Case No. 218400

IN THE SUPREME COURT OF CALIFORNIA

In Re TRANSIENT OCCUPANCY TAX CASES

CITY OF SAN DIEGO, CALIFORNIA

Petitioner,

v.

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

Respondents.

After an Opinion by the Court of Appeal, Second Appellate District, Division Two, Case No. B243800

On Appeal from the Superior Court of the State of California for the County of Los Angeles
The Hon. Elihu M. Berle, Judge of the Superior Court, Department 323
Los Angeles County Superior Court Case No. JCCP 4472

RESPONDENTS' REQUEST TO TAKE JUDICIAL NOTICE; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF STACY HORTH-NEUBERT IN SUPPORT THEREOF; [PROPOSED] ORDER

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Attorneys for Respondents,
TRAVELOCITY.COM LP and
SITE59.COM, LLC

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that, pursuant to California Rules of Court 8.252(a)(2), California Evidence Code sections 452 and 453, Respondents hereby respectfully request that, in considering The Online Travel Companies' (the "OTCs") Answer to Petitioner the City of San Diego's Petition for Review, this Court take judicial notice of the following exhibits attached to the Declaration of Stacy R. Horth-Neubert submitted concurrently herewith:

Exhibit 1:	City of Los Angeles' Class Action Complaint, Case No. BC 326693 (Los Angeles Superior Court), filed December 30, 2004.
Exhibit 2:	City of San Diego's Complaint, Case No. GIC 861117 (San Diego Superior Court), filed February 8, 2006.
Exhibit 3:	Recommendations Regarding Coordination and Order on Stay Request (coordinating the Los Angeles and San Diego cases), JCCP No. 4472 (Los Angeles Superior Court), filed July 3, 2006.
Exhibit 4:	Opinion and Order on Defendants': (1) Demurrer to Plaintiff City of Los Angeles' Third Amended Complaint; And (2) Motion to Strike Class Allegations from Third Amended Complaint, JCCP No. 4472 (Los Angeles Superior Court), filed July 27, 2007.
Exhibit 5:	Opinion and Order on Defendants' Demurrer to Plaintiff City of San Diego's First Amended Complaint, JCCP No. 4472 (Los Angeles Superior Court), filed July 27, 2007.

Exhibit 6: Stipulation and Order To Coordinate Add-On Cases and Stay Actions, JCCP No. 4472 (Los Angeles Superior Court), dated July 27, 2009 (adding additional San Francisco cases).

Exhibit 7: Opinion and Order on the Online Travel Companies' Motion for Judgment Granting Writ of Mandate and the City of Anaheim's Motion to Deny Online Travel Companies' Writs of Administrative Mandamus, JCCP No. 4472 (Los Angeles Superior Court), dated Feb. 1, 2010.

Exhibit 8: Opinion and Order On the Joint Demurrer of Defendant Online Travel Companies To The City Of Santa Monica's First Amended Complaint, JCCP No. 4472 (Los Angeles Superior Court), dated March 16, 2011.

Exhibit 9: Opinion of The California Court of Appeal, Second Appellate District, Division Two, Case No. B230457, JCCP No. 4472, filed November 1, 2012 (Anaheim decision).

Exhibit 10: Opinion of The California Court of Appeal, Second Appellate District, Division Two, Case No. B236166, JCCP No. 4472, filed November 1, 2012 (Santa Monica decision).

Exhibit 11: Notice of California Supreme Court's Denial of Review in Anaheim and Santa Monica Actions, JCCP No. 4472 (Los Angeles Superior Court), filed Jan. 23, 2013.

Exhibit 12: Appellant's Opening Brief, Case No. B243800, JCCP No. 4472 (California Court of Appeal, Second Appellate District, Division Two), dated March 15, 2013.

Exhibit 13: Appellant's Reply Brief, Case No. B3243800, JCCP No. 4472 (California Court of Appeal, Second Appellate District, Division Two), filed August 6, 2013.

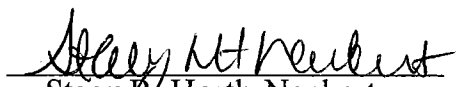
Exhibit 14: Appellant's Petition for Rehearing and Request for Publication, Case No. B243800, JCCP No. 4472 (California Court of Appeal, Second Appellate District, Division Two), filed March 20, 2014.

These materials are relevant to the issues raised in the OTCs' Answer to Petitioner City of San Diego's Petition for Review. This Request is made based on this Notice, the Accompanying Memorandum of Points and Authorities, the Declaration of Stacy R. Horth-Neubert and Exhibits 1 through 14 attached.

DATED: May 27, 2014

Respectfully submitted,

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

By: 
Stacy R. Horth-Neubert
Attorneys for Respondents, PRICELINE.COM INC., n/k/a The Priceline Group Inc. and TRAVELWEB LLC

DATED: May 27, 2014

JONES DAY

By: Brian D. Hershman /SNH/ with permission
Brian D. Hershman
Attorneys for Respondents, EXPEDIA, INC., HOTWIRE, INC., TRAVELNOW.COM, HOTELS.COM, L.P., and HOTELS.COM GP, LLC

DATED: May 27, 2014

McDERMOTT WILL & EMERY LLP

By: Jeffrey Rossman /SNH/ with permission
Jeffrey Rossman
Attorneys for Respondents, ORBITZ, LLC, TRIP NETWORK, INC. (d/b/a CHEAPTICKETS.COM), and INTERNETWORK PUBLISHING CORP. (d/b/a LODGING.COM)

DATED: May 27, 2014

K&L GATES LLP

By: Nathaniel S. Currall /SNH/ with permission
Nathaniel S. Currall
Attorney for Respondents, Travelocity.com, L.P. and Site59.com, LLC

MEMORANDUM OF POINTS AND AUTHORITIES

Evidence Code Section 452 authorizes this Court to take judicial notice of "[r]ecords of [] any court of this state" and "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." Cal. Evid. Code §§ 452(d)(1); 452(h). Under these provisions, this Court may take judicial notice of Exhibits 1 through 14 in considering the OTCs' Answer to Plaintiff's Petition for Review.

Evidence Code § 459 provides that a reviewing court may take judicial notice of those matters specified in § 452. State court orders, pleadings and other documents are properly noticed since they compromise the "[r]ecords of [] any court of this state." Cal. Evid. Code §§ 452(d)(1). Exhibits 1 through 14 are orders, motions and pleadings from the proceedings below in this action and in related actions in these coordinated proceedings, *In re Transient Occupancy Tax Cases*, JCCP 4472. Because these documents are all part of the records of a court in this State, they may be noticed upon review.

Exhibits 1 through 14 are relevant to establish why the City of San Diego's Petition for Review should be denied. First, Exhibits 1 through 11 are relevant to provide this Court with the history of the coordinated proceedings. Exhibits 9 and 10 show the consistent analysis used in the coordinated proceedings and why here, as below, the plain meaning of the San Diego transient occupancy tax ordinance does not impose any obligations or liability on the OTCs. They also establish relevant context for the Court of Appeal's citation to two of its own prior decisions, demonstrating why citation to those decisions is consistent with the coordination of the proceedings and not an error of law, and does not

warrant review by this Court. Exhibits 12 through 14 are relevant to show that the City also cited to the same two previous Court of Appeal decisions and asked the Court of Appeal in this action to rely on those previous decisions.

CONCLUSION

For the foregoing reasons, upon proper notice, the Court is required to take judicial notice of the documents listed above. *See* Cal. Evid. Code § 453 (the Court "shall take judicial notice of any matter specified in Section 452 if a party requests it" and (i) gives each adverse party sufficient notice of the request to enable the party to prepare to meet the request, and (ii) furnishes the court with sufficient information to enable it to take judicial notice). The OTCs respectfully request that this Court take judicial notice of Exhibits 1 through 14.

DATED: May 27, 2014

Respectfully Submitted,

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

By: Stacy R. Horth-Neubert
Stacy R. Horth-Neubert
Attorneys for Respondents, PRICELINE.COM INC. (n/k/a The Priceline Group Inc.) and TRAVELWEB LLC

JONES DAY

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K&L GATES LLP

By: Nathaniel S. Currall /SNHN with permission
Nathaniel S. Currall
Attorney for Respondents, Travelocity.com, L.P. and Site59.com, LLC

DECLARATION OF STACY R. HORTH-NEUBERT

I, Stacy R. Horth-Neubert, declare:

1. I am an attorney licensed to practice law in the State of California and Counsel in the law firm of Skadden, Arps, Slate, Meagher & Flom LLP ("Skadden"), counsel of record for priceline.com Inc. (n/k/a The Priceline Group Inc.) and Travelweb LLC in the above-captioned matter. I submit this Declaration in support of The Online Travel Companies' (i) Answer to Petition for Review; and (ii) OTC's Request To Take Judicial Notice. I make this declaration on personal knowledge and, if called as a witness, I could and would testify competently to such facts under oath.

2. As counsel of record in the *Transient Occupancy Tax Cases*, JCCP 4472, I am familiar with the record in these actions. The exhibits below are true and correct copies of records filed in these actions.

3. Attached as Exhibit 1 is a true and correct copy of the City of Los Angeles' Class Action Complaint, Case No. BC 326693 (Los Angeles Superior Court), filed December 30, 2004.

4. Attached as Exhibit 2 is a true and correct copy of the City of San Diego's Complaint, Case No. GIC 861117 (San Diego Superior Court), filed February 8, 2006.

5. Attached as Exhibit 3 is a true and correct copy of the Recommendations Regarding Coordination and Order on Stay Request (coordinating the Los Angeles and San Diego cases), JCCP No. 4472 (Los Angeles Superior Court) filed July 3, 2006.

6. Attached as Exhibit 4 is a true and correct copy of the Opinion and Order on Defendants': (1) Demurrer to Plaintiff City of Los Angeles' Third Amended Complaint; And (2) Motion to Strike Class

Allegations from Third Amended Complaint, JCCP No. 4472 (Los Angeles Superior Court), filed July 27, 2007.

7. Attached as Exhibit 5 is a true and correct copy of the Opinion and Order on Defendants' Demurrer to Plaintiff City of San Diego's First Amended Complaint, JCCP No. 4472 (Los Angeles Superior Court) filed July 27, 2007.

8. Attached as Exhibit 6 is a true and correct copy of the Stipulation and Order To Coordinate Add-On Cases and Stay Actions, JCCP No. 4472 (Los Angeles Superior Court), July 27, 2009.

9. Attached as Exhibit 7 is a true and correct copy of the Opinion and Order on the Online Travel Companies' Motion for Judgment Granting Writ of Mandate and the City of Anaheim's Motion to Deny Online Travel Companies' Writs of Administrative Mandamus, JCCP No. 4472 (Los Angeles Superior Court), filed Feb. 1, 2010.

10. Attached as Exhibit 8 is a true and correct copy of the Opinion and Order On the Joint Demurrer of Defendant Online Travel Companies To the City of Santa Monica's First Amended Complaint, JCCP No. 4472 (Los Angeles Superior Court), filed March 16, 2011.

11. Attached as Exhibit 9 is a true and correct copy of the Opinion of The California Court of Appeal, Second Appellate District, Division Two, Case No. B230457, JCCP No. 4472 filed November 1, 2012 (Anaheim decision).

12. Attached as Exhibit 10 is a true and correct copy of the Opinion of The California Court of Appeal, Second Appellate District, Division Two, Case No. B236166, JCCP No. 4472, filed November 1, 2012 (Santa Monica decision).

13. Attached as Exhibit 11 is a true and correct copy of the Notice of California Supreme Court's Denial of Review in Anaheim and Santa Monica Actions, JCCP No. 4472 (Los Angeles Superior Court), filed Jan. 23, 2013.

14. Attached as Exhibit 12 is a true and correct copy of the Appellant's Opening Brief, Case No. B243800, JCCP No. 4472 (California Court of Appeal, Second Appellate District, Division Two), dated March 15, 2013.

15. Attached as Exhibit 13 is a true and correct copy of the Appellant's Reply Brief, Case No. B243800, JCCP No. 4472 (California Court of Appeal, Second Appellate District, Division Two), filed August 5, 2013.

16. Attached as Exhibit 14 is a true and correct copy of the Appellant's Petition for Rehearing and Request for Publication, Case No. B243800, JCCP No. 4472 (California Court of Appeal, Second Appellate District, Division Two), filed March 20, 2014.

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

Executed on May 27, 2014, in Los Angeles, California

Stacy R. Horth-Neubert

Case No. 218400

IN THE SUPREME COURT OF CALIFORNIA

In Re TRANSIENT OCCUPANCY TAX CASES

CITY OF SAN DIEGO, CALIFORNIA

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The Hon. Elihu M. Berle, Judge of the Superior Court, Department 323
Los Angeles County Superior Court Case No. JCCP 4472

[PROPOSED] ORDER

FOR GOOD CAUSE SHOWN, Respondents the Online Travel Companies' Request to Take Judicial Notice is GRANTED as to the following documents:

Exhibit 1: City of Los Angeles' Class Action Complaint, Case No. BC 326693 (Los Angeles Superior Court), filed December 30, 2004.

Exhibit 2: City of San Diego's Complaint, Case No. GIC 861117 (San Diego Superior Court), filed February 8, 2006.

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Exhibit 14: Appellant's Petition for Rehearing and Request for Publication, Case No. B243800, JCCP No. 4472 (California Court of Appeal, Second Appellate District, Division Two), filed March 20, 2014.

DATED: _____ _____

, Justice

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Attorneys for Plaintiff, the City of Los Angeles, California, on behalf of itself and all others similarly situated

FILED
LOS ANGELES SUPERIOR COURT
DEC 30 2004
JOHN A. CLARKE, CLERK
BY JENNY RHEA, DEPUTY

Case assigned to Judge Charles W. McCoy

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES, CENTRAL DISTRICT

CITY OF LOS ANGELES, CALIFORNIA, on behalf of itself and all others similarly situated,

Plaintiff,

v.

HOTELS.COM, L.P.; HOTELS.COM GP, LLC; HOTWIRE, INC.; CHEAP TICKETS, INC.; CENDANT TRAVEL DISTRIBUTION SERVICES GROUP, INC.; EXPEDIA, INC.; INTERNETWORK PUBLISHING CORP. (d/b/a LODGING.COM); LOWEST FARE.COM, INC.; MAUPINTOUR HOLDING, LLC; ORBITZ, INC.; ORBITZ, LLC; PRICELINE.COM, INC.; SITE 59.COM, LLC; TRAVELOCITY.COM, INC.; TRAVELOCITY.COM, LP; TRAVELWEB, LLC; TRAVELNOW.COM, INC.; and DOES 1 through 1000, inclusive,

Defendants.

CASE NUMBER: BC326693

CLASS ACTION COMPLAINT FOR:

(1) **VIOLATIONS OF UNIFORM TRANSIENT OCCUPANCY TAX ORDINANCES**

(2) **UNFAIR BUSINESS PRACTICES IN VIOLATION OF CALIFORNIA BUSINESS & PROFESSIONS CODE, § 17200 et seq**

(3) **CONVERSION**

(4) **IMPOSITION OF A CONSTRUCTIVE TRUST**

JURY TRIAL DEMANDED

Plaintiff City of Los Angeles, California, on behalf of itself and all others similarly situated (*i.e.*, the "Plaintiff Class" or "Class" described and defined, *infra*), complains of Defendants and alleges as follows:

I. PARTIES

1. Plaintiff is the City of Los Angeles, California.

2. Defendant HOTELS.COM, L.P. is a Delaware limited partnership with its principal place of business in Dallas, Texas.

3. Defendant HOTELS.COM GP, LLC is a Texas corporation with its principal place of business in Dallas, Texas.

4. Defendant HOTWIRE, INC. is a Delaware corporation with its principal place of business in San Francisco, California.

5. Defendant CHEAP TICKETS, INC. is a Delaware corporation with its principal place of business in Honolulu, Hawaii.

6. Defendant CENDANT TRAVEL DISTRIBUTION SERVICES GROUP, INC. is a Delaware corporation with its principal place of business in Parsippany, New Jersey.

7. Defendant EXPEDIA, INC. is a Washington corporation with its principal place of business in Bellevue, Washington.

8. Defendant INTERNETWORK PUBLISHING CORP. d/b/a LODGING.COM), a Florida corporation with its principal place of business in Boca Raton, Florida.

9. Defendant LOWEST FARE.COM, INC. is a Delaware corporation with its principal place of business in Norwalk, Connecticut.

10. Defendant MAUPINTOUR HOLDING, LLC is a Nevada corporation with its principal place of business in Las Vegas, Nevada.

11. Defendant ORBITZ, INC. is a Delaware corporation with its principal place of business in Chicago, Illinois.

12. Defendant ORBITZ, LLC is a Delaware corporation with its principal place

of business in Chicago, Illinois.

13. Defendant PRICELINE.COM, INC. is a Delaware corporation with its principal place of business in Norwalk, Connecticut.

14. Defendant SITE59.COM, LLC is a Delaware corporation with its principal place of business in New York, New York.

15. Defendant TRAVELOCITY.COM, INC. is a Delaware corporation with its principal place of business in Texas.

16. Defendant TRAVELOCITY.COM, LP is a Delaware partnership with its principal place of business in Texas.

17. Defendant TRAVELWEB, LLC is a Delaware corporation with its principal place of business in Dallas, Texas.

18. Defendant TRAVELNOW.COM, INC. is a Delaware corporation with its principal place of business in Springfield, Missouri.

19. The true names and capacities, whether individual, corporate, associate or otherwise, of each of the Defendants designated herein as a DOE are unknown to Plaintiff at this time and therefore said Defendants are sued by such fictitious names. Plaintiff will ask leave of Court to amend this Complaint to show their true names and capacities when the same have been ascertained. Plaintiff is informed and believes and thereon alleges that each of the Defendants designated herein as a DOE is legally responsible in some manner and liable for the events and happenings herein alleged and in such manner, proximately caused damages to Plaintiff as hereinafter further alleged.

