purchase of additional life and/or AD&D insurance coverage.

(H) SHORT TERM AND LONG TERM DISABILITY INSURANCE

The CITY shall provide EMPLOYEE with a short-term and long-term insurance policy in the amount of two-thirds (2/3) the amount of EMPLOYEE's base salary. The maximum amount of such coverage shall be Two Thousand Seven Hundred dollars (\$2,700) per week in short-term disability benefits and Twelve Thousand dollars (\$12,000) per month in long-term disability benefits.

(I) FLEX SPENDING ACCOUNT

EMPLOYEE shall be entitled to participate in the CITY's voluntary flexible spending plan ("125 Plan") available to other City employees pursuant to the terms and conditions of the plan as they now exist and may be changed from time to time in the future. The City is not responsible for contributing any amount for or on behalf of EMPLOYEE towards her elective

participation in the 125 Plan.

(J) EMPLOYEE BENEFIT ALLOCATION PROGRAM

CITY shall contribute the same amount per year as it does for other management-level employees for EMPLOYEE's participation in the Employee Benefit Allocation Program for so long as EMPLOYEE remains employed with the CITY. EMPLOYEE must be employed with the CITY as of December 31 of the prior year to participate in the program effective starting on January 1.

(K) MOBILE PHONE

The CITY shall provide EMPLOYEE with a mobile phone stipend of Seventy-Five dollars (\$75) per month to cover EMPLOYEE's mobile phone use for any and all CITY business that she conducts. EMPLOYEE agrees to sign an Acknowledgment that is provided by the CITY and hereby agrees that even in the absence of a signed Acknowledgment, the CITY may access EMPLOYEE's mobile phone, including in order to access CITY records and to review said mobile phone for purposes of responding to Public Records Act requests. EMPLOYEE agrees that she will take all reasonable steps to facilitate CITY's access to her mobile phone.

(L) AUTOMOBILE ALLOWANCE

CITY shall pay EMPLOYEE an automobile allowance in the amount of Three Hundred Ninety-Six dollars (\$396) per month. This automobile allowance encompasses all automobile related compensation and/or reimbursement including, but not limited to, purchase, operation, maintenance, repair and/or replacement, and insurance, and is in lieu of any other reimbursement or compensation mechanism including, but not limited to mileage reimbursements, whether provided to other CITY employees or not.

(M) BUSINESS AND PROFESSIONAL EXPENSES

The CITY recognizes that EMPLOYEE may incur expenses of a non-personal, job-related nature that are reasonably necessary to the City Manager's service to the CITY. To the extent that such costs may be budgeted by the CITY, the CITY shall pay EMPLOYEE for professional membership dues and fees, and for attendance at professional conferences. The CITY shall reimburse EMPLOYEE upon presentation to the CITY of verified receipts for sums necessarily incurred by EMPLOYEE in the performance of EMPLOYEE's duties or as otherwise budgeted for by the CITY, so long as the expenses are in accordance with the CITY's policies and state laws.

SECTION 9. LEAVES

In addition to any paid and/or unpaid leaves to which EMPLOYEE may be entitled as a matter of law, EMPLOYEE shall be entitled to the following paid leaves.

(A) EXECUTIVE LEAVE

- (1) EMPLOYEE, who is an exempt employee, is entitled to 80 paid hours of executive leave, but may not accrue more than 80 hours of executive leave

at any time. Executive leave, which is different from vacation leave, is to compensate EMPLOYEE for the hours she will be expected and required to work above forty (40) hours a week.

- (2) Upon termination of employment, pursuant to EMPLOYEE's election, which she may update once per year in the same manner as other CITY management-level employees, CITY shall either pay to EMPLOYEE the cash value of her accrued and unused executive leave or deposit the cash value into her Retiree Health Saving's plan (RHS).

(B) HOLIDAYS

EMPLOYEE is entitled to be paid time off on all CITY observed holidays, as well as three (3) floating holidays equal to 27 hours of pay per year. If EMPLOYEE does not take advantage of the floating holidays that are available to her in the year in which they are earned, they shall not be carried over into the next year.

