PUBLIC—REDACTS MATERIAL FROM SEALED RECORD PURSUANT TO RULE CALIFORNIA RULES OF COURT, RULE 8.46(f)(2)(A)

No. S218400

IN THE SUPREME COURT OF CALIFORNIA

In Re Coordinated Proceeding Special Title (Rule 3.550(c))
TRANSIENT OCCUPANCY TAX CASES

CITY OF SAN DIEGO, CALIFORNIA,

Appellant,

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)

PETITIONER'S OPENING BRIEF ON THE MERITS

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INTRODUCTION

San Diego is an international tourist destination that welcomes millions of visitors each year. The City's economy depends on the money these visitors spend. Their tax dollars form a core part of the City's budget, funding services that both residents and tourists depend upon, including police, fire, paramedic, street maintenance, library, park, and homeless services, to name just a few.

Like most California cities, San Diego has enacted an ordinance imposing a transient occupancy tax ("room tax") on the "rent" that hotel guests are charged to obtain the privilege of occupying rooms in the City. Because these taxes contribute substantially to funding essential municipal services, it is crucial that the City be able to collect all taxes that are owed.

Historically, room taxes were generated by bookings made directly with hotels or indirectly through travel agents. The tax was always based on the rent the customer was charged and had to pay to obtain the right of occupancy. Thus, if a customer was charged and paid $100 in rent for a room, the tax percentage was applied directly to that $100 rent amount.

In recent years, the Internet has entered the picture and expanded the ways that customers book hotel rooms. Online travel companies ("OTCs") like Priceline.com, Orbitz.com and Hotels.com have become a significant source of hotel-room bookings. As part of their deals with the hotels, the OTCs have contractually assumed responsibility for collecting the rent due on bookings made through their auspices, and for calculating, collecting

and remitting room taxes for payment to the City.[1] The problem is that the OTCs are not remitting the correct amount of room tax.

The governing room-tax ordinance requires that the applicable tax percentage be applied to the "rent charged by the [hotel]" for transferring "the privilege of Occupancy" to the customer. "Rent" is defined as "the total consideration charged to a Transient as shown on the guest receipt for the Occupancy of a room . . . without any deduction therefrom." Since there is only one "rent" that is being "charged" and paid by the customer for the privilege of occupancy, the ordinance language itself, as well as logic, dictates that the "rent" on which the tax is based should be the amount charged to and paid by the customer.

The OTCs disagree. They have not remitted room tax based on the rent charged to and paid by the customer. Instead, they have remitted tax based on a *lower* amount—namely, on the portion of the rental proceeds that the hotels receive after the OTCs have taken their contractually-agreed cut. Thus, when a customer is charged and pays $100 rent for a room, the OTCs have remitted tax based *not* on this $100 room rate, but rather based

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[1] By orders dated March 14, 2012 and April 18, 2012, the trial court sealed substantial portions of the underlying administrative record. (7JA, T.21, pp. 1241-1479; 7JA, T.22, pp. 1784-1492.) Consistent with California Rules of Court, rule 8.46(f), the City has: (a) publicly filed a redacted version of its opening brief; and (b) applied for permission to file an unredacted version of its opening brief under seal. (Cal. Rules of Court, rules 8.46(f)(1), 8.46(f)(2)(A), 8.46(f)(2)(B).) In the unredacted version of its opening brief, the City has marked all disclosures of sealed materials with a dotted underline. (Cal. Rules of Court, rule 8.46(f)(2)(B).)

on some lower, never-disclosed "net" amount (say, $80) that the hotels have received from that rental payment.

In Section I, we will demonstrate why this practice is wrong. Regardless of whether a room is booked directly through a hotel or indirectly through a travel agent or an OTC, the tax on the taxpaying customer should be the same. The tax should be based on the *full* amount of rent the customer is charged and is required to pay to gain the privilege of occupancy. There is no possible justification for taxing a lesser amount.

The hotels own the rooms and dictate the minimum rent that a customer must pay to obtain the privilege of occupying one of them. Unless a customer pays the rent the hotel specifies, he cannot obtain a room. This rent must therefore constitute the tax base. Indeed, if a hotel determines that a customer must pay a room rate of $100, that $100 rental payment is taxable at $100, no matter how cleverly those seeking to avoid tax might try to package the transaction.

The terms of the room-tax ordinance dictate this result. They are laser-focused on the *taxpaying customer* and on the rent he is charged and must pay to obtain a room. Who closes the rental transaction on behalf of the hotel, and how the hotel and the OTC might choose to share the rental proceeds, are entirely beside the point. Rent is rent. What the customer pays for his room is the tax base. That this is so is underscored by the fact that the ordinance commands that the taxable event occurs at the moment when rent is paid by the customer, not later when the rental proceeds are

divvied up between the OTC and the hotel. Thus, if a customer is charged and pays rent in a certain amount to obtain a room, that amount must necessarily constitute the tax base in *all* booking circumstances.

This conclusion is buttressed by the uncontroverted evidence establishing that the hotels "charge" the rent that the customer pays to book a room. In the hotel-OTC contracts, the hotels—in order to avoid price wars—set the minimum amount of rent that the OTCs are permitted to quote to customers. Under these "rate parity" clauses, the OTCs cannot quote (let alone charge) room rates that are lower than what the hotels themselves quote to customers directly on their own websites. Since the customer cannot obtain a privilege of occupancy by paying a penny less than the rent the hotels demand, this amount is taxable "rent" under the ordinance.

If there were any doubts about who is doing the "charging" of the rent that the customer pays to book a room, those doubts are put to rest by the administrative hearing officer's finding that the OTCs act as the hotels' agents when charging and collecting rent. This key agency finding, which was neither challenged by the OTCs nor disturbed by the lower courts, dictates the result here. As a matter of law, when an agent acts, those acts are the same as if the principal itself is acting. Thus, the hotels are the ones directly charging the rent that the customers pay to obtain occupancy. Again, there is no possible justification for calculating room tax based on some lesser portion of that rental amount.

Common sense, too, dictates that the amount of rent that the customer is charged and pays to obtain occupancy must define the tax base. Since the customer is the sole taxpayer and since the tax applies to the rent he is charged as consideration for obtaining the privilege of occupancy, it defies logic to conclude that the ordinance would contemplate *different* tax treatment depending on how the hotels and their booking agents choose to divvy up the rental proceeds after the fact. The amount of rent the customer pays is identical regardless of whether the transaction is completed with the hotel, with a travel agent or through an online travel agent. The tax result must be the same, too.

For these reasons and others to be explained in Section I below, the judgment must be reversed. The Court of Appeal prejudicially erred in holding that the rent charged and paid by customers is *not* the basis on which room tax must be paid. In reversing, this Court should direct that the *full* amount of the rent that is charged to and paid by the customer constitutes the basis on which room tax must be calculated.

Moreover, the OTCs cannot escape their obligation to remit the proper amount of room tax by contending they are not "Operators" under the ordinance and thus have no collection/remittance obligations. In Section II, we will show that there are multiple independent bases on which the OTCs are liable for remitting room tax, regardless of whether they qualify as an "Operator" under the ordinance.

Finally, in Section III, we will demonstrate why the Court of Appeal erred by holding that its prior unpublished decisions constitute law of the case. The law-of-the-case doctrine cannot apply here, as the coordinated cases were never merged as one and no notice or opportunity to be heard was ever given to San Diego. A coordination order, standing alone, does not result in a merger of the coordinated cases.

* * * * *

For many years, the OTCs have shortchanged San Diego by millions of dollars. They will continue to do so unless this Court puts a halt to their wrongful practices. The judgment must be reversed with directions compelling that room taxes must be calculated, collected and remitted based on the rent the customer is charged and must pay to obtain the privilege of occupancy. Nor can this result be undermined by the Court of Appeal's law-of-the-case determination.

STATEMENT OF FACTS

The facts of this case are essentially undisputed. (Court of Appeal Opinion [Opn.] 6.)

A. The Important Players.

1. The City.

San Diego levies a room tax on all customers who rent hotel rooms in the City. (8JA, T.25, p. 1632; 1JA, T.4, pp. 202-204, 212.)[2] These taxes constitute an important part of the City's tax base; the City relies upon room-tax revenue to fund vital municipal services. The City has sued the OTCs because it believes they are not remitting the full amount of room taxes that are due on the room bookings they complete. (1JA, T.2, pp. 18-19, 23; 1JA, T.4, pp. 199-201; 1JA, T.5, pp. 231-232, 235; 2JA, T.8, pp. 292-293; 2JA, T.9, pp. 345, 355, 362.)

2. The Online Travel Companies ("OTCs").

The OTCs are the defendants and respondents in this action. Pursuant to their contracts with hotels, the OTCs rent hotel rooms to customers by acting as the hotels' rental agents, connecting customers to the hotels and completing the bookings that customers choose to make through the OTCs' websites. (1JA, T.4, pp. 198-200.) The OTCs never

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[2] Most factual citations in this brief refer to the Court of Appeal's March 27, 2014 slip opinion ("Opn."), to the Joint Appendix ("JA") filed in the Court of Appeal, and to the Administrative Record ("AR") filed in the Court of Appeal. The citations refer to the volume number, the JA or the AR, the tab number, and sequential page numbers; for example, "1JA, T.4, pp. 202-204" refers to volume 1 of the Joint Appendix, tab 4, at pages 202 through 204.

purchase rooms; they do not pre-purchase and resell room inventory; they do not buy or obtain any right of room occupancy; and they never pay rent. Rather, they complete room bookings and share rental proceeds with the hotels, as per their agreements with the hotels. (See 1JA, T.4, pp. 199-201, 208; 2JA, T.10, p. 424 [OTCs "are not 'lessees' or 'sublessees' of hotels, (and) do not take 'title' to hotel rooms"].)

3. The Transients.

The "transients" (also referred to herein as "customers" or "hotel guests") are not parties to this action. They are the people who purchase the right to occupy hotel rooms in the City.

4. The Hotels.

The hotels are not parties to this action either. They are, however, important players since they own the hotel rooms and have the exclusive right to dictate the terms under which those rooms are to be occupied. (2JA, T.10, p. 424; 8JA, T.25, p. 1643; see Opn. 14 ["In merchant transactions, it is the hotel that sets the price for the transient's occupancy of a room"]; Opn. 15, fn. 12 ["Each hotel establishes and maintains complete control of its room rates and availability"].)

The hotels have entered into agreements with the OTCs defining their relationships. These agreements contain "rate-parity" provisions establishing a minimum amount of rent that the hotels require the OTCs to charge customers. (See discussion at pp. 13-15, *post.*) Specifically, the hotels bar the OTCs from quoting room rates that are lower than the room rates quoted on the hotels' own websites. (*Ibid.*) These provisions ensure

that the OTCs do not undercut the rental prices at which the hotels sell their rooms directly to the public.[3]

B. The Governing Ordinance.

The City's room-tax ordinance (appearing as San Diego Mun. Code, §§ 35.0101 et seq.)[4] provides in relevant part as follows:

- The purpose and intent of the ordinance is to impose tax on hotel room customers, called "Transients." (§ 35.0101, subd. (a).)
- A "Transient" is any person who exercises or is entitled to Occupancy. (§ 35.0102.)
- "Occupancy" means the use or possession of a hotel room, or the right to use or possess a hotel room. (*Ibid.*)
- "Operator" is defined as the owner or proprietor of the hotel, or the hotel's managing agent. (*Ibid.*)
- The tax is imposed as follows: "For the privilege of Occupancy" in any hotel in the City, each customer is subject to and shall pay

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[3] See, e.g., 26 AR, T.210, pp. 3427-3428 (Travelocity executive: Rate-parity contracts mean "[y]ou cannot sell a room at the sell rate for less than the hotel"; "you can't undercut the hotels on that first line as to the sell rate or the room rate"); *id.* at pp. 3427-3430 (rate-parity contracts are common with the big hotel chains, and standard as a matter of practice even with independent chains); 4AR, T.7, pp. 14241-14243 (Priceline.com executive: "the hotel doesn't want you to undercut the price that they want to make available"); 51AR, T.365, pp. 8144-8148.