20. Plaintiff is informed and believes and thereon alleges that each of the Defendants, including all DOE defendants, at all times herein mentioned, was acting as the agent, servant and employee of each of the other Defendants and within the scope of said agency and employment. Plaintiff is further informed and believes and thereon alleges that at the time and place of the incident described, each of the Defendants, their agents, servants and/or employees became liable to Plaintiff for one or more of the reasons described herein.

2. JURISDICTION AND VENUE

21. This action is brought to remedy violations of state law in connection with Defendants' misconduct in the failure to remit taxes to the City of Los Angeles, California and others similarly situated. Defendants have failed to remit taxes owed under similar uniform transient occupancy taxes to the Plaintiff Class.

22. This Court has jurisdiction over this action pursuant to California Business and Professions Code § § 17202 and 17203 and California Code of Civil Procedure § 410.10.

23. Venue is proper in this Court pursuant to California Code of Civil Procedure § 395.5.

3. COMMON ALLEGATIONS

24. Defendants, and each of them, are on-line sellers and/or on-line resellers of hotel rooms to the general public. Defendants have sold hotel rooms to the public and collected taxes on those rooms, but have failed to pay the taxes due and owing to the Plaintiff and Plaintiff Class members on these transactions.

25. Plaintiff Los Angeles's Uniform Transient Occupancy Tax requires Defendants to remit transient occupancy taxes collected (currently 14%) to the city. See Uniform Transient Occupancy Tax Ordinance of the City of Los Angeles § 21.7.1, *et seq.* Class members have similar uniform transient occupancy taxes requiring Defendants to collect taxes on the sale of hotel rooms and to remit same to the Plaintiff Class members.

26. Defendants are charging and collecting "taxes" from consumers that are not being remitted to the appropriate municipal class members. In addition to the rental price of the hotel rooms, all occupants are also required to pay a transient occupancy tax. The tax is paid by the consumer occupants and collected on behalf of Plaintiff Class members by the Defendants, who are the operators of the hotels at the time the rent is paid. The amount of the transient occupancy tax is correctly calculated as a percentage of the price each consumer occupant pays each Defendant operator for a hotel room. That is the

Post Amendment of CLA ordinance

amount each Defendant is required to remit to Plaintiff Class members.

27. The Defendants, however, have failed to remit the proper tax amounts, underpaying each Plaintiff Class member for the taxes due and owing. Defendants contract with hotels for rooms at negotiated discounted room rates. Defendants then mark up their inventory of rooms and sell the rooms to the members of the public, who actually occupy the rooms. Defendants charge and collect taxes from occupants based on the marked up room rates, but only remit to Plaintiff Class members tax amounts based on the lower, negotiated room rates. Defendants, and each of them, then pocket the difference.

28. For example, if a consumer pays Hotels.com $100.00 for a room in a hotel located in Los Angeles, Hotels.com calculates the tax rate the consumer pays on that "gross" amount ($100.00). Hotels.com, however, obtains that room at a lower "net" rate, for instance, $70.00. Because Hotels.com and other Defendants act as retailers rather than agents, the amount due to Plaintiff City of Los Angeles is $14. However, the amount the Defendants have remitted to the City has been based on the lower "net" rate. In this illustration, Hotels.com would remit $9.80 (14% of $70.00), instead of the $14.00 it actually owed to the City (14% of $100.00).

29. Not only are Defendants charging consumers for transient occupancy taxes that are not being remitted to the municipality, in most instances Defendants are charging more money in "fees and taxes" than required by the statutory occupancy tax rate. These "fees and taxes" often exceed the appropriate statutory occupancy tax rate by 1-3%.

30. Thus, in the above illustration, the consumer will often pay closer to $16.00 in fees and taxes for a $100.00 room, in a location like Los Angeles where the tax rate is 14%. The tax remitted will be based on the $70.00 net cost of the room to the online retailer, in this case $9.80. The difference between the $16 collected and the $9.80 remitted is an additional, hidden and unlawfully retained profit of $6.20.

31. Defendants have failed to remit the transient occupancy taxes due and owed to the Plaintiff and putative Class members.

4. PLAINTIFF CLASS ALLEGATIONS

32. The City of Los Angeles, California, requests the Court certify its claims as a class action. It seeks relief for (1) Violations of Uniform Transient Occupancy Tax Ordinances; (2) Unfair Business Practices in Violation of California Business & Professions Code § 17200 et seq.; and (3) Conversion. Further, Plaintiff seeks the imposition of a Constructive Trust.

33. Plaintiff seeks to certify a state-wide class of all California cities and counties who have enacted uniform transient occupancy taxes with an effective date on or after December 30, 1990.

34. Plaintiff brings this action pursuant to California Code of Civil Procedure § 382.[1] The Class meets the prerequisites for the maintenance of a class action in that:

(a) The Class is so numerous that joinder of all Class members is impracticable. Plaintiff is informed and believes that the practices complained of herein affected over a hundred cities and counties, although the exact number and identities of the members of the Class are currently unknown to Plaintiff.

(b) Nearly all factual, legal, and statutory relief issues that are raised in this Demand are common to each of the members of the Class and will apply uniformly to every member of the Class;

(c) The claims of the representative Plaintiff are typical of the claims of each member of the Class. It, like all other members of the Class, sustained damages arising from Defendants' violations of law, including (1) Violations of Uniform Transient Occupancy Tax Ordinances; (2) Unfair Business Practices in Violation of California Business & Professions Code § 17200 et seq.; and (3) Conversion. The representative Plaintiff and the members of the Class were and

[1]The California courts have found that Fed. R. Civ. P. 23 outlines procedures that are useful in all class actions prosecuted in California.

are similarly or identically harmed by the same unlawful, deceptive, unfair, systematic and pervasive pattern of misconduct;

(d) The representative Plaintiff will fairly and adequately represent and protect the interests of the Class. There are no material conflicts between the claims of the representative Plaintiff and the members of the Class that would make class certification inappropriate;

(e) The counsel selected to represent the Class will fairly and adequately protect the interests of the Class. They are experienced trial lawyers who have experience in complex litigation and are competent counsel for this class action litigation. Counsel for the Class will vigorously assert the claims of all members of the Class;

35. This action is properly maintained as a class action in that common questions of law and fact exist as to the members of the Class and predominate over any questions affecting only individual members, and a class action is superior to other available methods of the fair and efficient adjudication of the controversy, including consideration of:

(a) The interests of the members of the Class in individually controlling the prosecution or defense of separate actions;

(b) The extent and nature of any other proceedings concerning the controversy already commenced by or against members of the Class;

(c) The desirability or undesirability of concentrating the claims in a single forum; and

(d) The difficulties likely to be encountered in the management of a class action.

36. The members of the Class contemplate the eventual issuance of notice to the proposed Class members which would set forth the subject and nature of the instant action. The Defendants' own business records and electronic media can be utilized for the

contemplated notices. To the extent that any further notices may be required, Plaintiff would contemplate the use of additional media and/or mailings.

37. Among the numerous questions of law and fact common to the Class are:

(a) Whether Defendants have committed violations of California Business & Professions Code, § 17200 *et seq.*

(b) Whether Plaintiff and the Plaintiff Class are entitled to the imposition of a constructive trust;

(c) Whether Defendants have committed acts of conversion;

(d) The appropriate remedy for the Plaintiff Class;

(e) Whether, and in what amount, the Plaintiff Class members are entitled to recover court costs and attorneys' fees.

5. CAUSES OF ACTION

COUNT I: VIOLATIONS OF UNIFORM TRANSIENT OCCUPANCY TAX ORDINANCES

(As against all Defendants)

38. Plaintiff incorporates each of the above allegations by reference as if set forth herein at length.

39. Plaintiff and Class members are cities and counties granted the authority to collect transient occupancy taxes pursuant to the California Revenue and Taxation Code § 7280 and the authority to pursue taxes owed under California Revenue and Taxation Code § 7284.

40. Defendants have failed to collect and remit to Plaintiff and the Class the amounts due and owing to them pursuant to the Uniform Transient Occupancy Tax Ordinance of the City of Los Angeles, §§ 21.7.2(f) and § 21.7.3 and similar ordinances. Plaintiff and the Class are entitled to penalties and interest to be determined by Uniform Transient Occupancy Tax Ordinance of the City of Los Angeles § 21.7.8 and similar

ordinances. Failure to remit these taxes to Plaintiff and the Class are deemed a debt owed by the Defendants to the Plaintiff City of Los Angeles and the Class and are hereby sought to be recovered pursuant to § 21.7.13 of the Uniform Transient Occupancy Tax Ordinance of the City of Los Angeles and similar ordinances.

COUNT II: VIOLATION OF CALIFORNIA BUSINESS & PROFESSIONS CODE § 17200

(As Against All Defendants)

41. Plaintiff incorporates each of the above allegations by reference as if set forth herein at length.

42. Defendants have engaged in unfair, unlawful and fraudulent business acts and practices, as follows: Defendants have failed to remit taxes to the City of Los Angeles and the Class that are due and owing to the Plaintiff and the Class.

43. By engaging in the above-described acts and practices, Defendants have committed one or more acts of unfair competition within the meaning of California Business and Professions Code § 17200, *et seq.*

44. Plaintiff, individually, on behalf of the Class, seeks restitution and all other relief allowed under § 17200, *et seq.*

COUNT III: CONVERSION

(As Against All Defendants)

45. Plaintiff restates and incorporates by this reference each and every preceding paragraph in this complaint as though fully set forth at this point.

46. At all times herein mentioned, Plaintiff and the Class were, and are, the sole rightful owners of the taxes due and owing to them.

47. At all times herein mentioned, the monies due and owing to the Plaintiff and Class were in the possession and under the control of Defendants. Defendants have taken these monies for their own use and benefit, thereby permanently depriving Plaintiff

and the Class of the use and benefit thereof.

48. At all times herein alleged, Defendants acted wilfully, wantonly, with oppression, and with a conscious disregard of the rights of Plaintiff and the Class, such that Plaintiff requests that the trier of fact, in the exercise of sound discretion, award Plaintiff and the Class additional damages for the sake of example and in sufficient amount to punish defendants for their conduct.

49. As a direct and proximate result of defendants' conduct, Plaintiff and the Class have, and will continue to, suffer damage in an amount to be determined according to proof at the time of trial.

COUNT IV: IMPOSITION OF A CONSTRUCTIVE TRUST

(As Against All Defendants)

50. Plaintiff restates and incorporates by this reference each and every preceding paragraph in this complaint as though fully set forth at this point.

51. At all times herein mentioned, Plaintiff's and the Class' monies were in the possession and under the control of Defendants. Defendants have taken this property for their own use and benefit, thereby depriving Plaintiff and the Class of the use and benefit thereof. Plaintiff and the Class have been damaged by their failure to receive the monies.

52. By virtue of Defendants' actions, Defendants hold these funds as constructive trustee for the benefit of Plaintiff and the Class. Plaintiff requests an order that Defendants be directed to give possession thereof to Plaintiff and the Class.

6. DAMAGES

53. Plaintiff requests that the Court order Defendants to provide restitution to the Class and to disgorge the monies due and owing to the Plaintiff and the Plaintiff Class.

54. Plaintiff requests on behalf of itself and the Class that it recover all penalties, interest, and reasonable and necessary attorneys' fees it is entitled to under the law.

55. Plaintiff and the Plaintiff Class request both prejudgment and post-judgment

interest at the maximum rate allowed by law.

7. PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED. Plaintiff prays for the following judgment in her favor against Defendants:

i. An order certifying this case as a class action against the Defendants and appointing Plaintiff and her counsel as Representative of the Plaintiff Class;

ii. For judgment against Defendants and in favor of Plaintiff and the Class on all claims asserted in this Complaint;

iii. For disgorgement and restitution plus interest due thereon at the legal rate and/or as established by each Class Members' transient occupancy taxes;

iv. For costs of suit incurred herein;

v. For prejudgment interest to the extent allowed by law;

vi. For penalties as allowed by law; and

vii. For such other and further relief as this Court may deem just and proper.

Dated: December 30, 2004

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

CITY OF SAN DIEGO, CALIFORNIA,

Plaintiff,

v.

HOTELS.COM, L.P.; HOTELS.COM GP, LLC; HOTWIRE, INC.; CHEAP TICKETS, INC.; CENDANT TRAVEL DISTRIBUTION SERVICES GROUP, INC.; EXPEDIA, INC.; INTERNETWORK PUBLISHING CORP. (d/b/a LODGING.COM); LOWEST FARE.COM, INC.; MAUPINTOUR HOLDING, LLC; ORBITZ, INC.; ORBITZ, LLC; PRICELINE.COM, INC.; SITE 59.COM, LLC; TRAVELOCITY.COM, INC.; TRAVELOCITY.COM, LP; TRAVELWEB, LLC; TRAVELNOW.COM, INC.; and DOES 1 through 1000, inclusive,

Defendants.

CASE NUMBER: GIC 861117

COMPLAINT FOR:

(1) VIOLATIONS OF UNIFORM TRANSIENT OCCUPANCY TAX ORDINANCES:
(2) UNFAIR BUSINESS PRACTICES IN VIOLATION OF CALIFORNIA BUSINESS & PROFESSIONS CODE. § 17200 et seq.;
(3) CONVERSION:
(4) IMPOSITION OF A CONSTRUCTIVE TRUST: and,
(5) DECLARATORY JUDGMENT.

[EXEMPT FROM FILING FEES PURSUANT TO GOVERNMENT CODE SECTIONS 811.2 AND 6103]

Plaintiff City of San Diego, California, on information and belief, complains of Defendants and alleges as follows:

1. PARTIES

1. Plaintiff is the City of San Diego, California.

2. Defendant HOTELS.COM, L.P. is a Delaware limited partnership with its principal place of business in Dallas, Texas.

3. Defendant HOTELS.COM GP, LLC is a Texas corporation with its principal place of business in Dallas, Texas.

4. Defendant HOTWIRE, INC. is a Delaware corporation with its principal place of business in San Francisco, California.

5. Defendant CHEAP TICKETS, INC. is a Delaware corporation with its principal place of business in Honolulu, Hawaii.

6. Defendant CENDANT TRAVEL DISTRIBUTION SERVICES GROUP, INC. is a Delaware corporation with its principal place of business in Parsippany, New Jersey.

7. Defendant EXPEDIA, INC. is a Washington corporation with its principal place of business in Bellevue, Washington.

8. Defendant INTERNETWORK PUBLISHING CORP. (d/b/a LODGING.COM), is a Florida corporation with its principal place of business in Boca Raton, Florida.

9. Defendant LOWEST FARE.COM, INC. is a Delaware corporation with its principal place of business in Norwalk, Connecticut.

10. Defendant MAUPINTOUR HOLDING, LLC is a Nevada corporation with its principal place of business in Las Vegas, Nevada.

11. Defendant ORBITZ, INC. is a Delaware corporation with its principal place of business in Chicago, Illinois.

12. Defendant ORBITZ, LLC is a Delaware corporation with its principal place of business in Chicago, Illinois.

13. Defendant PRICELINE.COM, INC. is a Delaware corporation with its principal place of business in Norwalk, Connecticut.

14. Defendant SITE59.COM, LLC is a Delaware corporation with its principal place of business in New York, New York.

15. Defendant TRAVELOCITY.COM, INC. is a Delaware corporation with its principal place of business in Texas.

16. Defendant TRAVELOCITY.COM, LP is a Delaware partnership with its principal place of business in Texas.

17. Defendant TRAVELWEB, LLC is a Delaware corporation with its principal place of business in Dallas, Texas.

18. Defendant TRAVELNOW.COM, INC. is a Delaware corporation with its principal place of business in Springfield, Missouri.

19. The true names and capacities, whether individual, corporate, associate or otherwise, of Defendants designated herein as DOES are unknown to Plaintiff at this time, and therefore said Defendants are sued by such fictitious names. Plaintiff will ask leave of Court to amend this Complaint to show the true names and capacities when the same have been ascertained. Each of the Defendants designated herein as a DOE is legally responsible in some manner and liable for the events and happenings herein alleged and, in such manner, proximately caused damages to Plaintiff as hereinafter further alleged.

2. JURISDICTION AND VENUE

20. This action is brought to remedy violations of state and local law in connection with Defendants' misconduct in failing to remit taxes to Plaintiff. Defendants have failed to remit taxes owed under similar uniform transient occupancy tax schemes to Plaintiff.

21. This Court has jurisdiction over this action pursuant to California Business and Professions Code §§ 17202 and 17203 and California Code of Civil Procedure § 410.10.

22. All Plaintiff's claims relate to activities conducted within the state of California, *i.e.*, the occupancy of hotel rooms in the City of San Diego, California.

23. This Court has personal jurisdiction over these Defendants, including foreign corporate defendants, since each Defendant has established an economic

and/or physical presence within the State, and, wherever domiciled, each Defendant engages in the continuous and widespread solicitation of business within the State of California and purposefully avails itself of the economic markets of the State of California.

24. Venue is proper in this Court pursuant to California Code of Civil Procedure § 395.5.

3. COMMON ALLEGATIONS

25. Defendants are online sellers and/or online resellers of hotel rooms to the general public. Defendants have sold hotel rooms to the public and collected transient occupancy taxes on those rooms, but have failed to pay the full taxes due and owing to Plaintiff on these transactions.

a. Defendants Engaged in Common Practices and Schemes and Acted as Agents for the Hotel Operators and/or Acted as Operators.