(C) VACATION LEAVE

- (1) EMPLOYEE shall receive the same amount of paid vacation leave per year, accrued at the rate of 6.152 hours per pay period, as other CITY management-level employees of similar tenure. EMPLOYEE's accrual of vacation leave may be adjusted based on an accrual schedule adopted by the City Council, and subject to change from time to time, in the City Council's discretion. The maximum amount of vacation leave that EMPLOYEE may accrue at any time is double the EMPLOYEE'S annual accrual amount, which is subject to change on the same terms and conditions as other management-level employees.
- (2) Upon termination of employment, pursuant to EMPLOYEE's election, which she may update once per year in the same manner as other CITY management-level employees, CITY shall either pay to EMPLOYEE the cash value of her accrued and unused vacation leave or deposit the cash value into her Retiree Health Savings plan (RHS).

(D) SICK LEAVE

- (1) EMPLOYEE shall be entitled to sick leave, which shall accrue at the rate of eight (8) hours per full month of service. The maximum amount of sick leave that EMPLOYEE may accrue at any time is 600 hours. The cash value of excess sick leave, above 600 hours, will be directed in the same manner as other CITY management-level employees.
- (2) Sick leave may be used for the following purposes:
 - a. Diagnosis, care, or treatment of an existing health condition of, or preventative care for EMPLOYEE or any of the following of the EMPLOYEE's family members: child of any age or dependency status;

parent; parent-in-law; spouse; registered domestic partner; grandparent; grandchildren; or sibling; and

- b. If EMPLOYEE is a victim of domestic violence, sexual assault, or stalking in order for EMPLOYEE to: i) obtain or attempt to obtain a temporary restraining order or other court assistance to help ensure the health safety or welfare of the EMPLOYEE or her child; or ii) obtain medical attention or psychological counseling; services from a shelter; program or crisis center; or participate in safety planning or other actions to increase safety.
- (3) One-half (1/2) of the EMPLOYEE's accrued and available annual sick leave is protected, and may be used for any of the purposes stated above.
- (4) Upon termination of employment, pursuant to EMPLOYEE's election, which she may update once per year in the same manner as other CITY management-level employees, CITY shall either pay to EMPLOYEE the cash value of her accrued and unused sick leave or deposit the cash value into her Retiree Health Saving's plan (RHS).

SECTION 10. INDEMNIFICATION

The CITY shall defend, hold harmless, and indemnify EMPLOYEE using legal counsel of the CITY's choosing, against expense or legal liability for acts or omissions by EMPLOYEE occurring within the course and scope of the EMPLOYEE's employment under this AGREEMENT, determination of the issues, including any and all losses, damages, judgments, interest, settlements, fines, court costs, and the reasonable costs and expenses of legal proceedings, including appeals, and including attorneys' fees, and expert witness fees and all other trial and appellate costs, and other liabilities incurred, imposed upon, or suffered by the EMPLOYEE in connection with or resulting from any claim, action, suit, or proceeding, actual or threatened. In the event there is a conflict of interest between the CITY and the EMPLOYEE such that independent counsel is required for the EMPLOYEE, the EMPLOYEE may engage her own legal counsel, in which event the CITY shall indemnify the EMPLOYEE, including direct payment of all such reasonable costs related thereto.

SECTION 11. BOND

In the event CITY discontinues carrying a master bond and/or insurance policy in lieu of individual surety bonds as provided in San Marcos Municipal Code§ 2.20.220, EMPLOYEE shall furnish a corporate surety bond, to be approved by the City Council, in such a sum as may be determined by the City Council, which bond shall be conditioned upon the faithful performance of the duties imposed upon the City Manager as prescribed in this Agreement and the Municipal Code. The City shall pay the cost of the premium for such bond.

SECTION 12. ABUSE OF OFFICE OR POSITION

Notwithstanding anything to the contrary, pursuant to the requirements set forth in Government Code Section 53243, if EMPLOYEE is convicted of a crime involving an abuse of her office or position, all of the following shall apply: (i) if EMPLOYEE is provided with

administrative leave pay pending an investigation, EMPLOYEE shall be required to fully reimburse CITY such amounts paid; (ii) if CITY pays for the criminal legal defense of EMPLOYEE (which would be in its sole discretion, as it is generally not obligated to pay for a criminal defense), EMPLOYEE shall be required to fully reimburse CITY such amounts paid; and (iii) if this AGREEMENT is terminated, any Severance Pay and Severance Benefits related to the termination that EMPLOYEE may receive from CITY shall be fully reimbursed to CITY or shall be void if not yet paid to EMPLOYEE.