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

a tax equal to a percentage "of the Rent charged by the Operator." (§ 35.0103.)

- "Rent" means the "the total consideration charged to a Transient as shown on the guest receipt for the Occupancy of a room . . . without any deduction therefrom." (§ 35.0102.)
- The amount of the tax is determined and must be collected "at the same time as the Rent is collected from every Transient." (§ 35.0112(a).)
- If tax is not paid as required, penalties are imposed. (§ 35.0116.)[5]

C. The Hotels And The OTCs Have Primarily Used Two Compensation Models, The "Agency" Model And The "Merchant" Model, The Latter Being The Only One At Issue In This Case.

Historically, the hotels and the OTCs have employed a number of rental and compensation models. (Opn. 15-16.) The most common models are known as the "agency" and "merchant" models.[6] (Opn. 5, 15; 1JA, T.4,

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[5] While the transient is the sole person upon whom the tax is imposed (§ 35.0110, subd. (a)), if the tax is not collected from the transient, then the City may file a collection action against the hotel operator or any other "person owing [the] money to the City." (See §§ 35.0110, subd. (b); 35.0123, subd. (a) ["Any person owing money to the City under the provisions of the Article shall be liable to an action brought in the name of The City . . . for the recovery of such amount"].)

[6] The Court of Appeal's opinion mentions several other models, and the record reflects at least one more (the "opaque" model), but as the Court of Appeal recognized, the operation of the standard merchant model is at the heart of this case. (Opn. 4 ["At issue here is what the parties refer to as the 'merchant model' or 'merchant transactions.'"].)

pp. 199-201.) While this case involves only the merchant model, it is helpful to briefly examine both models.

Agency model. Under the agency model, the OTC's website quotes the rent the customer must pay to book a room. (Opn. 14-15; 1JA, T.4, p. 199.) The customer pays both the rent and the room tax directly to the hotel at check-in. (Opn. 15; 1JA, T.4, p. 199.) After the customer's stay, the hotel remits a pre-agreed percentage of the rent—e.g., 20%—to the OTC as a commission. (*Ibid.*) Although the hotel ultimately retains less than the full amount of rent that the customer has paid, room tax is calculated based on the *full* rent charged to and paid by the customer. What the hotel ultimately receives as its contractually-dictated share of the rental proceeds does not enter into the tax calculation. (See 1JA, T.4, p. 199; 2AR, T.4, p. 13812:13-18; 36AR, T.240, pp. 5617:2-5618:2.)

Merchant model. Under the merchant model, the OTC's website quotes the rent that a customer must pay to book a room. (1JA, T.4, p. 199.) Pursuant to the rate parity provisions in the OTC-hotel contracts, that quoted rent can never be less than the rent the hotel is currently quoting to customers renting rooms directly from the hotel (i.e., on the hotel's own website). (See pp. 13-15, *ante*; see also 26AR, T.210, pp. 3427-3430; 17AR, T.64, p. 1016.)[7] To procure a room, the customer pays the room rate

[7] While each OTC has its own separate "merchant model" agreement with the hotel operators, all of the OTCs' merchant models operate substantially identically, virtually all providing that the hotels set the minimum rent that must be paid by the customer. (See pp. 13-15, *ante*.)

quoted on the OTC's website, plus an undifferentiated amount referred to as "taxes and fees." (E.g., 1JA, T.4, p. 200; Opn. 4, 16; 2JA, T.10, p. 413; 41AR, T.310, pp. 6370-6374.) Once the customer makes this payment, he gains the right to occupy the room. (1JA, T.4, pp. 200, 205, fn. 5.)

After collecting the rent and taxes, the OTC remits a pre-arranged portion of the rental proceeds to the hotel, plus the taxes collected, while retaining the remainder (plus whatever additional fees the OTC has charged) as the OTC's compensation. (*Id.* at pp. 199-201.)

Although the agency and merchant models involve the same players and the same rental payment, the OTCs insist the tax result should be different. They maintain that although taxes under the agency model are calculated based on the rent charged to and paid by the customer to obtain an occupancy privilege, the merchant model results in a lower tax base, one calculated based on *the portion* of the customer's room rate that the hotels receive as their share of the rental proceeds.[8]

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[8] The Court of Appeal compared the agency-model and merchant-model transactions by using hypothetical examples involving a $100 customer-facing room rate and a 15% room-tax rate. (Opn. 15-16.) Under the agency model, room tax is paid on the $100 rent the customer pays for occupancy. (*Ibid.*) But under the merchant model, room tax is instead paid only on the $80 the hotel retains after the OTC has taken its cut. (Opn. 16.) Thus, even though the customer pays the same $100 room rate and the hotel retains the same $80 amount under both models, the City receives $15 in room tax under the agency model, but only $12 under the merchant model. (Opn. 15-16.)

D. The Three Transactional Steps Of The Merchant Model.

The merchant model involves three transactional steps. Only the second of those transaction steps involves the customer actually paying rent in exchange for the privilege of occupancy.

1. Transactional step no. 1: The agreements between the hotels and the OTCs.

The first transactional step occurs when the hotels and OTCs enter into the master agreements that define their working relationships. While the precise terms of these contracts are not the same, virtually all of them have similar features. They provide that: (1) the hotels set the minimum rent that must be charged by the OTCs and paid by the customer in order to obtain the privilege of occupancy, (2) the OTCs act on behalf of the hotels in the room-rental transactions, including by collecting rent from customers, (3) the OTCs collect the room taxes due on these bookings, and (4) the rental revenue received by the OTCs will be divvied up between the OTCs and the hotels in accordance with a pre-arranged formula stated in the hotel-OTC agreements. The common agreement terms are as follows:

a. *Rate-parity provisions establishing the minimum room rate that the OTCs must charge their customers.*

As owners, the hotels have the right to dictate the amount of rent that a customer will be charged to let a room. The hotels exercise this right by setting the minimum rent in the rate-parity provisions that appear in almost all of the hotel-OTC contracts.[9] While the wording can vary from contract

[9] The record includes 63 standard merchant-model contracts between the hotels and the OTCs. Fifty-nine of those contracts (i.e., 93.6% of them)

to contract, these provisions all dictate in substance that an OTC cannot sell any room for rent that is less than what the hotel quotes to its customers directly.[10]

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contain rate-parity terms. (See, e.g., 16AR, T.57, pp. 904-905; 16AR, T.58, p. 937; 16AR, T.60, pp. 963, 961-962; 17AR, T.62, pp. 988, 982, 985-986; 17AR, T.64, pp. 1015-1016; 17AR, T.65, p. 1025; 17AR, T.66, pp. 1040-1041; 17AR, T.67, pp. 1049, 1097-1098; 17 AR, T.68, pp. 1117-1118; 17AR, T.70, p. 1145; 17AR, T.71, pp. 1162, 1164-1165; 17AR, T.72, p. 1182; 17AR, T.74, pp. 1015-1016; 18AR, T.79, pp. 1286, 1303; 18AR, T.83, p. 1343; 18AR, T.85, pp. 1371-1372; 18AR, T.86, p. 1382; 18AR, T.87, pp. 1394, 1419; 18AR, T.88, pp. 1429-1430; 19AR, T.92, pp. 1517, 1519; 19AR, T.93, pp. 1542-1543; 19AR, T.94, pp. 1560, 1568; 19AR, T.95, pp. 1577, 1603; 19AR, T.96, p. 1622; 19AR, T.97, at p. 1661; 19AR, T.98, p. 1678; 19AR, T.99, p. 1690; 19AR, T.100, pp. 1698, 1700, 1702; 19AR, T.101, pp. 1708, 1710; 20AR, T.102, pp. 1735, 1738; 20AR, T.103, p. 1764; 20AR, T.105, p. 1784; 20AR, T.106, p. 1794; 20AR, T.106, p. 1812; 20AR, T.107, pp. 1822, 1825; 20AR, T.108, pp. 1838, 1835, 1837, 1845; 38AR, T.264, pp. 12053, 12056; 39AR, T.284, p. 12241; 40AR, T.289, p. 6193; 40AR, T.292, p. 6260; 40AR, T.293, pp. 6273, 6277, 6284; 40AR, T.294, pp. 6289, 6292; 40AR, T.295, pp. 6298, 6301; 41AR, T.312, p. 6469; 41AR, T.313, p. 6476; 41AR, T.314, p. 6487; 41AR, T.315, pp. 6496, 6499; 41AR, T.316, pp. 6506, 6509; 41AR, T.317, p. 6520; 41AR, T.319, pp. 6549-6550; 41AR, T.320, p. 6556; 41AR, T.321, pp. 6569, 6573; 42AR, T.322, p. 6577; 42AR, T.323, p. 6586; 42AR, T.325, p. 6609; 42AR, T.326, p. 6620; 42AR, T.327, pp. 6632, 6636; 42AR, T.328, pp. 6646, 6650; 43AR, T.349, p. 6916.) Only four contracts do not contain rate-parity terms; and these contracts nonetheless do not prevent the hotels from undercutting whatever rates the OTCs quote to customers (thus effectively driving the price of the room to whatever the hotel is charging customers directly). (See 16AR, T.52, pp. 862-868; 16AR, T.55, pp. 894-899; 17AR, T.69, pp. 1139-1140, 1130; 18AR, T.80, pp. 1321-1322.)

[10] OTCs' Answer To Petition For Review 16 (hotel-OTC agreements set a "floor" below which OTCs cannot quote room rates to customers); *Expedia, Inc. v. City of Columbus* (Ga. 2009) 681 S.E.2d 122, 124, fn. 1 ("In most of its contracts with hotels, however, 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

An example of a rate-parity provision appears in the contract between Marriott, Expedia and Hotels.com: In determining the "Booking Price quoted on behalf of the Participating Hotel to the guest," Expedia and Hotels.com shall ensure "the Booking Price offered by [the OTCs] is" the "lowest Published Rate"—that is, the lowest rate "made available through the . . . [hotel] call center . . . or any web site operated by [the hotel]." (16AR, T.60, pp. 963 [§8], 960 [§2b, "Best Available Rate"], 961 [§2o, "Published Rates"].)[11]

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the room"); 24AR, T.202, pp. 2723-2724 ("it is common among the national hotel chains to have a provision which says that Priceline cannot offer a room on its web site for less than the amount that Hilton in this case makes available on its web site"); 2AR, T.4, p. 13791; 3AR, T.5, pp. 13865-13867 (if hotel charges customers $100 in hotel-direct transactions, Travelocity will not quote a room rate under $100); 34AR, T.248, pp. 5280-5282 (testimony describing rate-parity agreements); 51AR, T.365, pp. 8144-8148 (hotel executive: rate-parity contracts ensure "customers' access to the same sell rate, no matter what channel they actually go to, whether through a travel agent, through another OTC as Travelocity is here, or on our branded website direct . . . they get the same price available for all of those, so that it's more of a level playing field in the channel"); see, e.g., 26AR, T.210, pp. 3427-3428 (Travelocity executive: rate-parity agreements provide that "you cannot sell a room at the sell rate for less than the hotel"); *id.* at pp. 3427-3430 (Travelocity executive: rate-parity contracts are common with the big hotel chains, and standard as a matter of practice even with independent chains); 4AR, T.7, pp. 14241-14243 (Priceline.com executive: "the hotel doesn't want you to undercut the price that they want to make available").