26. At all pertinent times alleged in this Complaint and currently, each Defendants engaged in the following common practice and scheme regarding hotel transactions for hotel accommodations in the City of San Diego, California:

a) Consumers used Defendant's Internet-based search engines and portals to select the desired hotel accommodations using the computer-based information resources made available by Defendant. The hotel offerings showed the total amount which would be due to Defendant for the hotel accommodation, which amount was represented to include all applicable taxes and fees.

b) After selecting the desired hotel accommodations, the consumer provided Defendant with his or her personal identifying and payment information using Defendant's Internet-based portal.

c) Defendant charged the consumer's credit card for the hotel accommodations selected, which included Defendant's fees and purportedly all applicable taxes.

d) Defendant sent the consumer a confirmation by e-mail, acknowledging the

dates, price and hotel accommodations requested by the consumer.

e) Defendant transmitted the consumer's request for hotel accommodations to the hotel. That communication contained the accommodations requested by the consumer to reserve the accommodations on behalf of the consumer, or in certain cases, to confirm that rooms previously purchased by Defendant would be occupied by the consumer.

f) Certain hotels confirmed the consumer's booking of accommodations to Defendant.

g) Upon the consumer's arrival at the hotel for check-in, the hotel requested identification from the consumer and informed the consumer that the room had been arranged through Defendant and that no further payment was required for the hotel accommodations.

h) At check-in, the hotel requested a credit card "imprint" from the consumer to guarantee payment of any "incidental" charges, such as charges for telephone usage, pay-per-view cable television, mini-bar food or beverage consumption.

i) The hotel provided hotel accommodations to the consumer as requested by the consumer through Defendant.

j) At checkout, the consumer was charged by the hotel for any incidental services provided by the hotel.

k) The hotel did not know the amount Defendant charged the consumer for the hotel accommodations, and Defendant never so informed the hotel.

l) After the hotel accommodations were provided by the hotel to the consumer, the hotel invoiced Defendant for the hotel accommodations, including separately stated transient occupancy taxes for the pertinent taxing municipality where the hotel was located, measured by the agreed-upon amount charged by the hotel operator to Defendant. This was incorrect and improper, as a matter of law. As more fully alleged in paragraph 28 *infra*, each Defendant was required to collect and remit transient occupancy taxes based upon the amounts actually

charged the consumers by Defendant for the hotel accommodations, including any fees added by Defendant.

m) Defendant reviewed the invoice submitted by the hotel for the hotel accommodations and the applicable transient occupancy tax.

n) Defendant remitted payment of the invoice submitted by the hotel, including transient occupancy tax based on the insufficient amount calculated by the hotel operators, as explained *supra*.

o) The hotel reported and remitted the transient occupancy tax collected from Defendant to the appropriate agency or authority for the pertinent taxing municipality where the hotel was located.

27. In carrying out the common practice and scheme stated in paragraph 26 of this Complaint, each Defendant undertook to transact business and manage some affairs for the hotel operators by, namely, allowing consumers to book the hotel operators' rooms and collecting funds from consumers that, in part, were paid to the hotel operators, all as detailed in paragraph 26 of this Complaint. The agreements between Defendants and the hotel operators allowed Defendants to act in place of the hotel operators for the booking with and collection of funds from consumers related to the hotel accommodations booked through Defendants' Internet portals, all for the purpose of bringing consumers into legal relations with the hotel operators.

28. At all pertinent times alleged in this Complaint and currently, under the appropriate transient occupancy tax scheme and Plaintiff's uniform transient occupancy tax schemes, and by virtue of the relationships between each Defendant and the hotel operators as detailed in this Complaint, and under the common practice and scheme by and among Defendants as stated in paragraph 26 of this Complaint, each Defendant was required to collect and remit transient occupancy taxes to the hotel so that they could be remitted to the City of San Diego, based upon the amounts Defendants charged consumers for the hotel accommodations, including any fees added by Defendants. Each Defendant has failed to remit this amount, and instead has remitted

to the hotel operators, as and for transient occupancy taxes, the transient occupancy tax percentage on the amounts charged by the hotel to Defendants for the hotel accommodations. The hotels could not charge Defendants the proper amount, because, as alleged in Paragraph 26 *supra*, Defendants did not inform the hotel operators of the amount Defendants charged consumers for hotel accommodations.

29. Defendants have failed to remit the transient occupancy taxes due and owing to Plaintiff.

b. Many Defendants Are Affiliated Through a Common Corporate Parent.

30. **"Expedia Group"** – Defendants Expedia, Inc. (Washington), Hotels.com, L.P.; Hotels.com GP LLC; Hotwire, Inc.; and Travelnow.com are all affiliated business entities, related through the common corporate parent Expedia, Inc., a Delaware corporation.

31. **"Cendant Group"** – Defendants Cendant Travel Distribution Services Group, Inc.; Orbitz, Inc.; Orbitz LLC; Cheaptickets.com, Inc.; and Internetwork Publishing Corp. d/b/a Lodging.com, are affiliated business entities, related through the common corporate parent Cendant Corporation, a Delaware corporation.

32. **"Sabre Group"** – Defendants Site59.com LLC; Travelocity.com, Inc.; and Travelocity.com LP are affiliated business entities, related through the common ultimate corporate parent, Sabre Holdings Corporation, a Delaware corporation.

33. **"Priceline Group"** – Defendants Priceline.com, Inc.; Lowestfare.com, Inc.; and Travelweb, LLC are all affiliated business entities, related through the common corporate parent Priceline.Com, Inc., a Delaware corporation.

34. Defendant Lowestfare.com, Inc. is a wholly owned subsidiary of Priceline.com, Inc. In 2002, Priceline.Com, Inc. purchased the Internet URL and Trademarks of Lowestfare.com and formed a subsidiary corporation, Lowestfare.com, Inc. (Delaware).

35. **"Maupintour"** – Defendant Maupintour Holding, LLC is a Nevada limited liability company. Maupintour Holding, LLC is the successor in interest of

Lowestfare.com, Inc., a Nevada Corporation that is/was a subsidiary of Lowestfare.com LLC, a Nevada limited liability company. Defendant MaupIntour Holding, LLC is a direct or indirect subsidiary of Vauxhall, LLC, a Nevada limited liability company.

36. Defendants, in public communications, in communications to Plaintiff, and through the media, have taken the position that they are not liable for transient occupancy taxes on the total amount of their sales of hotel rooms to consumers for several reasons. There is, therefore, an actual and live controversy between the parties on the subjects enumerated in paragraph 60 herein below.

c. Defendants Have Entered into Agreements with Each Other to Market and Sell Each Other's Hotel Room Inventory.

37. Each Defendant, including all DOE defendants, at all times herein mentioned, were acting under common plans, schemes or methodologies, and from time to time entered into agreements and ventures between and among themselves for the common marketing, distribution and sale or resale of hotel rooms throughout the state of California.

38. Defendants have shared products and customers and entered into agreements and co-ventures for the sale or resale of hotel room inventory by cross-listing between them available hotel rooms on their respective Internet portals.

39. Given the tangled web of arrangements between Defendants, any room ostensibly purchased by a consumer from Expedia, Travelocity, Cheaptickets, Hotwire, TravelNow or Lowestfare could actually have been purchased from Hotels.com. Furthermore, any room ostensibly purchased by a consumer from Orbitz, could actually have been purchased from Travelweb or Hotwire. Any room ostensibly purchased by a consumer from Expedia could actually have been purchased from Travelocity or Hotwire or Hotels.com. Any room ostensibly purchased by a consumer from Site59.com could actually have been purchased from Orbitz or Travelocity or Cheaptickets or Priceline or Lowestfare.com or Travelweb. Also, any room ostensibly purchased from Priceline could have actually been purchased from Travelweb, and vice versa; any room

ostensibly purchased from Hotels.com could have actually been purchased from Lowestfare.com, and vice versa; any room ostensibly purchased from TravelNow.com could have actually been purchased from Hotwire, and vice versa; any room ostensibly purchased from Lodging.com could have actually been purchased from Cheaptickets.com, and vice versa. There are numerous other such marketing and distribution agreements between and among Defendants, and these interdependent relationships are just the tip of the iceberg.

d. Defendants' Conduct Arises Out Of The Same Transaction Or Occurrence Or Series Of Transactions And Occurrences And Involves Common Questions Of Law And Fact.

40. Defendants' conduct involves common questions of fact and law as set forth herein, as the parties are all interested in the principal questions raised by this Complaint. Moreover, Defendants' affiliations and agreements to market, sell and distribute each other's hotel room inventory make their conduct connected and logically related. As detailed above, Defendants have and currently engage in a common practice and scheme regarding selling hotel rooms to consumers and collecting and remitting amounts to the hotel operators.

e. The Structuring of Defendants' Conduct Is Such That There Is Doubt About Which Defendant Is Liable

41. Given the interrelatedness of one Defendant's activities to those of the other Defendants, and the manner in which Defendants have chosen to structure their business relations, there is doubt as to from which Defendant or Defendants, Plaintiff is entitled to redress in any particular sale of lodging. Therefore, all Defendants have been joined with the intent that the question as to which of the Defendants is liable, and to what extent, may be determined between the parties.

42. Defendants' memberships in Interactive Travel Service Association ("ITSA") further demonstrates the interrelatedness among the Defendants and confirms common practices of Defendants in booking hotel rooms online. Many of the

Defendants are members of the ITSA. The ITSA website makes numerous representations pertaining globally to all of its member online travel companies regarding the way that online travel companies do business, the manner in which rooms are booked, the tax liability for Defendants, and the impact the instant lawsuit will have on Defendants as a group.

f. Plaintiff Has Asserted A Claim, Right, Or Interest Adverse To Defendants In The Controversy Which Is The Subject Of The Action.

43. Each Defendant has an interest adverse to Plaintiff in the property and controversy that is the subject of this action. Plaintiff has alleged that each Defendant has failed to remit taxes due and owing to Plaintiff in the same manner. This common conduct raises common factual and legal issues. Moreover, the claims asserted by Plaintiff against Defendants are identical, and are clearly asserted against all Defendants. The parties are also directly adverse in relation to the controversies about which declaratory relief is sought herein.

4. CAUSES OF ACTION

FIRST CAUSE OF ACTION: VIOLATIONS OF UNIFORM TRANSIENT OCCUPANCY TAX ORDINANCES

(As against all Defendants)

44. Plaintiff incorporates each of the above allegations by reference as if set forth herein at length.

45. Plaintiff is a city granted the authority to collect transient occupancy taxes pursuant to the California Revenue and Taxation Code § 7280 and the authority to pursue taxes owed under California Revenue and Taxation Code § 7284.

46. Defendants have failed to collect and remit to Plaintiff the amounts due and owing to them pursuant to the transient occupancy tax ordinances or other similar transient occupancy tax scheme in place at the time of each such transaction. Plaintiff is entitled to penalties and interest to be determined by the transient occupancy tax ordinances and/or other similar transient occupancy tax scheme in place at the time of

each such transaction. Failure to remit these taxes to Plaintiff is deemed a debt owed by Defendants to Plaintiff, and the taxes are hereby sought to be recovered pursuant to the transient occupancy tax ordinances and/or other similar transient occupancy tax scheme in place at the time of each such transaction.

SECOND CAUSE OF ACTION: VIOLATION OF CALIFORNIA BUSINESS & PROFESSIONS CODE § 17200

(As Against All Defendants)

47. Plaintiff incorporates each of the above allegations by reference as if set forth herein at length.

48. Defendants have engaged in unfair, unlawful and fraudulent business acts and practices, as follows: Defendants have failed to remit to Plaintiff taxes that are due and owing to Plaintiff.

49. By engaging in the above-described acts and practices, Defendants have committed one or more acts of unfair competition within the meaning of California Business and Professions Code § 17200, *et seq.*

50. Plaintiff seeks restitution and all other relief allowed under California Business and Professions Code § 17200, *et seq.*

THIRD CAUSE OF ACTION: CONVERSION

(As Against All Defendants)

51. Plaintiff incorporates each of the above allegations by reference as if set forth herein at length.

52. At all times herein mentioned, Plaintiff was, and is, the sole rightful owner of the taxes due and owing to them.

53. At all times herein mentioned, the monies due and owing to Plaintiff were in the possession and under the control of Defendants. Defendants have taken these monies for their own use and benefit, thereby permanently depriving Plaintiff of the use and benefit thereof.

54. At all times herein alleged, Defendants acted wilfully, wantonly, with

oppression, and with a conscious disregard of the rights of Plaintiff, such that Plaintiff requests that the trier of fact, in the exercise of sound discretion, award Plaintiff additional damages for the sake of example and in sufficient amount to punish Defendants for their conduct.

55. As a direct and proximate result of Defendants' conduct, Plaintiff has suffered, and will continue to suffer damage in an amount to be determined according to proof at the time of trial.

FOURTH CAUSE OF ACTION: IMPOSITION OF A CONSTRUCTIVE TRUST

(As Against All Defendants)

56. Plaintiff incorporates each of the above allegations by reference as if set forth herein at length.

57. At all times herein mentioned, funds belonging to Plaintiff was in the possession and under the control of Defendants. Defendants have taken this property for their own use and benefit, thereby depriving Plaintiff of the use and benefit thereof. Plaintiff has been damaged by their failure to receive the funds.

58. By virtue of their actions, Defendants hold these funds as constructive trustees for the benefit of Plaintiff. Plaintiff requests an order that Defendants be directed to give possession thereof to Plaintiff.

FIFTH CAUSE OF ACTION: DECLARATORY JUDGMENT

(As Against All Defendants)

59. Plaintiff incorporates each of the above allegations by reference as if set forth herein at length.

60. Pursuant to California Code of Civil Procedure § 1060, Plaintiff seeks a declaration of rights and/or duties with respect to all Defendants. An actual case or controversy exists between Plaintiff and these Defendants as to:

a) Whether Defendants as merchants of record and/or direct sellers and re-sellers of the right to occupy hotel rooms are "hotel operators" as that term is defined under the appropriate transient occupancy tax ordinance, statute and/or

rule in place at the time of each such transaction.

b) Whether Defendants as merchants of record and/or direct sellers and re-sellers of the right to occupy hotel rooms in Plaintiff's respective city is agents of the "hotel operators" as that term is defined under the appropriate transient occupancy tax ordinance, statute and/or rule in effect at the time of each such transaction.

c) Whether Defendants have a duty, under law, to collect hotel occupancy taxes from consumers who purchase from Defendants the right to occupy hotel rooms in the State of California and whether Defendants have a duty to remit these taxes to Plaintiff.

d) Whether, under the appropriate transient occupancy tax ordinance, statute and/or rule, the amount of hotel occupancy tax due and owing to Plaintiff is to be calculated as a percentage of the total amount charged consumers for the right to occupy hotel rooms, without regard to service fees, operating expenses and other amounts currently deducted by Defendants.

6. DAMAGES

61. Plaintiff requests that the Court order Defendants to provide restitution to Plaintiff and to disgorge the monies due and owing to Plaintiff.

62. Plaintiff requests that it recover all penalties, interest, and reasonable and necessary attorneys' fees they are entitled to recover under the law.

63. Plaintiff requests pre-judgment and post-judgment interest at the maximum rate allowed by law.

7. PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays for the following judgment in its favor against Defendants:

a) For judgment against Defendants and in favor of Plaintiff on all causes of action asserted in this Complaint;

b) As to the second and fourth causes of action, for disgorgement and

restitution plus interest due thereon at the legal rate and/or as established by Plaintiff's transient occupancy taxes due and owing;

c) As to the first and third causes of action, compensatory damages as allowed by law;

d) As to the third cause of action, punitive damages as allowed by law;

e) As to the fifth cause of action, for a declaration and determination by the Court of the rights, duties and remedies for the underpayment of transient occupancy taxes as alleged in this Complaint;

f) For costs of suit incurred herein;

g) For pre-judgment interest to the extent allowed by law;

h) For penalties as allowed by law; and,

i) For such other and further relief as this Court may deem just and proper.

DATED: February 8, 2006

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(Additional Defendants Listed on Signature Page)

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

COORDINATION PROCEEDING
SPECIAL TITLE [RULE 1550(b)]

TRANSIENT OCCUPANCY TAX CASES

CITY OF LOS ANGELES, CALIFORNIA, on behalf of itself and all others similarly situated,

Plaintiff,

v.

HOTELS.COM, L.P., et al. and DOES 1 through 1000, inclusive,

Defendants.

CITY OF SAN DIEGO, CALIFORNIA,

Plaintiff,

v.

HOTELS.COM, L.P., et al. and DOES 1 through 1000, inclusive,

Defendants.

JUDICIAL COUNCIL COORDINATION PROCEEDING No. 4472

Assigned to the Hon. Carolyn B. Kuhl for hearing on Petition for Coordination

[redacted] **RECOMMENDATIONS REGARDING COORDINATION AND ORDER ON STAY REQUEST**

Los Angeles Superior Court
Case No. BC326693

San Diego Superior Court
Case No. GIC 861117

In accordance with the Order Assigning Coordination Motion Judge in this matter dated April 19, 2006, the Court makes the following determinations:

1. These actions are complex under Rule 1800, *et seq.*, of the California Rules of Court;

2. Coordination of *City of Los Angeles v. Hotels.com, et al.*, Los Angels County Superior Court Case No. BC 326693, and *City of San Diego v. Hotels.com, et al.*, San Diego Superior Court Case No. GIC 86111, which is not opposed by any party, is appropriate under Code of Civil Procedure § 404, *et seq.*, and Rule 1520, *et seq.*, of the California Rules of Court;

3. The Court of Appeal, Second Appellate District, is designated, pursuant to Code of Civil Procedure § 404, *et seq.*, and Rule 1505(a) of the California Rules of Court, as the reviewing court herein; and

4. It is recommended, pursuant to Code of Civil Procedure § 404, *et seq.*, and Rule 1530 of the California Rules of Court, that the Los Angeles Superior Court is the appropriate court site for assignment of the coordination trial judge. The court bases this recommendation on its findings that the Los Angeles Superior Court action has been pending longer than the San Diego Superior Court action; Judge Anthony Mohr has made a substantive ruling in the Los Angeles action, while Judge Richard Strauss has not made any such rulings; court congestion has not delayed either action, and Los Angeles is a more convenient forum for counsel in the action.