For purposes of this Section, abuse of office or position means either: (i) an abuse of public authority, including, but not limited to waste, fraud, and violation of the law under color of authority; or (ii) a crime against public justice, including, but not limited to the crimes described in Titles 5 through 7 of Part 1 of the California Penal Code.

SECTION 13. NOTICES

Any notices to be given hereunder by either party to the other in writing may be effected either by personal delivery, mail, or email. Mailed notices shall be addressed to the parties as set forth below, but each party may change her/its address by written notice given in accordance with this Section. Notices delivered personally or by email will be deemed communicated as of the date of actual receipt. Mailed notices will be deemed communicated and received as of three (3) calendar days following the date of mailing.

CITY: City of San Marcos
 Attention: Mayor
 1 Civic Center Drive
 San Marcos, CA 92069

CITY MANAGER: Michelle Bender
 1 Civic Center Drive San
 Marcos, CA 92069

SECTION 14. ENTIRE AGREEMENT AND AMENDMENTS

The CITY and EMPLOYEE acknowledge that no representation, inducement, promise or agreement, oral or written, has been made or is being relied upon which is not set forth in this AGREEMENT. This AGREEMENT supersedes all prior agreements with respect to the subject matter hereof and, to the extent permitted by law, any and all CITY Ordinances, Resolutions or Personnel Rules and Regulations of the CITY that have been or may be adopted. No amendment or modification to this AGREEMENT shall be effective unless such is in writing and signed by the parties.

SECTION 15. EFFECT OF WAIVER/SEVERABILITY

Failure by either party to insist on strict compliance with any term or condition of this AGREEMENT shall not be deemed a waiver of such term or condition, nor shall any such failure be deemed a waiver of that right at any other time. If any provision of this AGREEMENT is held by a court of competent jurisdiction to be unenforceable, the remaining provisions shall remain in full force and effect.

SECTION 16. EMPLOYEE REPRESENTATION

EMPLOYEE represents that she has reviewed this AGREEMENT and has had the opportunity to consult with legal counsel of EMPLOYEE's own choosing with respect to this AGREEMENT. This AGREEMENT shall be deemed to have been drafted by both parties and it shall not be interpreted against either party hereto based upon the drafting hereof.

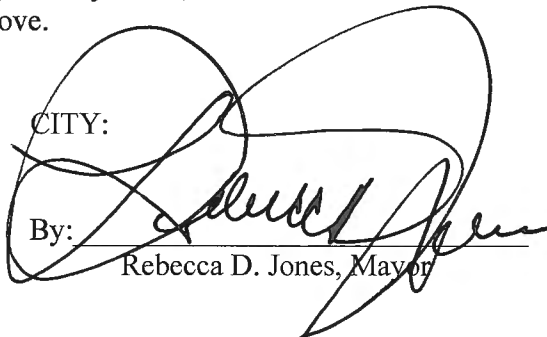
SECTION 17. GOVERNING LAW

This AGREEMENT shall be governed by and construed in accordance with the laws of the State of California and the venue for any legal action relating to this AGREEMENT shall be the Superior Court of the State of California, County of Los Angeles.

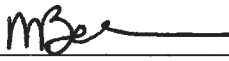
SECTION 18. COUNTERPARTS

This AGREEMENT may be executed in counterparts.

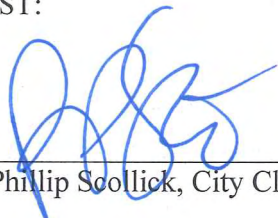
IN WITNESS WHEREOF, the CITY has caused this AGREEMENT to be executed on its behalf by its Mayor and duly attested by its City Clerk; and EMPLOYEE has executed this AGREEMENT on the date first written above.