[11] Some rate-parity provisions expressly require the OTC to charge customers the exact same room rate that the hotel charges customers directly on the hotel's own website. (See, e.g., 16AR, T.60, pp. 961-962 [sections 2m, 2u, 2b, 2o], 963 [sections 7, 8]; 17AR, T.968, pp. 1117-1118 [Exhibit A, section 10.1]; 18AR, T.85, pp. 1371-1372; 38AR, T.264, pp. 12053, 12056; 40AR, T.289, p. 6193.) Other rate-parity agreements do not

b. *Provisions establishing that the OTCs are the hotels' agents in booking rooms and collecting rent and room tax.*

The hotel-OTC agreements provide that the OTCs act on behalf of the hotels in booking the hotel rooms, including by charging rent and collecting it from customers.[12] These agreements also provide that the OTCs must collect and remit taxes for each booking they complete. (E.g., 17AR, T.62, pp. 990, 982; 18AR, T.79, p. 1312; 18AR, T.85, p. 1379;

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preclude the relevant OTC from charging a higher room rate than the minimum rate that the hotel demands be charged. (See, e.g., 16AR, T.58, p. 937; 17AR, T.62, pp. 982, 985, 988; 17AR, T.63, p. 1009.) However, the practicalities of competition render it highly unlikely that a customer would ever choose to book a room through an OTC that is charging higher rates than the rates charged by the hotel itself or by other OTCs.

[12] See 1JA, T.4, pp. 199-201; Opn. 4, 15; 16AR, T.52, pp. 862, 863; 16AR, T.55, p. 894; 16AR, T.57, pp. 904, 912; 16AR, T.58, pp. 935, 938; 16AR, T.60, pp. 960, 963; 17AR, T.62, pp. 981-983; 17AR, T.63, pp. 1009-1010; 17AR, T.64, p. 1015; 17AR, T.65, p. 1025; 17AR, T.66, p. 1040; 17AR, T.67, p. 1046; 17AR, T.68, p. 1114; 17AR, T.69, pp. 1130-1131; 17AR, T.70, pp. 1144-1145; 17AR, T.71, p. 1157; 17AR, T.72, p. 1182; 17AR, T.74, p. 1015; 18AR, T.79, pp. 1294-1295; 18AR, T.80, p. 1321; 18AR, T.83, p. 1343; 18AR, T.85, pp. 1371, 1375; 18AR, T.86, p. 1382; 18AR, T.87, pp. 1393, 1394; 19AR, T.92, p. 1517; 19AR, T.93, pp. 1542, 1544-1545; 19AR, T.94, pp. 1560-1563; 19AR, T.95, p. 1576; 19AR, T.96, pp. 1621-1622; 19AR, T.97, pp. 1658, 1661; 19AR, T.98, p. 1678; 19AR, T.99, p. 1685; 19AR, T.100, pp. 1700, 1702; 19AR, T.101, pp. 1708, 1710; 20AR, T.102, pp. 1716, 1722; 20AR, T.103, pp. 1768, 1764, 1748, 1760; 20AR, T.105, pp. 1790, 1784; 20AR, T.106, p. 1800; 20AR, T.106, p. 1818; 20AR, T.107, pp. 1822-1823; 20AR, T.108, pp. 1835, 1838; 38AR, T.264, p. 12053; 39AR, T.284, p. 12241; 40AR, T.289, p. 6191; 40AR, T.292, p. 6259; 40AR, T.293, p. 6273; 40AR, T.294, p. 6289; 40AR, T.295, p. 6298; 41AR, T.312, p. 6468; 41AR, T.313, p. 6476; 41AR, T.314, p. 6486; 41AR, T.315, p. 6496; 41AR, T.316, p. 6506; 41AR, T.317, p. 6520; 41AR, T.319, p. 6549; 41AR, T.320, p. 6556; 41AR, T.321, p. 6568; 42AR, T.322, p. 6576; 42AR, T.323, p. 6585; 42AR, T.325, p. 6609; 42AR, T.326, p. 6620; 42AR, T.327, p. 6632; 42AR, T.328, p. 6646; 43AR, T.349, p. 6915.

18AR, T.78, pp. 1250-1251; 18AR, T.92, pp. 1518, 1523; 19AR, T.93, pp. 1543-1544; 19AR, T.94, p. 1572.)

c. *Provisions establishing how rental proceeds are to be shared after they have been collected.*

The hotel-OTC agreements specify how the OTCs and hotels will share the rental proceeds after the customers have paid rent. (1JA, T. 4, pp. 199, 206-207.) Those agreements provide that for each room that a customer books through the OTC, the hotel will accept a certain portion of the rental revenue as its share of the transaction receipts, while the OTC will retain another portion of the rental revenue as additional compensation for helping the hotel to book its rooms. (1JA, T.4, pp. 199-201; Opn. 4, 15.)

d. *Provisions reciting that the OTCs will indemnify and hold the hotels harmless for any room-tax underpayment.*

The hotels and the OTCs have long been aware of their potential exposure to additional room-tax liability based on their failure to transmit room tax based on the full amount of rent charged to and paid by hotel customers. (See 1JA, T.4, pp. 214-216.) Indeed, hotel executives have told the OTCs that they believe the OTCs should be collecting and remitting room tax based on the full rent the customer has paid. (*Ibid*; see also 26AR, T.210, pp. 3450-3453; 25AR, T.208, pp. 3033-3035, 3108-3109; 27AR, T.212, pp. 3785-3786; 44AR, T.355, pp. 8536-8537; 29AR, T.215, pp. 4063-4064; 17AR, T.68, p. 1124; see also 23AR, T.197, pp. 2590-2591 [tax advisor to OTC cautioned in 2002 that "the entire amount of the cost of

the room (plus markup) is subject to tax" and that OTC should "calculate and remit the tax based on the" full rent the customer pays].)

Knowing of this exposure, the hotels and the OTCs have frequently included liability-allocating provisions in their agreements. Under these provisions, the OTCs (a) directly assume the hotels' tax-payment obligations; (b) agree to be directly responsible for paying any room tax that might be owing based on rent charged to and paid by the customer; and/or (c) agree to indemnify and/or hold harmless hotels against room-tax payment liability.[13]

e. *Provisions mandating that the terms of the agreements shall remain confidential.*

The hotel-OTC agreements uniformly mandate that the OTCs' arrangement with the hotels must be kept secret from the public.[14] This

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[13] See, e.g., 16AR, T.57, p. 913; 18AR, T.85, p. 1363; 18AR, T.86, p. 1383 (contracts providing that "in no event" shall the relevant hotel chain be liable for room tax underpayments); 16AR, T. 58, p. 937; 17AR, T.68, p. 1117; 20AR, T.105, p. 1790 (contracts providing that the relevant OTC shall be "solely responsible" for room tax underpayments); 3AR, T.5, p. 13923:7-18; 34AR, T.238, pp. 5311:16-5312:16; 29AR, T. 215, pp. 4127:16-4128:8; 17AR, T.67, p. 1060; 18AR, T.82, p. 1337; 20AR, T.102, p. 1721 (contracts and testimony establishing that OTCs have frequently indemnified hotel chains for room tax underpayments).

[14] See 1JA, T.4, p. 201; 50AR, T.364, pp. 7970-7971; 51AR, T.365, pp. 8145-8146; 16AR, T.60, p. 968; see also 16AR, T.52, p. 863; 16AR, T.55, p. 894; 16AR, T.57, pp. 912-913; 16AR, T.58, p. 937; 17AR, T.62, p. 988; 17AR, T.64, p. 1016; 17AR, T.65, pp. 1025, 1029-1030; 17AR, T.66, p. 1041; 17AR, T.67, p. 1049; 17AR, T.68, p. 1108; 17AR, T.69, p. 1130; 17AR, T.70, p. 1145; 17AR, T.71, p. 1165; 17AR, T.72, p. 1182; 17AR, T.74, p. 1016; 18AR, T.79, p. 1298; 18AR, T.80, p. 1322; 18AR, T.83, p. 1344; 18AR, T.85, p. 1377; 18AR, T.86, p. 1386; 18AR, T.87, p. 1402;

means that a customer never learns what portion of the rent he has paid to the OTC will be remitted to the hotel; a customer is never told that the OTCs are remitting room tax based on an amount that is less than the rent he paid to book a room; and a customer is never told what portion of his rental payment is retained by the OTC as that entity's contractual compensation for acting as a rental agent. (1JA, T.4, p. 201.) The tax-avoidance purpose is explicit in some of the contracts, which provide that the hotels are precluded from advocating that taxes be based on the full rent charged to and paid by the customer and/or from contacting taxing authorities regarding the issue.[15]

19AR, T.92, pp. 1524, 1531-1532; 19AR, T.93, pp. 1550-1551; 19AR, T.94, pp. 1558, 1568; 19AR, T.95, p. 1579; 19AR, T.96, p. 1622; 19AR, T.97, p. 1661; 19AR, T.99, p. 1692; 19AR, T.100, p. 1703; 19AR, T.101, pp. 1708, 1710; 20AR, T.102, p. 1736; 20AR, T.103, pp. 1754, 1761; 20AR, T.105, p. 1784; 20AR, T.106, p. 1794; 20AR, T.106, p. 1812; 20AR, T.107, p. 1827; 20AR, T.108, p. 1838; 38AR, T.264, p. 12058; 39AR, T.284, p. 12242; 40AR, T.289, p. 6193; 40AR, T.292, p. 6260; 40AR, T.293, p. 6275; 40AR, T.294, p. 6291; 40AR, T.295, p. 6300; 41AR, T.312, p. 6469; 42AR, T.313, p. 6478; 41AR, T.314, p. 6487; 41AR, T.315, p. 6498; 41AR, T.316, p. 6508; 41AR, T.317, p. 6520; 41AR, T.319, p. 6550; 41AR, T.320, p. 6557; 41AR, T.321, p. 6569; 42AR, T.322, p. 6577; 42AR, T.323, p. 6586; 42AR, T.325, p. 6609; 42AR, T.326, p. 6620; 42AR, T.327, p. 6634; 42AR, T.328, p. 6648; 43AR, T.349, p. 6916.

15 [redacted]

2. Transactional step no. 2: The process of renting a room through an OTC.

The second transactional step in the merchant model is when the customer pays rent for the right to occupy a room. The customer goes online and sees the following information posted on the OTC's website: A "room rate" (which, under the rate-parity provisions, is never less than the room rate currently being quoted directly by the hotel to customers on the hotel's own website) and an undifferentiated line item for "taxes/fees." (1JA, T.4, pp. 199-200; 2JA, T.10, p. 413; see e.g., 41AR, T.310, pp. 6370-6374 [screen shot of Expedia booking page].) To rent the room, the customer clicks the "book" button, pays the quoted rent and the taxes/fees, and then receives a confirmation from the OTC that he has now obtained the right to occupy the room. (1JA, T.4, pp. 200-201; 2JA, T.10, p. 413.) If the customer does not pay the rent quoted as the "room rate," he cannot complete the online booking and does not obtain the privilege of occupancy. (1JA, T.4, pp. 199-200, 205, fn. 5.)

Under the ordinance, the room tax must be calculated and collected at this point in the transactional process—i.e., at the moment when the room booking is consummated. (See p. 10, *ante*.)

3. Transactional step no. 3: Divvying up the rental revenue, and remitting room tax.

The final transactional step in the merchant model occurs after the customer has paid the quoted rental amount, as well as the taxes/fees, and has completed his stay at the hotel. Then, the OTC and the hotel divvy up the proceeds received from the customer's rental payment and transmit

an amount for room taxes to the City.[16] This exchange of money between the OTC and the hotel takes place typically weeks or months after the hotel guest has completed his hotel stay. (See, e.g., 17AR, T.64, p. 1016 [hotel-OTC invoicing process may begin "180 days after a guest's departure" from the hotel]; 16AR, T.57, p. 913 [same].)

THE COORDINATION ORDER AND COORDINATION PROCEEDINGS.

Numerous unpaid-room-tax claims similar to this case are pending throughout California. On July 27, 2006, all of those proceedings were ordered coordinated as *In re Transient Occupancy Tax Cases* (Super. Ct.