These cases are not stayed pursuant to Code of Civil Procedure § 404.5 and Rule 1514 of the California Rules of Court; however, only discovery previously authorized in either case or that may be further authorized by Judge Anthony Mohr is allowed. The parties should address all issues regarding discovery matters in either case, including any protective orders, to Judge Anthony Mohr, pending assignment of a coordination trial judge by the Judicial Council.

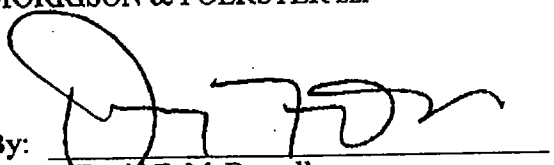
Dated: JUL 0 3 2006

Carolyn B. Kuhl

Carolyn B. Kuhl
Judge of the Los Angeles Superior Court

Submitted By:

MORRISON & FOERSTER LLP



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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

TRANSIENT OCCUPANCY TAX CASES Included Actions: *City of Los Angeles, California v. Hotels.com, L.P.*, Los Angeles Superior Court, Case No. BC 326693 *City of San Diego, California v. Hotels.com, L.P.*, San Diego Superior Court, Case No. GIC 861117	Judicial Council Coordination Proceeding No. 4472 OPINION AND ORDER ON DEFENDANTS': (1) DEMURRER TO PLAINTIFF CITY OF LOS ANGELES' THIRD AMENDED COMPLAINT; AND (2) MOTION TO STRIKE CLASS ALLEGATIONS FROM THIRD AMENDED COMPLAINT

On June 11, 2007, Defendants'[1] Demurrer to Plaintiff City of Los Angeles' Third Amended Complaint and Motion to Strike the Class Allegations from Plaintiff's Third Amended Complaint came on hearing before this court. This court has considered all of the briefs, objections and arguments presented on behalf of Plaintiff and Defendants. For the reasons stated in the following Opinion and Order, Defendants' Demurrer to Plaintiff City of Los Angeles' Third Amended Complaint is sustained with leave to amend. The case is stayed until such time as the City notifies the court that it has exhausted available

[1] The fifteen Defendants are: Priceline.com Inc.; Travelweb LLC; Lowestfare.com Inc.; Expedia, Inc.; Hotwire, Inc.; Travelnow.com; Hotels.com, L.P.; Hotels.com GP, LLC; Travelocity.com, L.P.; Travelocity.com, Inc.; Site59.com, Inc.; Orbitz, Inc.; Orbitz, LLC; Trip Network, Inc. (d/b/a Cheaptickets.com); and Internetwork Publishing Corp. (d/b/a lodging.com).

administrative remedies with respect to the taxes sought by way of this lawsuit. At that time, the court will set a date by which an amended complaint may be filed. Defendants' Motion to Strike Class Allegations from Plaintiff's Third Amended Complaint therefore is moot.

I. FACTUAL AND PROCEDURAL SUMMARY

In 1963, the California State Legislature enacted a statute permitting California cities and counties to levy a tax on a hotel guest (or "transient") for the privilege of occupying a hotel room in the city or county. (See Cal. Rev. & Tax Code section 7280(a).[2]) In 1964, Plaintiff City of Los Angeles exercised this right conferred by the Legislature and enacted a transient occupancy tax ordinance. (See Los Angeles Municipal Code ("Municipal Code") §§ 21.7.1 – 21.7.13.[3])

In this action, Plaintiff City of Los Angeles ("City") alleges that the fifteen defendants (eleven online travel companies (or "OTC Defendants") and four of those companies' corporate parents or subsidiaries ("non-OTC Defendants")) owe back occupancy taxes to the City. The City asserts that the OTC Defendants act as agents to hotels conducting business in the City. (See Third Amended Complaint (TAC), ¶¶25, 28.)

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[2] Section 7280 provides in relevant part: "(a) The legislative body of any city, county, or city and county may levy a tax on the privilege of occupying a room or rooms, or other living space, in a hotel, inn, tourist home or house, motel, or other lodging unless the occupancy is for a period of more than 30 days. . . ."

[3] Specifically, Section 21.7.3 [Tax Imposed] of the Municipal Code provides in relevant part:
> For the privilege of occupancy in any hotel, each transient is subject to and shall pay a tax in the amount of four percent (4%) of the rent charged by the operator on or after August 1, 1964, to and including October 31, 1967 . . . ." This Section then outlines tax percentages that incrementally increase for different time periods. The Section continues by stating that "[s]aid tax constitutes a debt owed by the transient to the City which is extinguished by the payment to the operator or to the City. The transient shall pay the tax to the operator of the hotel at the time the rent is paid. . . ."

As such, the City alleges that the OTC Defendants have a duty to collect and remit transient occupancy taxes to the City. (*Id.; see* Opposition Brief, p. 2.)

The City alleges that the OTC Defendants contract with local hotels for the right to purchase rooms at a discounted "wholesale" price, and sell the rooms to the public at a marked-up "retail" price, plus a surcharge for "tax recovery charges and fees." (TAC, ¶22.) The City alleges that the OTC Defendants collect occupancy taxes based on the higher "retail" price, but then remit to the hotels (who in turn pay the taxing authority) occupancy taxes based on the lower "wholesale" price. (See TAC, ¶23; see also Reporter's Transcript of June 11, 2007 Hearing, pp. 3-6.) The City alleges that the OTC Defendants owe the City transient occupancy taxes based on the price differential.

The Third Amended Complaint alleges seven causes of action for: (1) violation of transient occupancy tax ordinances; (2) violation of Business & Professions Code section 17200; (3) conversion; (4) violation of Civil Code section 2223; (5) violation of Civil Code section 2224; (6) imposition of constructive trust; and (7) declaratory judgment.

The City also purports to represent a class comprised of "[a]ll California cities with a transient occupancy tax ordinance in which the Defendants have sold or booked a hotel room located in that city prior to the filing of the complaint in this action." (TAC, ¶43.) The City of Los Angeles alleges that Defendants' conduct arises out of the same series of transactions or occurrences and involves common questions of law or fact making class treatment appropriate. (See TAC, ¶¶39, 43-47.)

Defendants demur jointly and severally to Plaintiff's Third Amended Complaint on three grounds: (1) this court lacks jurisdiction because Plaintiff City of Los Angeles has failed to exhaust its administrative remedies (Code of Civil Procedure §430.10(a));

(2) none of the seven causes of action states facts sufficient to state a claim (*id.* §430.10(e)); and (3) each of the seven causes of action is uncertain (*id.* §430.10(f)).

In the alternative, Defendants move to strike the class allegations of the Third Amended Complaint pursuant to Code of Civil Procedure sections 435 and 436 on the grounds that common questions do not predominate over individual issues, class treatment would not provide substantial benefits to the litigants and to the courts, and the proposed class is not ascertainable.

II. LEGAL ANALYSIS

Code of Civil Procedure section 430.10 provides in relevant part that "[t]he party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in Section 430.30, to the pleading on any one or more of the following grounds: (a) The court has no jurisdiction of the subject of the cause of action alleged in the pleading . . . ."

Upon reviewing the Third Amended Complaint and the applicable provisions of the Los Angeles Municipal Code, this court has determined that it lacks subject matter jurisdiction over this matter. Plaintiff must exhaust the administrative remedies provided in the Municipal Code before turning to this court for relief.

The City's Municipal Code, in section 21.16, provides that if the City of Los Angeles' Director of Finance ("Director") "determines that any tax is due or may be due to the City of Los Angeles under the provisions under this chapter, he may make and give notice of an assessment of such tax." (Municipal Code §21.16(a).) The notice of assessment is to "set forth the amount of any tax known by the [Director] to be due or estimated by the [Director], after full consideration of all information within his

knowledge concerning the business and activities of the person assessed, to be due . . . ." (*Id.*) The Director is required to serve the notice of assessment on the asserted taxpayer. (*Id.* §21.16(b).)

The asserted taxpayer may request a hearing on the assessment or may request that the hearing be waived. (*Id.*) If the person assessed does not request either a hearing or a waiver within 15 days, "the amount of the assessment shall be final and the amount thereof shall immediately be due and owing to the City of Los Angeles . . . ." (*Id.*) If the asserted taxpayer requests that the hearing be waived (and the Director grants the request for waiver), the administrative proceedings provided for in Section 21.16 are "deemed exhausted." (*Id.* §21.16(c).) The City then has "the right to bring an action in any court of competent jurisdiction to collect the amount of the assessment, plus such penalties and interest as may have accrued . . . ." (*Id.*)

If the asserted taxpayer requests a hearing on the assessment (or if the Director denies the asserted taxpayer's request for waiver), the Director is to set the matter for hearing before an Assessment Review Officer. (*Id.* §21.16(d).) At this hearing, the asserted taxpayer and the Director may submit evidence in support of their respective positions. (*Id.* §21.16(e).) Upon completion of the hearing, the Assessment Review Officer may affirm, increase, or decrease the assessment, "as the evidence may require." (*Id.* §21.16(f).) Municipal Code section 21.16 also provides for an optional administrative appeal process. (*Id.* §21.16(g)-(i).)

The Defendants argue that the City was required to make a transient occupancy tax assessment against them and allow them the benefits of the administrative remedy provided by Municipal Code section 21.16 before the City may apply to the court for the

relief requested in this case. They contend that exhaustion of this administrative remedy is mandatory, and that the court has no jurisdiction to adjudicate the claims in this case prior to such exhaustion.

The administrative remedies provided by Los Angeles Municipal Code section 21.16 were interpreted in *City of Los Angeles v. Centex Telemanagement, Inc.* (1994) 29 Cal.App.4th 1384. In that case, the City of Los Angeles brought suit against a taxpayer for business taxes allegedly owed. The taxpayer argued that the statute of limitations had run because the City could have brought suit during the pendency of the administrative process provided for by Municipal Code section 21.16. The Court of Appeal held that the statute of limitations was tolled during the pendency of the administrative process, because the City could not have brought an action against the taxpayer in court until the administrative process was exhausted. (*Centex, supra,* 29 Cal.App.4th at 1388-1389.)

Interpreting Municipal Code section 21.16, the *Centex* Court held that principles of administrative law require that a taxpayer be permitted to exhaust the available administrative remedies before the City of Los Angeles may sue for recovery of a tax in court. When "an administrative remedy is provided by statute, relief *must* be sought from the administrative body and this remedy exhausted before the courts will act." (*Centex, supra,* 29 Cal.App.4th at 1387, *citing Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 292 (emphasis added).) "When administrative machinery exists for the resolution of differences, the courts will not act until such administrative procedures are fully utilized and exhausted. To do so would be in excess of their jurisdiction." (*Id.* at 1387-88, *citing Horack v. Franchise Tax Board* (1971) 18 Cal.App.3d 363, 368.) The *Centex* court stated that it is "well established" that the rule of exhaustion of

administrative remedies "is applicable to tax matters." (*Id.*, *citing People v. Sonleitner* (1960) 185 Cal.App.2d 350, 361.)

Reviewing the provisions of Municipal Code section 21.16, the Court of Appeal found that the administrative process is not exhausted until the taxpayer has an opportunity to request a hearing. (*Centex, supra,* 29 Cal.App.4th at 1388.) The Court stated that "it would be pointless" for the City to be permitted to bring a collection action when the amount of the tax owed might be reduced or eliminated in the administrative process. (*Id., citing* Municipal Code §21.16(f).) Therefore, the Court concluded, "[i]t is clear to us from these provisions that the doctrine of exhaustion applies in this case and pending such exhaustion the City was not authorized to begin legal action." (*Id.*)

Municipal Code section 21.7.13 states: "Any person owing money to the City under the provisions of this article shall be liable to an action brought in the name of the City for the recovery of such amount." The City argues that this language allows it to proceed directly to court without permitting the asserted taxpayer access to administrative remedies. The *Centex* decision, however, rejected an analogous argument.

In that case, the taxpayer referenced Municipal Code section 21.19, which allowed the City to bring a lawsuit against a person "owing any tax due" under the provisions for assessment of business taxes. (*Centex, supra,* 29 Cal.App.4th at 1389.)[4] The Court held that this section, authorizing suit, could not be read in isolation from the

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[4] Section 21.19 of the Municipal Code provides:

> Any tax required to be paid under the provisions of this article or Article 1.5, shall be deemed a debt owed to the City. Any person engaging in a business required to obtain a registration certificate and pay a business tax without obtaining the certificate and paying the tax, and any person owing any tax due under the provisions of this article or Article 1.5, shall be liable to an action brought in the name of The City of Los Angeles in any court of competent jurisdiction for recovery of any such amount.

administrative remedy the Municipal Code also specifies. Statutes must be construed so that all parts can be harmonized. (*Id.*) The argument that a statutory provision authorizing lawsuits to collect taxes nullifies administrative exhaustion provisions found in the same Code, is "unpersuasive." (*See, id; see also Dix v. Superior Court* (1991) 53 Cal.3d 442, 459 ("Where reasonably possible, we avoid statutory constructions that render particular provisions superfluous or unnecessary." (citations omitted)).)

The City's argument that an assessment is optional and that the City may bring an action for recovery of taxes without making an assessment is similarly flawed. The City seizes on the word "may" in Municipal Code section 21.16(a), which states that when the Director determines a tax is or may be due, the Director "may make and give notice of an assessment of such tax." Read in context, the term "may" merely recognizes the discretion inherent in the enforcement authority of the Director. If "may" is read to allow the Director to proceed directly to court, subpart (a) of section 21.16 would nullify the administrative remedies provided to the asserted taxpayer by subparts (b) through (j) of section 21.16. As the Court of Appeal held in *Centex*, a proposed statutory construction that brings one part of the statute in conflict with others is "unpersuasive." (*Centex, supra,* 29 Cal.App.4th at 1389.)

The City also argues that it is not possible to make a tax assessment in this case because the Director lacks sufficient factual data to calculate the taxed owed. No doubt in many instances in which the Director suspects that a hotel is evading payment of transient occupancy taxes, the City lacks the data necessary to calculate or even estimate the tax due. (*See* Municipal Code §21.16(a) (allowing an assessment to be made based on the estimated amount of taxes due).) However, the Municipal Code gives the City the

power to conduct "discovery" in order to be able to calculate the amount of occupancy taxes owed. Municipal Code section 21.7.11 requires "every operator" (as defined in section 21.7.2(f)) to preserve for three years all records necessary to determine the amount of taxes that were required to be collected and paid to the City. (Municipal Code §21.7.11.) The Office of Finance has the right to inspect these records "at all reasonable times." (*Id.*)

The City argues that this right to discovery by way of inspection of documents is illusory, because the OTC Defendants contend they are not "operators" within the meaning of the Municipal Code. However, all Defendants have joined in the argument that the City is required to exhaust administrative remedies. The Court interprets Defendants' position as an implicit representation that they will participate in the administrative process, including cooperation in making their records available pursuant to section 21.7.11.[5] At oral argument, counsel for Priceline.com, Inc. expressly represented that his client was willing to permit the City to review its records pursuant to Municipal Code section 21.7.11 for purposes of determining whether to make an assessment, and in what amount. (Reporter's Transcript of June 11, 2007 Hearing, pp. 10-14.)

If a Defendant does refuse to participate in the administrative process, the City may well have a persuasive argument that the court should deem the administrative process to have been exhausted. Alternatively, the City may have the right to seek an injunction requiring a Defendant to comply with section 21.7.11. However, a party's request to be permitted to take advantage of an available administrative remedy should

[5] The court assumes that Defendants will reserve their right to argue that they are not "operators" within the meaning of the Municipal Code while furnishing documents pursuant to request under Municipal Code section 21.7.11.

not be denied on the basis of speculation that the party later may refuse to participate in the administrative process.

The City also argues that the Municipal Code's "investigation and assessment procedures, fairly read, contemplate 'brick-and-mortar' hotel facilities with records maintained in the City, so the City can access and review those records." (See Plaintiff's Opposition Brief, p. 25.) Given that Defendants are not local businesses, Plaintiff asserts that their records are not readily available for audit and review and that the assessment scheme is futile. (*See id.*) Plaintiff's argument is not convincing for several reasons. First, nothing in the Municipal Code limits the assessment scheme's applicability to local businesses who maintain records within the City of Los Angeles. The maintenance of records requirement applies to persons "liable for the collection and payment [of transient occupancy taxes] to the City . . . ." (Municipal Code §21.7.11.) Second, the City's argument is illogical given that many hotels operating in Los Angeles are parts of national entities that may not maintain relevant records within the actual confines of the hotel. The records of national hotel chains may be kept at a corporate office or a data facility not located in Los Angeles. Nevertheless, the City certainly would contend that section 21.7.11 allows it access to such records. Third, as noted above, Defendants have implicitly (and, in the case of one Defendant, explicitly) represented that the Director of Finance should have access to discover Defendants' records.

Because Plaintiff City of Los Angeles has failed to exhaust available administrative remedies, it may not have access to the court to adjudicate Defendants' liability for the taxes claimed in this case.

ORDER

For the reasons set forth above, Defendants' Demurrer to Plaintiff City of Los Angeles' Third Amended Complaint is sustained with leave to amend should Plaintiff City of Los Angeles be able to allege that available administrative remedies have been exhausted with respect to the taxes sought by way of this lawsuit. The case is stayed pending completion of the administrative process. Plaintiff may notify the court and request a status conference when the City has exhausted the administrative process. At that time the court will set a date by which an amended complaint may be filed. Plaintiff is ordered to file a status report on January 18, 2008. A non-appearance case review is set for January 18, 2008.

Dated: July 26, 2007

Carolyn B. Kuhl
Judge of the Superior Court

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 07/27/07			DEPT. 323
HONORABLE CAROLYN B. KUHL	JUDGE	N. NAVARRO	DEPUTY CLERK
HONORABLE	JUDGE PRO TEM		ELECTRONIC RECORDING MONITOR
A. MORALES, C.A.	Deputy Sheriff	NONE	Reporter

JCCP4472

Coordination Proceeding Special Title Rule (1550(B))

"Transient Occupancy Tax Cases"

Plaintiff Counsel

NO APPEARANCES

Defendant Counsel

NATURE OF PROCEEDINGS:

COURT'S RULINGS ON SUBMITTED MATTERS

This Court having taken the following matters under submission on June 11, 2007, issues an opinion and order with respect to each matter:

Defendants' Demurrer to City of Los Angeles' Third Amended Complaint and Motion to Strike Class Allegations in Plaintiff City of Los Angeles' Third Amended Complaint;

Defendants' Demurrer to City of San Diego's First Amended Complaint.

