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PUBLIC – REDACTS MATERIAL FROM SEALED RECORD

December 8, 2014

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

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 online travel companies (OTCs) bear a heavy burden to justify continued sealing of the administrative record. The law requires them to show how and why their secrecy interests override the public's presumptive First Amendment right of access to this Court's records. The OTCs' letter brief does not come close to carrying this burden. It ignores the public access presumption, instead proffering broad, conclusory statements as to why the record should remain sealed.

Nor does the letter brief support the OTCs' contention that footnote 15 of the Opening Brief on the Merits (Opening Brief) should remain sealed. There is no reason why this footnote, which exposes [redacted]—should ever be kept from the public.

Accordingly, this Court should order unsealed all of "those portions of the sealed administrative record" that "do not reveal consumers' identities." (November 6, 2014 order.) The general public and the other public entities that are interested in the outcome of this case have a right to see the full record.

1. The City Did Not Over-Redact Its Opening Brief; Instead, The City Reasonably Reviewed The Trial Court's Vague, OTC-Drafted, 238-Page Sealing Order And Complied With California Rules Of Court, Rule 8.46(f).

The OTCs claim that the City's Opening Brief was excessively redacted, and the OTCs profess not to "understand the rationale behind most of the redactions." (OTCs' November 21, 2014 Letter Brief, pp. 2-4.) This is nonsense. The Opening Brief was not over-redacted, and the rationale behind the redactions was the trial court's 238-page sealing order. (See Joint Appendix, Volume 7, pp. 1241-1479 [hereafter March 17, 2012 Sealing Order].)

Specifically, the City's redactions were made pursuant to California Rules of Court, rule 8.46(f), which prohibits disclosing the contents of sealed records in appellate briefs. (See Cal. Rules of Court, rules 8.46(f)(1), 8.46(f)(2)(A)-(C).) The City had good reason to exercise an abundance of caution when referring to sealed materials, as an erroneous disclosure of sealed records cannot be undone. The sealing order and the related stipulation (both of which were drafted by the OTCs) incorporate by reference yet another sealing order in a different coordinated case (see Exhibit A to March 17, 2012 Sealing Order, 7JA, Tab 21, pp. 1250-1264) and a lengthy spreadsheet of sealed pages (see Exhibit B, to March 17, 2012 Sealing Order, 7JA, Tab 21, pp. 1265-1479). These sealing materials are far from a model of clarity, but one thing is clear: They pertain to a wide swath of materials, including virtually all of the hotel-OTC contracts.

The sealing stipulation and sealing order describe the materials to be sealed and their relationships to the sealing order issued in a prior case as follows:

- "Exhibit B [to the trial court's sealing order] lists the excerpts of the San Diego Administrative Record that the OTCs seek to have sealed" (7JA, Tab 21, p. 1245);
- "Where the basis for sealing [in Exhibit B] indicates 'Hotel Contracts' or 'Confidential Information Relating to Hotels', this corresponds to category 'A' of the Anaheim Sealing Order" by Judge Carolyn Kuhl (*ibid.*);
- Exhibit A to the trial court's sealing order (Judge Kuhl's order in the *Anaheim* litigation) states that an "'A' ruling means that the portions of the documents sought to be protected are excerpts of or references to certain contracts between the OTCs and various hotels. The portions of these contracts *variously contain information regarding markets, pricing and rate methodologies, negotiated provisions concerning liability and indemnity, participating hotels, rates, and the duration of various agreements*. These contracts have a confidentiality clause, requiring the OTCs and the hotels to maintain the confidentiality of the terms . . . . [¶] . . . . The OTCs for the most part have redacted only portions of contracts that reference *pricing or other negotiated provisions* that might be of competitive interest to an OTC [or hotel] competitor . . . ." (*id.* at pp. 1255-1256, emphasis added); and
- The trial court's order grants the OTCs' motion to seal, providing in conclusory fashion that the motion is granted for the "reasons described in further detail in Exhibits A and B hereto, which are incorporated herein by reference" (*id.* at p. 1249).