CITY:
By: 
Rebecca D. Jones, Mayor

EMPLOYEE:

By: 
Michelle Bender

ATTEST:

By: 
Phillip Scollick, City Clerk

APPROVED AS TO FORM:

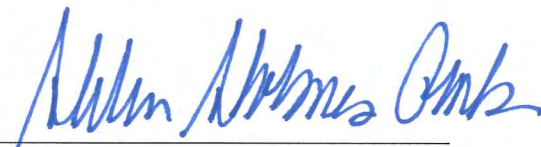
By: 
Helen Holmes Peak, City Attorney

EXHIBIT A

SEPARATION, SEVERANCE AND RELEASE AGREEMENT

1. PARTIES

This Separation, Severance and General Release Agreement (“AGREEMENT”) is made and executed as of [REDACTED], by and between Michelle Bender (“BENDER”) and the City of San Marcos (“CITY”), collectively referred to herein as the PARTIES.

2. RECITALS

2.1 BENDER commenced employment with the CITY as City Manager on or about September 15, 2023, pursuant to an employment agreement entered into between the PARTIES on or about September 12, 2023.

2.3 This AGREEMENT is made to amicably resolve all matters between BENDER and the CITY regarding BENDER’s employment and the cessation of said employment.

2.4 The PARTIES understand and agree that a material purpose of this AGREEMENT is to resolve any disputes and claims arising from or relating to BENDER’s employment with the CITY, if any, and provide for a separation payment for BENDER.

3. CONSIDERATION

3.1 In exchange for BENDER’s execution, faithful performance and compliance with this AGREEMENT, including without limitation the granting of the releases set forth herein, and in full satisfaction and settlement of BENDER’s claims, if any, the CITY shall:

3.1.1 Pay BENDER a sum equal to twelve (12) months of BENDER’s then base salary (“SEVERANCE PAYMENT”), in the form of a check made payable to Michelle Bender, to be delivered within ten (10) days of the effective date of this AGREEMENT (“EFFECTIVE DATE”). Required tax withholdings and deductions will be made from the SEVERANCE PAYMENT.

3.1.2 Pay BENDER’s “COBRA” premiums to continue her medical benefits coverage for herself and her dependents, if any, for twelve (12) months, or until she obtains subsequent employment offering medical benefits coverage, whichever occurs sooner. However, the CITY shall only be required to pay BENDER’s premiums if she qualifies for and elects to continue her medical benefits coverage under the Consolidated Omnibus Reconciliation Act (“COBRA”).

3.2.3 Pay BENDER the cash value of her accrued and unused executive, vacation, and sick leaves, or, at BENDER’s election, deposit the cash value into her Retiree Health Savings plan (RHS).

3.2 Respecting the SEVERANCE PAYMENT referenced in paragraph 3.1.1 above, BENDER understands and agrees that the employee's portion of any federal, state or local taxes, if any, that may be owed or payable on the sums caused to be paid hereunder by the CITY are the sole and exclusive responsibility of BENDER.

3.3 BENDER and the CITY shall otherwise each bear their own attorneys' fees and costs incurred in connection with any disputes and this AGREEMENT.

3.4 Except as set forth in this Paragraph 3, the PARTIES agree that no other monies or benefits are due, owing or unpaid by reason of BENDER's employment or association with CITY and that no other monies or benefits will be paid or maintained by CITY to/for BENDER, in BENDER's name, or on BENDER's behalf. BENDER expressly agrees that the SEVRANCE PAYMENT described in Paragraph 3 supersede and are in substitution for any payments or benefits under any employment agreement(s), business agreement(s) or arrangement(s), oral or written promises, or severance policy or plan respecting or regarding her employment or association with CITY.

