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No. S_____
2d Civ. No. B243800

#12

IN THE SUPREME COURT OF CALIFORNIA

In Re Coordinated Proceeding Special Title (Rule3.550(c))
TRANSIENT OCCUPANCY TAX CASES.

CITY OF SAN DIEGO, CALIFORNIA,

Petitioner,

v.

HOTELS.COM, L.P., et al.,

Respondents.

Appeal from the Los Angeles County Superior Court
Hon. Elihu M. Berle, Judge, Case Number: GIC861117
(Judicial Council Coordination Proceedings No. JCCP4472)

PETITION FOR REVIEW

[Request For Judicial Notice Filed Concurrently Herewith]

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TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

CASES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

PAGE

STATUTES AND RULES

TABLE OF AUTHORITIES

PAGE

OTHER AUTHORITIES

ISSUES PRESENTED

In this case involving claims by the City of San Diego against the major online travel companies (e.g., Expedia and Travelocity) to collect more than $21 million in unpaid hotel-room occupancy taxes owed by reason of room rentals booked through those companies, the City requests review of two issues arising from a published opinion of Division Two, Second Appellate District (per Victoria M. Chavez):

Issue No. 1:

> When a customer books a hotel room through an online travel company, should the occupancy tax, which is levied on the "rent charged by the Operator [the hotel]" for the customer's "privilege of Occupancy" (language identically adopted by over 400 California cities and counties) be calculated based on the *retail* rate paid by the customer to obtain the right to use the room or, instead, be calculated based on the *wholesale* amount that the hotel receives from the online travel company after that company has deducted its markup and fees?

Issue No. 2:

> Whether an appellate decision issued after a separate trial in one of several coordinated actions, is automatically "law of the case" as to all of the other coordinated actions simply because the actions have been ordered coordinated? Or is more required, such as an order or stipulation merging the coordinated actions into one action or providing that issues will be commonly determined and giving the litigants in all of the coordinated actions an opportunity to participate in the proceedings that are to be afforded law-of-the-case effect?

INTRODUCTION

This is one of multiple coordinated actions by public entities against the online travel companies ("OTCs") to recover unpaid hotel occupancy taxes that the public entities contend are owed as a result of hotel stays booked through the OTCs. These actions have been ordered coordinated so that each action will be heard by the same trial court judge and each will be reviewed by the same appellate panel.

San Diego brought the present suit seeking over $21 million in back taxes, interest and penalties, based on an ordinance levying a transient occupancy tax ("TOT") on the "rent charged by the Operator [the hotel]" for the customer's "privilege of Occupancy." (San Diego Mun. Code, §§ 35.0101, subd. (a) [expressing intent to impose tax on the customer, formally called "Transient"], 35.0102 [defining "Occupancy" as the customer's right to use the hotel room]; 35.0103 [imposing tax based on "rent charged by the Operator" for the customer's "privilege of occupancy"].)

As demonstrated in the Request for Judicial Notice ("RJN"), the operative language has identically been adopted by more than 400 cities and counties in California.

The Importance Of Issue No. 1

The OTCs never purchase rooms from hotels. Instead, they act as sales agents: They sell rooms to the public from the hotels' own inventories. The OTCs then remit a pre-agreed "wholesale" amount to the hotel, and retain as compensation their markup, plus fees.

The OTCs assert, and the trial court and Division Two held, that the tax owed by a customer on his hotel stay are based on the *wholesale* amount that the hotel receives after the OTC has deducted its markup and fees. San Diego, in contrast, claims that the taxes owed by the customer and collected by the OTC must be based on the *retail* rate that the customer actually pays to obtain the privilege of occupying the room.

San Diego contends its interpretation is correct because it is the taxpaying customer who obtains the privilege of occupancy, who pays rent to obtain that privilege, and who is charged with the tax. Thus, the tax must be based on what the customer has paid. And, the customer can never acquire the room unless he or she pays the *retail rate* quoted by the OTCs. Indeed, no matter what net amount the hotel ultimately receives as a result of its arrangement with the OTCs, the customer must always pay retail to obtain the "privilege of Occupancy." That rate is, thus, the "rent charged" under the tax ordinance. It must serve as the tax base for calculating TOT.

Definitive interpretation of the ordinance language is a matter of enormous statewide importance, as it directly impacts the budgets of public entities across the State. Substantially identical taxing language appears in

the TOT ordinances of over 400 California cities and counties. The back taxes, penalties and interest that the public entities contend are now due under these provisions, coupled with the hundreds of millions of dollars of taxes that will be due in the future, could easily exceed $1 billion. This is money that the public entities need to provide services to their residents.

If San Diego's interpretation of the TOT language is correct, only action by this Court will ensure the public entities receive the revenues they are due. This is so because Division Two has thrice held (once in the published opinion in this case and twice in unpublished opinions) that the tax base for calculating TOT is the wholesale amount received by the hotel.[1] By reason of the coordination order, all future TOT cases will be decided by Division Two. Thus, unless this Court intervenes now, the hundreds of public entities with have identically-worded (or operationally identical) TOT laws will be denied their just entitlements.

The bottom line: The TOT question presents a uniform issue of statewide importance to virtually every California public entity and resident. It begs for immediate, authoritative resolution by this Court.

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[1] Prior to its published decision in this case, Division Two rejected appeals by the cities of Anaheim and Santa Monica. (*In re Transient Occupancy Tax Cases* (Nov. 1, 2012, B230457) 2012 WL 5360907 [nonpub. opn.] (*Anaheim*); *In re Transient Occupancy Tax Cases* (Nov. 1, 2012, B236166) 2012 WL 5360882 [nonpub. opn.] (*Santa Monica*).)

The Importance Of Issue No. 2

The certainty that Division Two will not change its mind in any future case involving the commonly-enacted TOT language is reinforced by that court's newly-published proclamation in this case that its earlier unpublished decisions rejecting claims brought by other cities in the coordinated actions (see footnote 1, *supra*) automatically constitute "law of the case" as to the other coordinated actions simply because those actions are part of coordinated proceedings. Division Two's law-of-the-case pronouncement, if left undisturbed, permanently shuts the door to the identically-premised claims of over 400 cities and counties having TOT language identical to San Diego's, and possibly, the claims of any city with a TOT ordinance, however worded.

But, there are added reasons why Issue No. 2 should be reviewed. By declaring in a published decision that law-of-the-case consequences automatically flow from the mere fact that the cases have been coordinated, the opinion threatens to wreak havoc in all other coordinated cases. Unless this Court steps in and decides the issue, the opinion will be cited for the proposition that an appellate decision resolving issues in one coordinated action will automatically constitute law of the case in all the coordinated actions. This has never been the law.

Far from affording automatic law-of-the-case impact where actions have been coordinated, California law has always held that coordinated actions retain their separate identities unless the coordination judge issues

an order (or there is an agreement among the parties) providing otherwise. Even cases that have been ordered *consolidated for trial* are not automatically merged into a single action; they remain separate for law-of-the-case and all other purposes absent an order expressly merging the actions. This rule, which is grounded in due process principles, will be muddied and compromised if the opinion's published law-of-the-case pronouncement is allowed to survive.

This case presents significant and material issues of statewide importance and impact. The Court should grant review to interpret San Diego's TOT language (which is identical to that in over 400 cities and counties) and to weigh the propriety of Division Two's expansion of the law-of-the-case doctrine in coordinated proceedings.

STATEMENT OF THE CASE

The relevant facts are undisputed.[2]

A. How The Online Travel Companies Operate.

1. Online travel companies rent hotel rooms to the general public at retail rates.

OTCs act on behalf of the hotels by selling rooms to the public from out of the hotels' inventories. (Opn.3-4.) The OTC posts on its website the price that a customer must pay to secure the privilege of occupying the room. (1JA,T.4,p.198.) By industry standard, the prices that the OTCs offer to the public are never less than the retail rates that the hotels charge directly to customers renting rooms straight from the hotels. (26AR,T.210,pp.003427-003430; see also 17AR,T.64,p.001016.) Thus, a customer who rents a room through an OTC can never obtain the privilege of occupancy for less than that retail rate.

2. The compensation models utilized by the hotels and OTCs.

Two basic models are employed by hotels and OTCs when offering rooms to customers via the OTCs' websites: The agency model and the

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[2] Most factual citations are to the Court of Appeal's slip opinion ("Opn."), attached to this Petition, or to the Rulings Of The Administrative Hearing Officer, included in the Joint Appendix (1JA,T.4,pp.195-223). The remaining citations are to the Joint Appendix ("JA") and the Administrative Record ("AR") filed in the Court of Appeal.

merchant model. (Opn.3, 15; 1JA,T.4,pp.199-201.) The model used results in substantially different tax results.

a. The agency model.

Under the "agency" model, the customer reserves a room through the OTC, but pays both the retail rate and the TOT directly to the hotel when checking in. (Opn.15; 1JA,T.4,p.199.) The hotel remits an agreed-upon percentage—say, 20%—of the retail rate to the OTC as a commission. (*Ibid.*)

Under the agency model, the TOT is calculated based on the retail rate charged to the customer, not just on the portion that the hotel retains after paying the OTC's commission. (See 1JA,T.4,p.199; 2AR,T.4, p.013812:13-18; 36AR,T.240,pp.005617:2-005618:2.) For example, if the customer is charged $100 for the room and the TOT rate is 10%, the customer pays a total of $110. (See Opn.15.) The hotel remits $10.00 in TOT to the City, and pays $20 in commission to the OTC. The hotel retains $80.00. (Opn.15; 1JA,T.4,p.199.) Thus, TOT is calculated based on the full $100 that the customer has paid to rent the room (rather than on the $80 that the hotel has retained after paying commission to the OTC).

b. The merchant model—the model applicable in this case.

Under the "merchant" model, the customer reserves the room through the OTC and then pays the retail rate plus taxes and fees to the OTC (usually over the OTC's website). (1JA,T.4,p.199; Opn.4, 15.) The

OTC forwards a portion of the retail rate to the hotel, as well as the TOT, which the hotel then remits to the city or county. (*Ibid.*) The OTC retains the rest as its compensation or commission. (*Ibid.*)

As to the specific amounts that the OTC retains and remits, the hotels' arrangement with the OTC is as follows: For each room that a customer books through the OTC, the hotels agree to accept a pre-agreed wholesale amount from the OTC. (1JA,T.4,pp.199-200; Opn.4, 15.) The OTC then markets the rooms to customers at a marked up rate—i.e., at the *retail* rate (plus combined taxes and fees). (*Ibid.*) After the customer's hotel stay, the OTC retains the difference (called the "markup") between the retail rate that the customer has paid and the wholesale amount that the OTC must give to the hotel. (1JA,T.4,p.199.) Part of the OTC's compensation includes certain "fees" charged to the customer. (*Id.* at p. 200.)