It wasn't easy to make sense of the order and stipulation, since they do not specifically identify each of the matters sealed, and instead use broad terms like

"negotiated provisions." It is impossible to tell from reviewing a contract whether all or only some of the terms have been "negotiated" and the OTCs' letter brief offers no assistance in this regard. In addition to wading through the opaque and lengthy sealing order and stipulation, the City also examined the lengthy spreadsheet of sealed pages in Exhibit B, again a convoluted and complex task.

Based on its review of these materials, the City concluded (reasonably, we submit) that substantial portions of the hotel-OTC contracts that were central to the merits of this case had been ordered sealed. As a result, the City took pains to follow the California Rules of Court in order to safeguard against an inappropriate disclosure, recognizing that once sealed information is revealed, the bell cannot be un-rung.

To that end, the City redacted virtually all references to the terms of sealed hotel-OTC agreements that were material to its arguments. These materials, which appear to fall within the sealing order (as shown by the footnotes, *post*), include:

- [redacted];[1]
- [redacted]
  [redacted][2]

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[1] **Compare redactions in** Opening Brief pp. 8-9 & fn.3 **with** March 17, 2012 Sealing Order pp. 1313, 1376, 1473 (sealing numerous cited pages); **cf.** Opening Brief p. 11 **with** March 17, 2012 Sealing Order pp. 1269, 1313 (sealing numerous cited pages); **cf.** Opening Brief pp. 13-14 & fn. 9 **with** March 17, 2012 Sealing Order pp. 1266-1285, 1348-1353, 1356, 1461 (sealing numerous cited pages); **cf.** Opening Brief pp. 13-15 & fn. 10 **with** March 17, 2012 Sealing Order pp. 1299-1300, 1313, 1342, 1376, 1467, 1473 (sealing numerous cited pages); **cf.** Opening Brief pp. 15-16 & fn. 11 **with** March 17, 2012 Sealing Order pp. 1268-1270, 1274, 1348, 1461 (sealing numerous cited pages).

[2] **Compare redactions in** Opening Brief pp. 16-17 & fn. 12 **with** March 17, 2012 Sealing Order pp. 1266, 1268-1271, 1272-1275; 1277; 1278-1285, 1347-53, 1356, 1461 (sealing numerous cited pages); **cf.** Opening Brief p. 50 & fn. 27 **with** March 17, 2012 Sealing Order pp. 1275, 1279-1280 (sealing numerous cited pages).

- [redacted][3]
- [redacted]
  [redacted][4]
- [redacted]
  [redacted][5] and,
- [redacted]

Given the breadth of the 238-page sealing order and the irreversible consequences of violating a sealing order, the City's redactions were entirely appropriate. The OTCs are wrong to suggest otherwise; indeed, they would have been the first to complain if the City had erred by disclosing sealed information.

In fact, if the OTCs had truly believed that the City over-redacted its Opening Brief on the Merits, one might expect that they would have made that known to this Court and the City before the Court issued its November 6, 2014 order. But, that never happened. After the City applied to file a sealed opening brief (as required by the rules), the OTCs did not contact the City and suggest the Opening Brief was over-redacted, and they did not file a response to the application and inform this Court of their position.

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[3] **Compare redactions in** Opening Brief p. 51 & fn. 28 **with** March 17, 2012 Sealing Order pp. 1267-1273, 1275, 1278-1279, 1281-1283, 1285, 1332, 1343 1349, 1352, 1356, 1461, 1469

[4] **Compare redactions in** Opening Brief pp. 47-49 & fn. 23-25 **with** March 17, 2012 Sealing Order pp. 1266, 1268-1271, 1273, 1275, 1278-1285, 1348-1352, 1356, 1461 (sealing numerous cited pages).

[5] **Compare redactions in** Opening Brief pp. 18-19 & fn. 14 **with** March 17, 2012 Sealing Order pp. 1268-1271, 1273, 1275, 1278-1285, 1348-1352, 1356, 1376, 1461 (sealing numerous cited pages).

For all the City knew, the OTCs were content that the Opening Brief had been properly redacted.