4. **SPECIFIC ACKNOWLEDEEMENT OF WAIVER OF CLAIMS UNDER ADEA AND OWBPA**

The Age Discrimination in Employment Act of 1967 ("ADEA") makes it illegal for an employer to discharge any individual or otherwise discriminate with respect to the nature and privileges of an individual's employment on the basis that the individual is age forty (40) or older. The Older Workers Benefit Protection Act ("OWBPA", 29 U.S.C. sections 626, et. seq., Pub. L. 101-433, 104 Stat. 978 (1990)) further augments the ADEA, and prohibits the waiver of any right or claim under the ADEA, unless the waiver is knowing and voluntary. By entering into this AGREEMENT, BENDER acknowledges that she knowingly and voluntarily, for just compensation, waives and releases any rights she may have under the ADEA and/or OWBPA. BENDER further acknowledges that she has been advised and understands, pursuant to the provisions of the ADEA and OWBPA, that:

- (a) This waiver/release is written in a manner understood by BENDER;
- (b) BENDER is aware of, and/or has been advised of, her rights under the ADEA and OWBPA, and of the legal significance of her waiver of any possible claims she currently may have under the ADEA, OWBPA and/or similar age discrimination laws;
- (c) BENDER is entitled to a reasonable time of at least twenty-one (21) days within which to review and consider this AGREEMENT and the waiver and release of any rights she may have under the ADEA, the OWBPA and similar age discrimination laws; but may, in the exercise of her own discretion, sign or reject this AGREEMENT at any time before the expiration of the twenty-one (21) days;
- (d) The waivers and releases set forth in this AGREEMENT shall not apply to any rights or claims that may arise under the ADEA and/or OWBPA after the EFFECTIVE DATE of this AGREEMENT;
- (e) BENDER has been advised by this writing that she should consult with an attorney prior to executing this AGREEMENT;

(f) BENDER has discussed, or had the opportunity to discuss, this waiver and release with, and been advised with respect thereto by, her counsel of choice, and that she does not need any additional time within which to review and consider this AGREEMENT;

(g) BENDER has seven (7) days following her execution of this AGREEMENT to revoke the AGREEMENT;

(h) Notice of revocation within the seven (7) day revocation period must be provided, in writing, to the CITY pursuant to this paragraph and must state, "I hereby revoke my acceptance of our 'Separation and Release Agreement'"; and

(i) This AGREEMENT shall not be effective until all PARTIES have signed the AGREEMENT and ten (10) days have passed since BENDER's execution of the AGREEMENT.

5. RELEASE

In exchange for the SEVERANCE PAYMENT, representations and covenants made herein, and except only as to such rights or claims as may be created by this AGREEMENT, BENDER hereby, and for her heirs, representatives, successors, and assigns, releases, acquits, and forever discharges the CITY, and all of its agents, officers, current and former elected and appointed officials, current and former employees, representatives, insurers, attorneys, and all persons acting by, through, under, or in concert with any of them, and each of them, from any and all claims (including without limitation all claims for workers compensation benefits, if any), charges, complaints, liabilities, obligations, promises, benefits, agreements, controversies, costs, losses, debts, expenses, damages, actions, causes of action, suits, rights, and demands of any nature whatsoever, known or unknown, suspected or unsuspected, which BENDER now has or may acquire in the future, which relate to or arise out of any act, omission, occurrence, condition, event, transaction, or thing which was done, omitted to be done, occurred (including without limitation any circumstance(s) giving rise to liability for workers compensation benefits) or was in effect at any time from the beginning of time up to and including the EFFECTIVE DATE of this AGREEMENT ("CLAIMS"), without regard to whether such CLAIMS arise under the federal, state or local constitutions, statutes, rules, ordinances or regulations, workers compensation statutes or the common law. BENDER expressly acknowledges that the CLAIMS forever barred by this AGREEMENT specifically include, but are not limited to, claims related to her employment with the CITY and its cessation, any claims for wages, overtime or benefits (including without limitation workers compensation benefits), any alleged breach of any duty, any alleged employment discrimination, harassment, retaliation or unlawful discriminatory act, any alleged breach of any express or implied employment contract, breach of any duty arising out of contract, statute, regulation, ordinance or tort, constructive discharge, wrongful termination or constructive discharge in violation of public policy, or any claim or cause of action including, but not limited to, any and all claims whether arising under any federal, state or local law prohibiting or respecting wrongful termination, breach of employment contract, or employment discrimination, employee injury, death, workers compensation, wrongful hiring, harassment or retaliation based upon sex, race, age, color, religion, handicap or disability, national origin or any other protected category or characteristic, including but not limited to the Federal Fair Labor Standards Act, the California Fair Employment and Housing Act, the Americans With Disabilities Act, Title VII of the Civil Rights Act of 1964, and any other federal, state, or local

human rights, civil rights, or employment discrimination or employee rights statute, rule, regulation, ordinance or decisional law.