The OTC also collects and forwards the TOT to the hotel to be remitted to the city. (*Id.* at p. 201; Opn.4, 15.) The amount of TOT that the OTCs remit is calculated based on the *wholesale* amount that the hotel pockets after the OTC deducts its markup, rather than on the *retail* rate paid by the customer to book the room. (Opn.4, 15; 1JA,T.4,pp.199-201.) The OTCs collect that TOT through the "taxes and fees" charged to the customer on top of the retail rate, and then transmit just the wholesale-based TOT amount to the hotels for payment to the cities or counties. (Opn.4, 15.)

Thus, under the merchant model, as compared with the agency model described above, if the hotel receives $80 on a $100 room, the OTC's markup (i.e., its commission) is still $20. But given the same 10% tax rate, the OTC only remits $8.00 in TOT. The OTC retains the $2.00 difference ($10.00 minus $8.00) as additional profit: Instead of remitting this $2.00 to the City as part of the TOT, the OTC calls this amount a "service fee" and pockets it along with the $20 markup. (See 2AR,T.3, p.013749:16-25; 20AR,T.103, p.001768; 20AR,T.105, p.001790; 26AR,T.211, pp.003587-003588; 34AR,T.238, p.005270, pp. 1-17.)

The present case concerns the merchant model. (Opn.3-4.)

3. Although customers booking rooms through OTCs must always pay the retail rates, they never know that their tax rate varies depending on which compensation model is being used.

A customer booking a room through an OTC is never informed which tax model is being used or what the tax base is for her transaction. (1JA,T.4,p.201.) Instead, the customer knows only that she is being charged the retail rate for her room (as posted on the OTC website) and is being additionally charged "taxes and fees," without any breakdown. (Opn.4, 10, fn. 10; 2JA,T.10,p.413.)

Customers are never told about the wholesale amount that the hotel receives from the OTC for the room. (1JA,T.4,p.201; Opn.4, 16, fn. 12.) Nor are customers apprised of the amount of TOT they are paying.

(1JA,T.4,pp.200-201; Opn.10, fn. 10, 16, fn. 12.) For all the customers know, the applicable room taxes are always being calculated and charged based on the retail rates quoted on the OTCs' websites.

4. Customers booking rooms through OTCs using the merchant model cannot gain the privilege of occupancy unless they pay the retail rate.

Regardless whether a customer books her room directly through the hotel or books it online through an OTC, she must pay the retail rate. (See pp. 8-9, *ante*.) Under the merchant model, customers booking hotel rooms through OTCs can never secure the privilege of occupancy unless they pay the retail rate quoted by the OTCs, as well as the "taxes and fees." (1JA,T.4,p.200.) Customers are never offered rooms at the wholesale rate. (See *ibid.*) Rather, the wholesale rate exists only in the context of the behind-the-scenes transaction between the OTC and the hotel.

B. The City Assesses The OTCs For Failing To Remit Sufficient TOT.

San Diego performed TOT audits of the OTCs and subsequently issued assessments for unpaid TOT, plus interest and penalties for the OTCs' failure to remit the full amount of hotel-room occupancy taxes. (Opn.4; 1JA,T.4,p.196.) The City took the position that the TOT should have been calculated based on the *retail rate* paid by the customer to gain the privilege of occupancy, rather than on the *wholesale amount* that the hotel retained after the OTC took its cut. (2JA,T.8,p.288, 293.) The City

claimed more than $21 million in unpaid taxes, interest and penalties. (2JA,T.8,p.288; 1JA,T.4,pp.222-223.)

C. The Litigation.

1. Administrative proceedings.

The OTCs invoked the TOT ordinance's administrative hearing procedures to challenge the City's tax assessments. (1JA,T.4,pp.195-196.) An administrative hearing officer conducted a hearing to determine whether the OTCs had any TOT liability and, if so, the amount of unpaid taxes, interest and penalties owed. (1JA,T.4,p.196.)

In a lengthy decision containing extensive factual findings, the hearing officer determined that the OTCs owed TOT based on the retail rates. (1JA,T.4,pp.203-206.) He concluded "it is clear that in promulgating the Ordinance, the City Council intended to collect TOT on all monies charged to the Transient for the privilege of Occupancy of a given hotel room" (1JA,T.4,pp.203-204); that "the City Council anticipated that all due TOT would be paid as a straight pass-through from the Transient to the Operator [hotel] to the City without reduction and without exception," so that "whatever the Transient paid for the right of Occupancy would be the basis upon which the TOT would be calculated and paid to the City on behalf of a Transient by the Operator" (1JA,T.4,p.204; 1JA,T.4,pp.205, 206, 212, 217); and that the TOT ordinance requires a tax on "*whatever is ultimately charged for the room*" (1JA,T.4,p.213, original emphasis;

1JA,T.4,p.216).[3] The hearing officer assessed over $21 million in back-taxes and penalties. (1JA,T.4,pp. 222-223.)

The OTCs challenged this ruling by petition for writ of mandate (1JA,T.3,pp.35-101) and the case was assigned to the Los Angeles Superior Court in accordance with a coordination order we now describe.

2. The coordination order has assigned all transient occupancy tax cases to the same Superior Court judge and Court of Appeal panel.

Numerous claims similar to the instant one are pending throughout California.[4] On July 27, 2006, all of these TOT proceedings were coordinated as *Transient Occupancy Tax Cases*, JCCP 4472. (1JA,T.3,pp.54-55; see also RJN, Exs. A-C.) Under the coordination order, all California litigation involving asserted TOT obligations owed by OTCs

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[3] The hearing officer also found that the OTC is an "Operator" under the TOT ordinance because the OTC acted as the hotel's agent (1JA,T.4,pp.206-211); and that "[a]ll dealings [by customers] are with and through the OTCs as the authorized agents of the hotels" (1JA,T.4,p.207).

[4] As discussed (p. 1, fn. 1, *supra*), three suits have already been resolved by Division Two. Others have been resolved at the trial court level, including suits brought by Los Angeles and San Francisco, and appeals are pending. (See Los Angeles Superior Court Case Nos. JCCP4472, BC326693; San Francisco Superior Court Case Nos. CGC 09-488289, CGC 09-488292, CGC 09-509573, CGC 09-489356, CGC 11-510705.) Dozens more TOT claims are working their way through the system; they are in the early assessment process, the precursor to administrative proceedings and superior court litigation. (See Expedia, Inc. Form 10-K for fiscal year ended December 31, 2013, pp. 35 & 36, found at http://www.sec.gov/Archives/edgar/data/1324424/000119312514039090/d648005d10k.htm [reflecting claims against OTCs by 46 cities and one county].)

are assigned for decision by the same Los Angeles Superior Court judge (currently Judge Elihu Berle) and the same panel of the Court of Appeal (Division Two, Second District). (*Id.* Exs. C & D.)

3. The writ of mandate proceedings.

In the mandate proceedings brought by the OTCs to review the hearing officer's assessment of unpaid taxes and penalties, the trial court (Judge Berle) accepted the hearing officer's factual determinations and reviewed only his legal determinations—namely, whether the hearing officer "properly interpreted the ordinances at issue." (8JA,T.25,p.1632.)

Judge Berle issued a writ of mandate rejecting the hearing officer's interpretation of the TOT ordinance. (8JA,T.25,p.1620, 1622-1654.) He reasoned that the ordinance based the TOT on the amount "charged by the operator" (i.e., the hotel), and so the proper tax base was the wholesale amount received by the hotel (rather than the retail rate charged to the customer). (8JA,T.25,pp.1639-1654; see also San Diego Mun. Code, § 35.0101, subd. (a).) He concluded, therefore, that no additional TOT was owing.

4. In an initially unpublished, but now-published decision, Division Two of the Second District Court of Appeal affirms the trial court's determination that TOT need only be paid based on the wholesale amount.

Division Two affirmed Judge Berle's interpretation of the TOT ordinances in an initially-unpublished decision, holding that the proper tax base for calculating TOT is the *wholesale* amount received by the hotel, not the *retail* rate charged to the customer. (Unpub. Opn.6-7.) Division Two reasoned that "the words of the ordinance do not reveal an intent to impose a tax on the service fees and markups charged by the OTCs." (*Id.* at p. 7.) "Because the City's ordinance imposes tax only on rent charged by an operator, it does not reach amounts charged by the OTC for its services." (*Id.* at pp. 7-8.)

Division Two's opinion cited, relied on and is consistent with the unpublished decisions that the court previously issued in two of the other coordinated actions, rejecting the TOT claims asserted by Anaheim and Santa Monica. (*Anaheim, supra*, 2012 WL 5360907; *Santa Monica, supra,* 2012 WL 5360882.) Division Two said those unpublished decisions decided "the question of whether OTCs are liable for TOT" and that "[i]n both of those cases, we determined that the ordinances at issue did not impose a tax on the service fees charged by the OTCs." (Unpub. Opn.7.)

5. The Court of Appeal grants rehearing and issues a new, published decision that relies on the "law of the case" doctrine as justification for its citation of and reliance on its earlier unpublished decisions.

San Diego sought rehearing of the Court of Appeal's unpublished opinion on the ground that it improperly cited and relied on two unpublished decisions. The City based its argument on California Rules of Court, rule 8.1115(a), which prohibits citation and reliance on opinions not certified for publication, except in certain circumstances not applicable here. (Cal. Rules of Court, rule 8.1115(a).)

Division Two granted both rehearing and the City's concurrent publication request, yet its newly-issued opinion continued to cite and rely on its prior unpublished decisions. In order to justify its reliance on the unpublished decisions, the court declared that the unpublished decisions are law of the case and, thus, citation to those decisions was permissible under an exception to Rule 8.1115(a). (Opn.3-4, fn. 4, citing Cal. Rules of Court, rule 8.1115(b) [unpublished opinion can be cited when relevant as law of the case].) The court reasoned that because all of the coordinated TOT cases comprise "the same single coordinated proceeding," necessarily involving common issues of law and fact, the court could properly cite its earlier unpublished opinions as binding law of the case. (*Ibid.*)[5]

[5] Footnote 4 of the opinion states, in relevant part: "Pursuant to California Rules of Court, rule 8.1115, subdivision (b), this court may cite and rely upon an unpublished case when it is relevant as law of the case. The

6. The Court of Appeal denies the City's second petition for rehearing challenging the the opinion's law-of-the-case holding.

The City again petitioned the Court of Appeal for rehearing, this time on the ground that the court's law-of-the-case rationale for relying on its unpublished decisions was fundamentally flawed. Among other things, the City argued:

a. The law-of-the-case pronouncement contravened settled law providing that coordinated or consolidated actions are not merged into a single action absent an order expressly so providing. Unless a coordination or consolidation order expressly directs merger or the parties so agree, a decision in one coordinated or consolidated case does not govern separate parties in another case. (Second Petition for Rehearing 9-13.)

b. There was never any coordination order or agreement by the parties that the coordinated TOT cases would be merged as one. Nor did any of the parties ever receive notice that the appellate proceedings leading to the unpublished *Anaheim* and *Santa Monica* opinions would have reach beyond the parties in those cases. Nor was any city (other than Anaheim or

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unpublished opinions that we cite in this opinion are part of the same single coordinated proceeding as this case, captioned '*In re Transient Occupancy Tax Cases* (No. JCCP 4472).' The coordinated transient occupancy tax cases necessarily share common questions of fact and law. (Code Civ. Proc., § 404.) Under the circumstances, we cite these unpublished opinions as law of the case." (Opn.3-4, fn. 4.)