The Court's Opinion and Orders with respect to each of the above matters is filed and entered this date and incorporated herein by reference to the court file.

Defendants' Demurrer to Plaintiff City of Los Angeles' Third Amended Complaint is sustained with leave to amend as more fully reflected in the Court's opinion.

Defendants' Demurrer to Plaintiff City of San Diego's First Amended Complaint is sustained with leave to amend as more fully reflected in the Court's opinion.

The case is ordered stayed pending completion of the administrative process.

MINUTES ENTERED
07/27/07
COUNTY CLERK

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 07/27/07 DEPT. 323

HONORABLE CAROLYN B. KUHL JUDGE | N. NAVARRO DEPUTY CLERK

HONORABLE JUDGE PRO TEM | ELECTRONIC RECORDING MONITOR

A. MORALES, C.A. Deputy Sheriff | NONE Reporter

JCCP4472

Coordination Proceeding Special Title Rule (1550(B))

"Transient Occupancy Tax Cases"

Plaintiff Counsel

NO APPEARANCES

Defendant Counsel

NATURE OF PROCEEDINGS:

The Court sets a Non-Appearance Case Review for January 18, 2008 at 9:00 a.m. in Department 323. Plaintiff is ordered to file a status report by January 18, 2008.

Attorney for defendants as listed below is ordered to give notice to all parties.

CLERK'S CERTIFICATE OF MAILING/
NOTICE OF ENTRY OF ORDER

I, the below named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that this date I served Notice of Entry of the above minute order of 7-27-07 upon each party or counsel named below by depositing in the United States mail at the courthouse in Los Angeles, California, one copy of the original entered herein in a separate sealed envelope for each, addressed as shown below with the postage thereon fully prepaid.

Date: 7-27-07

John A. Clarke, Executive Officer/Clerk

MINUTES ENTERED
07/27/07
COUNTY CLERK

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 07/27/07			DEPT. 323
HONORABLE CAROLYN B. KUHL	JUDGE	N. NAVARRO	DEPUTY CLERK
HONORABLE	JUDGE PRO TEM		ELECTRONIC RECORDING MONITOR
A. MORALES, C.A.	Deputy Sheriff	NONE	Reporter

JCCP4472

Coordination Proceeding Special Title Rule (1550(B))

"Transient Occupancy Tax Cases"

Plaintiff Counsel

NO APPEARANCES

Defendant Counsel

NATURE OF PROCEEDINGS:

N. NAVARRO

By: _____
N. NAVARRO, Deputy Clerk

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MINUTES ENTERED
07/27/07
COUNTY CLERK

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

TRANSIENT OCCUPANCY TAX CASES Included Actions: *City of Los Angeles, California v. Hotels.com, L.P.*, Los Angeles Superior Court, Case No. BC 326693 *City of San Diego, California v. Hotels.com, L.P.*, San Diego Superior Court, Case No. GIC 861117	Judicial Council Coordination Proceeding No. 4472 OPINION AND ORDER ON DEFENDANTS'DEMURRER TO PLAINTIFF CITY OF SAN DIEGO'S FIRST AMENDED COMPLAINT

On June 11, 2007, Defendants'[1] Demurrer to Plaintiff City of San Diego's First Amended Complaint came on hearing before this court. This court has considered all of the briefs, objections and arguments presented on behalf of Plaintiff and Defendants. For the reasons stated in the following Opinion and Order, Defendants' Demurrer to Plaintiff City of San Diego's First Amended Complaint is sustained with leave to amend. The case is stayed until such time as the City of San Diego notifies the court that it has exhausted

[1] These are the same fifteen Defendants who have demurred to Plaintiff City of Los Angeles's Third Amended Complaint: Priceline.com Inc.; Travelweb LLC; Lowestfare.com Inc.; Expedia, Inc.; Hotwire, Inc.; Travelnow.com; Hotels.com, L.P.; Hotels.com GP, LLC; Travelocity.com, L.P.; Travelocity.com, Inc.; Site59.com, Inc.; Orbitz, Inc.; Orbitz, LLC; Trip Network, Inc. (d/b/a Cheaptickets.com); and Internetwork Publishing Corp. (d/b/a lodging.com).

available administrative remedies with respect to the taxes sought by way of this lawsuit. At that time, the court will set a date by which an amended complaint may be filed.

I. FACTUAL AND PROCEDURAL SUMMARY

In 1963, the California State Legislature enacted a statute permitting California cities and counties to levy a tax on a hotel guest (or "transient") for the privilege of occupying a hotel room in that city or county. (See Cal. Rev. & Tax Code section 7280(a).) In 1964, Plaintiff City of San Diego exercised this right conferred by the Legislature and enacted a transient occupancy tax ordinance. (See San Diego Municipal Code ("Municipal Code") §§ 35.0101 – 35.0138.[2])

In this action, Plaintiff City of San Diego ("San Diego") alleges that the fifteen defendants owe back occupancy taxes to the city. San Diego's First Amended Complaint (FAC) is almost identical to Plaintiff City of Los Angeles' Third Amended Complaint. (Indeed, many of San Diego's allegations are contained in the same numerical paragraphs as the allegations made in Plaintiff City of Los Angeles' Third Amended Complaint.) The only major differences between the two complaints are that first, Plaintiff City of Los Angeles' Third Amended Complaint is a class action complaint while San Diego's FAC is not. Second, San Diego's FAC alleges Defendants violated the relevant San Diego ordinance, not the Los Angeles ordinance. Accordingly, much of the legal analysis provided in this Opinion and Order is an abbreviated discussion of the analysis provided

[2] Specifically, Section 35.0103 provides:

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

Other sections in the Municipal Code impose additional taxes (which are added to the base tax percentage provided in Section 35.0103).

in the accompanying Opinion and Order on Defendants' Demurrer to Plaintiff City of Los Angeles' Third Amended Complaint.

San Diego's FAC alleges seven causes of action for: (1) violation of San Diego's transient occupancy tax ordinance; (2) violation of Business & Professions Code section 17200; (3) conversion; (4) violation of Civil Code section 2223; (5) violation of Civil Code section 2224; (6) imposition of constructive trust; and (7) declaratory judgment.

Defendants demur jointly and severally to San Diego's FAC on three grounds: (1) this court lacks jurisdiction because San Diego has failed to exhaust its administrative remedies (Code of Civil Procedure § 430.10(a)); (2) none of the seven causes of action state facts sufficient to state a claim (*id.* § 430.10(e)); and (3) each of the seven causes of action is uncertain (*id.* § 430.10(f)).

II. LEGAL ANALYSIS

Code of Civil Procedure section 430.10 provides in relevant part that "[t]he party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in Section 430.30, to the pleading on any one or more of the following grounds: (a) The court has no jurisdiction of the subject of the cause of action alleged in the pleading . . . ."

Upon reviewing the First Amended Complaint and the applicable provisions of the San Diego Municipal Code, this court has determined that it lacks subject matter jurisdiction over this matter. Plaintiff must exhaust the extensive administrative remedies provided in the Municipal Code before turning to this court for relief.

The City of San Diego's Municipal Code provides that if any operator fails to collect and remit a tax, or if the operator maintains records which are inadequate to show

the amount of tax due, "the City Treasurer *shall* forthwith assess the tax and penalties provided for by this Article against the operator." (Municipal Code § 35.0117(a) (emphasis added).) The City Treasurer then shall deliver notice of the assessment to the operator. (*Id.* § 35.0117(c).)

The operator may then request a hearing on the amount assessed by the City Treasurer. If a timely request for hearing is not made, the amount assessed by the City Treasurer shall become final, conclusive and immediately due. (*Id.* § 35.0118(a).) If a timely application is made, a hearing is initiated before a Board (consisting of the City Treasurer, City Auditor and Comptroller and Financial Management Director or the duly appointed deputy of each). (*Id.*) "At the hearing, the operator may appear and offer evidence why the specified tax and penalties should not be fixed." (*Id.*) The Board "shall consider all evidence produced and shall determine the proper tax to be remitted." (*Id.*)

If the amount which the Board deems is owed does not exceed $750.00, the Board's decision shall be final and conclusive and shall constitute an exhaustion of the operator's administrative remedies. (*Id.*) If the amount which the Board deems is owed exceeds $750.00 and an appeal is filed by the operator, the City Manager shall cause the appeal to be assigned to a Hearing Officer who shall schedule a hearing to be heard within a reasonable time thereafter. (*Id.* § 35.0118(b).)

As discussed in the accompanying Opinion and Order re Defendants' Demurrer to Plaintiff City of Los Angeles' Third Amended Complaint, in *City of Los Angeles v. Centex Telemanagement, Inc.* (1994) 29 Cal.App.4th 1384, the appellate court noted that the rule of exhaustion requires that when "an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted

before the courts will act." (*Id.* at 1387 (citation omitted).) "When administrative machinery exists for the resolution of differences, the courts will not act until such administrative procedures are fully utilized and exhausted. To do so would be in excess of their jurisdiction." (*Id.* at 1387-88 (citation omitted).) The *Centex* court found that "[t]he administrative remedy must be pursued as a condition precedent" to filing a lawsuit and that it is "well established" that the rule of exhaustion of administrative remedies "is applicable to tax matters." (*Id.* at 1388 (citations omitted).) The Court of Appeal also rejected the taxpayer's argument that the doctrine of exhaustion is not applicable when the taxing entity, rather than the taxpayer, brings the legal action. (*See id.*)

Here, it is undisputed that San Diego did not initiate the assessment scheme provided by its Municipal Code (sections 35.0117 and 35.0118), let alone exhaust its administrative remedies, before filing the instant action. San Diego presents the same arguments made by Plaintiff City of Los Angeles as to why it is not required to exhaust its administrative remedies prior to filing suit. These arguments are not persuasive for the same reasons discussed in the accompanying Opinion and Order on Defendants' Demurrer to Plaintiff City of Los Angeles' Third Amended Complaint.

ORDER

For the reasons set forth above, Defendants' Demurrer to Plaintiff City of San Diego's First Amended Complaint is sustained with leave to amend should Plaintiff City of San Diego be able to allege that available administrative remedies have been exhausted with respect to the taxes sought by way of this lawsuit. The case is stayed pending completion of the administrative process. Plaintiff may notify the court and

request a status conference when San Diego has exhausted the administrative process. At that time the court will set a date by which an amended complaint may be filed. Plaintiff is ordered to file a status report on January 18, 2008. A non-appearance case review is set for January 18, 2008.

Dated: July 26, 2007

Carolyn B. Kuhl
Judge of the Superior Court

323

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LOS ANGELES SUPERIOR COURT

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and LOWESTFARE.COM INC. (n/k/a LOWESTFARE.COM LLC)

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES, CENTRAL DISTRICT

FAXED

Coordination Proceeding Special Title (Rule 1550(b))

TRANSIENT OCCUPANCY TAX CASES

Included actions:

CITY OF LOS ANGELES, CALIFORNIA v. HOTELS.COM, L.P., et al.
Los Angeles Superior Court Case No.: BC326693

CITY OF SAN DIEGO, CALIFORNIA v. HOTELS.COM, L.P.
San Diego Superior Court Case No.: GIC861117

PRICELINE.COM INCORPORATED and TRAVELWEB LLC v. CITY OF ANAHEIM, a municipal corporation, and MICHAEL H. MILLER, in his capacity as HEARING OFFICER APPOINTED BY THE CITY OF ANAHEIM
Orange County Superior Court Case No.: 30-2009-00244120

EXPEDIA, INC. v. CITY OF ANAHEIM, a municipal corporation, and MICHAEL H. MILLER, in his capacity as

HEARING OFFICER APPOINTED BY THE CITY OF ANAHEIM

JUDICIAL COUNCIL COORDINATION PROCEEDING NO.: 4472

STIPULATION and ~~[PROPOSED]~~ ORDER TO COORDINATE ADD-ON CASES and STAY ACTIONS

Dept. 323: Hon. Carolyn B. Kuhl

CIT/CASE: JCCP4472 LEA/DEF#:
RECEIPT #: CCM533785013
DATE PAID: 07/07/09 02:20:45 PM
PAYMENT: $20.00 0310
RECEIVED:
CHECK: 20.00
CASH:
CHANGE:
CARD:

RECEIVED
JUL 07 2009
BY:

Orange County Superior Court Case No.:
30-2009-00244175

TRIP NETWORK, INC., et al. v.
CITY OF ANAHEIM, a municipal corporation, and MICHAEL H. MILLER, in his capacity as HEARING OFFICER APPOINTED BY THE CITY OF ANAHEIM
Orange County Superior Court Case No.:
30-2009-00244232

ORBITZ, LLC v.
CITY OF ANAHEIM, a municipal corporation, and MICHAEL H. MILLER, in his capacity as HEARING OFFICER APPOINTED BY THE CITY OF ANAHEIM
Orange County Superior Court Case No.:
30-2009-00244240

TRAVELOCITY.COM LP, et al., v.
CITY OF ANAHEIM, a municipal corporation, and MICHAEL H. MILLER, in his capacity as HEARING OFFICER APPOINTED BY THE CITY OF ANAHEIM
Orange County Superior Court Case No.:
30-2009-00244139

HOTELS.COM, L.P. v.
CITY OF ANAHEIM, a municipal corporation, and MICHAEL H. MILLER, in his capacity as HEARING OFFICER APPOINTED BY THE CITY OF ANAHEIM
Orange County Superior Court Case No.:
30-2009-00244176

HOTWIRE, INC. v.
CITY OF ANAHEIM, a municipal corporation, and MICHAEL H. MILLER, in his capacity as HEARING OFFICER APPOINTED BY THE CITY OF ANAHEIM
Orange County Superior Court Case No.:
30-2009-00244195

HOTWIRE, INC. v. CITY AND COUNTY OF SAN FRANCISCO, et al.
San Francisco Superior Court Case No. CGC 09-488289

EXPEDIA, INC. v. CITY AND COUNTY OF SAN FRANCISCO, et al.
San Francisco Superior Court Case No. CGC 09-488292

This Stipulation and [Proposed] Order is entered into by the City and County of San Francisco and George Putris, in his capacity as Tax Administrator and Tax Collector (together, the "City") and the following online travel companies and their affiliates: priceline.com Incorporated, Lowestfare.com Incorporated, and Travelweb LLC (the "Priceline Entities") and Travelocity.com L.P. and Site59.com, LLC (the "Travelocity Entities"). The City, Priceline Entities and Travelocity Entities stipulate and agree as follows:

WHEREAS, on June 11, 2009, the Priceline Entities filed the action entitled *priceline.com Inc., et al. v. City and County of San Francisco, et al.*, Case No. CPF-09-509573, in the Superior Court of the State of California, City and County of San Francisco (the "Priceline San Francisco Judicial Action"), against the City.

WHEREAS, on June 11, 2009, the Travelocity Entities filed the action entitled *Travelocity.com L.P., et al. v. City and County of San Francisco, et al.*, Case No. CGC-09-489356, in the Superior Court of the State of California, City and County of San Francisco (the "Travelocity San Francisco Judicial Action"), against the City.

WHEREAS, on June 16, 2009, this Court, the Honorable Carolyn B. Kuhl, coordination trial judge, ordered virtually identical actions previously pending in San Francisco Superior Court (specifically, *Expedia, Inc. v. City and County of San Francisco, et al.*, Case No. CGC 09 488292 and *Hotwire, Inc. v. City and County of San Francisco, et al.*, Case No. CGC 09 488289 (together, the "Expedia San Francisco Judicial Actions")) coordinated as add-on cases to the already-coordinated *Transient Occupancy Tax Cases*, Judicial Council Coordination Proceedings No. 4472 (the "Coordinated Actions"), pending in the Superior Court of the State of California, County of Los Angeles.

WHEREAS, the Priceline Entities and Travelocity Entities assert that this Court's reasoning regarding the Expedia San Francisco Judicial Actions applies equally to the Priceline San Francisco Judicial Action and the Travelocity San Francisco Judicial Action and that coordination of each those actions as an add-on to the *Transient Occupancy Tax Cases* is appropriate. The City disagrees, but in light of the June 16, 2009 coordination order in the Expedia San Francisco

Judicial Actions, does not oppose coordination of the Priceline San Francisco Judicial Action and Travelocity San Francisco Judicial Action.

NOW THEREFORE, IT IS HEREBY STIPULATED by the parties, through their duly-authorized counsel of record, that pursuant to Section 404.4 of the California Code of Civil Procedure ("CCP"), both the Priceline San Francisco Judicial Action and the Travelocity San Francisco Judicial Action should be coordinated as add-on cases, subject to the Order of this Court.

AND FURTHER, WHEREAS, on June 19, 2009, this Court issued an Opinion and Order on Demurrers of Defendants City and County of San Francisco and George Putris to the Petitions for Writ of Mandate and Complaints for Declaratory Relief of Expedia, Inc. and Hotwire, Inc. in the Expedia San Francisco Judicial Actions (the "Demurrer Order").

WHEREAS, pursuant to the Demurrer Order, the Court sustained the City's demurrers to the writ petitions in the Expedia San Francisco Judicial Actions with leave to amend, ruling that the petitioners in those cases (the "Expedia Entities") must first exhaust their administrative remedies under the San Francisco Tax Code, including by paying the tax at issue (pursuant to the "pay-first rule"). The Court granted the petitioners in the Expedia San Francisco Judicial Actions forty-five (45) days leave to amend to exhaust their administrative refund remedies.