There is a lesson here: Public policy and the First Amendment mandate that sealing orders are the exception, not the rule. As a result, they should be specific and clear as to each item that is sealed and the reasons for sealing that item. No reviewing court, no member of the public and no litigant should ever have to guess about what must be kept from public view. Nor should accusations of over-redaction ever be necessary. Rather, to comport with the public policy presuming that court records are open, sealing should always be undertaken with precision and clarity—something that did not happen here.

2. The OTCs Have Failed To Carry Their Burden To Show That Continued Sealing Is Appropriate Here.

Regardless of whether the City's redactions were appropriate in light of the sealing order, the OTCs' letter brief provides no tenable basis for concluding that the underlying administrative record should remain sealed.

a. An appellate court must independently review the propriety of a trial court order sealing records.

As a threshold matter, this Court's review of the sealing order is de novo.

California Rules of Court, rules 8.46(e)(5), 2.550(c), and 2.550(d) establish that in order to maintain sealing in this case, the Court must find: "(1) There exists an overriding interest that overcomes the right of public access to the record; (2) The overriding interest supports sealing the record; (3) A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed; (4) The proposed sealing is narrowly tailored; and (5) No less restrictive means exist to achieve the overriding interest." And,

under *People v. Jackson* (2005) 128 Cal.App.4th 1009, an order sealing records implicates First Amendment rights and is therefore subject to "independent review." (128 Cal.App.4th at pp. 1020-1021.) Where, as here, the trial court did "not take testimony" or make credibility determinations, and merely considered "the court record that" is before a reviewing court, independent review of the sealing order is the "equivalent of de novo review." (*Id.* at p. 1021.)

b. The OTCs bear the burden of proof: They are required to (a) specifically identify the information subject to sealing; (b) specifically describe the harm threatened by disclosure; and (c) specifically show why the public's interest in having access to the sealed records is outweighed by a need for secrecy.

It isn't enough for the OTCs to simply point to what the trial court did and urge the Court to adopt it or to give it deference. Rather, the OTCs were obligated to make a showing as to what needed to be sealed and why.

The proponent of sealing bears a heavy burden to show why its interests in confidentiality outweigh the First Amendment presumption in favor of access to court records. (See *Mercury Interactive Corp. v. Klein* (2007) 158 Cal.App.4th 60, 103 ["party seeking sealing" is required to meet "heavy burden of overcoming the presumption of public access"].) The proponent must make "a specific showing of serious injury" that "would result from public disclosure" of the proposed sealed materials. (*Huffy Corp. v. Superior Court* (2003) 112 Cal.App.4th 97, 106, internal quotation marks omitted, citing *Universal Studios, Inc. v. Superior Court* (2003) 110 Cal.App.4th 1273, 1281-1282.)

Under these standards, whether sealing is appropriate turns on "identifying and weighing the competing interests and concerns" related to continued sealing—a "process [that] is impossible without (1) identifying the specific information claimed to be entitled

to such treatment; [and] (2) identifying the nature of the harm threatened by disclosure . . . ." (*H.B. Fuller Co. v. Doe* (2007) 151 Cal.App.4th 879, 894 (*Fuller*).) "[A]t a minimum," the party seeking to "maintain [documents] under seal" must "come forward with a specific enumeration of the facts sought to be withheld and specific reasons for withholding them." (*Ibid.*)

As we now explain, the OTCs have not made this showing.

c. The OTCs have not met their heavy burden: Other than simply making conclusory statements that sealing should continue, the OTCs' letter brief is silent on the key issues before this Court.

The OTCs do not even try to explain why the administrative record should remain sealed. Their letter brief refers to some of the proceedings and decisions made below, and then urges, in purely conclusory fashion, that sensitive, confidential information was sealed. (See OTCs' November 21, 2014 Letter Brief, pp. 6-8.) Absent from the OTCs' letter brief is any showing why the administrative record should remain sealed now.

The OTCs barely acknowledge, let alone address, the strong public policy interests compelling open court records absent proof of why specific portions should be sealed. It is beyond dispute that the press, the public, and potential amici (including cities and counties that have enacted similar room-tax laws) all have a strong interest in accessing the documents upon which this Court will base its decision. Yet the OTCs never meaningfully address the public's rights to open proceedings, much less explain to this Court why the OTCs' interests outweigh the strong and competing First Amendment interests. (See *Klein, supra*, 158 Cal.App.4th at p. 103.)