Santa Monica) ever informed that they could present arguments in the *Anaheim* and *Santa Monica* cases. (*Id.* at 5-6, 13-15.)

c. Elementary due process principles require that before a decision in one coordinated case can be binding on different parties in other coordinated cases, the litigants in the other cases must receive notice and a chance to be heard on the potentially binding issue. (*Id.* at 15-17.)

d. The published opinion's newly-minted law-of-the-case ruling threatened to seriously disrupt settled law establishing that coordinated and consolidated actions remain separate unless otherwise ordered and agreed; and that such disruption was not worth the short-term convenience of Division Two's being able to rely on unpublished decisions to dispose of the present appeal. (*Id.* at 1-3, 6-7, 17-18.)

On April 22, 2014, the Court of Appeal denied the petition for rehearing, without comment.

WHY REVIEW IS NECESSARY

I. INTERPRETATION OF THE TOT ORDINANCE IS AN ISSUE OF STATEWIDE IMPORTANCE THAT HAS HAD, AND WILL CONTINUE TO HAVE, WIDE-RANGING FISCAL IMPACT ON BUDGET-STRAPPED PUBLIC ENTITIES ACROSS THE STATE.

Interpretation of the key provisions of San Diego's TOT ordinance is an issue of statewide importance, involving the budget and revenue expectations of virtually every city and many counties in California. The past and future revenues at issue could easily exceed a billion dollars. Compelling arguments demonstrate that Division Two wrongly decided the case and will continue to commit the same error in all future coordinated cases unless this Court steps in. In these trying economic times, public entities can ill afford to lose revenues to which they are entitled and upon which they depend to fund the services their residents require.

A. The Commonly-Used Ordinance Language.

Over 470 hotel-occupancy tax laws have been enacted by California cities and counties.[6] As relevant, the operative language identically used by the vast majority of these public entities is as follows:

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[6] See RJN, Exh. I; see also Dean Runyan Associates, "*California Travel Impacts by County 1992-2012, 2013 Preliminary State & Regional Estimates*," p. 101, found at http://www.deanrunyan.com/doc_library/CAImp.pdf.

- The purpose and intent of the ordinance is to impose TOT on "Transients." (San Diego Mun. Code, § 35.0101, subd. (a).)
- A "Transient" is any person who exercises or is entitled to Occupancy. (§ 35.0102.)
- "Occupancy" means the use or possession, or the right to use or possess, a hotel room. (*Ibid.*)
- "Operator" is defined as owner or proprietor of the hotel. (*Ibid.*)
- Tax is imposed as follows: "For the privilege of Occupancy" in any hotel in the City, each transient is subject to and shall pay a tax equal to a percentage "of the Rent charged by the Operator." (§ 35.0103.)
- "Rent" means the "consideration charged" to a Transient "for the Occupancy of a room." (§ 35.0102.)[7]
- If tax is not paid as required, penalties are imposed. (§ 35.0116.)

While the enactments of the cities and counties often vary slightly, the key language, just quoted from San Diego's ordinance, is replicated

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[7] San Diego's definition of "rent" differs immaterially for present purposes, from that used by other cities. Specifically, in San Diego, "Rent" is defined as "the total consideration charged to a Transient as shown on the guest receipt for the Occupancy of a room." (§35.0102.) Most cities define "Rent" as meaning "the consideration charged . . . for the occupancy of space in a hotel," without specifying "total" or "shown on the guest receipt." (See RJN, Ex. I.) For purposes of this Petition, these differences don't matter; the important point is that, in San Diego's TOT enactment, like virtually all of the 400-plus commonly-worded enactments, "Rent" is defined in terms of the amount "charged to" the Transient as the price he or she must pay in order to gain the privilege of occupying the hotel room.

identically, or nearly so, in the vast majority of cities and counties throughout the state. Indeed, 393 of 415 cities with TOT ordinances (94.7%) and 52 of 55 counties (94.5%) share common definitions for "occupancy"; 395 cities (95.2%) and 51 counties (92.7%) share common definitions of "rent"; and 359 cities (86.5%) and 49 counties (89.1%) commonly define the tax as being imposed for the "privilege of occupancy." (See RJN, Ex. I.)

B. Review Is Necessary: A Common, Recurring Question Of Statewide Importance Is Presented, As The Operative Ordinance Language At Issue Here Is Identical To That Enacted By Hundreds Of Public Entities In The State.

Because the TOT language at issue in this case has been widely adopted, the public entities and the OTCs need a definitive interpretation of their respective rights and obligations under that language. The public entities need to know whether their TOT laws, as written, presently impose taxes based on the retail rates charged to customers, or whether they must endure the difficult and costly process of amending their laws to make sure they apply to those retail rates for future transactions. The Court should grant review to provide this guidance.

C. Review Is Necessary: Unless This Court Intervenes, Division Two's Incorrect Ruling Will Perpetuate In All Future Cases By Reason Of The Coordination Order And Division Two's Law-Of-The-Case Holding.

While not typically a reason for granting review, the merits of the controversy here militate strongly in favor of this Court's intervention. The coordination order, Division Two's prior dispositions and its law-of-the-case pronouncement ensure that if Division Two's interpretation of the TOT ordinance is wrong, that wrong result will perpetuate. It will govern every future case that comes after this one or, equally unfortunately, it will prompt public entities having valid claims to abandon them as hopeless. Unless this Court acts, the lower courts will continue to reject the TOT claims of hundreds of public entities having TOT laws identical to those involved here. Those rejected claims will be embodied in final judgments, permanently foreclosing the claims. And, there is no possibility that other appellate panels will assess the issues and arrive at different results, since no other appellate panel will ever have any occasion to hear an appeal involving the TOT issue presented here.

Such a result is repugnant since a careful review of the issue by this Court is likely to lead to a conclusion that Division Two's interpretation of the TOT ordinance is *wrong*.

1. If this Court grants review to examine the TOT ordinance, it will likely conclude that the Court of Appeal's interpretation is wrong.

a. The two interpretations giving rise to the issue presented for review.

The TOT ordinance imposes a tax on "the Rent charged by the Operator [the hotel]" for the customer's "privilege of Occupancy." (San Diego Mun. Code, § 35.0103.)

The trial court and the Court of Appeal held that the "rent charged by the Operator" language means the wholesale amount the hotel is willing to receive from the OTCs for the rooms rented to customers through those OTCs. According to those lower courts, "rent charged" means "rent received" by the hotels and, thus, the tax base for calculating TOT must be the wholesale amount received by the hotels from the OTCs, not the retail amount paid by the customers for their rooms.

The administrative hearing officer, in contrast, concluded that "rent charged by the operator for the privilege of occupancy" means the retail rate the taxpaying customer must pay to gain the right of occupancy. This was so even though the hotel ultimately receives less than that after the OTCs deduct their markups and fees. (See pp. 12-13, *ante*.) He reasoned that the municipalities intended to levy a tax on *the customer*—that is, to tax what *the customer* pays to gain the "privilege of occupancy."

(*Ibid.*) And since the customer cannot obtain the privilege of occupancy without paying the retail rate, the tax must be based on that amount. (*Ibid.*)

b. The hearing officer got it right: The tax base for calculating TOT is necessarily the retail rate.

For multiple reasons, the hearing officer's construction of the TOT ordinances is correct.

First: Settled rules of statutory construction are consonant with the hearing officer's determination that the tax base for calculating TOT must be the retail rate the customer pays for the privilege of occupying the room. In construing a legislative enactment, the statutory language must be considered "in the context of the entire statute and the statutory scheme of which it is a part," and "the various parts of a statutory enactment must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole." (*Phelps v. Stostad* (1997) 16 Cal.4th 23, 32.)

Under this rule, the phrase "rent charged by the Operator" cannot be read in insolation. It must be read together with the other language appearing in the ordinance, including particularly the language that ties payment of the "rent charged" to the price that must be paid by the customer to obtain "the privilege of Occupancy." The customer cannot occupy the room unless he pays the the retail rate.

That the tax base is equal to whatever the customer pays is buttressed by the fact that the TOT language states that the tax is levied on and must be paid by the *customer*, not by the hotels or the OTCs. (San Diego Mun. Code, § 35.0101, subd. (a).)[8] This makes perfect sense, since the *customer* is the only person who desires the privilege of occupancy and who must pay in order to gain that privilege. (§§ 35.0102, 35.0103.) The OTCs do not pay rent. There is only one rent paid in exchange for the "privilege of Occupancy"—defined as the right to use the room; and, that is the rent paid by the customer.

And significantly, the customer can never gain the privilege of occupancy unless he or she pays the retail rate. Indeed, while the hotel is willing to accept the wholesale amount *from the OTC*, the hotel never offers that rate to the customer and the customer can never gain the privilege of occupancy by paying the wholesale rate. In fact, the customer never even knows there is a wholesale price.

Since the customer can never attain the right of occupancy without paying the retail rate, the only reading of the TOT ordinance that gives recognition to *all* its terms (not just to some) is that the amount of "rent charged" by a hotel for the customer to obtain the privilege of occupying one of its rooms is the retail rate quoted on the OTC's website and that

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[8] In imposing the tax on the customer (the person purchasing the privilege of occupancy), the ordinance is consistent with the principle that privilege taxes are imposed on the person acquiring the privilege. (See *Union Oil Co. v. State Bd. of Equal.* (1963) 60 Cal.2d 441, 452.)

must be paid by the customer. Once the OTCs receive that retail rate as rent from the customer, the amount paid becomes income that is then paid to the hotel by the OTC. But the only "rent charged" and paid is the retail rate charged to and paid by the customer.

In coming to a contrary conclusion, the Court of Appeal misreads "rent charged" to the customer to mean "rent received" by the hotel. It ignores that the tax is imposed on the "Transient" who pays the "rent charged." It ignores that the Transient is the only person who is paying the rent charged in order to gain "privilege of Occupancy." And it ignores the fact that the customer cannot obtain that privilege without paying the retail rate.

Second: Using the retail rate as the tax base for calculating TOT is the only interpretation that makes sense in light of the price-parity agreements that are standard in the industry. (See p. 7, *ante*.) Under these agreements, the hotels and the OTCs cannot engage in competitive price wars among themselves—the OTCs can never offer rooms to customers for less than the retail rates that the hotels offers to their customers directly. (*Ibid.*) Thus, if a hotel offers a room directly to customers for $100, an OTC may not offer that same room to the public for less than $100. (*Ibid.*) This means the price the customer sees—whether online or at the hotel—is never less than *the retail rate*.

By ensuring that its rooms are never offered to customers for less than the retail rate, it is *hotels* (not the OTCs) that determine the "rent charged" for the "privilege of Occupancy." That retail rate is thus the "rent

charged by the Operator" "for the privilege of Occupancy." Accordingly, that retail rate must serve as the tax base for calculating TOT, exactly as the language of the ordinance itself compels.