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[16] See 1JA, T.4, pp. 199-201, 205, fn. 5, 206-207; 8JA, T.25, pp. 1629, 1632; 2JA, T.10, p. 413; see also 16AR, T.52, pp. 862-864; 16AR, T.57, pp. 912-914; 16AR, T.58, pp. 941-942; 16AR, T.60, pp. 960-961, 963, 965-967; 17AR, T.62, pp. 984-985, 990; 17AR, T.64, p. 1016; 17AR, T.65, pp. 1027, 1029; 17AR, T.66, p. 1041; 17AR, T.67, p. 1055; 17AR, T.68, pp. 1120-1121, 1124-1125; 17AR, T.69, pp. 1131-1132, 1130, 1138; 17AR, T.70, pp. 1146-1147, 1149; 17AR, T.71, pp. 1160, 1167; 17AR, T.72, p. 1183; 17AR, T.74, p. 1016; 18AR, T.79, pp. 1292-1293, 1312; 18AR, T.80, pp. 1321-1322; 18AR, T.83, pp. 1343-1344; 18AR, T.85, pp. 1375, 1379; 18AR, T.86, pp. 1383-1384; 18AR, T.87, p. 1400; 19AR, T.92, pp. 1518, 1523; 19AR, T.93, pp. 1543-1544, 1546-1547; 19AR, T.94, pp. 1563, 1572; 19AR, T.95, pp. 1578, 1582; 19AR, T.96, pp. 1625, 1621-1622, 1629, 1620; 19AR, T.97, pp. 1660, 1663, 1666; 19AR, T.98, pp. 1678, 1680; 19AR, T.98, pp. 1686, 1691; 19AR, T.100, pp. 1702-1703; 19AR, T.101, pp. 1708, 1710; 20AR, T.102, pp. 1721-1722, 1738; 20AR, T.103, pp. 1768, 1772-1773; 20AR, T.105, pp. 1785, 1790; 20AR, T.106, pp. 1795-1796, 1798, 1800; 20AR, T.106, pp. 1813-1814, 1816, 1818; 20AR, T.107, pp. 1823, 1826-1827; 20AR, T.108, pp. 1841, 1837, 1846-1847; 38AR, T.264, p. 12054; 39AR, T.284, p. 12242; 40AR, T.289, p. 6194; 40AR, T.292, pp. 6261-6262; 40AR, T.293, p. 6274; 40AR, T.294, p. 6290; 40AR, T.89, p. 6299; 41AR, T.312, pp. 6469-6470; 41AR, T.313, p. 6477; 41AR, T.314, pp. 6487-6488; 41AR, T.315, p. 6507; 41AR, T.317, p. 6521; 41AR, T.319, pp. 6550-6551; 41AR, T.321, pp. 6569-6570; 42AR, T.322, pp. 6587-6588; 43AR, T.349, p. 6920.

L.A. County, 2006, No. JCCP 4472). (1JA, T.3, pp. 54-55; see also Petitioner's Request to Take Judicial Notice ("RJN"), filed May 7, 2014, Exs. A-C.) Under the coordination order, all California cases involving claims that additional room taxes are due are assigned to the same Los Angeles County Superior Court judge (currently, Judge Elihu Berle) and the same panel of the Court of Appeal (Division Two, Second Appellate District). (*Id.*, Exs. C & D.)

Although all pending and future room-tax cases have been ordered coordinated, there has never been any order that consolidates (as opposed to coordinates) the cases. (See Petitioner's RJN, Exs. A-H.) Nor has there ever been any notification in the coordination proceedings that resolution of one coordinated matter would be binding on others.

To date, the Court of Appeal has disposed of three appeals in the coordinated proceedings. (*In re Transient Occupancy Tax Cases* (2014) 225 Cal.App.4th 56, review granted July 30, 2014 [hereafter *San Diego*]; *In re Transient Occupancy Tax Cases* (Nov. 1, 2012, B230457) [nonpub. opn.] [hereafter *Anaheim*]; *In re Transient Occupancy Tax Cases* (Nov. 1, 2012, B236166) [nonpub. opn.] [hereafter *Santa Monica*].) Two appellate cases (in addition to this one) are pending. (*City of Los Angeles v. Hotels.com, L.P.* (B255223, app. pending) [hereafter *Los Angeles*]; *In re Transient Occupancy Tax Cases* (B253197, app. pending) [hereafter *San Francisco*].)

On August 7 and 13, 2014, the Court of Appeal issued orders staying further proceedings in those appeals pending this Court's resolution of the instant case. (See Aug. 13, 2014 Order Granting Appellant's Request to Stay Appeal, *Los Angeles*, *supra*, B255223; Aug. 7, 2014 Order Granting Appellant's Motion to Stay Appeal, *San Francisco*, *supra*, B253197.)

PROCEDURAL HISTORY

A. The City's Tax Collector Audits The OTCs And Assesses Millions Of Dollars In Unpaid Room Tax, Penalties And Interest.

Under ordinance sections 35.0116 and 35.0117, the City is authorized to audit OTCs and to assess them for any room tax that the City's tax collector determines remains owing. Pursuant to that authority, the tax collector audited the OTCs, determined they had failed to remit the full amount of room tax due, and assessed them for unpaid room tax, penalties and interest. (Opn. 5; 1JA, T.4, p. 196; 2JA, T.8, pp. 288, 293; 1JA, T.4, pp. 222-223.)

Then, as now, the City's position was that room tax should have been calculated, collected and remitted based on the rent that the customer was charged and paid in order to obtain his privilege of occupancy. The City disputed the OTCs' contention that room tax should be based on only the portion of the rental proceeds that the hotels agreed to accept in their deals with the OTCs.

B. The Litigation.

1. Administrative proceedings: The hearing officer determines that in OTC transactions, the tax base for calculating room tax is the full amount of the rent charged to and paid by the customer, and that the OTCs are agents for the hotels as to all of the reservation, rent-collection, tax-collection, and customer-service functions.

The OTCs challenged the City's tax assessments under the ordinance's administrative procedures, and a hearing officer heard their challenge. (1JA, T.4, pp. 195-196.) After a five-day evidentiary hearing, the hearing officer issued a lengthy decision containing extensive factual findings. He determined that the OTCs owed tax based on the full amount of rent charged to and paid by the customer in order to obtain the privilege of occupancy. (1JA, T.4, pp. 203-206.)

The hearing officer determined that: (a) "it is clear that, in promulgating the Ordinance, the City Council intended to collect [room tax] on all monies charged to the Transient for the privilege of Occupancy of a given hotel room" (1JA, T.4, pp. 203-204); (b) "the City Council anticipated that all due [room tax] 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 [room tax] would be calculated and paid to the City on behalf of a Transient by the Operator" (1JA, T.4, pp. 204, 205, 206, 212, 217); and (c) the room tax ordinance requires a tax on "*whatever is ultimately charged for the room*" (1JA, T.4, p. 213, original emphasis; 1JA, T.4, p. 216). The hearing officer also found

that the OTCs act as the hotels' agents (1JA, T. 4, pp. 206-211); and "[a]ll dealings [by customers] are with and through the OTCs as the authorized agents of the hotels" (1JA, T.4, p. 207).[17]

The hearing officer concluded that back taxes were due and awarded over $21 million in back taxes and penalties. (1AR, T.4, pp. 222-223.) The hearing officer further concluded the OTCs owed a duty to remit that amount. (*Ibid.*)

2. Writ-of-mandate proceedings and trial court decision: The trial court concludes the tax base for calculating room tax is the portion of the rental proceeds the hotels ultimately receive after the OTCs take their cut.

Following the hearing officer's determination, the OTCs commenced mandate proceedings seeking review of the hearing officer's assessment of unpaid taxes and penalties. (1JA, T.3, pp. 35-101; 1JA, T.4, pp. 222-223.) The OTCs also moved to seal significant portions of the administrative record, and the trial court entered sealing orders. (7JA, T.21,

[17] More specifically, the hearing officer found as to the OTCs' agency relationship with the hotels: "The OTCs serve as the hotels' agents in assuming essentially (or absolutely) all of the marketing, reservation, room price collection, tax collection, and customer service functions as to those Transients who book online through the OTCs. The OTCs are authorized (a critical component of an agency relationship) by the hotels to market room reservations to the general public. Per the terms of lengthy contracts between the OTCs and the hotels, the OTCs are authorized to make certain representations to the public about the availability, features and prices of hotel rooms. In the merchant model, Transients do not have direct dealings with the hotels. All dealings are with and through the OTCs as the authorized agents of the hotels." (1AR, T.4, p. 207.)

pp. 1241-1479; 7JA, T.22, pp. 1784-1492; see also 7JA, T.21, p. 1243 [referencing OTCs' "Motion to Seal Excerpts of the . . . Administrative Record"].)

During the trial court proceedings, the OTCs did not challenge the hearing officer's factual findings. (6JA, T.19, p. 1203 ["The OTCs do not dispute the Hearing Officer's findings of fact for purposes of these motions. They do dispute the interpretation of the law"].) The trial court accepted the hearing officer's factual determinations and reviewed only his legal conclusions—i.e., whether the hearing officer "properly interpreted the ordinances at issue." (8JA, T.25, p. 1632.)

The trial court issued a writ of mandate rejecting the hearing officer's interpretation of the room-tax ordinance. (8JA, T.25, pp. 1620, 1622-1654.) On the issue of what constitutes taxable "rent," the court reasoned that the ordinance language taxing the amount "charged by the operator" (i.e., the hotel) referred only to the portion of the customer's payment that the hotel receives after the OTC receives its cut. (8JA, T.25, pp. 1639-1654; see also § 35.0101, subd. (a).) The court concluded, therefore, that no additional room tax was owing. (8JA, T.25, pp. 1639-1654.)

3. The Court of Appeal affirms the trial court's ruling that room tax is calculated based on the portion of the rental proceeds that the hotel receives and concludes that, by reason of this ruling, it is not necessary to address whether the OTCs are obligated to collect/remit room taxes.

The Court of Appeal affirmed the judgment, holding that the tax base for calculating room tax is only the portion of the customer's rental payment that the hotel receives after the OTC has taken its cut. (Opn. 7-9.) The Court of Appeal reasoned that "[t]he OTCs' markups and service fees cannot be considered 'Rent charged by the Operator.'" (Opn. 17.) The court defined "markups" as the amounts charged to customers that were over and above the pre-agreed amount the hotels agreed to retain from the customer's rental payment on OTC transactions. (Opn. 9, 10, fn. 10.)

Because the Court of Appeal ruled that no further taxes were due, it did not rule on the issue of whether the OTCs could be liable for remitting room taxes based on their status "as agents of the hotel operators." (Opn. 17.) The court reasoned that even "under [such] labels," there could be no liability since all room taxes due and owing had been paid. (*Ibid.*)

In rendering its decision, the Court of Appeal relied on two unpublished decisions that it had previously issued in two of the other coordinated actions, cases in which it had rejected room-tax claims by the cities of Anaheim and Santa Monica, respectively. (*Anaheim*, *supra*, B230457; *Santa Monica*, B236166.) The court said those unpublished decisions decided "the question of whether OTCs are liable for" room tax 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." (Opn 7.)

4. The City's petition for rehearing and the Court of Appeal's modification of its opinion in response.

The City filed a petition for rehearing objecting to the Court of Appeal's reliance on unpublished decisions because, it asserted, such reliance violated the proscription of California Rules of Court, rule 8.1115. (Petition For Review 16.) The court disagreed, stating in a modified, published opinion that its reliance on unpublished decisions was permissible because those decisions are law of the case and, thus, satisfied an exception to the usual rule that unpublished decisions in one case are not binding in another case. (Opn. 3-4, fn. 4, citing Cal. Rules of Court, rule 8.1115(b).)[18]

5. San Diego successfully petitions for review.

This Court granted San Diego's petition for review on July 30, 2014.

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[18] This ruling was set forth in a new footnote 4 added in a modified opinion issued on March 27, 2014: "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 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.)

ARGUMENT

I. THE TAX BASE FOR CALCULATING ROOM TAX MUST BE THE RENTAL PAYMENT THE HOTEL REQUIRES THE CUSTOMER TO BE CHARGED TO OBTAIN OCCUPANCY. THE PORTION OF THE RENTAL PROCEEDS THAT THE HOTEL HAS CONTRACTUALLY AGREED TO ACCEPT AS ITS SHARE OF THOSE RENTAL PROCEEDS IS IRRELEVANT TO THE TAX CALCULATION.

