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**PUBLIC – REDACTS MATERIAL FROM SEALED RECORD**

November 21, 2014

**VIA FEDERAL EXPRESS**

Honorable Tani Cantil-Sakauye, Chief Justice  
Honorable Associate Justices  
Supreme Court of the State of California  
350 McAllister Street  
San Francisco, CA 94102-4797

SUPREME COURT  
**FILED**

NOV 24 2014

Frank A. McGuire Clerk  

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Deputy

Re: *In re Transient Occupancy Tax Cases*  
California Supreme Court Case No. S218400  
Second District Court of Appeal Case No. B243800

Dear Chief Justice Cantil-Sakauye and Associate Justices of the Supreme Court:

The City of San Diego respectfully submits this letter in response to the Court's November 6, 2014 order requesting briefing on whether it should unseal the portions of the administrative record that do not reveal the identities of customers doing business with online travel companies ("OTCs"). The City urges that such an order should issue and that the parties should be allowed to file unredacted merits briefs as part of the public record.<sup>1</sup> The City's opposition to sealing is based on the following:

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<sup>1</sup> The City's application to file an unredacted version of its Opening Brief under seal does not reflect the City's position on the merits of sealing. Instead, the City's application was compelled by California Rules of Court, rule 8.46(f), a rule prohibiting parties from disclosing the contents of previously-sealed materials in this Court. (Cal. Rules of Court, rules 8.46(f)(1), 8.46(f)(2)(A) & 8.46(f)(2)(B).) The materials at issue here were ordered to be filed under seal by the trial court.

COPY

**1. Strong Public Policy Considerations, As Well As The First Amendment, Compel That Court Records And Proceedings Be Open And Accessible.**

Public policy strongly favors open courts and open records. This policy compels that except in extraordinary circumstances, the public be given full access to all proceedings and records pending in its court system. As this Court has said: “[T]he public has an interest, in all civil cases, in observing and assessing the performance of its public judicial system, and that interest strongly supports a general right of access” to court records “in ordinary civil cases.” (*NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178, 1210; see also *In re Marriage of Burkle* (2006) 135 Cal.App.4th 1045, 1054-1059 [financial privacy interests do not automatically trump the First Amendment right of access to courts, and there is a “settled principle that substantive courtroom proceedings in ordinary civil cases are presumptively open”].)

As multiple courts have uniformly held, “[t]he law favors maximum public access to judicial proceedings and court records. Judicial records are historically and presumptively open to the public and there is an important right of access which should not be closed except for compelling countervailing reasons.” (*Champion v. Superior Court* (1988) 201 Cal.App.3d 777, 788; *Pantos v. City and County of San Francisco* (1984) 151 Cal.App.3d 258, 262-263 [same]; see also *Wilson v. Science Applications Internat. Corp.* (1997) 52 Cal.App.4th 1025, 1030 [“The substantive aspects of the law guaranteeing public access to court records are fairly well established. ‘To prevent secrecy in public affairs, public policy makes public records and documents available for public inspection by newsmen and members of the general public alike’”; “If public court business is conducted in private, it becomes impossible to expose corruption, incompetence, inefficiency, prejudice, and favoritism. For this reason traditional Anglo-

American jurisprudence distrusts secrecy in judicial proceedings and favors a policy of maximum public access to proceedings and records of judicial tribunals,” internal citation omitted]; *Estate of Hearst* (1977) 67 Cal.App.3d 777, 785 [a trial court possesses “limited power, exercisable under exceptional circumstances and on a showing of good cause, to restrict public access to portions of court records on a temporary basis”].)

In addition to the common law right of access to court records, “[n]umerous reviewing courts likewise have found a First Amendment right of access to civil litigation documents filed in court as a basis for adjudication.” (*Overstock.com, Inc. v. Goldman Sachs Group, Inc.* (Nov. 13, 2014, A133487) \_\_\_ Cal.App.4th \_\_\_ [2014 WL 6092152, p. \*5]; see also *In re Marriage of Nicholas* (2010) 186 Cal.App.4th 1566, 1575 [sealing orders implicate public’s right of access under the First Amendment]; *Savaglio v. Wal-Mart Stores, Inc.* (2007) 149 Cal.App.4th 588, 596-597 [public has First Amendment right to access civil litigation documents filed in court and used at trial or submitted as basis for adjudication].)