Third: As a separate and independent ground in addition to those just described, and as a matter of law, merchant-model transactions necessarily create an agency relationship between the OTC and the hotel, such that when the OTC (acting as the hotel's rental agent) charges the customer, it is tantamount to the hotel *itself* charging the customer. In short, the existence of the agency relationship establishes that the "rent charged" by the OTCs is exactly the "rent charged" by the hotels, since the OTCs are acting on the hotels' behalf as the hotels' agents.

Where the salient facts are undisputed, a party may be deemed an agent as a matter of law. (See *Heiner v. Kmart Corp.* (2000) 84 Cal.App.4th 335, 350.) Here, the controlling facts are undisputed. Specifically, all merchant-model transactions share the following characteristics necessarily giving rise to an agency relationship whereby the OTCs act as the hotels' agents: The OTCs do not pre-purchase rooms and then offer them to the public. Rather, the OTCs offer the *hotels'* rooms from the *hotels'* own inventories. The hotels control the minimum rent that the OTCs must charge the customer in order for the customer to obtain the "privilege of occupancy" in the hotel (i.e., the hotels require the OTCs to charge no less than the hotels' own retail rates). And, as far as the customers are concerned, the OTCs are the hotels' representatives for rent-charging and rent-collecting purposes: The OTCs charge the customers for

and collect the rents that must be paid to gain access to the hotels' rooms. In other words, the OTCs *stand in the shoes of the hotels* for all rent-charging and rent-collecting purposes.

This means that when the customer completes a transaction on the OTC's website, it is the same as completing a transaction directly with the hotel. (See *Columbia Pictures Corp. v. DeToth* (1948) 87 Cal.App.2d 620, 630 ["The agent acting within the scope of his authority, is, as to the matters existing therein during the course of the agency, the principal himself"].)

Since it is really the hotel that is completing the rental transaction, through its agent the OTC, the statutory phrase "rent charged by the Operator" necessarily means the retail rate charged by the hotel. This, too, establishes why the Court of Appeal's interpretation of the ordinance cannot be sustained.

2. Without this Court's intervention, the coordination order, Division Two's track record in disposing of TOT issues, and its law-of-the-case pronouncement guarantee that the valid TOT claims belonging to the more than 400 public entities that share San Diego's ordinance language are doomed.

Division Two has now resolved the TOT issue adversely to the public entities in three cases. Its views are set in stone, both as a result of the coordination order, which ensures the same decision-maker, and as

a result of Division Two's law-of-the-case pronouncement. Thus, without this Court's review, the potential claims of hundreds of other public entities whose TOT laws have operative language identical to San Diego's, are doomed. A billion dollars of past and future revenue will be forever lost. And, since Division Two is the only appellate panel that will ever hear a TOT case, no other outcome is possible.

Delay in addressing the issue is not a tenable option. The claims of two cities, Anaheim and Santa Monica, are now forever lost. Unless this Court acts in this case, San Diego's rights will also be forever foreclosed by final judgment. The claims of many other California cities and counties will either be rejected or never pursued by reason of the Court of Appeal's opinion here. If Division Two's reading is wrong, it would be unjust to all public entities and their residents to allow the error to perpetuate.

D. Review Is Necessary: Unless Review Is Granted, Public Entities Will Remain In An Intolerable Litigation And Legislative Limbo That Will Result In A Continuing Waste Of Litigant And Court Resources, An Abandonment Of Valid Claims, Or The Burdensome Task Of Amending TOT Ordinances.

This Court should grant review because without a definitive determination from this Court regarding what is the proper tax base for calculating TOT, public entities will be placed in intolerable litigation and legislative limbo. As things stand now, over 400 public entities face

impossible alternatives: Do they continue to pursue claims and incur litigation expenses they can ill afford to incur knowing that Division Two will reject the claims? Do they pursue these claims in the hope that, if this Court does not grant review in this case, it might do so later? Do they simply cave, giving up legitimate claims? Do they commence the difficult, time-consuming and expensive separate processes of trying to amend TOT laws that they believe do not really need to be amended?

If San Diego's interpretation of the commonly-enacted TOT language is correct, then the sooner the cities and counties obtain a definitive ruling from this Court so holding, the sooner they can collect the funds that are due and put them to good work in funding public services that can't be funded with present revenue flow. If, however, that language does not permit taxes based on the retail rates, the sooner the public entities receive a definitive ruling to that effect, the sooner they can divert their energy away from litigation, to legislation in commencing the process of amending their TOT laws. Either way, the public entities require this Court's guidance.

E. Review Is Necessary: The Statewide Financial Stakes Dependent On The Outcome Of This Case Are Enormous For Hundreds Of Public Entities Across The State.

The financial magnitude of the TOT-interpretation issue strongly militates in favor of review. In this case alone, San Diego claims that it is

entitled to receive more than $21 million in unpaid occupancy tax revenue, plus interest and penalties. (2JA,T.8,p.288; 1JA,T.4,pp.222-223.)[9]

Statewide, the financial stakes are staggering. The State Controller's analysis of the financial data of local governments indicates that in fiscal year 2010-2011, statewide TOT receipts totaled over $1.141 billion. (See California Controller, 1992-2011 [www.CaliforniaCityFinance.com; http://www.californiacityfinance.com/TOT11p.xlsx].) Thus, the total existing claims against the OTCs are easily valued in the hundreds of millions of dollars statewide and, when coupled with future claims, will vastly exceed that number.

Revenues received by cities and counties from hotel-occupancy taxes often form significant parts of their annual budgets, with TOT revenues comprising between 1.4% and 39.6% of the general annual revenue expectations of the top ten largest California cities. (*Ibid.*) Correct interpretation of the more than 400 commonly worded TOT ordinances thus will have a tangible and immediate impact on the ability of public entities to offer needed services. It is no secret that public entities across the State face severe financial constraints. Nor is it any secret that budget cuts

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[9] In the *Anaheim* and *Santa Monica* cases, over $21 million and $6 million in lost revenues were at stake, respectively. The OTCs are currently challenging in the Superior Court administrative assessment of $37 million by Los Angeles and the San Francisco case, involving claims of more than $58 million, is presently pending on appeal with briefing time having commenced running. (See Los Angeles Superior Court Case Nos. JCCP4472, BC326693; *City and County of San Francisco v. Hotels.com, LP* (B253197, app. pending).)

threaten the ability of public entities to continue to provide much-needed public services. The public entities rely on TOT revenues to fund the public services that their local residents need and expect.

Before cities and counties (and their residents) across the State lose hundreds of millions of dollars of tax revenues they believe they are entitled to receive under their TOT enactments, this Court should weigh in.

F. The TOT Issue Presented Here Is Of National Importance: The Issue Is Being Litigated In Cases Across The Country—Many Of Which Have Decided The Issue In The Public Entities' Favor.

The issue presented here is brewing not only throughout California, but throughout the nation. Public entities with hotel-room occupancy tax ordinances have asserted claims in dozens of states. (See James Mak, "What Should Be the Appropriate Tax Base for OTCs' Hotel Room Sales?" *State Tax Notes*, September 17, 2012, pp. 775-786 (*Tax Analysts Special Report*, available at http://www.uhero.hawaii.edu/products/view/354) [noting more than 70 litigations in at least 23 states and the District of Columbia as of date of publication]; T.J. Evans, *Casenote: Online Travel Companies Find Issues with Hotels Extremely Taxing: Georgia's Hotel-Motel Occupancy Excise Tax and Expedia, Inc. v. City of Columbus* (Summer 2010) 61 Mercer L.Rev. 1263, 1272 & fns. 79-80 [noting cases in over fifty jurisdictions].)

Many of these jurisdictions have sided with the public entities. (E.g. *City of San Antonio v. Hotels.com* (W.D.Tex. July 1, 2011) 2011 U.S. Dist. LEXIS 72665 (*San Antonio*); *Travelscape, LLC v. South Carolina Dep't of Revenue* (S.C. 2011) 705 S.E.2d 28 (*Travelscape*); *Village of Rosemont v. Priceline.com, Inc.* (N.D. Ill. Oct. 14, 2011) 2011 U.S. Dist. LEXIS 119231 (*Village of Rosemont*); *District of Columbia v. Expedia, Inc.* (D.C. Sup. Ct. September 24, 2012, 2011 No. 2011-CA-002117-B) 2012 D.C.Super. LEXIS 14 [finding tax encompasses any payments made by ultimate purchaser]; *Expedia, Inc. v. City of Columbus* (Ga. 2009) 681 S.E.2d 122.)

Even where those ordinances are different from those at issue here, the logic in those jurisdictions' ordinances is the same: When a public entity taxes an individual on a transaction (i.e., a sales tax), it is the *amount that the taxpayer pays* that is the tax base, not the net *amount that the seller receives*. (See *Travelscape*, *supra*, 705 S.E.2d at p. 34 ["'[t]he core purpose of the Ordinances is to levy a tax on the amount of money visitors to the municipality spend on their hotel rooms or other accommodations,'" quoting *City of Charleston v. Hotels.com*, LP (D.S.C. 2007) 520 F.Supp.2d 757, 768]; *San Antonio*, *supra*, 2011 U.S. Dist. LEXIS 72665 at p. *59 [finding 173 cities' position "that hotel occupancy tax is "based upon the price that the occupant pays for the room'" consistent with the terms and intent of the 173 city ordinances reviewed by the court, all of which tax "the consideration paid by the occupant for the cost of occupancy"]; *Village of Rosemont*, *supra*, 2011 U.S. Dist. LEXIS 119231 at *8 [finding the tax is

imposed on the "bargain struck" and that is the money the customer pays for access to the hotel room]; *City of Columbus*, *supra*, 681 S.E.2d 122 [finding that the tax basis is the amount paid by the consumer, including to OTC, if OTC chooses to collect it].)

To date, there have been six opinions issued by the highest court of a state. Four times, the court has ruled in favor of the taxing authorities on the issue of the OTCs' liability for tax: Wyoming (*Travelocity.com, L.P. v. Wyoming Dep't of Revenue* (Wy. Apr. 3, 2014) 2014 Wyo. LEXIS 45); New York (*Expedia, Inc. v City of New York Dep't of Fin.* (N.Y. 2013) 3 N.E.3d 121), South Carolina (*Travelscape*, *supra*, 705 S.E.2d 28), and Georgia (*City of Columbus*, *supra*, 681 S.E.2d 122 and *City of Atlanta v. Hotels.com* (Ga. 2011) 710 S.E.2d 766). Two state supreme courts have ruled in the OTCs' favor: Alabama (*City of Birmingham v. Orbitz, LLC* (Ala. 2012) 93 So.3d 932) and Missouri (*St. Louis County v. Prestige Travel, Inc.* (Mo. 2011) 344 S.W.3d 708). Two other state supreme courts have accepted jurisdiction; appeals are pending. (Florida, *Alachua County v. Expedia*, and Hawaii *In re Travelocity.com, L.P.*).