A. The Governing Ordinance Imposes Room Tax On The Customer And Bases The Tax On The Rent Charged To And Paid By The Customer To Obtain The Privilege Of Occupancy.

The tax base is determined by looking through the lens of what *the customer* is charged and must pay to obtain a room, not by looking at what amount the hotel nets after the OTC has taken its share of those rental proceeds. The tax ordinance is laser-focused on the *customer* and on what the customer must pay to obtain the privilege of occupancy. This focus makes sense since the customer is the sole taxpayer. He is the only one who wants to obtain the privilege of occupancy. He is the only one who pays rent to obtain it. In contrast, the hotels and the OTCs are not taxpayers; they do not pay rent; they do not seek a privilege of occupancy. Thus, taxable "rent" must be what the *customer* is charged, not what the hotel ultimately receives.

Consider the following:

The ordinance expressly states that the customer, the sole taxpayer, is the exclusive focus of the room tax: "It is the *purpose and intent* of the City Council that there shall be imposed a tax *on Transients* [customers]."

(§ 35.0101, subd. (a), emphasis added; § 35.0102 ["Transient" is "any Person who exercises Occupancy, or is entitled to Occupancy"].)

Consistent with this focus, room tax is based on the rent "charged" by the hotel as the price that the customer must pay to obtain an occupancy privilege. (§ 35.0103.) As defined in section 35.0102, that rental charge is described as "the total consideration *charged to a Transient* as shown on the guest receipt for the Occupancy of a room . . . without any deduction therefrom." (§ 35.0102, emphasis added.)

Thus, the trigger and purpose of the room tax are each rooted in the Transient's purchase of Occupancy. The tax base is set as the total consideration charged for that occupancy as shown on the guest receipt—i.e., the full room rate quoted to, charged to and paid by the customer.

The amount the hotel has contractually agreed to accept as its share of the rental proceeds cannot qualify as taxable "rent" because that amount is *less* than the consideration charged to the customer for the privilege of occupancy. Indeed, a customer cannot obtain a room for the amount the hotel "nets" on OTC transactions. A customer is never offered a room for that price. A customer can never book a room for that price. The only way a customer can ever obtain the privilege of occupancy when dealing with an OTC is by paying *the full amount of the room rate* required by the hotel and quoted on the OTC's website. Thus, it is that rent that necessarily establishes the basis on which room tax must be calculated and paid.

That the tax base is the amount of rent the customer is charged and must pay to book his room is buttressed by section 35.0112, subdivision (a), which states that room tax must be calculated and collected at the same time the room is booked. (§35.0112, subd. (a) [tax is determined and must be collected "at the same time as the Rent is collected from every Transient"].) Since the taxable moment occurs when the customer pays rent and obtains the right of occupancy, nothing that happens later is relevant to the tax calculus. It simply does not matter how the OTCs and hotels later share the rental proceeds paid by the customer.

B. Undisputed Evidence And Uncontested Factual Findings Conclusively Establish That It Is The Hotels That "Charge" Rent In Exchange For The Privilege Of Occupancy—And That The *Full* Amount Of That Rent Must Be The Tax Base, Not Some Lesser Amount.

The record confirms what the ordinance itself establishes. Uncontroverted evidence and uncontested findings combine to confirm that the rent that is actually charged to and paid by the customer to obtain occupancy forms the basis for calculating room tax. This is so for two reasons: First, under the rate-parity agreements, the hotels set the minimum rent that must be charged in OTC transactions and preclude the OTCs from ever quoting or charging a lesser rate. Second, the OTCs are the undisputed agents of the hotels in charging and collecting rent and, thus, the acts of the agent OTCs are the same as the acts of the hotels, such that the room rate the OTCs charge and collect is of the same legal effect as though the hotel directly charged and collected that room rate.

1. The rate-parity agreements establish that it is the hotels that charge rent, as those agreements give the hotels the exclusive power to fix the minimum rent that must be charged to and paid by the customer if he is to obtain a privilege of occupancy.

The Court of Appeal correctly recognized that "each hotel establishes and maintains complete control of its room rates and availability." (Opn. 15, fn. 12.)[19] The hotels exercise this control via their rate-parity agreements with the OTCs, which mandate that the hotels set the minimum rate that will be charged to customers. (See pp. 13-15, *ante*.) By setting the minimum rental rate that is charged to the customer, it is *the hotels* that are charging that rent. Thus, it is the amount of rent that the hotels determine must be charged and that the customer must pay that necessarily determines the tax base.

As the Court of Appeal also correctly held, "Rent" does not change: "Whether[] rent is charged directly by the hotel or indirectly through a third party—the OTC—its numeric value does not change. The [room tax] is

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[19] While the Court of Appeal's quoted words are objectively accurate, the conclusion the court drew from those words is not. The Court of Appeal concluded that the tax base is what the hotels are willing to accept from the OTCs as their share of the rental proceeds. But, that can't be: The amount the hotels are willing to accept as their share of the rental proceeds can never be treated as "rent" because the definition of "rent" establishes that "rent" is "the total consideration charged to the Transient" for the privilege of Occupancy. (§35.0102) and, under the rate-parity agreements, that amount can never be less than what the hotels have insisted the OTCs must quote and charge on their websites. Since a customer can never obtain a privilege of occupancy by paying the lesser amount the hotels are willing to accept as their cut, that amount simply does not meet the definition of "rent" and cannot form the basis on which room tax is imposed.

calculated on the rent charged by the operator, regardless of whether the hotel-transient transaction is direct or indirect." (Opn. 17.) The City agrees with this statement, though the Court of Appeal failed to apply it correctly. Properly applied, the Court of Appeal's holding means that whether the hotel "directly" charges the transient $100 for the room (as in a hotel-direct transaction) or the hotel "indirectly" charges the transient $100 (as in a merchant-model transaction subject to rate parity), the "numeric value does not change." "Rent" is $100 in both cases.

2. The agency finding—that the OTCs act as the hotels' agents when charging and collecting rent—establishes as a matter of law that the hotels themselves are the entities charging the customers rent, since the acts of an agent are tantamount to the acts of the principal.

That the hotels are charging the rent that the customers pay via the OTCs' websites is also established by the fact that the OTCs function as the hotels' agents for purposes of charging and collecting rent. The hearing officer found the OTCs acted as the hotels' agents for these purposes. (See pp. 24-25 & fn. 17, *ante*.) The OTCs did not challenge this factual finding, and the lower courts did not review it. (See pp. 26-27, *ante*.) Moreover, the Court of Appeal confirmed the finding's accuracy, stating in its opinion that "[t]he OTC collects the rent on the hotel's behalf . . . . 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." (Opn. 14-15.) And, the OTCs have conceded the point, admitting that that they

"serv[e] as an intermediary" in "facilitating a guest's payment to the hotel for the hotel's furnishing of sleeping accommodations." (1JA, T.4, p. 165.)

The agency finding and the uncontroverted evidence that supports it establish that when the OTCs charge and collect rent, it is the *hotels themselves* that are performing these acts. Elementary principles of agency law compel that the acts of agents are deemed to be the same as acts of the principal. (E.g., *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"]; *Handley v. Guasco* (1958) 165 Cal.App.2d 703, 709 ["In the case of a contract, if the agent, at the time of making the contract, makes any representation, declaration or admission, whether true or false, touching the matter of the contract, it is treated as the representation, declaration or admission of the principal himself"].)

Numerous cases establish that when someone acts as an intermediary in handling funds on behalf of a principal, he acts as an agent, such that the *entirety* of what he collects is deemed collected on behalf of the principal. (See, e.g., *Scholastic Book Clubs, Inc. v. State Bd. of Equalization* (1989) 207 Cal.App.3d 734, 739-740 [schoolteachers who took orders and payments from their students for a bookseller's books were the bookseller's agents; by accepting orders and payments, and by delivering the books, bookseller confirmed the teachers' authority as bookseller's representatives]; *Groves v. City of Los Angeles* (1953) 40 Cal.2d 751, 760 [where city taxed "gross receipts" of bail bond companies, "gross receipts"

meant the full amount paid to the insurer via the bail bond agent; "What the agent receives, in legal effect the insurer receives"].)

Here, as far as the customer is concerned, the OTC stands in the shoes of the hotel for rent-charging and rent-collecting purposes. In other words, the OTC is the hotel's agent for those purposes as a matter of law. Indeed, even if the hearing officer had not found that the OTCs acted as the hotels' agents, the uncontroverted evidence would separately compel such a finding. (Cf. *Van't Rood v. County of Santa Clara* (2003) 113 Cal.App.4th 549, 562, 571-576 [agency is established by evidence that agent acted on behalf of and under the control of the principal; "When the essential facts are not in conflict and the evidence is susceptible to a single inference, the agency determination is a matter of law for the court"].)

Thus, it is the hotels themselves that are charging the rent that the customers must pay to obtain the privilege of occupancy. The rent that the OTC charges and collects is the rent that the hotel itself charges and collects. Accordingly, the room-tax percentage must be applied to that rental amount, not to some lesser portion of it.

C. The Portion Of The Rental Proceeds That The Hotel Receives *After* Rent Is Paid By the Customer And *After* The Booking Is Made Cannot Define The Tax Base.

That the proper tax base must be the rent charged to and paid by the customer is underscored by the fact that the tax must be calculated at the moment when the customer pays rent. There is no other point in the

transactional relationship that can possibly trigger the room tax or set the tax base.

As shown, the merchant model consists of three transactional steps: (1) the agreement between the hotel and the OTC; (2) the customer's room-rental transaction; and (3) the post-occupancy exchange of money between the OTC and the hotel. (See pp. 13-21, *ante*.) There is only *one* part of this process that could possibly trigger a tax: That is in transactional step no. 2, when the customer pays rent to purchase the privilege of occupancy. No other part of the transactional process can possibly define the proper tax base. Here's why:

1. The first transactional step—when the hotel signs an agreement with the OTC—is not a taxable event because no room is rented, no right of occupancy is transferred, and no money changes hands. In their agreements with the hotels, the OTCs make clear that they *do not buy rooms*; rather, all the OTCs receive is a right to *sell* the privilege of occupancy to customers at rental rates not less than the minimum rent the hotels specify (i.e., the hotel's room rate in customer-direct transactions). (1JA, T.4, p. 208; 2JA, T.10, p. 412; see, e.g., 16AR, T.60, p. 964; 17AR, T.64, p. 1016; 18AR, T.79, pp. 1294-1295, 1307; and see pp. 13-19, *ante*.) The customer, on whom the tax is levied and who is the only one desiring to obtain occupancy, is not a party to this hotel-OTC agreement. The customer is not yet part of the picture.

2. The second transactional step—when the customer clicks the "book" button on the OTC's website and pays rent in order to obtain the privilege of occupancy—is the only event that gives rise to the room tax. (See p. 20, *ante*.) The ordinance so provides: The customer is the taxpayer (§ 35.0101, subd. (a)); the customer is the only one who seeks occupancy and who pays rent to obtain it (§ 35.0102); the tax is due and must be calculated and collected "at the same time as the Rent is collected from every Transient" (§ 35.0112, subd. (a)); and "Rent" is the amount stated on the customer's receipt (§ 35.0102). What the customer is charged when he books a room is the "rent" upon which the tax must be calculated.

3. The third transactional step—when the hotel and OTC divvy up the rental proceeds—occurs *after* the booking has been completed, *after* rent has been paid and *after* the customer has obtained a right of occupancy. At this point, the taxable moment has already passed—typically weeks or months earlier. The object of the room tax, the customer, is not even a party to this transaction. What happens after rent is charged and paid has nothing to do with determining the proper base for calculating the tax.

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The bottom line: Room tax must be calculated based on the rental amount that the hotels insist the taxpaying customer must be charged and must pay in order to obtain the privilege of occupancy. Rent is rent. The room rate the customer must pay must be the tax base. The tax base cannot be some lesser portion of that rental amount.