Additionally, the CITY hereby agrees not to initiate, or proceed with any actions, causes of action, claims, etc., that could be or that have been asserted against BENDER arising out of BENDER's employment with the CITY, in any forum, whatsoever. To the extent that any such actions, causes of action, claims, etc., are, or become pending in any forum whatsoever, the CITY agrees to execute all documents necessary for the withdrawal of such actions, causes of action, claims, with prejudice, forthwith.

6. UNKNOWN CLAIMS

6.1 BENDER on the one hand, and the CITY, on the other hand, each hereby waive and release any rights which the other and its successors, heirs, executives, administrators, may have directly or indirectly, if any, jointly or severally, directly or indirectly, under the provisions of California Civil Code section 1542, and any similar state or federal statute, which reads in sum, substance or substantial part as follows:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, AND THAT IF KNOWN BY HIM OR HER, WOULD HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR OR RELEASED PARTY.

6.2 BENDER and the CITY acknowledge that the facts which give rise to this general release may turn out to be different from the facts they now believe to be true. BENDER and the CITY hereby assume the risk of the facts turning out to be different, and agree that this AGREEMENT shall in all respects be effective and not subject to termination or rescission because of any such difference in facts.

7. WAIVER OF ADDITIONAL CLAIMS

BENDER and the CITY hereby waive any provisions of state or federal law that might require a more detailed specification of the claims being released pursuant hereto.

8. REPRESENTATIONS AND WARRANTIES

Each of the PARTIES represent, warrant, and agree as follows:

8.1 No Other Claims: BENDER and the CITY hereby represent and warrant that neither BENDER nor the CITY has filed, nor will they file in the future, any complaint, charge, claim, legal action, or proceeding arising out of BENDER's employment with the CITY, the disputes or the CLAIMS released hereby or in any way related to her employment with the CITY or separation therefrom with any court, agency, board, hearing officer or tribunal against the CITY or any of its agents, officers, current and former elected or appointed officials,

current and former employees, representatives, insurers, attorneys, and all persons acting by, through, under, or in concert with any of them. BENDER retains her right to request indemnification from the City pursuant to California Government Code Section 825 et seq. with respect to any action brought against BENDER in her capacity as an employee.

8.2 Advice of Counsel: Each party has received, or has had the opportunity to receive, independent legal advice from their respective attorney(s) with respect to the advisability of making the settlement and releases provided herein, with respect to the advisability of executing this AGREEMENT, and with respect to the meaning of California Civil Code section 1542.

8.3 No Fraud in Inducement: No party (nor any officer, agent, employee, representative, or attorney of or for any party) has made any statement or representation or failed to make any statement or representation to any other party regarding any fact relied upon in entering into this AGREEMENT, and neither party relies upon any statement, representation, omission or promise of any other party (or of any officer, agent, employee, representative, or attorney of or for any party) in executing this AGREEMENT, or in making the settlement provided for herein, except as expressly stated in this AGREEMENT.

8.4 Independent Investigation: Each party to this AGREEMENT has made such investigation of the facts pertaining to this severance and settlement and this AGREEMENT and all the matters pertaining hereto as it deems necessary.

8.5 Comprehension and Authority: Each party or responsible officer thereof has read this AGREEMENT and understands the contents hereof. Any of the officers executing this AGREEMENT on behalf of the CITY are empowered to do so and thereby bind the CITY.

8.6 Mistake Waived: In entering into this AGREEMENT and the severance and settlement provided for herein, each party assumes the risk of any misrepresentation, concealment or mistake. If any party should subsequently discover that any fact relied upon by it in entering into this AGREEMENT was untrue, or that any fact was concealed from it, or that it's understanding of the facts or of the law was incorrect, such party shall not be entitled to rescind or set aside the AGREEMENT. This AGREEMENT is intended to be and is final and binding between the PARTIES, regardless of any claims of misrepresentation, promise made without the intent to perform, concealment of fact, mistake of fact or law, or any other circumstance whatsoever.