This Court should decide the question once and for all for all California citizens.

II. PROPER APPLICATION OF THE LAW-OF-THE-CASE DOCTRINE IN COORDINATED PROCEEDINGS IS AN ISSUE OF BROAD STATEWIDE IMPORTANCE.

The published opinion will upset settled law governing how coordinated and consolidated cases are governed. By holding that any appellate decision in any coordinated case *necessarily* constitutes law of the case as to all of the other coordinated actions, the opinion brings a sea change to how the law-of-the-case doctrine applies in coordinated proceedings. The opinion's conclusion that coordinated proceedings automatically merge, regardless of whether there has been any order merging the actions into one or any stipulation by the parties to that effect, contravenes all prior law and runs afoul of due process.

It will take years of litigation and appeals to unwind the mess, and this Court will eventually have to act in order to undo the problem. Far better to act now, than to allow the problem to spread.

A. Before The Opinion, California Case Law Held That Coordination And Consolidation Alone Does Not Automatically Merge The Case Into One.

Cases presenting common questions of fact or law may be coordinated or consolidated before a single court—they are flexible tools that give a single administrating coordination or consolidation trial judge "the power to organize the litigation in an efficient and equitable manner."

(See *McGhan Medical Corp. v. Superior Court* (1992) 11 Cal.App.4th 804, 813; Cal. Rules of Court, rule 3.541; Code Civ. Proc., § 1048.)[10]

The trial judge has significant discretion to determine whether and to what extent various issues should be tried together or separately. (See *McGhan, supra*, 11 Cal.App.4th at pp. 812-813.) While law-of-the-case principles can apply to coordinated or consolidated proceedings in proper circumstances, California case law establishes that the separate cases, although coordinated or consolidated, do not merge unless (1) the coordination or consolidation trial judge issues an order notifying all parties that determinations in one matter or at one hearing will be binding on all parties in each of the coordinated or consolidated actions, and (2) the parties that will be bound by an order or ruling to be commonly applied are given an opportunity to ask to participate and be heard in the proceeding that will be deemed binding.

Sanchez v. Superior Court (1988) 203 Cal.App.3d 1391, 1395-1396, is instructive, holding that a consolidation order—even one consolidating separate cases in a single trial—does not automatically bring about

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[10] Whether cases are "coordinated" or "consolidated" primarily depends on whether the different cases initially arose in the same or different courts. (Younger & Bradley, Younger on Cal. Motions (2d ed. 2013) § 22:14; Code Civ. Proc., § 404 et seq.; Cal. Rules of Court, rules 3.501 et seq.; Code Civ. Proc., § 1048; Cal. Rules of Court, rules 3.350, 3.500.)

a merger of multiple actions. (*Id.* at p. 1396.) Rather, without an order or stipulation that the two actions became one, there was no merger. (*Ibid.*)[11]

Thus, before the opinion here, the rule was that coordinated actions remain separate unless the coordination judge directs that they (or particular issues) are to be determined in a merged proceeding—something that never happened here. (See RJN, Exs. A-H.)

B. Nothing In California's Statutes Permits A Conclusion That Coordinated Cases Are Automatically Merged.

A complex scheme of rules applies to coordinated cases. (Code Civ. Proc., § 404 et seq.; Cal. Rules of Court, rule 3.501 et seq.) Not one word in these rules even hints that a coordination order automatically results in a merger of all cases, so that a decision in one is automatically binding on another. Rather, the coordination rules are designed to assure that all parties receive notice of other coordination orders and proceedings, so that they may know when participation in a particular proceeding is needed in

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[11] The extent to which an order in a consolidated proceeding is binding on all parties to each of the consolidated actions depends on whether "complete" consolidation is ordered for all purposes or whether consolidation is merely "for purposes of trial." A court may order "complete" consolidation where the parties are identical and the causes could have been joined, in which event the pleadings are regarded as merged, one set of findings is made, and one judgment is rendered. (See 4 Witkin, Cal. Procedure (5th ed. 2008) Pleading, §§ 341, 346; Cal. Rules of Court, rule 3.350(c).) In contrast, where cases are consolidated only "for purposes of trial," the pleadings, verdicts, findings and judgments are kept separate; the actions are simply tried together for the sake of convenience and judicial economy. (See 4 Witkin, Cal. Procedure (5th ed. 2008) Pleading, §§ 341, 347; *Sanchez*, *supra*, 203 Cal.App.3d at p. 1396.)

order to protect their rights. (See, e.g., Cal. Rules of Court, rules 3.501, 3.506, 3.510, 3.513, 3.514, 3.531.)

C. The Federal Law, Upon Which California Law, Rejects Automatic Merger.

California law governing consolidation and coordination is based on federal consolidation and multi-district-litigation law under Federal Rule of Civil Procedure 42 and 28 U.S.C. § 1407, and thus, federal law provides guidance in this area. (See 4 Witkin, Cal. Procedure (5th ed. 2008) Pleading, §§ 342, 352; Legis. Com. com. (1971) Cal. Code Civ. Proc., § 1048.) Federal case law uniformly holds that consolidated proceedings do not automatically merge and, thus, that caution should be used when applying the law-of-the-case doctrine.

The United States Supreme Court has declared: Consolidation "does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another." (*Johnson v. Manhattan Ry. Co.* (1933) 289 U.S. 479, 496-497.)

The Advisory Committee reinforces this view, emphasizing that consolidated appeals "do not merge into one" for all purposes. (Advisory Com. Note, Fed. Rules App.Proc., rule 3, 28 U.S.C. (1998 amend.).) And the Ninth Circuit warned that a "district court should be careful about invoking the 'law of the case' doctrine" in consolidated cases where only certain parties were subject to the Court's opinion on appeal and materials involving other parties were not in the record, despite the similarity of those

remaining parties' cases. (*Simmonds v. Credit Suisse Securities (USA) LLC* (9th Cir. 2010) 638 F.3d 1072, 1097-1098 & fn. 23, as amended (9th Cir., Jan. 18, 2011) 2011 U.S. App. LEXIS 974, *46 & fn. 23, judg. vacated, affd. in part without precedential effect (2012) 132 S.Ct. 1414.)

D. Scholarly Texts Explain The Due Process Problems Of Automatic Merger.

Scholarly texts are not only in accord, they explain the fatal due process problems created when the law-of-the case doctrine is applied without prior notice that a decision will be binding on all parties in all actions.

As one scholar has explained, "consolidation does not render rulings in one case also rulings 'in' the other consolidated actions. Hence, a request for a ruling on the same point in one of the other consolidated actions does not trigger law of the case principles." (Steinman, *Law of the Case: A Judicial Puzzle in Consolidated and Transferred Cases and in Multidistrict Litigation* (1987) 135 U.Pa. L.Rev. 595, 623, internal footnotes omitted.)

This rule is based in due process principles: "Parties to the other consolidated actions who are neither parties nor in privity with parties to the 'case of origin' did not have their day in court, their opportunity to be heard before the initial ruling was rendered. If, through consolidation, an adverse ruling automatically became the law in their cases and law of the case doctrine were held to preclude reconsideration, these litigants' due

process rights would be infringed." (*Id.* at pp. 623-624 [there must be assurance that "all interested parties should be heard, without hindrance from law of the case"].)

* * * * *

The opinion's law-of-the-case pronouncement is contrary to prior law, as well as basic principles of fairness. Yet without this Court's review, it will become binding precedent that courts across the State will be compelled to follow in coordinated cases even where, as here, no order ever issued that merged the coordinated actions and no parties in the various coordinated actions ever received any notice that a determination in one of the actions would be deemed binding in any other action.

CONCLUSION

For all the foregoing reasons, the Court should grant review.

DATED: May 6, 2014

Respectfully Submitted,

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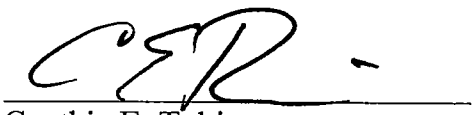
By: 
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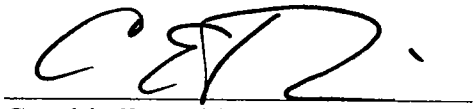
CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.204(c)(1), I certify that this **PETITION FOR REVIEW** contains **8,399 words**, not including the tables of contents and authorities, the caption page, or this certification page, as counted by the word processing program used to generate it.

DATED: May 6, 2014



Cynthia E. Tobisman

OPINION

MARCH 27, 2014

Filed 3/27/14 Opinion following rehearing

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re TRANSIENT OCCUPANCY TAX CASES	B243800 (Los Angeles County Super. Ct. No. JCCP 4472)

APPEAL from a judgment of the Superior Court of Los Angeles County. Elihu M. Berle, Judge. Affirmed.

Kiesel Boucher Larson, William L. Larson; Baron & Budd, Laura J. Baughman and Thomas M. Sims; McKool Smith, Steven D. Wolens and Gary Cruciani; City of San Diego City Attorney's Office, Daniel F. Bamberg and Jon E. Taylor for Plaintiff and Appellant City of San Diego.

Skadden, Arps, Slate, Meagher & Flom, Darrel J. Hieber, Stacy R. Horth-Neubert, and Daniel M. Rygorsky for Defendants and Respondents Priceline.com Incorporated and Travelweb LLC.

Jones Day, Brian D. Hershman and Erica L. Reilley for Defendants and Respondents Expedia, Inc., Hotwire, Inc., Hotels.com, L.P., and Hotels.com GP, LLC.

K&L Gates and Nathaniel S. Currall for Defendants and Respondents Travelocity.com, L.P. and Site59.com, LLC.

McDermott Will & Emery and Jeffrey A. Rossman for Defendants and Respondents Orbitz, LLC, Cheaptickets.com, and Lodging.com.

This action is one of the coordinated "Transient Occupancy Tax Cases," in which certain cities have sought to impose liability on online travel companies (OTCs) for transient occupancy tax (TOT).[1] The superior court ruled that under the plain language of appellant City of San Diego's (City) TOT ordinance, the OTCs have no TOT obligations or liability. We affirm.

FACTS

The City's TOT ordinance

The City's TOT ordinance imposes a "tax on Transients." (San Diego Mun. Code, § 35.0101, subd. (a).)[2] The language of the tax imposition ordinance reads:

> "For the privilege of Occupancy in any Hotel located in the City of San Diego, each Transient is subject to and shall pay a tax in the amount of six percent (6%) of the Rent charged by the Operator." (§ 35.0103.)[3]

A transient is defined as a person who "exercises Occupancy, or is entitled to Occupancy, . . . for a period of less than one (1) month." (§ 35.0102.)

"Rent" is defined as:

> "[T]he total consideration charged to a Transient as shown on the guest receipt for the Occupancy of a room, or portion thereof, in a Hotel, or a space in a Recreational Vehicle Park or Campground. 'Rent' includes charges for utility and sewer hookups, equipment, (such as rollaway beds,

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1 Respondent OTCs are Priceline.com Incorporated; Travelweb LLC; Expedia, Inc.; Hotwire, Inc.; Hotels.com, L.P.; Hotels.com GP, LLC; Travelocity.com, LP; Site59.com, LLC; Orbitz, LLC; Trip Network, Inc. (doing business as Cheaptickets.com); and Internetwork Publishing Corp. (doing business as Lodging.com).