At most, the OTCs' letter brief refers in vague and general terms to "negotiated provisions in confidential contracts between hotels and OTCs, and testimony" relating to those provisions, and then concludes that those vaguely-defined provisions contain

"confidential, proprietary, competitively sensitive and trade secret information." (OTCs' November 21, 2014 Letter Brief, pp. 7-8.) But the OTCs never identify the particular points of information they believe need to remain sealed, as the law requires. (*Fuller*, *supra*, 159 Cal.App.4th at p. 894.) Nor do the OTCs make a showing of any injury—let alone a "specific showing of serious injury" that would result from disclosure. (See *Huffy Corp.*, *supra*, 112 Cal.App.4th at p. 106 ["settlement agreement which had a confidentiality provision could not be sealed unless there was a showing of serious injury which would result from public disclosure"].) Instead, they offer only rote, conclusory claims, such as that they "could be economically and competitively harmed if competitors had access to [the] records." (OTCs' November 21, 2014 Letter Brief, p. 8.)

The OTCs' "showing" is really no showing at all. It is inadequate.

In fact, if anything, the OTCs' letter brief effectively concedes that there is *no need to seal* the vast majority of the hotel-OTC contractual provisions in the administrative record. Indeed, the OTCs seem to believe that it is appropriate to reveal to the public virtually all of the contract terms discussed in, but publicly redacted from, the Opening Brief. (See OTCs' November 21, 2014 Letter Brief, pp. 3-5.) But if, as the OTCs concede, the City's Opening Brief and the hotel-OTC contract terms discussed therein need not be kept out of public view (except for footnote 15, which we discuss below), then no reason has been proffered as to why all the contractual provisions in the administrative record should not also be opened to the public.

The bottom line: Because the OTCs' letter brief does not specifically identify a single portion of the administrative record (except the matters referenced in footnote 15) that should remain sealed or explain why the OTCs' interest in secrecy outweighs the public's right of access, this Court should order unsealed all "those portions of the sealed administrative record" that "do not reveal consumers' identities." (November 6, 2014 Order, p. 1.)

3. Footnote 15 Is Exactly The Type Of Contractual Provision That Should Never Be Hidden From The Public, Because The Matters Discussed In Footnote 15 [redacted].

The sole exception to the OTCs' complete failure to meaningfully brief the necessity of sealing is their contention that footnote 15 of the Opening Brief should continue to be redacted and sealed. As we now show, the OTCs have failed to provide any tenable basis for keeping the matters discussed in footnote 15 under wraps.

a. The content of footnote 15.

Footnote 15 reveals [redacted]. The footnote is appended to a discussion in the body of the Opening Brief explaining [redacted]. (Opening Brief On Merits, p. 19.) Footnote 15 proves the point, providing:

> [redacted]

(Opening Brief On Merits, p. 19, fn. 15.)

The contract terms that footnote 15 discusses are [redacted] the cities, the counties and the public (all of whom are keenly interested in collecting the full amount of taxes due them) [redacted]

The OTCs claim these types of provisions are "unique to the relationship between one OTC and one hotel chain." (OTCs' November 21, 2014 Letter Brief, p. 8.) Not so. [redacted]:

[redacted]

(See Administrative Record, Volume 17, Tab 62, at p. 994, emphasis added.)[6]

[6] While footnote 15 [redacted] it is likely that other OTC-hotel contracts contain identical or similar provisions, because such contracts are the same or substantially similar across all jurisdictions. (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 [the hotels and the OTCs "pervasive(ly)" use the merchant model, "a uniform, nationwide model that operates the same for all

b. The OTCs have not carried their burden to show that the matters in footnote 15 should continue to be redacted and sealed.

It is not surprising that the OTCs do not provide a single public-policy reason as to why footnote 15 should remain redacted. Instead, the OTCs' entire argument in favor of redaction is that these contractual provisions are "unique provision[s]" that were "heavily negotiated and provide[] a competitive advantage to" [redacted] that "could be harmed if the provision[s]" are "disclosed to . . . competitor[]" [redacted] "also could be competitively harmed in negotiating contracts with other OTCs if th[e] provision[s]" are "publicly disclosed." (OTCs' November 21, 2014 Letter Brief, p. 5.)