WHEREAS, the City has agreed to refrain from enforcement or collection of the Expedia Entities' tax obligations for ten days after the Court rules on the City's demurrers, to give the Expedia Entities an opportunity to file a writ petition challenging the Court's ruling. Further, the City has agreed to refrain from enforcement or collection for an additional ten days, in the event the Expedia Entities file a timely writ petition within the ten-day period.

WHEREAS, the City asserts that the Court's reasoning on the Demurrer Order applies equally to both the Priceline San Francisco Judicial Action and the Travelocity San Francisco Judicial Action. The Priceline Entities and Travelocity Entities disagree, but in light of the Demurrer Order, agree that motion practice on this issue in the Priceline San Francisco Judicial Action and Travelocity San Francisco Judicial Action would subject the Court and the parties to needless repetition and will waste judicial and party resources.

THEREFORE, IT IS STIPULATED AND AGREED THAT the Priceline San Francisco Judicial Action and the Travelocity San Francisco Judicial Action shall be stayed pending the outcome of the Expedia Entities' writ petition.

IT IS FURTHER STIPULATED AND AGREED THAT the City, Priceline Entities and Travelocity Entities will deem the briefing on the "pay-first rule" in the Expedia San Francisco Judicial Actions applicable to the Priceline San Francisco Judicial Action and the Travelocity San Francisco Judicial Action and in each action will abide by the outcome of the Expedia Entities' writ petition (or, should the Court of Appeal decline to hear the Expedia Entities' writ petition, will abide by the Demurrer Order), with all parties preserving any and all objections thereto.

DATE: July 7, 2009

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By: _____
DARREL J. HIEBER
Attorney for PRICELINE.COM INC., LOWESTFARE.COM INC., and TRAVELWEB LLC

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By: _____
WILLIAM B. GRENNER
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SAN FRANCISCO CITY ATTORNEY'S OFFICE

By: _____
JAMES M. EMERY
Deputy City Attorney
Attorneys for the City and County of San Francisco and George Putris

~~[PROPOSED]~~ ORDER

Based on the stipulation of the parties set forth above, and GOOD CAUSE APPEARING,

IT IS SO ORDERED that the Priceline San Francisco Judicial Action (*priceline.com Inc., et al. v. City and County of San Francisco*, Case No. CPF-09-509573) and the Travelocity San Francisco Judicial Action (*Travelocity.com L.P., et al. v. City and County of San Francisco, et al.*, Case No. CGC-09-489356), currently pending in the Superior Court of the State of California, City and County of San Francisco, shall be coordinated as add-on cases to the already-coordinated *Transient Occupancy Tax Cases*, Judicial Council Coordination Proceedings No. 4472, pending in the Superior Court of the State of California, County of Los Angeles.

IT IS FURTHER ORDERED that thereafter, the Priceline San Francisco Judicial Action and Travelocity San Francisco Judicial Action shall be stayed pending the outcome of the Expedia Entities' writ petition to the California Court of Appeal concerning this Court's Demurrer Order.

DATED: July 27, 2009

By: Carolyn B. Kuhl
Hon. Carolyn B. Kuhl
Judge of the Superior Court

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 300 South Grand Avenue, Suite 3300, Los Angeles, California 90071.

On **July 7, 2009**, I served the foregoing document described as:

STIPULATION and [PROPOSED] ORDER TO COORDINATE ADD-ON CASES and STAY ACTIONS

on the interested parties in this action addressed as follows:

SEE ATTACHED SERVICE LIST

☐ **(BY US MAIL)** I am readily familiar with the firms' practice for the collection and processing of correspondence for mailing with the United States Postal Service and the fact that the correspondence would be deposited with the United States Postal Service that same day in the ordinary course of business; on this date, the above-referenced correspondence was placed for deposit at Los Angeles, California and placed for collection and mailing following ordinary business practices. (AS NOTED)

☒ **(BY ELECTRONIC MAIL)** Via electronic filing in accordance with the Court's ruling governing the Judicial Council Coordination Proceeding No. 4472 requiring all documents to be served upon interested parties via the Court's e-Service System.. (AS NOTED)

☒ **(BY FEDERAL EXPRESS)** I am readily familiar with the firm's practice for the daily collection and processing of correspondence for deliveries with the Federal Express delivery service and the fact that the correspondence would be deposited with Federal Express that same day in the ordinary course of business; on this date, the above-referenced document was placed for deposit at Los Angeles, California and placed for collection and delivery following ordinary business practices. (AS NOTED)

☐ **(BY PERSONAL SERVICE):** ☐ I caused to be delivered such envelopes by hand to the offices of the addressee (AS NOTED)

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on **July 7, 2009** at Los Angeles, California.

Eunice L. Bautista
Type or Print Name

Eunice A-Bautista
Signature

SERVICE LIST

Via Federal Express

Judicial Council of California

Judicial Council of California
ATCJS – 7th Floor
455 Golden Gate Avenue
San Francisco, CA 94102-3688
Phone: 415-865-4200

Via Electronic Mail

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

Coordination Proceeding Special Title (Rule 1550 (b)) TRANSIENT OCCUPANCY TAX CASES Included actions: PRICELINE.COM INCORPORATED and TRAVELWEB LLC v. CITY OF ANAHEIM, et al., Orange County Superior Court Case No.: 30-2009-00244120 EXPEDIA, INC. v. CITY OF ANAHEIM, CITY OF ANAHEIM, et al., Orange County Superior Court Case No.: 30-2009-00244175 TRIP NETWORK, INC et al. v. CITY OF ANAHEIM, CITY OF ANAHEIM, et al., Orange County Superior Court Case No.: 30-2009-00244232 ORBITZ, LLC v. CITY OF ANAHEIM et al., Orange County Superior Court Case No.: 30-2009-00244240 TRAVELOCITY.COM LP et al., v. CITY OF ANAHEIM, et al., Orange County Superior Court Case No.: 30-2009-00244139 HOTELS.COM, L.P. v. CITY OF ANAHEIM, et al., Orange County Superior Court Case No.: 30-2009-00244176 HOTWIRE, INC v. CITY OF ANAHEIM, et al., Orange County Superior Court Case No.: 30-2009-00244195	Case No. JCCP 4472 OPINION AND ORDER ON THE ONLINE TRAVEL COMPANIES' MOTION FOR JUDGMENT GRANTING WRIT OF MANDATE AND THE CITY OF ANAHEIM'S MOTION TO DENY ONLINE TRAVEL COMPANIES' WRITS OF ADMINISTRATIVE MANDAMUS

These cases concern taxes, interest, and penalties in the amount of $21,326,881.30 assessed by Respondent City of Anaheim ("City" or "Anaheim") on Petitioners, which are online (*i.e.,* internet) travel companies ("OTCs").[1] The taxes were assessed based upon Anaheim's Municipal Code, which states that "[f]or the privilege of occupancy of space in any hotel, each transient is subject to and shall pay a tax in the amount of fifteen percent of the rent." (Anaheim Mun. Code § 2.12.010). This tax is known as the "transient occupancy tax." The OTCs appealed the City's tax assessment. In February 2009, a Hearing Officer for the City found that the OTCs were subject to the Anaheim Municipal Code ("Code" or "ordinance") and thus owed transient occupancy taxes (and associated interest and penalties) to the City.

In these actions, the OTCs petition this court to issue a writ of mandate overturning the 2009 decision of the City's Hearing Officer ("Decision")[2] in favor of Respondent. The City has filed a motion to deny the writ. The OTCs ask this court to determine (1) whether each OTC is an "operator" of hotels under the Code; and (2) whether the total amount collected by each OTC is "rent" subject to the transient occupancy tax. The OTCs also contend that the City's assessments are barred in part by a three-year statute of limitations and equitable doctrines of laches and estoppel. The City has asked this court to determine (1) whether the Hearing Officer proceeded in the manner required by law; (2) whether the Decision is supported by the findings; and (3) whether the findings are supported by the evidence.

---

[1] The OTC Petitioners are Priceline.com Inc., Travelweb LLC; Expedia, Inc.; Hotwire, Inc.; Hotels.com, L.P.; Travelocity.com, L.P.; Site59.com, LLC; Orbitz, LLC; Trip Network, Inc. (d/b/a/ Cheaptickets); and Internetwork Publishing Corp. (d/b/a Lodging.com).

[2] The Hearing Officer's Decision, issued Jan. 28, 2009, is located in the Administrative Record at ANA-ADMIN 11557-11610. Further citations will be to the page numbers (1-54) in the Decision.

The court has considered all of the briefs, evidence, objections, and arguments presented on behalf of all parties. For the reasons stated below, the court grants the OTCs' Motion for Judgment Granting the Writ of Mandate and denies the City's Motion to Deny the OTCs' Writs of Administrative Mandamus.

I. FACTUAL AND PROCEDURAL SUMMARY

Stated briefly, traditionally hotels have sold directly to consumers the privilege of occupying hotel rooms for a specified period of time. Anaheim, like many municipalities, taxes this local commercial transaction by imposing a transient occupancy tax on the rental of hotel rooms that are physically located within the boundaries of the municipality.

More recently, the efficient access to broad customer markets through the internet has been exploited by internet-based travel companies. These OTCs offer hotel rooms or packages of travel services to a world-wide audience of internet users. Hotels have utilized the OTCs as a mechanism for price differentiation and marketing. While hotels continue to offer rooms directly to travelers at rates determined by the hotel, hotels also negotiate wholesale rates for blocks of rooms, allowing the OTCs to resell the privilege of occupying those rooms at rates determined by the OTC. The issue in this case is how Anaheim's transient occupancy tax applies to a hotel room rental transaction through an OTC.

As the OTCs' counsel stated at oral argument on the current motions, there essentially is no dispute as to the facts concerning the OTCs' mode of doing business. The facts found by the Hearing Officer as set forth in his written Decision are as follows:

1. The City of Anaheim (City) is a California charter city that imposes a transient occupancy tax pursuant to AMC Chapter 2.12. It is a privilege tax.
2. The Online Travel Companies (OTCs) collect and publish travel-related information on the internet and provide for the making of hotel reservations for customers on the internet. They do business on a nationwide scale and provide for the making of reservations at hotels and motels in the City.
3. On May 23, 2008, the City issued estimated assessments of transient occupancy tax to the OTCs. These have been supplanted by revised assessments.
4. The OTCs timely appealed the City's tax assessment by serving Applications for Hearing on the City.
5. The operations and business model utilized by the OTCs that is the subject matter of the City's application of the transient occupancy tax is referred to as the merchant model.
6. Pursuant to the merchant model, the OTCs contract with hotel operators for the ability to make rooms available (through reservations) to consumers (transients) by way of their websites. The OTCs then charge a higher rate to the customer on his or her credit card. That rate (retail price) is presented to the consumer as three line items: the room price, taxes and fees, and the combined total price. The discounted room rate negotiated by the hotels and OTCs is called the wholesale price. The OTCs act as the merchant of record in these transactions by establishing the room pricing, charging the consumer's credit card, and establishing cancellation policies. Once the consumer completes the transaction with the OTC, he or she can check in and out of the hotel without paying any additional money for the room.
7. Under the merchant model, the OTCs and hotels share customers, the customer only pays the OTC for the hotel room rental, only the OTC knows all the amounts charged to the transient, and upon arrival at the hotel, the transient gets the room key and makes arrangement to pay for incidentals to occupy the hotel room.
8. Pursuant to contracts between the OTCs and hotels, the OTCs market hotel rooms to transients and then handle all financial aspects of the rental. The hotels supply the rooms to the transients. Contractually and in actuality, they work together to rent and supply rooms to customers.
9. Pursuant to the contracts between the hotels and OTCs, the hotels supply rooms for marketing and rental by the OTCs which results in the OTC performing pricing, collecting, advertising, determining the markup and the retail price, and

collecting consideration for the room from the transient, functions typically associated with a hotel operator.

10. Under contracts between the OTCs and the hotels, the OTCs usually incorporate the hotel's cancellation policy into the contract between the OTC and the transient, provide customer support services and call in centers for the transient, and (contractually) commit to a prohibition of disclosing the wholesale rate to transients. The OTCs provide a room confirmation and room receipt to the transient. The transient does not receive a rental receipt from the hotel.
11. The evidence shows that, in many instances, the OTCs admit that they "sell" (i.e. rent) hotel rooms to transients rather than "facilitate" reservations as set forth in much of their current wording to describe what they do.
12. Pursuant to the merchant model, the room rate paid by the transient is composed of a net rate or wholesale rate, as negotiated between the hotel and OTC, and a mark up of approximately 20 to 40% of the net rate. The transient is not informed of the net rate for the room. The OTC and hotels do not want transient to be able to calculate (reverse engineer) the net rate. The transient knows the amount he or she is paying to the OTC for a room; the net rate is an unknown amount to the customer. Under this pricing arrangement, the OTCs use the net rate to calculate the transient occupancy tax, instead of the room rate paid by the transient.
13. The OTCs do not occupy hotel rooms. The net rate, which is the tax basis used by the OTCs (and through the OTCs the hotels which remit the collected tax) for the transient occupancy tax is the room cost incurred by the OTCs, who don't occupy the room. . . .

(Decision at 26-28 (footnote omitted).)

The City initiated administrative proceedings against the OTCs on October 10, 2007 for failure to collect and/or remit transient occupancy taxes to the City. (*Id.* at 50.) On May 23, 2008, the City issued estimated assessments against the OTCs covering an eight-year audit period. (*Id.* at 4, 49.) These assessments "evolved over time from estimated to actual based on the provision and exchange of real data between the parties and a related meet and confer process." (*Id.* at 4.) Pursuant to Anaheim Code section 2.12.060, the OTCs appealed the assessments by way of Applications for Hearing filed in

June, 2008. (*Id.* at 50.) The Hearing Officer and the parties agreed to a bifurcated proceeding by which liability issues would be adjudicated first, followed, if necessary, by adjudication of the amounts of tax due. (*Id.* at 2.) The appeal hearings took place on eight days over the period of August through December, 2008. (*Id.* at 1.) The OTCs and the City submitted briefing, declarations, depositions, documentary evidence and expert testimony, and both sides had opportunity for direct and cross examination. (*Id.*)

The Hearing Officer's Decision, dated January 28, 2009, determines that each OTC is liable for payment of a transient occupancy tax based on the total amount paid by customers to the OTCs (except for cancellation/change fees). (*Id.* at 53-54.) The total amount of the assessment for all OTCs that were parties to the proceeding is $21,326,881.30. The Hearing Officer found that each OTC is both "the proprietor" and the "managing agent" of every hotel in the City for which it books any room reservation. (*Id.* at 17-26). The Hearing Officer determined that the total amount an OTC charges a customer for its online reservation services is taxable "rent" charged by the "operator" under the City's transient occupancy tax.

The OTCs filed timely Petitions for Writ of Mandate in the Orange County Superior Court. The City contended that the OTCs were not entitled to challenge the tax unless they first paid the totality of the assessment, but the Orange County Superior Court trial judge disagreed, and that ruling now has been affirmed on appeal. (*Anaheim v. Superior Court* (2009) 179 Cal.App.4th 825.) Subsequently, the OTCs sought to have the Orange County Superior Court proceedings included in the Transient Occupancy Tax Cases, Judicial Council Coordination Proceeding No. 4472, then pending before this

court. This court granted the request to have the Orange County writ challenges included in these coordinated proceedings as "add-on" cases.

The City filed a Motion to Deny Online Travel Companies' Writs of Administrative Mandamus, and the OTCs filed a Motion for Judgment Granting Writ of Mandate. Briefing on these motions was coordinated, and the court heard oral argument on both motions simultaneously.

II. LEGAL ANALYSIS

A. Standard of Review

Petitioners seek a writ of mandate pursuant to Code of Civil Procedure section 1094.5. Review under this statute "is limited to the record compiled by the administrative agency, and the agency's findings of fact must be upheld if supported by 'substantial evidence.'" (*State Bd. of Chiropractic Examiners v. Superior Court* (2009) 45 Cal.4th 963, 977, *quoting* Code Civ. Proc. § 1094.5(c).) As noted above, however, the facts concerning operation of the OTCs, their relationship with their customers and their contracts with hotels are essentially undisputed. The issue, rather, is the correct interpretation of the Anaheim ordinance and its application to the undisputed facts.

The parties dispute whether and to what extent deference is owed to the Hearing Officer's construction of the Anaheim ordinance.[3] The analysis of the Court of Appeal in *State Building and Construction Trades Council v. Duncan* (2008) 162 Cal.App.4th 289, is instructive on this point. In *Duncan* the Court of Appeal considered a petition for writ

[3] The OTCs urge this court to conclude that, in reviewing administrative decisions on writ of administrative mandamus, a court *always* reviews questions of law *de novo*, without deference to the administrative agency's construction of the statute. However, on close consideration of the authorities cited by the OTCs, they stand rather for the proposition that an appellate court reviews *de novo* a trial court's legal determinations. (*See Scottish Rite Cathedral Ass'n v. City of Los Angeles* (2007) 156 Cal.App.4th 108, 115; *Schutte & Koerting, Inc. v. Regional Water Quality Control Bd.* (2007) 158 Cal.App.4th 1374, 1384; *Radian Guaranty, Inc. v. Garamendi* (2005) 127 Cal.App.4th 1280, 1288.)

of mandate challenging an administrative determination by the Director of the Department of Industrial Relations. The Director had found that receipt of federal tax credits does not constitute a payment out of public funds within the meaning of Labor Code section 1720(b), so as to require a construction project receiving such tax credits to pay prevailing wages to workers on the project (as would be required for public works projects). (*Id.* at 298-299.) The Court of Appeal considered the issue presented to be the correct interpretation of Labor Code section 1720. (*Id.* at 294.)

Although the Court of Appeal ultimately ordered that the writ be denied (thus agreeing with the position taken by the Director), the Court gave no deference to the Director's interpretation of the relevant statute. The Court of Appeal applied the general principles set forth in *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, in order to determine whether the Director's ruling was "the equivalent of an established administrative interpretation of a statute by the official responsible for administering that statute, and thus a quasi-legislative rule entitled to our deference." (*Duncan, supra,* 162 Cal.App.4th at 302, *citing Yamaha, supra,* 19 Cal.4th at 6-11.)