2 All further section references are to the San Diego Municipal Code, unless otherwise noted.

3 Four amendments increased the percentage rate of the tax. The first three amendments are captioned "Additional Tax Imposed." Each of these first three amendments provides that "each Transient is subject to and shall pay an additional tax in the amount of one percent (1%) of the Rent charged by the Operator." (§§ 35.0104; 35.0105; 35.0106.) The fourth amendment provides that "each Transient is subject to and shall pay an additional tax in the amount of one and one half percent (1.5%) of the Rent charged by the Operator." (§ 35.0108.)

> cribs and television sets, and similar items), and in-room services (such as movies and other services not subject to California taxes), valued in money, whether received or to be received in money, goods, labor, or otherwise. 'Rent' includes all receipts, cash, credits, property, and services of any kind or nature without any deduction therefrom." (§35.0102.)

"Operator" is defined as "the Person who is the proprietor of the Hotel . . . whether in the capacity of owner, lessee, sublessee, mortgagee in possession, licensee, or any other capacity. 'Operator' includes a managing agent, a resident manager, or a resident agent, of any type or character, other than an employee without management responsibility." (§ 35.0102.)

Under the terms of the ordinance, the operator of the hotel is responsible for collecting the tax. Section 35.0112, subdivision (a) provides that "[e]ach Operator shall collect the tax imposed . . . to the same extent and at the same time as the Rent is collected from every Transient." If the Operator fails to collect the tax for any reason, "the City shall require the Operator to pay the tax." (§ 35.0112, subd. (b).) Thus the hotel operator is responsible not only for collecting the tax, but for paying any tax that it failed to collect.

The ordinance further makes it clear that the tax obligations are only imposed on transients and hotel operators. The TOT "constitutes a debt owed by each Transient to the City which is extinguished only by payment to the Operator or to the City." (§ 35.0110, subd. (a).) There is no provision imposing any tax liability on any entity other than the hotel operator or the transient.

The OTCs

OTCs are companies that publish comparative information about airlines, hotels and rental car companies on their websites. They allow consumers to book reservations with these different travel providers. OTCs are not hotel operators. (See *In re Transient Occupancy Tax Cases* (Nov. 1, 2012, B230457) [nonpub. opn.] at p. 11.)[4]

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[4] Pursuant to California Rules of Court, rule 8.1115, subdivision (b), this court may cite and rely upon an unpublished case when it is relevant as law of the case. The

When facilitating hotel room sales, the OTCs employ several different room-sale models. At issue here is what the parties refer to as the "merchant model" or "merchant transactions." Under the merchant model, the OTCs contract with hotels for the right to advertise and sell (or rent) rooms to the general public. "[T]he OTCs handle all financial transactions related to the hotel reservations, and . . . become the 'merchant of record.'" "In the OTC-hotel relationship, the price charged to the OTCs for the rooms is . . . the 'wholesale' price." The OTCs then offer the rooms to the public at retail prices, which are set by the OTCs and are higher than the wholesale price. The OTC's charge to a customer includes a "Tax Recovery Charge," which represents the OTC's estimate of what the hotel will have to pay in TOT based on the wholesale price of the room as charged by the hotel to the OTC. The customer's payment is made to the OTC, not the hotel.

Once the hotel reservation has been made and paid for, the OTC provides customer service up until the time that the consumer checks into the hotel. The OTC provides a receipt to the transient, which includes a room rate and separately delineated taxes and fees. The hotel then sends out a bill to the OTC for the wholesale price of the room and the TOT required to be paid by the hotel based on the wholesale price of the room. The OTC remits the charged amount to the hotel, and the hotel, in turn, remits the TOT to the City. The OTC retains its fees.

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unpublished opinions that we cite in this opinion are part of the same single coordinated proceeding as this case, captioned "In re Transient Occupancy Tax Cases (No. JCCP 4472)." The coordinated transient occupancy tax cases necessarily share common questions of fact and law. (Code Civ. Proc., § 404.) Under the circumstances, we cite these unpublished opinions as law of the case. (See *Kowis v. Howard* (1992) 3 Cal.4th 888, 892-893 ["The law of the case doctrine states that when, in deciding an appeal, an appellate court 'states in its opinion a principle or rule of law necessary to the decision, that principle or rule becomes the law of the case and must be adhered to throughout its subsequent progress, both in the lower court and upon subsequent appeal.'"]

PROCEDURAL HISTORY

Audit proceedings and administrative hearing

In October 2007, the City began TOT audits of the OTCs and later issued TOT assessments against the OTCs, which each OTC timely appealed. The City selected a hearing officer to conduct a consolidated administrative hearing to determine whether each OTC had TOT obligations and liability, and if so, the amount of unpaid taxes and penalties owed. The hearing was held in early 2010, and in May 2010 the hearing officer issued a decision finding that the OTCs owed TOT on their service charges in merchant transactions.

The hearing officer explained that "with respect to [the] essential function of the TOT administrative process, the OTCs are the Operator, or they share Ordinance obligations with the Operator, or they are the agent for the Operator in providing the receipt which reflects the price of the room, the taxes being charged, and the OTC service fee." The hearing officer concluded the OTCs are responsible under the ordinance for paying TOT on their "service fees."

Writ proceedings

The OTCs challenged the hearing officer's decision through a petition for writ of mandate and cross-complaint. On September 6, 2011, after extensive briefing and oral argument, the superior court granted the OTCs' motion for judgment granting writ of mandate and denied the City's cross-motion.

The superior court held that the tax ordinance at issue imposes a tax on rent "charged by the operator." The court noted that the phrase "charged by the operator" is repeated six times throughout the ordinance. The court concluded that OTCs are not operators or managing agents of the hotels, thus the amount that the OTCs charge for their reservation services are not part of the rent.

On July 10, 2012, the superior court issued a writ of mandate ordering the hearing officer to vacate his ruling in favor of the City, issue a new ruling that the OTCs are not liable for TOT, and set aside the City's assessments.

On August 8, 2012, the City filed its notice of appeal.

DISCUSSION

I. Standard of review

The parties agree that the facts of this case are essentially undisputed. Therefore, we presume that the administrative hearing officer's factual findings are correct. (*Lee v. Board of Civil Service Comrs.* (1990) 221 Cal.App.3d 103, 108.) The interpretation of the TOT ordinance is an issue of law which we review de novo. (*People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432.)

II. Rules governing statutory construction

The canons of statutory construction are well settled. The fundamental rule of statutory construction is that the court should ascertain the intent of the drafters in order to effectuate the purpose of the law. (*Select Base Materials v. Board of Equalization* (1959) 51 Cal.2d 640, 645 (*Select Base*).)

In determining the intent of the enacting body, we first examine the words of the statute itself. (*California Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 698 (*California Teachers*).) If the language of the statute is clear and unambiguous, there is no need for statutory construction. (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.) However, "the 'plain meaning' rule does not prohibit a court from determining whether the literal meaning of a statute comports with its purpose." (*Ibid.*) "If . . . the terms of a statute provide no definitive answer, then courts may resort to extrinsic sources, including the ostensible objects to be achieved and the legislative history. [Citation.]" (*People v. Coronado* (1995) 12 Cal.4th 145, 151.) Every statute should be construed "'with reference to the whole system of law of which it is a part so that all may be harmonized and have effect.' [Citation.]" (*Select Base, supra*, 51 Cal.2d at p. 645.) "'We must select the construction that comports most closely with the apparent intent of the [drafters], with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences.' [Citation.]" (*Coronado, supra*, at p. 151.) The purpose of the statute "will not be sacrificed to a literal construction" of any part of the statute. (*Select Base*, at p. 645.)

In interpreting tax statutes, we must find an express intent to impose a tax. The Supreme Court has declared: "In every case involving 'the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government, and in favor of the citizen.' [Citations.]" (*Pioneer Express Co. v. Riley* (1930) 208 Cal. 677, 687.)

In sum, a taxing authority must be held to the express terms of a tax statute. (*Agnew v. St. Bd. of Equalization* (1999) 21 Cal.4th 310, 327.)

III. The City's TOT ordinance

Our first task is to examine the words of the ordinance. (*California Teachers, supra*, 28 Cal.3d at p. 698.) The ordinance provides: "For the privilege of Occupancy in any Hotel located in the City of San Diego, each Transient is subject to and shall pay a tax in the amount of six percent (6%) of the Rent charged by the Operator." (§ 35.0103.)[5] As set forth below, we find that the words of the ordinance do not reveal an intent to impose a tax on the service fees and markups charged by the OTCs.

A. The ordinance does not impose tax on OTCs

As the City acknowledges, this court has addressed the question of whether OTCs are liable for TOT under the TOT ordinances of two other cities, Anaheim and Santa Monica. (See *In re Transient Occupancy Tax Cases* (Nov. 1, 2012, B230457) [nonpub. opn.] (*Anaheim*) and *In re Transient Occupancy Tax Cases* (Nov. 1, 2012, B236166) [nonpub. opn.] (*Santa Monica*).) In both of those cases, we determined that the ordinances at issue did not impose a tax on the service fees charged by the OTCs. In the case of Santa Monica, we concluded that the relevant TOT ordinance specifically limited

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5 As noted above, four amendments have raised the tax, but each amendment reiterates that the tax base is the "Rent charged by the Operator." (§§ 35.0104; 35.0105; 35.0106; 35.0108.)

the tax base to amounts paid by the transient to the hotel for room rental. (*Santa Monica, supra*, at p. 12.)[6]

The Anaheim ordinance imposes TOT on the "rent." In the *Anaheim* opinion, we concluded that the term "rent," as defined in the ordinance, only includes consideration charged by an operator.[7] Because the OTCs are not hotel operators, or managing agents of the hotels for which they facilitate room sales, we held that the amount that the OTCs charge is not subject to Anaheim's tax. (*Anaheim, supra*, at pp. 9-17.)

Like the Anaheim ordinance, the City's TOT ordinance specifies that the tax is imposed on the rent charged by the hotel operator.[8] The ordinance further makes it clear that the tax obligations are only imposed on transients and hotel operators. (§ 35.0110.) There is no provision imposing any tax liability on any entity other than the hotel operator or the transient.

Also, using language similar to that found in the Anaheim ordinance, the City's ordinance defines the term "Operator" as "the Person who is the proprietor of the Hotel,"

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6 The Santa Monica ordinance imposes "on each and every transient a tax equivalent to fourteen percent (14%) of the total amount paid for room rental by or for any such transient to any hotel." (Santa Monica Mun. Code, § 6.68.020.)

7 The Anaheim ordinance provides: "For the privilege of occupancy of space in any hotel, each transient is subject to and shall pay a tax in the amount of fifteen percent of the rent." (Anaheim Mun. Code, § 2.12.010.010.) "Rent" is defined as "the consideration charged by an operator for accommodations . . . ." (Anaheim Mun. Code, § 2.12.005.080.)