D. The Court Of Appeal Reached The Wrong Result: It Incorrectly Read The Terms "Rent Charged" To Mean "Rental Proceeds *Received*"; It Gave No Effect To The Phrase "For The Privilege Of Occupancy"; It Ignored The Definition Of "Rent"; And It Lost Sight Of The Fundamental Purpose Of The Ordinance.

The Court of Appeal concluded that room tax was due on only *a portion* of the rent that customers are charged and must pay to book their rooms. The court reasoned that "rent charged by the Operator" is "the same amount that the hotel receives back from the OTC after the transaction with the transient is complete." (Opn. 17.) In other words, the only taxable "rent" is the hotel's post-booking share of the rental proceeds.

This determination is wrong. It misreads key language in the ordinance by reading "rent charged" to mean "the share of the rental proceeds the hotel has agreed to receive." It overlooks that the tax base is not simply "rent charged," but rather is "rent charged" "[*f*]*or the privilege of Occupancy*"—a privilege that can only be obtained by the customer by paying the amount of rent reflected on the OTC's website. It effectively nullifies the definition of "Rent" which is "the total consideration charged to a Transient as shown on the guest receipt." (§ 35.0102.) And, it fails to grasp the fundamental purpose of the *Transient Occupancy* Tax ordinance, namely, to tax *transients* on the room rates they are actually charged and must actually pay to obtain the privilege of *occupancy*.

1. The Court of Appeal misread the terms "rent charged by the Operator" to mean "rental proceeds *received* by the Operator."

The ordinance levies a tax based on the rent "charged by the [hotel]" for the "privilege of Occupancy." (§ 35.0103.) In construing this language, the Court of Appeal misread "charged" to mean "received."

Specifically, the court concluded that the portion of the customer's rental payment that is ultimately *received* by the hotel (after the OTC has taken its cut) forms the tax base, rather than the amount *charged* to the customer for the privilege of occupancy. (See, e.g., Opn. 17 ["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," emphasis added].)[20]

But the ordinance doesn't calculate tax based on the share of the rental proceeds that "the hotel receives back from the OTC." The ordinance calculates room tax based on the amount "charged" by the hotel for the privilege of occupancy. The hotel's act of *charging* rent is far

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[20] In the proceedings below, the parties used the shorthand terms "retail rate" and "wholesale rate" to describe the difference between the rent that the customer must pay to book his room (described as the "retail rate"), and the portion of the rental revenue that the hotels have agreed to accept from the OTCs as their share of the customer's room-rent (described as the "wholesale rate"). However, the shorthand terms "retail" and "wholesale" do not appear in the San Diego ordinance. In this brief, we have used the actual ordinance terms, including the term rent, not the shorthand terms the parties previously used.

different than the hotel's act of *receiving* a portion of the rental proceeds after the room is booked and paid for.

"Charge" means to "[d]emand (an amount) as a price from someone for a service rendered or goods supplied: 'the restaurant charged $15 for dinner.'"[21] (Oxford Dict. (2014), online at <http://www.oxforddictionaries.com/us/definition/american_english/charge>.) Thus, "charge" means the amount of money demanded of someone wanting to acquire something. It has nothing to do with the amount of money the seller pockets after splitting the customer's payment with third parties.

The room-tax ordinance focuses on "rent charged" by the hotel—i.e., the amount the hotel has determined the OTCs must demand and the customer must pay to obtain the right of occupancy. What the hotel ultimately receives as its share of that rental revenue is irrelevant to how the tax base is determined. The Court of Appeal's misreading of the term "rent charged" contributed significantly to its reaching the wrong result.

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[21] The restaurant example in the dictionary's definition of "charge" is instructive. A sales tax imposed on the $15 dinner would without question be understood to apply to the $15 charge the customer paid for the meal, not the lesser amount the restaurant owner ended up with after paying its food purveyors. In like fashion, if a hotel customer is charged and pays $100 for a hotel room, that is the amount that is taxable under the ordinance, not the lesser amount the hotel owner ends up with after paying the OTC.

2. The Court of Appeal gave no effect to the terms "for the privilege of Occupancy," terms that are essential in interpreting what is meant by the terms "rent charged by the Operator."

The Court of Appeal also erred by failing to give effect to the ordinance language declaring that taxable "rent" is the amount charged for a specific purpose—namely, for a customer *to obtain "the privilege of occupancy."* (See pp. 9-10, *ante*.) Because the "rent charged" is necessarily tied to what the customer must pay to obtain the privilege of occupancy, the phrase cannot mean a lesser amount for which the customer could *never* obtain occupancy. Indeed, a customer cannot obtain a $100 room by paying the $80 that the hotel receives on the transaction (after the OTC takes its cut). Not only is the customer never quoted a room at that lower amount, the hotel-OTC secrecy agreements prevent the customer from even knowing about that lower amount. (See pp. 18-19, *ante* [hotel-OTC contracts keep the rent-split secret].) Accordingly, it makes no sense to treat that $80 as the tax base.

Nothing in the ordinance ties the tax to what the hotel is ultimately willing to accept as its share of the rental revenue generated by the payment of rent. Rather, the ordinance's exclusive focus is the customer-taxpayer and what he is charged and must pay for the privilege of occupancy. The Court of Appeal's failure to pay heed to the "privilege of Occupancy" language was prejudicial error.

3. The Court of Appeal gave no effect to the ordinance language defining "rent" as the "total consideration" "shown on the guest receipt" "without any deduction therefrom."

In addition to misreading the "charged by the [hotel]" language in the tax imposition provision of the ordinance (§ 35.0103), the Court of Appeal also failed to give proper effect to the definition of "rent" as "the *total* consideration charged to a Transient as shown on the *guest receipt* for the Occupancy of a room . . . *without any deduction therefrom*" (§ 35.0102, emphasis added).

The "total consideration" language makes clear that "rent" is defined as the "total" amount a customer is charged for the privilege of occupying a room, not any lesser amount. That this is so is confirmed by the additional definitional requirements that "rent" is the amount "shown on the guest receipt" "without any deduction therefrom." The "without any deduction" language shows that the drafters of the ordinance anticipated and rejected the very type of argument the OTCs make in this case—i.e., that it is appropriate to deduct amounts from the rent the customer pays and then apply the tax percentage to that artificially-lowered portion of rent.

It is undisputed that the OTCs provide their customers with a guest receipt, and that the "room amount" shown on the guest receipt is always the *full* amount the customer is charged for his room—a room rate that the rate-parity agreements require must never be less than the rate set by the hotels in their direct-purchase transactions. As the ordinance commands, there can be no deduction from this amount. Thus, if a hotel charges its

direct-purchase customers $100 for a room, then the OTC must charge at least $100 for the same room and the OTCs must state on the customer's guest receipt that the "room amount" is $100. This is the rent charged by the hotel and it equals the consideration the customer must pay to gain an occupancy privilege. This amount is necessarily the taxable "rent."

In coming to a contrary conclusion, the Court of Appeal gave no effect to the ordinance's definition of rent, and it misunderstood what the "guest receipt" and the "without any deduction" language means. It erred in at least two ways.

First, the Court of Appeal erred when it stated the guest receipt cannot be conclusive because it might reference charges in addition to rent. (Opn. 10.) While that may be true, it doesn't negate the fact that the rent is itemized on the guest receipt. For tax-imposition purposes, the rent charged to and paid by the customer is shown on the guest receipt and that is all that matters. That the guest receipt might also contain other charges does not alter this truth: the stated room rate is what was charged and it is necessarily the tax base.

Second, the Court of Appeal erred when it concluded the definition of rent "has no effect" for tax purposes unless the rent is "charged by the Operator," and thus, that the only taxable rent is the amount the Operator ultimately receives as its share of rental proceeds. (Opn. 10.) As shown, what the hotel receives is irrelevant. That amount cannot be rent since "rent" is defined as the consideration "charged to the Transient." The

hotel's ultimate share of rental proceeds is never what is "charged to the Transient." The customer can never gain a privilege of occupancy by paying that amount, nor can the OTCs ever transfer a possessory right for that amount. By definition, the lower amount cannot be "rent" and it is never "charged" to the customer by the hotel or anyone else.

The only "rent" charged is the room rate the hotel insists must be charged to and paid by the customer to obtain an occupancy privilege. This rent is therefore the amount on which the tax must be calculated.

4. The Court of Appeal failed to consider or give effect to the fundamental purpose of the room-tax ordinance; namely, to tax the customer on the rent he is charged and must pay to gain the privilege of room occupancy.

By focusing too narrowly, the Court of Appeal lost track of what the room-tax ordinance was enacted to achieve—namely, to tax the customer who pays rent to acquire the right to occupy a room. Given this purpose, it makes perfect sense that the amount of the tax should be calculated as a percentage of the rent charged to and paid by the customer to gain that privilege. It makes zero sense that the amount of tax would be based on the hotel's contractually-determined, post-booking entitlement to a share of rental proceeds.

The Court of Appeal's misreading of the ordinance is clearly revealed in the following passage of the opinion:

> "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.

(Opn. 4, emphasis added, original ellipses.)

This description of the transaction is wrong for multiple reasons. Rent is never "charged to the OTCs." The OTCs do not obtain any right of room occupancy. The OTCs are not wholesalers—they do not pre-purchase rooms for resale. The OTCs never pay rent, nor are they ever charged rent. They are not lessees, they are not sublessees, and they never take title to rooms. (1JA, T.4, p. 208; 2JA, T.10, p. 412.)

In failing to take a step back and assess what the room-tax ordinance was designed to achieve in light of the entire statutory scheme, the Court of Appeal violated the most basic of statutory-construction precepts: "A fundamental rule of statutory construction is that a court should ascertain the intent of the Legislature so as to effectuate the purpose of the law." (*Phelps v. Stostad* (1997) 16 Cal.4th 23, 32.) The statutory language at issue 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." (*Ibid.*)

When the ordinance is properly viewed as a whole and the taxation purpose is properly assessed, the only proper construction is that the room tax must be calculated as a percentage of the rent actually charged to and actually paid by the customer to obtain the privilege of occupancy.

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For all the reasons stated above, the judgment should be reversed with directions that room tax must be calculated based on the amount of rent charged to and paid by the customer, not some lesser amount.[22]

II. THE OTCS CANNOT ESCAPE LIABILITY FOR UNPAID ROOM TAX BY CLAIMING THEY HAVE NO REMITTANCE DUTIES.

Below, the OTCs claimed they should prevail because they are not "Operators" within the meaning of the ordinance, and thus had no room-tax remittance obligations. (See, e.g., OTCs' Respondents' Brief 11-17.) The Court of Appeal concluded it didn't need to resolve the question because it determined that no additional taxes were owing. (Opn. 17 ["We need not address the OTCs' potential liability for TOT under the various labels listed

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[22] The OTCs have gone to great lengths to keep the public from learning the details of their economic arrangements: They have secrecy agreements with the hotels, and they arranged for a sealing order in this case that assures continued secrecy. It can be inferred from these secrecy efforts that the OTCs do not want customers to know that the room rates they quote are not bargains because they can never be cheaper than those charged by the hotels directly. The opacity resulting from this secrecy is reflected in the OTCs' practice of charging "taxes and fees" in a combined billing line without differentiation of the amounts charged for each component. Because the numbers are combined, the customer cannot learn from reading the guest receipt how much he is being charged for each item and, thus, cannot tell how much he is paying in taxes or whether he is actually being charged more than what he would pay if he booked directly with the hotels. In fact, 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." (*City of San Antonio v. Hotels.com* (W.D.Tex., July 1, 2011, Civil No. SA-06-CA-381-OG) 2011 U.S. Dist. LEXIS 72665, *36, emphasis added.)

by the City" because "(e)ven if the OTCs were liable for (room tax) under any of these labels, they would only be liable for (room tax) on the rent charged by the operator—*not* on the fees that the OTCs themselves charge"].)

We expect the OTCs will reassert the duty-to-remit argument in these proceedings. In anticipation of that argument, we will show that, for multiple reasons, the OTCs are obligated to collect and remit room tax, regardless of whether they qualify as "Operators" under the ordinance.