8.7 Later Discovery: BENDER and the CITY are aware that they may hereafter discover claims or facts in addition to or different from those they now know or believe to be true with respect to the matters related herein. Nevertheless, it is both PARTIES intention to fully, finally and forever settle and release all such matters, and all claims relative hereto, which do now exist, may exist or have previously existed between both PARTIES. In furtherance of such intention, the releases given here shall be and remain in effect as full and complete releases of all such matters, notwithstanding the discovery or existence of any additional or different claims or facts relative thereto.

8.8 Ownership of Claims: BENDER represents and warrants as a material term of this AGREEMENT that she has not heretofore assigned, transferred, released or granted, or purported to assign, transfer, release or grant, any of the CLAIMS disposed of by this

AGREEMENT. In executing this AGREEMENT, BENDER further represents and warrants that none of the CLAIMS released by her hereunder will in the future be assigned, conveyed, or transferred in any fashion to any other person and/or entity.

8.9 Future Cooperation: The PARTIES will execute all such further and additional documents as shall be reasonable or necessary to carry out the provisions of this AGREEMENT.

9. MISCELLANEOUS

9.1 No Admission: Nothing contained herein shall be construed as an admission by the PARTIES of any liability of any kind. The PARTIES each deny any liability in connection with any claim or wrongdoing. Each party also intends hereby solely to amicably resolve all matters between the PARTIES.

9.2 Governing Law: This AGREEMENT and the rights and obligations of the PARTIES shall be construed and enforced in accordance with, and governed by, the laws of the State of California. The venue for any dispute arising out of or relating to this AGREEMENT shall be the Los Angeles Superior Court.

9.3 Full Integration: This AGREEMENT is the entire agreement between the PARTIES with respect to the subject matter hereof and supersedes all prior and contemporaneous oral and written agreements and discussions. This AGREEMENT may be amended only by a further agreement in writing, signed by the PARTIES hereto.

9.4 Continuing Benefit: This AGREEMENT is binding upon and shall inure to the benefit of the PARTIES hereto, their respective agents, employees, representatives, officers, and officials.

9.5 Joint Drafting: Each party has cooperated in the drafting and preparation of this AGREEMENT. Hence, in any construction to be made of this AGREEMENT, the same shall not be construed against any party.

9.6 Severability: In the event that any term, covenant, condition, provision or agreement contained in this AGREEMENT is held to be invalid or void by any court of competent jurisdiction, the invalidity of any such term, covenant, condition, provision or agreement shall in no way affect any other term, covenant, condition, provision or agreement and the remainder of this AGREEMENT shall still be in full force and effect.

9.8 Counterparts: This AGREEMENT may be executed in counterparts, and by facsimile and when each party has signed and delivered at least one such counterpart, each counterpart shall be deemed an original, and, when taken together with other signed counterparts, shall constitute one AGREEMENT, which shall be binding upon and effective as to all PARTIES.

9.9 Executed Copy: All PARTIES shall receive a fully executed copy of this AGREEMENT.

9.10 Notice: Any and all notices given to any party under this AGREEMENT shall be given as provided in this paragraph. All notices given to either party shall be made by certified or registered United States mail, or personal delivery, at the noticing party's discretion, and addressed to the PARTIES as set forth below. Notices shall be deemed, for all purposes, to have been given on the date of personal service or three (3) consecutive calendar days following deposit of the same in the United States mail.

As to BENDER:

Michelle Bender

1 Civic Center

San Marcos, CA 92069

As to the CITY:

Attn: Mayor

City of San Marcos

1 Civic Center Drive

San Marcos, CA

WHEREFORE, the PARTIES hereto have read all of the foregoing, understand the same, and agree to all of the provisions contained herein.

DATED: 9-12-2023

CITY OF SAN MARCOS

By: 

Rebecca D. Jones, Mayor

DATED: 9-12-2023

MICHELLE BENDER

By: 

Michelle Bender