First, the Court of Appeal considered whether the position of the Director was one that had endured for some period of time, because "judicial deference to an administrative interpretation is extended if the interpretation is long-standing, consistent, and if the interpretation was contemporaneous." (*Duncan, supra,* 162 Cal.App.4th at 303.) Because the Director's determination was less than two years old, and because that determination reversed a prior position taken by the Director, the Court of Appeal held that the administrative interpretation was not entitled to deference. (*Id.* at 303.)

In addition and "most importantly," the Court of Appeal noted that the issue presented was "a pure one of statutory interpretation," and thus "involve[d] the quintessential judicial function." (*Id.* at 304.) Although an agency's interpretation may be considered by a court and "[d]epending on the context, it may be helpful, enlightening, even convincing," it also "may sometimes be of little worth." (*Id., citing Yamaha, supra,* 19 Cal.4th at 7-8.) In the final analysis, while the Court of Appeal considered the administrative interpretation of the relevant statute, the Court did not "extend that interpretation any particular deference." (*Duncan, supra,* 162 Cal.App.4th at 304.) Because there was "no factual dispute, only the question of how [the relevant] statute is to be construed and applied," the Court exercised its "independent judgment" on that question. (*Id.*)

Following *Duncan*, while accepting the Hearing Officer's factual findings, this court determines that the Decision's interpretation of the Anaheim ordinance is not entitled to any particular deference. This court therefore exercises its independent judgment on the issue of statutory construction presented. There is no showing that the City previously had interpreted the ordinance in the context of transactions by companies offering internet travel services, or that there was a longstanding administrative practice with respect to collection of transient occupancy taxes from similarly situated entities. Therefore, the conclusions of the Hearing Officer do not reflect any administrative expertise with respect to regulation of the transaction in question.

JKH Enterprises, Inc. v. Department of Industrial Relations (2006) 142 Cal.App.4th 1046, relied on by the City, is not to the contrary. That case expressly recognizes that "pure issues of law are always subject to independent appellate court

review." (142 Cal.App.4th at 1058, footnote 11.) In *JKH Enterprises,* the court reviewed an administrative hearing officer's decision as to whether a worker was an employee or an independent contractor, a decision requiring application of a multifactor test in which there is no "single determinative factor . . . ." (*Id.* at 1054-55.) This issue, which would be presented to a jury in another context,[4] called for a "substantial evidence" standard of review. By contrast, the task of determining the meaning of the terms "rent," hotel "proprietor" and "managing agent," as used in the Anaheim ordinance, is at the center of the province of the judicial branch.

B. Properly Interpreted, Anaheim's Ordinance Does Not Impose a Tax Based on the Retail Price of Hotel Rooms Offered by the OTCs

1. Overview of the Structure of the Ordinance

As stated by the Hearing Officer in his Decision, the transient occupancy tax is a privilege tax – it is a tax based on the privilege of occupying a hotel room in the City of Anaheim for less than 30 days. Although the tax is imposed on the transient, the tax scheme is not operated independently of the hotel. The hotel is burdened with the duty of collecting the tax and transmitting it to the City. If the hotel fails in its duty to collect the tax, it must, nevertheless, pay from its own funds the amount of the tax that should have been collected.

The definition of the tax focuses on the locus of commercial activity taking place in the City of Anaheim. Section 2.12.010 of the Anaheim Code provides: "For the privilege of occupancy of space in any hotel, each transient is subject to and shall pay a tax in the amount of fifteen percent of the rent." Although the Code does not expressly state that "any hotel" is limited to hotels physically located in Anaheim, the ordinance

[4] *See* CACI 3704.

states the negative proposition that the tax shall *not* be imposed upon occupancy that is "beyond the power of Anaheim to impose the tax." (Anaheim Mun. Code § 2.12.015.) There is no dispute that only occupancy in hotels located in Anaheim generates tax liability to Anaheim.

The taxable event is focused on non-permanent occupancy of a physical living space. A "transient" is defined as a person who, for thirty days or less, "exercises occupancy, or is entitled to occupancy, of any room, space, lot, area or site in any hotel by reason of concession, permit, right of access, license or other agreement whether written or oral." (*Id.* § 2.12.005.100.) A "hotel" is defined as "any structure or portion thereof, which is occupied by persons for lodging or sleeping purposes for periods of less than thirty consecutive days . . . ." (*Id.* § 2.12.005.040.)

As stated in section 2.12.010 of the ordinance (quoted above), the tax is calculated based on a percentage "of the rent." Under the Anaheim Code, rent is not defined in terms of the amount paid by the transient; rather, it is calculated based on the amount charged by the hotel operator. "'Rent' means the consideration charged by an operator for accommodations, including without limitation any (1) unrefunded advance rental deposits or (2) separate charges levied for items or services which are part of such accommodations including, but not limited to, furniture, fixtures, appliances, linens, towels, non-coin-operated safes, and maid service." (*Id.* §2.12.005.080.) However, if the hotel operator is not able to collect what it charges, it does not owe tax on the uncollectable portion. (*Id.*)

The definition of the term "operator" is important in the structure of the Code, both because "rent" is defined in terms of the consideration charged by an operator for

accommodations, and because the ordinance places responsibility for collection and payment of rent on the hotel operator.

> "Operator" means any person, corporation, entity, or partnership which is the proprietor of the hotel, whether in the capacity of owner, lessee, sublessee, mortgagee in possession, debtor in possession, licensee or any other capacity. Where the operator performs its functions through a managing agent of any type or character other than as an employee, the managing agent shall also be deemed an operator and shall have the same duties and liabilities as its principal. Compliance with the provisions of this chapter by either the principal or managing agent shall constitute compliance by both. For purposes of the notice and appeal provisions of this chapter only, "operator" shall also include any managing employee or employee in charge of the hotel.

(*Id.* §2.12.005.050.) The "operator" of the hotel is obligated to "collect the tax to the same extent and at the same time as the rent is collected from every transient." (*Id.* §2.12.020.010.) The amounts for rent and tax are to be separately stated, and each transient is to be "tendered a receipt for payment from the operator with rent and tax separately stated thereon." (*Id.*) Taxes collected by the operator are to be "held in trust by such operator" until they are paid to the City. (*Id.* §2.12.040.010.) The operator is required to file a return and pay the full amount of the tax to the License Collector on the last business day of each month. (*Id.* §2.12.030.010.)

2. "Rent" Is Consideration Charged by an "Operator" and the OTCs Are Not "Operators"

The central issue in the dispute between the parties is whether the "rent" on which the Anaheim transient occupancy tax is calculated is the amount charged by the hotel to the OTC, or the amount charged by the OTC to the person who occupies the hotel room (the transient). As stated above, "rent" is "the consideration *charged by an operator* for accommodations." (*Id.* §2.12.005.080 (emphasis added).) The City argues that the OTCs

should be considered to be hotel "operators" within the meaning of the ordinance, because the functions performed by the OTCs are those of a proprietor of the hotel or those of a managing agent of the hotel.

In construing a statute, courts "first consult the words themselves, giving them their usual and ordinary meaning." (*DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 601.) The words of the statute must be considered within the context of the statutory scheme of which they are a part, and the various parts of the statute must be harmonized by considering the particular words, clause or section in the context of the statute as a whole. (*DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 388; *Wright v. Issak* (2007) 149 Cal.App.4th 1116, 1120.)

The definitional section of the Anaheim transient occupancy tax ordinance uses the words "operator" and "proprietor" as synonyms. Thus, "'[o]perator' means any person, corporation, entity, or partnership which is the proprietor of the hotel . . . ." (Anaheim Mun. Code §2.12.005.050.) "When attempting to ascertain the ordinary, usual meaning of a word, courts appropriately refer to the dictionary definition of that word." (*Wasatch Property Management v. Degrate* (2005) 35 Cal.4th 1111, 1121-22.) The dictionary definition of "operator" is "a person or company that runs a business or enterprise." (*Compact Oxford English Dictionary* (accessed online at www.askoxford.com/concise_oed.) The same source defines the word "proprietor" as "the owner of a business" or "a holder of property." (*Id.*) These words have in common the concept of a person or entity that controls and runs a business, in this case, a hotel.

The context in which these words are used in the statute confirms this construction. The statute states that the word "operator" means the proprietor of the hotel

"whether in the capacity of owner, lessee, sublessee, mortgagee in possession, debtor in possession, licensee or in any other capacity." (Anaheim Mun. Code §2.12.005.050.) Each of the enumerated types of ownership interests (owner, lessee, etc.) could entail the ability to control and run a hotel. Within the context of the statutory scheme, the apparent purpose of the list of types of ownership interests is to ensure that the entity responsible for controlling and running the business is held responsible for an operator's responsibilities under the transient occupancy tax ordinance, regardless of the formal capacity in which the entity is entitled to run the business.

OTCs do not control and run hotels. The Hearing Officer's factual findings list several functions performed by OTCs with respect to resale of hotel rooms. OTCs "contract with hotel operators for the ability to make rooms available (through reservations) to consumers (transients) by way of their websites." (Decision at 27 (footnote omitted).) OTCs "market hotel rooms to transients and then handle all financial aspects of the rental." (*Id.*) The OTCs determine the amount paid by the consumer for the hotel room (that is, the OTCs determine the mark-up they will charge for the room and for the OTCs own reservation services), but the amount the hotel receives for the room is determined by the hotel "as negotiated between the hotel and the OTC." (*Id.* at 28.)

None of these facts comprise incidents of control of a hotel or give the OTCs the right to run the business of a hotel. The hotel controls the production of the product sold (the hotel room and accompanying amenities), the quantity of production, the quality of production, the channels of distribution of the product (*i.e.*, whether and what quantity of rooms will be made available through a particular intermediary) and the pricing of the

product (whether sold directly to the consumer or to an intermediary). Certainly, given the laws of supply and demand, the price at which the OTCs choose to resell rooms is a factor in determining the number of hotel rooms sold and occupied. However, the same could be said with respect to a book publisher's sale of books through a bookstore. The fact that the bookstore determines the resale price does not make the bookstore the owner of the publishing house or give it the right to run or control the business of the publishing house.[5]

The City argues that the phrase "or in any other capacity" as used in the definition of "operator" opens up that definition to include entities to which a hotel owner delegates some part of the functions of running a hotel business. There are two problems with this argument.

First, the phrase "whether in the capacity of owner, lessee, sublessee, mortgagee in possession, debtor in possession, licensee or in any other capacity," is not used to designate entities that necessarily are proprietors. Rather, inclusion of the phrase ensures that the entity functioning as a proprietor is considered to be an operator regardless of the legal basis on which the entity's right to control rests. For example, a person running a hotel as a debtor in possession (or in another capacity, such as receiver) cannot disclaim the duty to collect and remit transient occupancy taxes on the ground that the person is not an owner. (*See City of San Diego v. DeLeeuw* (1993) 12 Cal.App.4th 10, 12-13 (under the San Diego transient occupancy tax ordinance, which includes language defining "operator" similar to that construed here, a partnership was the "operator" of the

[5] The usefulness of this analogy should not be overstated. Books are subject to a sales tax. A transient occupancy tax is structured and enforced differently. The point here is only that the ordinance in question defines "operator" in terms of controlling and running a business, and the right to resell a company's product is not understood in ordinary usage to comprise incidents of ownership and control of the company.

hotel and a general partner was jointly responsible for the partnership debts, including unpaid transient occupancy taxes).) However, if the holder of an enumerated right (*e.g.*, lessee) does *not* have the right to control the business of running the hotel, that person is not considered an operator. For example, a lessee of a portion of a hotel is not necessarily a proprietor; the lessee may only be running a restaurant and room service in the hotel. Thus, the enumeration of capacities does not take away from or change the meaning of the word "proprietor" or its synonym "operator."

Second the OTCs do not have a "capacity" that is anything like the terms listed. When a statute uses a list or catalogue of items, "a court should determine the meaning of each by reference to the others, giving preference to an interpretation that uniformly treats items similar in nature and scope." (*In re Corrine W.* (2009) 45 Cal.4th 522, 531 (citations omitted).) The list of capacities in which a hotel might be operated consists of types of ownership interests. Some of the capacities listed involve real property rights (*e.g.*, lessee) while others provide control by contractual agreement (*e.g.*, licensee). As determined by the Hearing Officer, OTCs have the right to "market hotel rooms to transients and then handle all financial aspects of the rental." (Decision at 27.) The right to market a hotel room or rooms at a time determined by the hotel owner and for consideration (paid to the hotel by the OTC) determined by the hotel owner is of an entirely different character than the right of a lessee or debtor in possession to run the general business of a hotel (*i.e.*, to act as a proprietor).

3. *The OTCs Are Not "Managing Agents" and Thus Do Not Take on the Duties of an "Operator"*

The City argues, in the alternative, that the OTCs are responsible for collecting transient occupancy taxes on the amount of their retail price to the consumer because they are "managing agents" within the meaning of the Anaheim ordinance. The term "managing agent" is used in the section of the ordinance that defines hotel "operator." It states: "Where the operator performs its functions through a managing agent of any type or character other than as an employee, the managing agent shall also be deemed an operator and shall have the same duties and liabilities as its principal. Compliance with the provisions of this chapter by either the principal or managing agent shall constitute compliance by both." (Anaheim Mun. Code §2.12.005.050.)

Under the language of this provision, a "managing agent is "deemed an operator" when the operator "performs its functions" through the managing agent. The City reads this provision as though it said that a managing agent is deemed an operator when the operator performs *some of* its functions through the managing agent, or when the operator performs *tax-related functions* through the managing agent. But in order to give the ordinance the construction urged by the City, it would be necessary to add words to the statute to specify that "its functions" does not mean the hotel operator's functions, but rather means only some hotel operator functions, or some hotel operator functions pertaining to tax collection and enforcement. The rules of statutory construction, however, forbid construing a statute in a manner that requires the addition of words that the enacting body did not use. (*See Ross v. Long Beach* (1944) 24 Cal.2d 258, 260.)

The apparent purpose of the reference to "managing agent" in the structure of the ordinance is to define persons who stand in the shoes of the hotel operator with respect to responsibility for collecting and remitting transient occupancy taxes to the City. Plainly the ordinance does not mean to impose such liability on a mere agent of the operator. Employees are agents of a corporate entity, but the ordinance expressly excludes employees from being considered managing agents, even if they are involved in carrying out the tax collection functions of the hotel operator. Moreover, the ordinance imposes an operator's responsibilities not on mere agents, but rather on *managing* agents. A statute must be read so as to give meaning, where possible, to each word. (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 249; *Reno v. Baird* (1998) 18 Cal.4th 640, 658.) Thus, "managing agent" may not be interpreted in a way that reads the word "managing" out of the statute.

In 1992 when the current Anaheim transient occupancy tax ordinance was enacted, the term "managing agent" had an accepted meaning under California law. The California legislature had used the term "managing agent" to define the type of agency relationship that was sufficient for attributing the consequences of an agent's wrongful conduct to a corporate employer for purposes of imposing punitive damages on the employer. (Cal. Civ. Code § 3294.) The California courts had explained that the "critical inquiry" in determining whether an employee or agent is managerial is "the degree of discretion [the agent] possesses in making decisions that will ultimately determine corporate policy." (*Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 822-823; *accord Hobbs v. Bateman Eichler, Hill Richards* (1985) 164 Cal.App.3d 174, 193.) Thus it is reasonable to interpret use of the term "managing agent" in the Anaheim ordinance

consistent with its meaning under California law as determined prior to enactment of section 2.12.005.050. (*See People v. Jones* (2001) 25 Cal.4th 98, 109 (presuming that when a legislative body uses a term that has a long-standing judicial construction, the legislature intends to incorporate that meaning).)

The facts found by the Hearing Officer do not support a conclusion that the OTCs exercised discretion in making decisions that would ultimately determine the hotels' corporate policies. The Hearing Officer found that the OTCs perform functions in pricing and marketing hotel rooms. (Decision at 27-28.) He placed great emphasis on the OTCs' ability to set the retail price for the rooms it resells. However, the OTCs' function in repricing rooms does not determine the hotels' corporate policies with respect to pricing. The hotels themselves determine how much revenue they will receive from the sale of hotel rooms, including hotel rooms marketed by the OTCs. As the Hearing Officer found, the hotels receive a "net rate or wholesale rate, as negotiated between the hotel and the OTC . . . ." (*Id.* at 28.) That is, each hotel determines the amount it is willing to receive for rental of a hotel room on a particular date. The OTCs have no discretion to determine the price at which the hotels are willing to sell their product and therefore no control of the hotels' corporate pricing policies.

With respect to marketing, the hotels determine whether to provide rooms for resale by the OTCs, how many rooms to make available and when to make them available. The OTCs have no control over these aspects of the hotels' marketing practices. The hotels determine their own policies with respect to cancellation of a reservation. As the Hearing Officer found, "the OTCs usually incorporate the hotel's cancellation policy into the contract between the OTC and the transient . . . ." (*Id.*) The

OTCs have the ability to advertise and market the number of rooms the hotels see fit to make available for marketing through this channel. But the Hearing Officer's decision did not make any findings suggesting that the OTCs can bind the hotels through advertising representations made by the OTCs or that the OTCs can in some other way bind the hotels with respect to their corporate marketing policies.

At most the Hearing Officer's findings would allow a conclusion that the OTCs are agents of the hotels for purposes of marketing a portion of the hotels' production (such portion having been determined by each hotel). But a mere agency relationship is not enough for shifting or sharing tax responsibilities under the Anaheim ordinance. Rather, the ordinance imposes such responsibility only on managing agents, agents who have been delegated sufficient discretion to allow them to make corporate policy. Based on the facts found by the Hearing Officer, the OTCs do not have the attributes of managing agents for the hotels.