This does not suffice.

OTC(s) in all jurisdictions"]; Memorandum and 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 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"].)

The OTCs do not identify "*specific facts* alleged to be worthy of the extraordinary measure of maintaining" the matters in footnote 15 under seal. (*Fuller, supra*, 151 Cal.App.4th at p. 898.) The OTCs instead make only vague references to [redacted] "competitive advantage" and conclusory assertions that [redacted] might be "competitively harmed." (OTCs' November 21, 2014 Letter Brief, p. 5.) But conclusory allegations, stating the party's interest "in an oblique, vague, attributive, conditional, incomplete, or otherwise circumlocutory manner," cannot overcome the constitutional presumption in favor of open court records. (*Fuller, supra*, 151 Cal.App.4th at p. 897.)

Even taken on its own terms, the OTCs' argument makes little sense. The OTCs' position is that disclosing [redacted] will deprive them of a "competitive advantage" against [redacted]. But what conceivable "competitive advantage" could the OTCs possibly be talking about? Are the OTCs suggesting that disclosing [redacted]? What type of "competitive advantage" could [redacted] possibly preserve? None, we submit. Indeed, it is against public policy to allow sealing to be used to prevent the public from knowing about [redacted].

Sealing cannot be allowed to "mask[] impropriety" and "conceal[] corruption." (*In re Marriage of Burkle* (2006) 135 Cal.App.4th 1045, 1062, internal quotation marks omitted, citing *Brown & Williamson Tobacco Corp. v. FTC* (6th Cir. 1983) 710 F.2d 1165, 1179.) Here, the OTCs' silence on public policy and the First Amendment right of access is telling. Of course, the public has a right to know about [redacted] what the City urges in this case—namely, that the OTCs have improperly withheld millions of dollars in unpaid room taxes. Those matters

directly concern "the conduct of the people's business" in collecting all taxes that are due. (*Marriage of Burkle*, *supra*, 135 Cal.App.4th at p. 1059.)

In sum, the OTCs never explain what they mean when they refer to "competitive advantage." A vague, unexplained statement cannot suffice to justify continued sealing. Nor can conclusory statements overcome the public's right to know that [redacted]. Simply put, there is no reason for footnote 15 to remain sealed.

* * * * *

The press, potential amici, and all California taxpayers residing in counties or cities with room-tax ordinances have a keen interest in determining whether the room-tax laws are being properly administered and enforced, and in knowing how the courts are deciding the claims that more taxes are due. The public likewise has an interest in assessing for itself whether the OTCs have flouted the tax laws. The public needs—and is constitutionally entitled to have—access to the sealed documents, including the materials discussed in footnote 15.

The Court should issue an order unsealing the administrative record, except as necessary to protect consumer identities, and allowing the City to file an unredacted Opening Brief.

Respectfully submitted,

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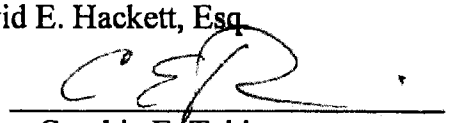
By: 
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PROOF OF SERVICE

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 December 8, 2014, I served the foregoing document described as: **PUBLIC VERSION OF PETITIONER'S RESPONSIVE LETTER BRIEF** on the parties in this action by serving:

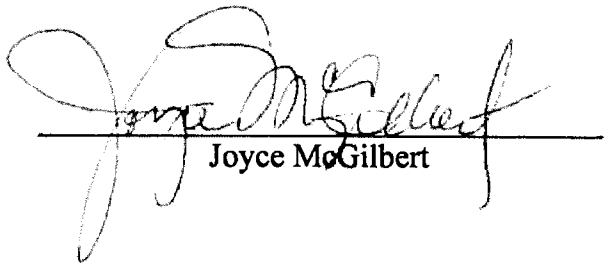
SEE ATTACHED SERVICE LIST

(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 December 8, 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.



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2d Civ. No. B243800

In Re Coordinated Proceeding Special Title (Rule 3.550(c))

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