Under this right, “a court must not permit a record to be filed under seal based solely on the agreement or stipulation of the parties.” (*Mercury Interactive Corp. v. Klein* (2007) 158 Cal.App.4th 60, 105–108, internal quotation marks omitted [concluding discovery material was not protected by constitutional right of access and remanding for determination of whether documents should remain confidential under protective order].) Rather, “the California courts of appeal have regularly employed a constitutional analysis in resolving disputes over public access to court documents.” (*Overstock.com, supra*, \_\_\_ Cal.App.4th \_\_\_ [2014 WL 6092152, at p. \*6].) Thus, “[s]ubstantive courtroom proceedings in ordinary civil cases, and the transcripts and records pertaining to these proceedings, are ‘presumptively open,’” and in order for records to be sealed, there must be a showing that “(1) there is an overriding interest supporting sealing of the records; (2)

there is a substantial probability that absent sealing, such interest will be prejudiced; (3) the sealing order is narrowly tailored to serve the overriding interest; and (4) a less restrictive means of meeting that interest is not available.” (*Savaglio v. Wal-Mart Stores, Inc.*, *supra*, 149 Cal.App.4th at pp. 596-597.)

**2. The Strong Public Policy Favoring Open Court Records And Proceedings Is Compelling Here Because This Case Involves The Public Interest And Broadly Impacts All California Municipalities, Counties And Their Residents.**

The public interest in favor of allowing broad public access to court proceedings and records is particularly compelling here. This case involves matters of great public interest impacting every California county, city and resident. The outcome will directly affect the amount of tax revenue each public entity has to fund and afford its residents with vital public services, including police, fire, paramedic, street maintenance, library, park, and homeless services, to name just a few. Non-payment of room taxes frustrates the ability of public entities to provide and their residents to receive these essential services. Accordingly, all public entities and their residents ought to be able to access the court records so that they can meaningfully assess whether the room tax laws are being properly administered and enforced.

Without full access to the underlying record, the public cannot make informed judgments about this matter. Nor can other municipalities with potential claims against the exact same OTCs adequately evaluate their own claims. And, if the record—and important portions of the merits briefs—are sealed, how do potential amici, who may be directly impacted by the decision, meaningfully participate when potentially decisive facts are hidden from their view?

Without access to the unredacted briefs addressing the issues, the municipalities, the taxpayers and all other potential stakeholders cannot fully comprehend the arguments that this Court is being asked to resolve. Continued sealing would force all interested parties to speculate as to whether they are impacted and then to guess as to how to respond, if at all. The important assistance that amicus briefs can offer in resolving the case will be unnecessarily restricted.

The public has a right to access the record that will form the basis on which this Court decides this case.

3. [REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]<sup>2</sup>

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<sup>2</sup> [REDACTED]  
[REDACTED]

(See Findings of Fact and Conclusions of Law, *City of San Antonio v. Hotels.com* (W.D.Tex. July 1, 2011, Civ. No. SA-06-CA-381-OG) 2011 WL 10970566, p. \*6 [REDACTED] “pervasive(ly)” use the merchant model, “a uniform, nationwide model that operates the same for all OTC(s) in all jurisdictions”]; Memorandum of Opinion on Class Certification, *City of San Antonio v. Hotels.com* (W.D.Tex. May 27, 2008, Civ. No. SA-06-CA-381-OG) 2008 WL 2486043, p. \*6 & fn. 9 [City’s claims “arise from the same uniform business practice of selling rooms to hotel occupants as the merchant of record, but failing to pay taxes on the amount paid by the

• “In most of its contracts with hotels . . . there is ‘rate parity’ language which prohibits Expedia from charging a room rate that is less than the rate the hotel would charge the consumer directly for occupancy of the room.” (*Expedia, Inc. v. City of Columbus* (2009) 285 Ga. 684, 684, fn. 1 [681 S.E.2d 122, 124, fn.1]; see also Memorandum of Opinion on Class Certification, *City of San Antonio v. Hotels.com* (W.D.Tex. May 27, 2008, Civ. No. SA-06-CA-381-OG) 2008 WL 2486043 p. \*10, fn. 20 [REDACTED] “less than the rate(s) being offered by the hotel”]; *ibid.* [“The same consistency (REDACTED) (REDACTED) is seen with room rates. Almost without exception, the net rate and sell rate for a given room on a given day are the same among the OTC’s because the (OTCs’) agreements with the hotels all contain ‘parity’ or ‘Most Favored Nation’ clauses” [REDACTED] [REDACTED] “the same”]; Findings of Fact and Conclusions of Law, *City of San Antonio v. Hotels.com* (W.D.Tex. July 1, 2011, Civ. No. SA-06-CA-381-OG) 2011 WL 10970566, p. \*7 [“Although the hotels and OTC’s claim that their