8 This limitation is made clear in both ordinances, although in different locations. As explained above, the Anaheim ordinance sets forth this limitation in the definition of "rent." (Anaheim Mun. Code, § 2.12.005.080 ["rent" is "the consideration *charged by an operator* for accommodations . . . ." (italics added)].) In the statute at issue here, this limitation is not set forth in the definition of "rent" but is made clear in the provision imposing the tax, which confines the tax to "Rent *charged by the Operator*." (§ 35.0103, italics added.)

or "a managing agent, a resident manager, or a resident agent, of any type or character, other than an employee without management responsibility." (§ 35.0102.)[9]

In the *Anaheim* case, we held that under the plain meaning of Anaheim's ordinance, the OTCs cannot be considered to be operators of the hotels for which they provide room reservations. (*Anaheim, supra*, at. p. 10.) We further held that OTCs do not assume the role of hotel operator, nor are they managing agents for any hotel. (*Id.* at pp. 11-17.) Thus, we concluded that the amounts charged by the OTCs for their services are not subject to TOT.

The same logic applies here. Because the City's ordinance imposes tax only on rent charged by an operator, it does not reach amounts charged by the OTC for its services. We may not enlarge the scope of the tax to embrace matters not included in the specific language of the statute. (*Pioneer Express Co. v. Riley, supra*, 208 Cal. at p. 687.) We therefore hold, as we did with the similar Anaheim ordinance, that the OTCs' services charges and markups are not within the scope of the City's ordinance.

B. The reference to a "guest receipt" must be harmonized with the rest of the statutory scheme

The City argues that its ordinance is materially different from the Anaheim ordinance. Unlike Anaheim's ordinance, the City argues, its "Rent" definition is tied to a specific document: the guest receipt. Specifically, the definition of "Rent" is "the total consideration charged to a Transient as shown on the guest receipt for the Occupancy of a room." (§35.0102.) Thus, the City argues, the ordinance objectively states the measure of tax as the total amount shown on the guest receipt. The City points out that the guest receipt, provided to the transient by the OTC, includes the OTC's markup as part of the total charged to the transient. The City argues that, under this definition, the rent may not be limited to the wholesale rate charged by the hotel in merchant transactions.

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[9] The Anaheim ordinance defines "Operator" as "any person, corporation, entity or partnership which is the proprietor of the hotel . . . ." (Anaheim Mun. Code, § 2.12.005.050.) The Anaheim law also provides that a managing agent is considered a proprietor. (*Ibid.*)

We disagree. First, while this definition references the amount shown on the guest receipt, it also contains language limiting the taxable rent to the amount charged *for the occupancy of a room.* The statute contemplates that not all items charged on the guest receipt will constitute "rent." Instead, it sets forth a specific list of items which *are* included in the definition of rent: "'Rent' includes charges for utility and sewer hookups, equipment, (such as rollaway beds, cribs and television sets, and similar items), and *in-room* services (such as movies and other services not subject to California taxes), valued in money, whether received or to be received in money, goods, labor, or otherwise." (§ 35.0102, italics added.) This list of charges included in the definition of rent cannot be interpreted to include service fees charged by OTCs.

In addition, the definition of rent cannot be read in isolation. (*Select Base, supra,* 51 Cal.2d at p. 645.) Read alone, the definition has no effect. The provisions that actually impose the tax use the term "rent" to describe the tax base. Those provisions specifically limit the tax base to "Rent charged by the Operator." (§§ 35.0103; 35.0104; 35.0105; 35.0106; 35.0108.) Thus, even if the term "rent" could be read expansively to include items not specifically listed in the definition, those items are not taxable unless they are charged by the hotel operator. The OTC service fees are not charged by the hotel operator, therefore they are not taxable.[10]

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[10] The City insists that in merchant transactions, the hotel charges *nothing* to the transient (other than incidentals.) Therefore, the City reasons, the consideration charged by the operator must be, and can only be, the entire amount the OTCs charge to the transients. This argument is absurd. The hotels are not giving away rooms for free. They are *charging* transients to occupy their hotel rooms. Counsel for the City stressed on this point considerably during oral argument, insisting repeatedly that the hotel operators are charging *nothing* during the transactions at issue. This position is disingenuous. The hotels are in the business of making money by charging transients for occupancy of their rooms. The price set by the OTCs includes the amount paid to the hotel for occupancy of its rooms, plus a markup for the OTCs' services.

Were we to accept the City's position it would lead to an absurd result. The TOT provision at issue does not permit taxation of amounts charged by any entity other than the hotel operator. Thus, following the City's logic, if the hotel operator is charging *nothing* to the transient, the merchant model transaction would not be taxable at all. If the merchant model at issue is not taxable at all, it is the City that might be liable to the

The City argues that this interpretation renders the "guest receipt" language in the definition of "Rent" to be surplusage. Again we disagree. The ordinance implies that the room rate charged by the hotel should be separately stated on the guest's receipt. However, it does not impose any consequences where, as here, the consideration charged for occupancy of a room is not separately stated on any receipt. Regardless, as the City admits, this lawsuit does not involve receipt violations by either the hotels or the OTCs.[11]

In sum, we find that the "guest receipt" language contained within the definition of "Rent" does not serve to expand the ordinance to reach amounts charged by OTCs in merchant transactions.

C. The third sentence in the definition of "Rent" does not change the tax base

The City places much emphasis on the third sentence of the definition of "Rent" in arguing that TOT must be paid on the OTCs' service fees. Because we must evaluate the third sentence in context with the rest of the definition, it is helpful to examine the entire three-sentence definition:

> "'Rent' means the total consideration charged to a Transient as shown on the guest receipt for the Occupancy of a room, or portion thereof, in a Hotel, or a space in a Recreational Vehicle Park or Campground. 'Rent' includes charges for utility and sewer hookups, equipment, (such as rollaway beds, cribs and television sets, and similar items), and in-room services (such as movies and other services not subject to California taxes), valued in money, whether received or to be received in money, goods, labor, or otherwise. 'Rent' includes all receipts, cash, credits, property, and

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hotels for years of collecting taxes on these non-taxable transactions. The City is better served by admitting the reality that the wholesale room rate -- which the hotel ultimately receives from the OTC pursuant to the contractual agreement between those entities -- is in fact *charged by the hotel.* The OTC service fees are not.

11 A different result is not compelled by the City's protests that the transient never knows the amount of tax he or she is paying. We addressed this issue in the *Santa Monica* opinion, and our analysis on this point remains the same. (*Santa Monica, supra,* at p. 11, fn. 3.) The OTC provides a receipt which sets forth an amount that the transient is paying for "taxes and fees." This conveys to the transient that the taxes will be taken care of. While the transient may not be aware of the precise amount of tax, the City is not harmed by this because it has received TOT on the amount of rent charged by the operator. The City is not entitled to anything more.

services of any kind or nature without any deduction therefrom." (§ 35.0102.)

The City describes the third sentence of the definition of "Rent" as a "catch-all" list of broadly described categories included in the taxable rent which, in their interpretation, "may not be peeled off through separate charges." The City argues that this third sentence furthers the City's purpose of capturing the total consideration paid by the transient for occupancy.

Both the trial court and the OTCs interpret this third sentence of the definition differently from the City. The trial court considered the last two sentences together and concluded:

> "The ordinance specifically delineates the types of services that are taxed and none of those fees paid to a third party for reservation services are included. As far as the last sentence is concerned, which sentence is '"Rent" includes all receipts, cash, credits, property . . . .' that refers to whatever consideration the transient might be giving in lieu of money for occupancy."

The OTCs argue that the trial court's interpretation of this language in the ordinance is correct. The OTCs point out that the third sentence does not mention "charges" by an operator to be included in rent. Rather, the third sentence sets forth a list of forms of payment that an operator might receive, and provides that all such forms of payment are included as rent.

The trial court used an example of a transient who has bartered services in exchange for occupancy. The trial court reasoned that the third sentence of this provision indicates that the transient would still be taxed on the value of those services, regardless of the method of payment.

The City agrees that in the case of the trial court's example of a transient who barters for services, the TOT would be owed on the value of the room, regardless of whether the transient paid with cash or services. However, the City also reads a different meaning into the last sentence of the definition of rent. The City claims that the trial

court erroneously limited this sentence of the ordinance to the consideration a transient might be *giving* in lieu of money. The City insists that this sentence should be read to apply equally to consideration that the transient might be *receiving* from the hotel operator. The City insists that the point is, whether the transient is giving non-monetary consideration or receiving non-monetary consideration, the City is entitled to collect 10.5 percent from the transient for the value of the room.

The City asks us to assume the following example: the hotel manager offers the honeymoon suite as a wedding present to his best friend who is getting married. In this example, the City argues, the transient would still owe TOT on the value of the room, notwithstanding that no money exchanged hands.

The City's interpretation of the sentence at issue is flawed for several reasons. First, an interpretation of the third sentence to include any and all consideration received by the transient renders the second sentence of the definition totally unnecessary. It makes no sense for the drafters to delineate specific items that are to be included in the taxable base, and then obliterate the significance of that sentence by saying that any "services of any kind or nature" must be taxed.

In addition, the second sentence of the definition specifically uses the term "charges." Thus, it is apparent that sentence is specifically directed toward describing the charges *to* the transient that must be included as the taxable rent. As the trial court pointed out, a fee charged by a third party for reservation services is not included in that sentence. The third sentence, in contrast, does not include the word "charges." Thus it cannot be interpreted to read "Rent includes all . . . *charges for* any services of any kind." If the drafters had intended "rent" to include charges for any and all services paid for by the transient, it would have included language specifying such an intent.

Furthermore, as the OTCs point out, the City's suggestion that the transient owes tax on anything and everything it receives in connection with occupancy is contrary to the express terms of the ordinance. For example, the ordinance specifies that if "the room rental charge in a Hotel is twenty-five dollars ($25.00) a day or less" no tax shall be due.

(§ 35.0111, subd. (a)(2).) Thus, in the wedding gift example, under the City's ordinance no TOT would be due because the transient occupied the room free of charge.

For the reasons set forth above, we reject the City's interpretation of the third sentence of the definition of "Rent," and conclude it cannot be interpreted to include as part of the tax base any and all service charges imposed upon the transient. However, even if the definition of "Rent" could be read to include such charges, as explained above, the definition of rent cannot be read in isolation. The provisions that actually impose the tax specifically limit the tax base to "Rent charged by the Operator." (§§ 35.0103; 35.0104; 35.0105; 35.0106; 35.0108.) The OTC service charges are *not* "charged by the Operator." They are charged by the OTC. Therefore, those charges are not taxed, regardless of how the term "Rent" is defined.