A. The OTCs Can Be Held Liable Because They Have Directly Agreed To Collect And Remit Room Taxes.

The OTCs must collect and remit room tax because many of the hotel-OTC contracts obligate them to do so. Those contracts contain terms making the OTCs directly liable to the City for non-payment of room tax. They contain covenants pursuant to which the OTCs agree to be "solely responsible" or "solely and directly responsible" for either payment of room tax on the full room rate, or any and all room taxes determined to be due and owing.[23]

These provisions render the OTCs directly liable to the City since when one contracting party agrees to be "solely responsible for paying" the counter-party's remittances, the counter-party "ha[s] no contractual

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[23] 16AR, T.57, p. 914; 16AR, T.58, p. 937; 17AR, T.68, pp. 1114, 1125; 19AR, T.92, at p. 1518; 20AR, T.103, p. 1772; 20AR, T.105, p. 1790; 20AR, T.106, p. 1800; 20AR, T.106, p. 1818; 20AR, T.108, p. 1846; 40AR, T.289, p. 6193.

obligation" to "pay [the remittances] directly" and the "payment obligation has been shifted by contract." (See *California Medical Assn. v. Aetna U.S. Healthcare of California, Inc.* (2001) 94 Cal.App.4th 151, 167 [discussing contractual shift of liability from large medical groups and independent practice organizations onto medical insurers].)

In addition, some contracts between the hotels and the OTCs provide that the OTCs are responsible for collecting and remitting room tax to the City. (17AR, T.68, p. 1125; 19AR, T.92, p. 1518; 20AR, T.103, pp. 1772-1773.) Other contracts require the OTCs to collect and remit all applicable room tax to the hotels, to be forwarded to the City.[24] And still other contracts require the OTCs to remit to the hotels the portion of the rent that the hotel has agreed to keep, as well as room tax calculated on that amount.[25]

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[24] 16AR, T.52, p. 862; 16AR, T.58, p. 938; 17AR, T.62, pp. 983, 990, 982; 17AR, T.66, p. 1041; 17AR, T.67, p. 1055; 18AR, T.79, p. 1312; 18AR, T.80, p. 1321; 18AR, T.85, p. 1379; 19AR, T.93, pp. 1543-1544; 19AR, T.94, p. 1572; 19AR, T.95, pp. 1578, 1606; 19AR, T.96, pp. 1629, 1621, 1620; 19AR, T.97, pp. 1660, 1666; 19AR, T.98, pp. 1678, 1680; 19AR, T.101, pp. 1708, 1710; see also 17AR, T.71, p. 1167 (Expedia must "collect all applicable taxes from its customers" but remits only certain amounts collected to hotel).

[25] 16AR, T.57, p. 914; 16AR, T.60, pp. 961, 963, 967; 17AR, T.65, p. 1029; 17AR, T.70, p. 1149; 17AR, T.72, pp. 1182-1183; 18AR, T. 80, p. 1321; 18AR, T.83, p. 1344; 18AR, T.86, p. 1383; 18AR, T.87, p. 1400; 19AR, T.99, pp. 1686, 1691; 20AR, T.102, pp. 1721-1722, 1738; 20AR, T.105, p. 1790; 20AR, T.106, p. 1800; 20AR, T.106, p. 1818; 20AR, T.107, pp. 1826-1827; 20AR, T.108, pp. 1837, 1846; 38AR, T.264, pp. 12057-12058; 38AR, T.284, p. 12242; 40AR, T.289, p. 6194; 40AR, T.292, p. 6261; 40AR, T.293, p. 6274; 40AR, T.294, p. 6290; 40AR, T.295, p. 6299;

Furthermore, many hotel-OTC agreements provide that the OTCs are liable for the full amount of room tax (i.e., tax on the full amount of the rent charged to and paid by the customer) under alternative theories.[26]

The purpose of all of these contractual duties is to make sure that the City receives all taxes owed. As a result, the City is a third-party beneficiary of these agreements. (*Johnson v. Superior Court* (2000) 80 Cal.App.4th 1050, 1064 [a third party qualifies as a beneficiary of a contract where the contracting parties "intended to benefit that third party"]; *Prouty v. Gores Technology Group* (2004) 121 Cal.App.4th 1225, 1232-1233 [third party may enforce contract where it "appear(s) to have been the intention of the parties to secure to him personally the benefit of its provisions"].) As such, the City may directly enforce the OTCs' collection and remittance duties. (E.g., *Hess v. Ford Motor Co.* (2002) 27 Cal.4th 516, 524 ["A third party beneficiary may enforce a contract made

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41AR, T.312, p. 6469; 42AR, T.313, p. 6477; 41AR, T.314, p. 6487; 41AR, T.315, p. 6497; 41AR, T.316, p. 6507; 41AR, T.319, p. 6550; 41AR, T.321, p. 6569; 42AR, T.322, p. 6578; 42AR, T.323, p. 6587; 43AR, T.349, p. 6918.

[26] For example, some contracts require the OTCs to indemnify the hotels against any tax underpayment. (See, e.g., 16AR, T.60, pp. 967, 961; 17AR, T.70, p. 1149; 17AR, T.72, p. 1184; 19AR, T.99, pp. 1693, 1691; 20AR, T.102, p. 1721; 20AR, T.107, p. 1828.) Other contracts require the OTCs to assume liability for any unpaid taxes. (See, e.g., 18AR, T.86, p. 1383; 18AR, T.87, p. 1400.) Yet other contracts render the OTCs "solely responsible" for payment of taxes. (See, e.g., 20AR, T.105, p. 1790; 20AR, T.106, p. 1800; 20AR, T.106, p. 1818; 20AR, T.108, p. 1846.) As discussed at pp. 47-52, under the indemnification and assumption language, the City is entitled to proceed directly against the OTCs for unpaid room tax.

for its benefit," citing Civ. Code, § 1559]; *Expedia, Inc. v. City of Columbus* (Ga. 2009) 681 S.E.2d 122, 127 [held, "(h)aving contracted with City hotels to collect hotel occupancy taxes, Expedia has rendered itself duty-bound to remit the taxes it has collected to the City's taxing authority"].)

B. The OTCs Are Liable Because They Have Contractually Agreed To Assume The Risk Of Non-Payment Of Room Taxes.

In addition, many OTCs have contractually assumed the risk and undertaken liability for any underpayment of room tax. Under many contracts, the OTCs agree that the hotels shall "in no event" be liable for paying room tax on the full room rate, or paying any other room taxes that become due.[27]

These contracts, too, can be enforced by the City as a third-party beneficiary since the OTCs, by assuming the risk of room-tax liability, have become the "primary obligors" for collecting and remitting room tax. (See, e.g., *Layton v. West* (1969) 271 Cal.App.2d 508, 511 [becoming a primary obligor is "the generally accepted effect of an assumption" in this state]; *Parrish v. Greco* (1953) 118 Cal.App.2d 556, 561 ["if the debt be assumed by the grantee he becomes the principal debtor"]; *Travelers Indemnity Co. v. Gillespie* (1990) 50 Cal.3d 82, 95 ["reinsurance and assumption

[27] See 16AR, T.57, p. 914; 18AR, T.85, p. 1379; 18AR, T.86, p. 1383; 18AR, T.87, p. 1400; 19AR, T.96, p. 1621; 19AR, T.97, p. 1661.

agreement()" results "in both the original insurer and the assuming insurer being obligated to the insured"].)

C. The OTCs Are Liable Because They Have Contractually Agreed To Indemnify And Hold Harmless The Hotels For Any Failure To Pay Room Tax.

Many hotel-OTC contracts also contain indemnification provisions, under which the OTCs have (a) indemnified the hotels against liability for room tax owed on the full room rate and/or (b) agreed to hold the hotels harmless from such liability.[28]

These provisions, like those discussed above, render the OTCs directly liable to the City. This is so not only because the City is a third-party beneficiary of these agreements, but also because Civil Code section 2777 provides: "One who indemnifies another against an act to be done by the latter, is liable *jointly with the person indemnified*, and separately, to every person injured by such act." (Civ. Code, § 2777, emphasis added.)

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[28] See, e.g., 3AR, T.5, p. 13923:7-18; 34AR, T.238, pp. 5311-5312; 29AR, T. 215, pp. 4127-4128; see also 1JA, T.4, pp. 214-216 (Hearing Officer: "In their contracts with the OTCs dating back to the 1990s, the hotels have always required that the OTCs agree to indemnify the hotels for any [room tax] not paid on 'mark up' and service charges under the Merchant Model"); 16AR, T.52, p. 865; 16AR, T.60, pp. 967, 961; 17AR, T.62, pp. 992, 990; 17AR, T.67, p. 1060; 17AR, T.68, pp. 1109, 1125; 17AR, T.70, p. 1149; 17AR, T.71, pp. 1169-1170; 17AR, T.72, p. 1184; 18AR, T.79, pp. 1229, 1233; 18AR, T.79, p. 1297; 18AR, T.85, p. 1380; 18AR, T.87, p. 1400; 19AR, T. 92, p. 1529; 19AR, T.93, p. 1549; 19AR, T. 94, p. 1566; 19AR, T.95, p. 1583; 19AR, T.99, pp. 1693, 1691; 19AR, T.100, p. 1703; 20AR, T.102, p. 1721; 20AR, T.103, p. 1773; 20AR, T.107, p. 1828; 20AR, T.108, pp. 1837, 1849; 38AR, T.264, p. 12059; 40AR, T.292, p. 6264; 42AR, T.322, p. 6581; 42AR, T.323, p. 6590; 43AR, T.349, p. 6924.

Here, "nonpayment" of room tax to the City is the "future act indemnified against," and the indemnifying OTCs have "bec[o]me jointly liable with" the indemnitee-hotels for that nonpayment. (See *Bryan* v. *Banks* (1929) 98 Cal.App. 748, 756.) Under *Bryan* and the express language of Civil Code section 2777, the City is "allow[ed] . . . to proceed against the [OTC-indemnitors] separately, or jointly with the" indemnitee-hotels in these circumstances. (*Id.* at p. 757.)

D. The OTCs Are Liable Because They Are The Hotels' Agents And, Thus, Are Obligated Under Civil Code Section 2344 To Surrender All Room Tax They Collect On Behalf Of The Hotels, But Fail To Remit To The City.

Civil Code section 2777 is not the only statutory basis for imposing liability on the OTCs. Civil Code section 2344 also compels that result. Section 2344 requires that "[i]f an agent [the OTC] receives anything for the benefit of his principal [the hotel], to the possession of which another person is entitled [the City], he must, on demand, surrender it to such person . . . ." That requirement squarely applies here.

As the Court of Appeal expressly recognized, the OTCs act on behalf of the hotels when they rent rooms, "'handle all financial transactions related to the hotel reservations,'" collect rent, handle customer service up until the time the customer checks into the hotel, "provide[] a receipt to the transient, which includes a room rate and separately delineated taxes and fees," and remit room tax to the hotel to be remitted to the City. (Opn. 4, 14-15.) This confirms what the hearing officer found,

namely, that the OTCs are agents of the hotels for purposes of all collection and remittance obligations. (See pp. 24-25 & fn. 17, *ante*.)

While the Court of Appeal expressly declined to opine on the effect of the agency finding (see Opn. 17), the agency finding further compels the conclusion that the OTCs are obligated for remitting the room tax under Civil Code section 2344.[29] To the extent the OTCs have received funds from customers that should properly be designated as additional room taxes, the OTCs must remit such funds as taxes and cannot unilaterally change their character by mis-labelling those taxes as the OTCs' "fees."

The OTCs hold these funds "for the benefit of" the hotels because the hotels would be obligated to collect those funds as room taxes if they handled the transaction directly. And since all room taxes are owed to the City, any collection by the OTCs of amounts that can be characterized as unpaid room taxes are necessarily collected for the benefit of the City and must, on demand, be relinquished.