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occupant,” citing “deposition testimony of corporate representatives, *describing their nationwide merchant model business in remarkably similar fashion*,” emphasis added]; *id.* at p. \*10 & fn. 17 [“it is clear that (the OTCs) not only engage in a common course of conduct, but that many of their business practices are virtually identical”; “These practices include but are not limited to the manner in which they contract with the hotels”]; *id.* at p. \*10 [“The deposition testimony of the corporate representatives, standing alone, reflects an amazing similarity in practice, procedure and corporate methodology among all of the OTC’s. Moreover, the business practices that are relevant to the issues in this lawsuit have remained essentially unchanged over the years, even though their description of same may have changed”]; *ibid.* [“while every hotel contract may not contain the same terms, the material aspects of the agreements and the practical implications thereof are the same or substantially similar”]; *ibid.* [“As Defendants’ corporate representatives have confirmed, the *amount* of tax may differ between the cities, but the manner in which the Defendants otherwise conduct business (including the manner in which they calculate, assess and collect tax) does not change from city to city, nor has it changed in any material way over time”].)

negotiated rate is confidential, the contracts between them (with rare exception) contain parity and ‘most favored nation’ clauses and the various OTCs have the same wholesale or ‘net’ rate with the hotels and/or hotel chains”].)

- “[T]he OTC[s] are responsible for assessing and collecting the occupancy taxes just as the hotel would be responsible if the occupant was booking a reservation directly through the hotel. [¶] The OTCs have clearly and unequivocally assumed this duty in their contracts with the hotels.” (*Id.* at p. \*10.)

- [REDACTED]  
[REDACTED]  
[REDACTED]  
(Summary Judgment Order, *City of Columbus v. Expedia, Inc.* (Ga. Super. Ct. Muscogee County, Sept. 22, 2008, Civ. Action No. SU-06-CV-1794-7, pp. 6-7, record citation omitted [“Some of the contracts between Defendant Expedia and the hotels” have “set out the conflicting views of Defendant Expedia and the hotels concerning the amount on which applicable hotel occupancy or excise taxes should be based. Plaintiff Columbus’ position is similar to that expressed by some of the hotels”]; [REDACTED]

“(‘)Web Service Provider acknowledges that [Hotel] and Participating Hotels believe that Occupancy Tax may be due and payable on the Gross margin portion of the Gross Rate in some or all jurisdictions, and [Hotel] and each Participating Hotel acknowledges that Web Service Provider believes that Occupancy Taxes will not be due or payable on the Gross Margin portion of the Gross Rate in some or all jurisdictions(‘)”).)

- [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] (Memorandum of Opinion on Class Certification, *City*

of *San Antonio v. Hotels.com* (W.D.Tex. May 27, 2008, Civ. No. SA-06-CA-381-OG) 2008 WL 2486043, p. \*10 [“With many of the contracts, (██████████) have simply added indemnification language to protect the hotels from liability for bed taxes on the OTC’s margin”]; Summary Judgment Order and Opinion, *City of Chicago v. Hotels.com, et al.* (Ill. Cir. Ct. Cook County, June 21, 2013, Case No. 2005 L 051003), p. 4, fn. 3 [██████████ ██████████ “[I]n no event shall Hyatt ... be liable for Travelocity’s failure to collect, remit and/or pay taxes ... applicable to the sales of Rooms her(e)under”].)

- “The consumer almost always pays more for hotel occupancy when transacting business with the OTC[s] as opposed to the hotels directly as a result of the mark up and fees charged by the OTC.” (Findings of Fact and Conclusions of Law, *City of San Antonio v. Hotels.com* (W.D.Tex. July 1, 2011, Civ. No. SA-06-CA-381-OG) 2011 WL 10970566, p. \*12.)

\* \* \* \* \*

Strong public policy supports transparency in court proceedings and records to assure the public has access to those proceedings and records. This is especially true here, where all California cities and counties and their residents have a keen interest in making sure that those involved in renting hotel rooms collect and remit all room taxes that are due and needed to fund important public services. Not only does the public have a strong interest in knowing the facts underlying the proceedings in its courts, it has an equally compelling interest in knowing the basis upon which courts decide pending cases.

This case involves matters of widespread and fundamental public interest, an interest that involves the means by which essential public services are funded, and the extent to which taxes are administered and enforced. Public policy demands that the administrative record in this case and the briefs that form the issues to be decided be ordered unsealed, except to the limited extent that continued sealing is required to protect



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the identities of individual customers. The public should have full access to the administrative and court records, as well as the briefs that will form the basis on which this Court decides the case.

Respectfully submitted,

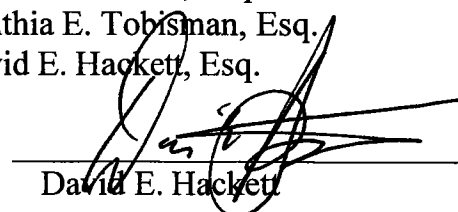
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**PROOF OF SERVICE**

**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 November 21, 2014, I served the foregoing document described as: **PUBLIC VERSION OF PETITIONER'S LETTER BRIEF** on the parties in this action by serving:

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Executed on November 21, 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

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

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