D. The ordinance imposes tax on rent charged by the operator, without regard to the timing of payment

The City argues that the ordinance only taxes the transient's room purchase transaction, which is payment of rent and TOT. In the merchant transactions at issue, the City argues, the only entities that charge rent are OTCs. Only in the post-occupancy transaction between the OTC and the hotel does the hotel receive the rent. The City takes the position that an interpretation of the ordinance imposing tax on only the lesser amount received by the hotel taxes the wrong transaction. The City asserts that nowhere does the ordinance provide that dealings between operators and third persons after the transaction may alter the tax base on the transient's receipt. In other words, the City argues, post-occupancy allocation of money between OTC and hotel cannot alter taxable transaction and tax base. The City insists that the process by which the hotel receives the net rate is not a taxable transaction.

The City's argument improperly emphasizes the timing of the payment to the hotel operator. Nothing in the ordinance suggests that the operator's collection of the rent it charges must be completed in one transaction. In merchant transactions, it is the hotel that sets the price for the transient's occupancy of a room. The OTC collects the rent on

the hotel's behalf.[12] Again, there is no prohibition of this in the ordinance. Regardless of the timing or means of the hotel's collection of the rent charged for the occupancy of a room, it is this amount that sets the tax base. (§ 35.0103 [TOT be collected on "the Rent charged by the Operator"].) Additional fees charged only by the OTCs for their services cannot be included in this taxable base.

The City protests that the OTCs' "commissions" are not separate, nontaxable charges. Instead, the City argues, these service charges are part of the taxable total paid by the transient for occupancy. Again, the City's argument is defeated by the plain language of the ordinance. TOT may only be collected on the rent charged by the operator. In the merchant transactions at issue, no mark-up or service fee imposed by the OTC is ever charged by the hotel operator.

In addition, the City argues, as did Anaheim, that the merchant model at issue results in significantly different tax results when compared with other "identical" transactions. In *Anaheim*, we set forth the five different models that hotels use for renting their hotel rooms. We described the models as follows (using Anaheim's 15 percent tax rate):

1. The hotel direct transaction model: this is the traditional model in which the transient deals directly with the hotel. If the retail room rate were $100, then the transient would pay the hotel $100 plus an additional $15 in TOT. The transient has paid $115, the hotel keeps $100, and the City receives $15.

2. The traditional travel agency model: in a traditional travel agency model, the transient reserves a room through a traditional travel agent. The transient pays $100 for the hotel room plus $15 for TOT, directly to the hotel. The hotel then pays the travel agent a back-end commission of $20. The transient has paid $115, the hotel keeps $80, the travel agent receives a $20 commission, and the City receives $15.

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12 Each hotel establishes and maintains complete control of its room rates and availability. As the City admits, the hotel operators contractually allow the OTCs to collect the rent that the hotels charge for occupancy.

3. The OTC agency model: here, the OTC acts as a travel agent. This model works exactly like a traditional travel agency model, with the transient paying $115 directly to the hotel, the hotel keeping $80 and paying the OTC a $20 commission. Again, the City receives $15.

4. OTC modified merchant model: the OTC modified merchant model is a model used by two major hotel chains. The transient contracts with the OTC and the OTC -- not the hotel -- serves as the merchant of record. The transient pays the OTC $115, which the OTC remits in full to the hotel. However, as with the traditional travel agency model, the hotel keeps $80, the OTC receives a $20 back-end commission, and the City gets $15.

5. The fifth model is the OTC merchant model, at issue in this lawsuit. Here, the OTC is the merchant of record. It collects the transient's entire $115 payment at the time the transient's credit card is charged. It then remits $80 to the hotel, plus TOT of $12. The OTC keeps the remainder of the money paid by the transient.

Based on these examples, Anaheim argued, as the City does here, that the OTC merchant model results in significantly different tax results for the same retail transaction. (*Anaheim, supra*, at p. 18.)[13]

In the *Anaheim* opinion, this court concluded that because Anaheim's TOT is based on the amount of money charged and received by a hotel operator, it makes sense that the tax is lower on a transaction where the hotel charges and receives less rent.

The City suggests that a different outcome is appropriate here because the San Diego ordinance defines "Rent" as the amount *charged to a transient* -- rather than the amount "charged by an operator," as that term is defined in the Anaheim ordinance. (See § 35.0102; Anaheim Mun. Code, § 2.12.005.080.) In each OTC business model, the

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13 The OTC merchant model does look like the same retail transaction from the transient's perspective. The transient pays the full $115 and is informed that taxes and fees account for a portion of that $115. However, the contractual agreements between the hotels and the OTCs are different for merchant model transactions. In merchant model transactions, the hotel operators have agreed to accept $80 as the rent. While the transient may have an incomplete understanding of the tax base, the City is not injured by any such obfuscation. As with all of the models, the City still receives TOT based on the rent charged by the hotel operator.

City explains, the amount charged to the transient is the same: $100. Thus, the City reasons, the tax outcome should be the same.

Again, the City ignores the language of the tax imposition provision, which expressly limits the tax to the amount of rent charged by the operator. In the merchant model transactions at issue, the amount charged by the operator is the lower, wholesale price of the room. It is the same amount that the hotel receives back from the OTC after the transaction with the transient is complete. The portion of the retail price which the OTC retains is not charged by the operator, and is not subject to tax.

The City also maintains that the OTCs are liable as agents of the hotel operators. The City explains that the OTCs act on the hotels' behalf, under contractual grants of authority from the hotels. The City insists that the OTCs are liable for TOT regardless of whether they are labeled as agents, sales agents, independent sales agents, representatives, or designees. We find that we need not address the OTCs' potential liability for TOT under the various labels listed by the City. Even if the OTCs were liable for TOT under any of these labels, they would only be liable for TOT on the rent charged by the operator -- *not* on the fees that the OTCs themselves charge.

In sum, none of the City's arguments regarding the timing and means of collection can change the plain meaning of the statute. The OTCs' markups and service fees cannot be considered "Rent charged by the Operator." (§ 35.0103.) Therefore these fees are not within the scope of the ordinance.

E. This interpretation effectuates the law's purpose

The City places much emphasis on the ordinance's stated intent: to impose a tax on transients. (§ 35.0101, subd. (a).) The City's position is that imposing the tax on the OTC, and its post-sale transaction with the hotel, undermines this stated purpose.

We disagree. First, as explained above, the TOT imposed in merchant transactions is calculated based on the rent charged by the operator. Whether that rent is charged directly by the hotel or indirectly through a third party -- the OTC -- its numeric value does not change. The TOT is calculated based on the rent charged by the operator, regardless of whether the hotel-transient transaction is direct or indirect.

In addition, the plain language interpretation set forth above fully comports with the stated intent of the ordinance. In order to determine intent, we first evaluate the words of the statute. (*California Teachers, supra*, 28 Cal.3d at p. 698.) This includes a review of the entire system of law so that all provisions of the law may be harmonized and have effect. (*Select Base, supra*, 51 Cal.2d at p. 645.) Our interpretation does this. We understand the statute's intent to impose a tax on transients; however, we also understand from the statute's plain language that the tax is limited. It may only be imposed upon the amount of rent charged by the hotel operator to the transient. The ordinance does not tax service charges imposed by an OTC.

In construing tax ordinances, we must find an express intent to impose a tax. (*Pioneer Express Co. v. Riley, supra*, 208 Cal. at p. 687.) The City's TOT ordinance provides no authority for the imposition of tax obligations or liability on any party other than a hotel or a transient. The City concedes that OTCs are not transients, and that OTCs are not hotel operators.[14] Under the circumstances, there is simply no basis for the imposition of TOT liability on the OTC.

IV. The City's non-ordinance based claims

The City asserted various tag-along claims in its third amended complaint, filed in the transient occupancy tax cases consolidated proceeding on April 28, 2011. The complaint included claims for injunctive relief, conversion, violations of Civil Code

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[14] While the City concedes, as it must, that OTCs are not hotel operators, the City attempts to argue that hotel operators may delegate their obligations to charge, collect, and remit TOT. The City cites one case in support of this proposition: *Los Angeles Gas & Electric Corp. v. City of Los Angeles* (1912) 163 Cal. 621 (*LA G&E*). We find that the case does not support the City's position that a hotel may delegate to the OTCs its responsibilities under the TOT ordinance. *LA G&E* involved an ordinance that expressly stated that a city clerk could perform a certain tax calculation based on the prior quarter's income. (*Id.* at p. 625.) The Supreme Court determined that the clerk was able to perform this task because it was purely ministerial. However, the high court explicitly restricted the scope of its ruling to public powers and trusts, and found that only tasks that are purely mechanical or ministerial may be delegated. (*Id.* at p. 626.) The case does not support a ruling that hotels may delegate to OTCs all of their responsibilities under the TOT ordinance, nor does it suggest that the OTCs may be audited or held liable for nonpayment of any TOT under the circumstances before us.

sections 2223 and 2224, imposition of constructive trust, breach of fiduciary duty, fraudulent concealment, money had and received, unjust enrichment, declaratory judgment, liability as agents under Civil Code sections 2343 and 2344, liability as subagents under Civil Code sections 2349 and 2351 for breach of fiduciary duty, and violation of Business and Professions Code section 17200.

Based on the trial court's findings and decision on the OTCs' writ petition, and the ruling on the OTCs' demurrer in the related *Anaheim* action, the parties agreed it was likely that the trial court would sustain, without leave to amend, a demurrer brought by the OTCs on the City's non-ordinance based claims. For reasons of judicial economy and to facilitate an appeal, the parties stipulated and agreed that a consent judgment as to the City's third amended complaint was appropriate. Therefore, as part of the judgment granting the OTCs' writ petition, the court entered a stipulated consent judgment against the City on all causes of action in its complaint.

The City admits that all of its non-ordinance based claims are based on the premise that the OTCs' service fees are part of the taxable rent in merchant transactions. Because we have determined that the OTCs' fees are not taxable rent, these non-ordinance based claims must also fail.

DISPOSITION

The judgment is affirmed. Respondents are awarded their costs on appeal.

CERTIFIED FOR PUBLICATION

_____, J.
CHAVEZ

We concur:

_____, P. J.
BOREN

_____, J.
ASHMANN-GERST

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On May 6, 2014, I served the foregoing document described as: **PETITION FOR REVIEW** on the parties in this action by serving:

SEE ATTACHED SERVICE LIST

(X) By Envelope by placing a true copy thereof enclosed in sealed envelopes addressed as above and delivering such envelopes:

(X) By Mail: As follows: I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with United States Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

Executed on May 6, 2014, at Los Angeles, California.

(X) (State) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Charice L. Lawrie

Charice L. Lawrie

2d Civ. No. B243800
In Re Coordinated Proceeding Special Title (Rule 3.550(c))
TRANSIENT OCCUPANCY TAX CASES

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Judge Elihu M. Berle, Dept. 323 Los Angeles Superior Court Central Civil West 600 S. Commonwealth Avenue Los Angeles, CA 90005	Court of Appeal Second Appellate District, Division Two Ronald Reagan State Building 300 S. Spring Street 2nd Floor, North Tower Los Angeles, CA 90013 **[(Served electronically pursuant to Second Appellate District electronic brief filing program. See Cal. Rules of Court, rule 8.212(c)(2).)**