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For these reasons, any argument by the OTCs that they have no duty to collect and remit unpaid room taxes must be rejected. Regardless

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[29] Though the Court of Appeal declined to rule on the agency issue, it did conclude the OTCs were not "managing agents" of the hotels. (Opn. 8-9.) The City does not assert that the OTCs are the managing agents or even the general agents of the hotels. The City asserts only that the OTCs are the hotels' agents with respect to the particular duties they have undertaken to perform—including, as relevant here, the duties to charge and collect rent from customers, and to calculate and remit room taxes.

whether the OTCs are "Operators" under the ordinance, they are obligated to collect and remit room taxes under the multiple theories of liability just described.

III. THE COURT OF APPEAL ERRED IN RULING THAT THE UNPUBLISHED *ANAHEIM* AND *SANTA MONICA* OPINIONS WERE BINDING AS LAW OF THIS CASE.

In holding that the OTCs did not owe room tax beyond what had previously been collected and paid, the Court of Appeal relied on its two prior unpublished decisions in *Anaheim* and *Santa Monica*. (Opn. 7.) The court justified citing these unpublished decisions by stating they were applicable as "law of the case" and thus fell within an exception to the rule precluding citation of unpublished opinions. (Opn. 3, fn. 4.)

This ruling was erroneous. Prerequisites to the application of the law-of-the-case doctrine (i.e., case and party identity) are not satisfied. Moreover, a coordination order that merely provides for administrative coordination of certain cases does not, without more, render a disposition in one coordinated case law of the case in others.

A. The Law-Of-The-Case Doctrine Is Inapplicable Here Because There Is No Case Or Party Identity.

For the law-of-the-case doctrine to apply, there must be both case identity and party identity. Neither requisite is satisfied here.[30]

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[30] We recognize that the law announced in a *published* decision can be binding in other cases, not because it is law of the case, but because the decision has precedential effect. That is not the situation here, as the *Anaheim* and *Santa Monica* decisions on which the Court of Appeal relied were not published.

1. The case-identity element is not satisfied.

An appellate decision "stating a rule of law necessary to the decision of [a] case" is binding "in any subsequent retrial or appeal *in the same case*." (*Morohoshi v. Pacific Home* (2004) 34 Cal.4th 482, 491, emphasis added, internal quotation marks omitted.) Where a prior appeal "involve[s] a different case," the result cannot be applied as law of the case in a later appeal. (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 626.) Thus, it is error to apply the law-of-the-case doctrine in a proceeding that does "not involve the same case . . . before th[at] court" previously. (*Id.* at p. 668.)

Case identity is absent here. This case concerns the OTCs' challenge to the San Diego "hearing officer's decision" regarding the construction of San Diego Municipal Code § 35.0101 et seq. The separate *Anaheim* and *Santa Monica* appeals involved different and distinct complaints/petitions, different room-tax ordinances, and different cities. The cases were never ordered consolidated, nor was notice ever given to any of the parties in the coordinated litigation that an appellate resolution in either of these cases would be binding in others. The "prior appeal[s]" in *Anaheim* and *Santa Monica* thus each "involved a different case" from the instant appeal. (*Rosenkrantz*, *supra*, 29 Cal.4th at p. 626.)

2. The party-identity element is not satisfied.

The law-of-the-case doctrine applies only "with regard to the rights of the *same parties* who were before the court" when an initial ruling was made. (*Rosenkranz*, *supra*, 29 Cal.4th at p. 668, emphasis in original.) If "different parties" were before the court when a ruling was entered, then

that ruling "does not support application of the law of the case doctrine." (*Id.* at p. 626.) This element, too, has not been satisfied here, as Anaheim and Santa Monica are obviously different cities than San Diego.

B. The Law-Of-The-Case Doctrine Is Inapplicable Here Because Coordinated Cases Remain Separate Unless They Are Ordered Merged Or The Parties Are Given Notice That A Decision In One Case Will Be Binding In Others And Are Afforded An Opportunity To Be Heard—None Of Which Happened Here.

The Court of Appeal apparently determined, without ever saying so, that all coordinated cases necessarily become the same case, such that every ruling in one case becomes law of the case as to all of the other coordinated cases. This is wrong. The mere fact that one case is coordinated with another does not mean that a decision in one is binding in the other.

1. There was never a merger order entered nor was San Diego ever given notice and an opportunity to be heard in the coordinated cases.

The purpose of a coordination order is to allow for the efficient administration of related cases separately pending in different jurisdictions throughout the state. (See *McGhan Medical Corp. v. Superior Court* (1992) 11 Cal.App.4th 804, 813 [discussing purposes of coordination]; Cal. Rules of Court, rule 3.541 [duties of trial coordination judge].) Consolidation achieves the same end under different circumstances.[31]

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[31] "Coordinated" and "consolidated" proceedings are not the same, but they achieve similar purposes. Coordinated proceedings, like those here, bring before the same court complex cases originally pending before different courts in the state. (See Code Civ. Proc. § 404 et seq.; Cal. Rules of Court, rules 3.501 et seq.) "Consolidated" proceedings unify cases pending before

Because the two types of orders serve the same function, the case law illuminating one, illuminates the other. That case law establishes that without an order or stipulation specifically merging the coordinated/consolidated cases into one case, the cases remain separate; they do not become merged into a single case. Here, there was no order directing that the separate coordinated actions would be treated as one.

Sanchez v. Superior Court (1988) 203 Cal.App.3d 1391 is instructive. There, a party formally appeared in one of two consolidated actions arising from the same auto accident. The Court of Appeal held that even though the actions were consolidated for trial, the actions retained their separate identities so that the appearance in one of the consolidated actions did not constitute an appearance in the other. (*Id.* at pp. 1385-1396.)

In so holding, *Sanchez* began by describing the two different types of consolidation:

> "[1] a complete consolidation resulting in a single action, and [2] a consolidation of separate actions for trial. Under the former

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the same court if it is shown that those cases have common issues of law or fact. (Code Civ. Proc., § 1048; Cal. Rules of Court, rules 3.350, 3.500.) Thus, whether cases are ordered "coordinated" or ordered "consolidated" primarily depends on whether the different cases were originally pending in the different courts or in the same court. (Younger & Bradley, Younger on Cal. Motions (2013) § 22:14, p. 697 ["(c)oordination is the equivalent of consolidation for cases pending in different counties"].) Opinions often use the terms "coordinated" and "consolidated" interchangeably.

> procedure, which may be utilized where the parties are identical and the causes could have been joined, the pleadings are regarded as merged, one set of findings is made, and one judgment is rendered. In a consolidation for trial, the pleadings, verdicts, findings and judgments are kept separate; the actions are simply tried together for the sake of convenience and judicial economy.

(*Id.* at p. 1396, generally citing 4 Witkin, Cal. Procedure (3d ed. 1985) Pleading, § 298 et seq; see also 4 Witkin, Cal. Procedure (5th ed. 2008) Pleading, §§ 341, 346, 347; Cal. Rules of Court, rule 3.350(c).)

Only the *first* type of consolidation results in a complete merger. Thus, *Sanchez* held: "While it is clear that the two actions arose from the same incident, nonetheless there were two different sets of plaintiffs who pleaded their cases separately and would presumably expect separate judgments. There is no indication in the record that the two complaints in these actions became merged. On the contrary, the actions retained their separate numbers." (*Id.* at p. 1396; see also 4 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 341.) Finally, *Sanchez* reasoned that in order for a consolidated case to become completely merged, the parties *must have agreed* to such a complete merger. (*Ibid.* ["Furthermore, a complete merger of the two actions would be improper in the absence of a stipulation or consent by defendants"].) Here, the parties never stipulated to a merger.

That coordinated cases do not automatically become merged into a single case is further evidenced by the fact that not one of the many rules

governing coordinated cases even hints that mere coordination without more yields a merger. (Code Civ. Proc., § 404 et seq.; Cal. Rules of Court, rule 3.501 et seq.) Rather, the coordination rules are designed to assure administrative consistency and 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 appropriate in order to protect their rights. (See, e.g. Cal. Rules of Court, rules 3.501, 3.506, 3.510, 3.513, 3.531, 3.541 [provisions for the appointment of liaison counsel, allowing court to separately try different issues, and requiring separate service of all court filings or submissions to all parties in "all included actions and coordinated actions"].)

If anything, these rules suggest that before parties in a coordinated case can be bound, they must receive notice of all proceedings that can affect their rights. This is a far cry from mandating that separate cases automatically merge into one for all purposes, as the Court of Appeal apparently believed happened here.

All parties that might be bound must be given an opportunity to request permission to make appearances. (See Cal. Rules of Court, rules 3.501, 3.510, 3.513, 3.514.) Here, San Diego never received notice that appellate determinations in the *Anaheim* and *Santa Monica* cases would be binding on San Diego. San Diego was not represented in either of those proceedings, nor was San Diego ever afforded an opportunity to appear and be heard in those cases. Under these circumstances, the mere coordination

of the room-tax cases did not result in a complete merger of the coordinated cases.

2. The federal law upon which California coordination and consolidation law is based offers powerful support for the conclusion that coordination and consolidation alone does not result in an automatic merger.

That coordinated cases remain separate absent an order providing otherwise is echoed by the relevant federal law of consolidation and multi-district litigation, all of which underlies California's law of consolidation and coordination. (See 4 Witkin, Cal. Procedure, *supra*, Pleading, §§ 342, 352; Legis. Com. com. (1971) Deering's Ann. Code Civ. Proc., § 1048 (1971 Supp.) [consolidation "conform(s) in substance" to Fed. Rules Civ.Proc., rule 42, 28 U.S.C.].)

Federal law holds that consolidated proceedings do not automatically merge for law-of-the-case purposes. (*Johnson v. Manhattan Ry. Co.* (1933) 289 U.S. 479, 496-497 [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"]; *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 on unrelated grounds, affd. in part without precedential effect (2012) 132 S.Ct.1414 [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]; Advisory Com. Note, Fed. Rules App.Proc., rule 3, as amended Apr. 24, 1998, 28 U.S.C. (1998 amend.) [consolidated appeals "do not merge into one" for all purposes].)

C. Applying The Law-Of-The-Case Doctrine In This Case Would Violate Due Process Guaranteed By The United States And California Constitutions.

Fatal due process problems are 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"; thus, "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.) Here's why:

> 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"].)

While it is certainly understandable that a court would have a "strong inclination to bring harmony and uniformity to the rulings" in coordinated cases (*id.* at p. 624), courts must be sensitive to the fact that due process precludes them from doing so unless there is assurance that all interested parties have been given notice and an opportunity to be heard in the matters that will later be considered binding on all. San Diego was not given such notice here, and therefore due process prevents San Diego from being bound by rulings in the separate room tax collection appeals.

CONCLUSION

For all the reasons stated above, the Court of Appeal's ruling should be reversed with directions that the tax base for calculating room tax is the rent charged to and paid by the customer as consideration for transferring the right of occupancy, and that the unpublished decisions in the *Anaheim* and *Santa Monica* cases are not binding on any issue presented in the instant case. The Court should reject any argument that the OTCs are not obligated to collect and remit room taxes; indeed, this Court should direct that the OTCs are duty-bound to do so.

DATED: January 26, 2015

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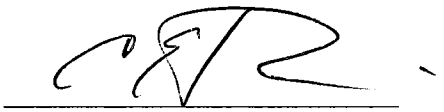
CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.204(c)(1), I certify that this **PETITIONER'S OPENING BRIEF ON THE MERITS** contains 13,296 words, not including the tables of contents and authorities, the caption page, signature blocks, the verification or this certification page, as counted by the word processing program used to generate it.

Dated: January 26, 2015



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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 January 26, 2015, I served the foregoing document described as: **PETITIONER'S OPENING BRIEF ON THE MERITS** on the parties in this action by serving:

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

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Executed on January 26, 2015, 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.

Joyce McGilbert

Supreme Court Case No. S218400
In Re Coordinated Proceeding Special Title (Rule 3.550(c))
TRANSIENT OCCUPANCY TAX CASES

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