The Hearing Officer found that the OTCs are "collection agents for rent" and that they charge and collect transient occupancy taxes from consumers. (*Id.* at 25.) Again, however, the City ordinance does not define an "operator" to include the proprietor's agent for collection of transient occupancy taxes. Employees who are the hotel's agents for collection of taxes are expressly excluded from the definition of "operator." (Anaheim Mun. Code §2.12.005.050.) In order to give a reasonable meaning to use of the phrase "managing agent," something more than mere agency is required for an entity to be considered an "operator."

In sum, based on the Hearing Officer's factual findings, and giving the words of the Anaheim ordinance their ordinary meaning in context, the OTCs cannot be found to

be hotel "operators," hotel "proprietors" or "managing agents" of a hotel. Because the City Code defines "rent" as "the consideration charged by an operator for accommodations," the amount charged by the OTCs is not "rent." Rather, the "rent" for use of a hotel room is the amount charged by the hotel to the OTC for the accommodation. The Hearing Officer acted contrary to law in assessing a tax based on the consideration charged by the OTCs, transactional intermediaries who are not operators, proprietors or managing agents of a hotel.

4. The Documentation and Collection Requirements of the Ordinance Do Not Require or Suggest a Different Interpretation of the Ordinance

The Hearing Officer expressed concern that "because the OTC collects all funds from the transient for hotel room rental and transient occupancy taxes, it is the only entity that can satisfy the provision of [section 2.12.020.010] that 'Each operator shall collect the tax to the same extent as the rent is collected from every transient.'" (Decision at 19.) But it is a logical fallacy to conclude, as the Hearing Officer apparently did, that because a hotel operator is responsible for collecting rent and taxes from transients, any entity that collects rent and taxes from a transient must be an operator (or a managing agent).[6]

Nothing in the section cited by the Hearing Officer suggests that the operator is precluded from delegating rent collection to an agent that is not a managing agent. Indeed, as discussed above, employees of the operator are expressly excluded from the definition of "managing agent," yet a hotel operator may well collect rent and taxes

[6] Principles of formal logic demonstrate that when the statement "If A then B" is a true statement, it is incorrect to conclude that the converse, "If B then A" must be true. Thus, "If an entity is a hotel operator, then it must collect transient occupancy tax," is a true statement; but it is a logical fallacy to conclude that the converse, "If an entity collects transient occupancy tax, then it must be a hotel operator," therefore is necessarily true. Yet the Hearing Officer accepted this reasoning.

through its employees. Nothing in the ordinance appears to preclude the hotel from selecting an independent contractor or other intermediary to perform certain rent collection functions.

Importantly, if the operator chooses to collect rent and taxes through an employee or other agent, the operator remains responsible for payment of the taxes to the City, even if the employee or agent fails to perform its agency functions properly (*i.e.*, fails to collect the taxes). (*See* Anaheim Mun. Code §2.12.030.010 (an operator is responsible for filing a return and for remitting the "full amount of the tax").) There is no dispute that the hotels did collect and remit transient occupancy taxes for rooms marketed by the OTCs. The only dispute in this case concerns whether the tax collected and remitted by the hotels was properly based on the amount paid by the hotels to the OTCs. Contrary to the Hearing Officer's reasoning, the language of the ordinance placing responsibilities on hotel operators for collection and remittance of the transient occupancy taxes does not suggest that the OTCs must be considered hotel "operators."

A similar fallacy is inherent in the Hearing Officer's conclusion that, because neither the hotel nor the OTC provides the transient with a receipt that complies with the ordinance, the OTC must be an operator. The Hearing Officer reasoned:

> The evidence presented shows that, under the merchant model, the transient receives a receipt from the OTC stating the room rate, an amount for "tax recovery charges and fees," and a total amount. No comparable receipt comes from the hotel. Accordingly, the OTC is acting as an operator under the ordinance of the City. AMC 2.12.020.010 requires the operator to tender a receipt for rent and taxes to the transient.

(Decision at 19.) Section 2.12.020.101 of the ordinance provides: "The amount of the rent and the tax thereon shall be separately stated from all other amounts on all receipts

and books of record of the hotel, and each transient shall be tendered a receipt for payment from the operator with rent and tax separately stated thereon." The Hearing Officer found that the hotel did not furnish a receipt in compliance with this requirement. The Hearing Officer also found that the receipt furnished to the consumer by the OTC set forth an amount for "tax recovery charges and fees," but did not separately state the tax as required by the Code.

One cannot logically conclude, however, that because a hotel operator is required to furnish a receipt specifying the amount of taxes, therefore any entity that furnishes a receipt of some sort to the consumer must be an operator. The definition of "operator" in the ordinance is not "one who furnishes a receipt." Rather, the entity that meets the definition of an operator is responsible for taking steps to ensure that the required receipt is furnished.

The administrative determination that is challenged in this litigation does not seek to penalize anyone for record-keeping violations. This lawsuit is about how the tax is calculated, not about whether a hotel operator or managing agent violated the ordinance by failing to give the consumer a receipt that complies with the ordinance. Nor does this litigation include a claim on behalf of consumers that they were misled by the receipts furnished by the OTCs.

Although the hotels' contracts with the OTCs preclude the OTCs from disclosing the wholesale price of the rooms (*i.e.*, the rent charged by the hotel operator), this negotiated contract provision is for the benefit of the hotels that wish to keep the wholesale price confidential. The rent charged by the hotel operator (the wholesale price) was disclosed to the City, because the hotels used that price to calculate the tax they

remitted to the City. As stated above, the City does not contend that the hotels failed to pay taxes based on the amount they charged the OTCs for rooms. The hotels obviously know the amount of the rent they charged for the rooms marketed through the OTCs, but the City has not sought in this litigation to require the hotels to disclose that amount to the consumer (or to require any particular change in the documentation provided to consumers who rent rooms that are resold by the OTCs).

The record-keeping requirements of the Code are relevant only insofar as they cast light on the inquiry whether the OTCs are "operators" and thus must remit transient occupancy taxes on the consideration they charge. Although the hotels may not have taken steps to comply with the Code requirements regarding receipts to consumers, this fact does not suggest a finding that the OTCs must be found to be "operators" under the statutory scheme.

5. *Interpretation of the Ordinance Based on Its Plain Language Does Not Lead to "Absurd" Results*

The result of the statutory interpretation outlined above is consistent with the purpose and structure of the transient occupancy tax as a privilege tax based on commercial activity taking place in the City of Anaheim. The hotel transaction is taxed by the City of Anaheim because the hotel's physical location is in the City. The revenue gained by the entity that provides the physical location (hotel) for occupancy within the City of Anaheim is the amount paid to the hotel. It is not unreasonable to base a local tax on the revenue of the commercial business that provides the local amenity. Based on the language of the City's ordinance, Anaheim has done just that.

Of course, a local entity could, as a matter of policy and drafting, construct a different scheme for taxation of transient occupancy. If a city decided to base a transient occupancy tax on the total amount *paid* by the transient for the hotel room (or for the hotel room and related services) there seems to be no reason why such a tax scheme could not be drafted and considered.[7]

The Hearing Officer concluded that an interpretation of the ordinance that bases the transient occupancy tax on the amount charged by the hotel would lead to absurd results. The Hearing Officer considered the following hypothetical: "[A] hotel or hotel chain [could establish] a wholly owned subsidiary corporation in a different municipality to handle all of its reservation and booking inquiries. The hotel could then provide rooms to the subsidiary at an extremely cheap price and the subsidiary could sell them to consumers at a much higher rate. In this way, the Company would be able to provide accommodations to customers without having to charge the customers the . . . tax on the amount the customers actually pay for the room." (Decision at 20, *quoting City of Charleston v. Hotels.com LP* (D.S.C. 2007) 520 F.Supp.2d 757, 766.)

Despite the Hearing Officer's concern, it is not necessary to skew the interpretation of the Anaheim ordinance in order to protect the City from the type of abuse suggested by the hypothetical. The hotel in the hypothetical is engaged in a collusive transaction with its subsidiary, charging "an extremely cheap price" to the benefit of its subsidiary, not a price determined in an arms-length transaction. The abuse represented by the hypothetical is not that the hotel is marketing rooms through a third

[7] The Hearing Officer opined that the "ultimate and definitive target of the Anaheim ordinance is its aim on the transient to pay the transient occupancy tax based on what the transient occupant pays for the privilege of occupancy." (Decision at 26.) This conclusion is not supported by the structure of the statute, which makes the transient pay a tax based on a percentage "of the rent." As discussed at length above, "rent" is "consideration charged by an operator."

party, but that it is marketing rooms within its own corporate structure. By doing so, the hotel in the hypothetical is purporting to characterize as "rent" consideration charged in a collusive transaction that sets a non-market price for a room. There is no evidence in the record that the prices charged by hotels to the OTCs are collusive prices. To the contrary, the Hearing Officer found that the prices charged by hotels to OTCs are set in negotiated transactions. The hotels certainly have no motive to set prices that favor the OTCs at the hotels' expense.

Sham transactions intended to evade taxes always present an enforcement challenge. For example, a hotel may purport to rent a hotel room for a low price to a customer who then pays an undisclosed kickback to the hotel. However, the hypothetical does not cast light on how the ordinance should be interpreted in light of the facts presented here – arms-length commercial transactions between hotels and marketing entities that resell hotel rooms with no further consideration flowing to the hotels.

The Hearing Officer also reasoned that an interpretation of the ordinance basing the tax on the amount charged by the hotel would lead to absurd results because two customers paying the same amount for a hotel room might pay a different tax. (Decision at 21.) However, in this hypothetical, the hotel *received* a different amount for the hotel rooms in the two transactions – it received a lower amount of revenue from the transaction arranged through the OTC than it received from the transaction the hotel arranged directly with a customer. Insofar as the transient occupancy tax is based on the consideration charged and received[8] by the operator, the structure of the tax represents a rational choice by the taxing agency.

[8] As discussed above, uncollectible rent is not taxed under section 2.12.005.080 of the ordinance.

The City also argues that Anaheim could not have anticipated the way in which the resale of hotel rooms on the internet has become possible, and that the ordinance should be construed so as to account for the changed circumstances in the way hotel rooms now are marketed. (*See also* Decision at 17: "[T]he City's position [is] that the current view of proprietor-owner is a product of changed circumstances and is therefore broader, being someone who takes care of the occupant concerning a key function of the hotel.")) Changed circumstances, however, do not provide a basis for a court to rewrite a statute. When interpreting statutes a court is limited to following the legislature's intent "as exhibited by the plain meaning of the actual words of the law," and the court "has no power to rewrite the statute so as to make it conform to a presumed intention which is not expressed." (*Stephens v. County of Tulare* (2006) 38 Cal.4th 793, 801 (quotation omitted).)

Particularly where a taxing agency has not anticipated a new revenue opportunity, the court may not act to fill what might be perceived as a "gap" in tax coverage. Creation of a larger tax rate or a larger tax base requires voter approval pursuant to Proposition 218 and its implementing legislation. (*See ABCellular LA, LLC v. City of Los Angeles* (2007) 150 Cal.App.4th 747, 763.) "A taxing methodology must be frozen in time until the electorate approves higher taxes. . . . The Proposition 218 voters rebelled against local government taxes that are moving targets." (*Id.* at 761-762.) Judicial interpretation must not be used as a means to avoid these restrictions.

6. Cases From Other Jurisdictions Interpreting Other Municipalities' Ordinances Are Neither Binding Nor Persuasive Precedent

In a section of the Hearing Officer's Decision captioned "Context of the Current Dispute," the Hearing Officer emphasized that the practices of the OTCs in relation to hotels are consistent nationwide. The Hearing Officer seemed to consider that how a transient occupancy tax relates to those practices should be resolved on a uniform, nationwide basis as well. Similarly, the City relies heavily on reasoning from out-of-state authorities construing the transient occupancy tax statutes of a variety of municipalities across the nation. Indeed, the OTCs, in their turn, cite cases from other jurisdictions that interpret other cities' transient occupancy taxes.

Even if the out-of-state and federal authorities considered the same statutory language as that used in the Anaheim ordinance, the reasoning and outcome of those cases would not be binding on this court. More importantly, the cases cited construe other statutes that use different language. Even though all of the ordinances considered in these cases may fit into the generic category "transient occupancy tax," there is no uniform state law code or other standardized template that would justify a conclusion that all "transient occupancy taxes" are likely to have the same structure or be based on identical principles.

Moreover, the fact that the OTCs have a uniform set of practices nationwide does not mean that municipalities must adopt a uniform approach to taxation of the transactions in which the OTCs participate. Apparently the OTCs have been able to adjust their financial dealings to the different tax *rates* applicable to rental of rooms located in different municipalities. Nothing in the record in this case suggests that this

court should defer to the decisions of other jurisdictions in order to make commercial life easier for the OTCs.[9]

Review of the cases relied on by the City demonstrates some of the differences that make the foreign jurisdictions' cases inapposite as a basis for interpreting the Anaheim ordinance. In *City of Charleston v. Hotels.com, LP* (D.S.C. 2007) 520 F.Supp.2d 757, the federal district court denied a motion to dismiss because the transient occupancy tax at issue was imposed on companies "in the business of 'furnishing' accommodations." (*Id.* at 768.) The ordinance at issue did not use the terms "operator," "proprietor" or "managing agent."

In *City of Fairview Heights v. Orbitz, Inc.* (S.D.Ill. 2006) 2006 U.S.Dist.LEXIS 47085, the federal district court refused to dismiss a complaint against the OTCs based on a transient occupancy tax ordinance that defined a hotel "owner" to include anyone "'receiving consideration for the rental of [a] hotel or motel room.'" (*Id.* at *15, *quoting* Fairview Heights, Ill., Code § 36-2-1(B).) The structure of a municipal ordinance that defines a hotel owner in terms of whether an entity receives consideration for renting a hotel room presents a very different issue of statutory interpretation from that presented in this case. (*See also Leon County v. Hotels.com, L.P.* (S.D.Fla. 2006) 2006 WL 3519102 (denying the OTCs' motion to dismiss with respect to a tax "to be 'charged by the person receiving the consideration for the lease or rental'").)

The ordinance at issue in *City of Goodlettsville v. Priceline.com, Inc.* (M.D.Tenn 2009) 605 F.Supp.2d 982, provided that the transient occupancy tax was to be collected

[9] In several post-argument filings, the City and the OTCs have sought to bring to this court's attention developments with respect to whether or not other municipalities' transient occupancy taxes apply to the OTCs. For the reasons stated above, the court has not found the authorities accompanying these filings helpful in the interpretive task currently before this court.

and remitted by "'all operators who . . . charge for occupancy within a hotel'" in the municipality. (*Id.* at 993 *quoting* Goodlettsville City Code § 5-504.) The Anaheim ordinance does not use this language. Moreover, in that case the term "operator" was defined to include a "'joint venture . . . or any other group or combination acting as a unit'" (*id.* at 994, footnote 8, *quoting* Goodlettsville City Code § 5-501(5)), a provision that also is absent from the ordinance at issue in this case. The federal district court relied on these provisions in refusing to grant the OTCs' motion to dismiss.

It should be noted that all of the above decisions reflect trial court decisions refusing to grant a motion to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6.) In a similar procedural setting, the federal trial court in *City of San Antonio v. Hotels.com* (W.D.Tex. 2007) 2007 U.S.Dist. LEXIS 39757, held that whether the OTCs were entities operating, managing or controlling any hotel was a question of fact based on the allegations of the complaint in that case.[10]

It must be conceded that the *reasoning* adopted by some of the cases cited above may be considered to be in conflict with this court's analysis. However, these out-of-state decisions are not binding on a California court, and this court does not find their reasoning persuasive based on the analysis set forth above.

C. Conclusion

The Decision of the Hearing Officer cannot stand because it is contrary to law, having incorrectly construed the Anaheim ordinance. Properly interpreted based on the plain language of its provisions, the Anaheim ordinance does not impose a transient occupancy tax based on the retail price of hotel rooms rented by or through the OTCs.

[10] The transient occupancy tax considered in *City of San Antonio* also varied significantly from the Anaheim ordinance insofar as the San Antonio ordinance imposed the tax on the "consideration paid" for a hotel room. (*Id.*)

The OTCs' arguments based on the statute of limitations, laches and estoppel are moot in light of the above holding.

ORDER

For the reasons set forth above, the OTCs' Motion for Judgment Granting the Writ of Mandate is granted. The Hearing Officer's Decision is hereby set aside pursuant to California Code of Civil Procedure section 1094.5. The City's Motion to Deny the OTCs' Writs of Administrative Mandamus is denied.

DATED: February 1, 2010

Carolyn B. Kuhl

CAROLYN B. KUHL
Judge of the Superior Court

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

Coordination Proceeding Special Title (Rule 1550 (b)) TRANSIENT OCCUPANCY TAX CASES	Case No. JCCP 4472
This Opinion and Order concerns: CITY OF SANTA MONICA v. EXPEDIA, INC. et al. Los Angeles Superior Court – West District Case No. SC108568	OPINION AND ORDER ON THE JOINT DEMURRER OF DEFENDANT ONLINE TRAVEL COMPANIES TO THE CITY OF SANTA MONICA'S FIRST AMENDED COMPLAINT

This Coordinated Proceeding concerns disputes over the efforts of several California cities to impose transient occupancy taxes on online (*i.e.*, internet) travel companies ("OTCs"). The current motion concerns an included action by which Plaintiff City of Santa Monica (hereinafter "City" or "Santa Monica") seeks to enforce transient occupancy tax assessments against defendant OTCs made in June 2010 totaling $3,533,214.30, inclusive of penalties. The OTC Defendants are Priceline.com Inc.; Travelweb LLC; Lowestfare.com LLC; Expedia, Inc.; Hotels.com, L.P.; Hotels.com GP, LLC; Hotwire, Inc.; Orbitz, LLC; Trip Network, Inc. (d/b/a Cheap Tickets); Internetwork Publishing Corp. (d/b/a Lodging.com); Travelocity.com LP; Travelocity.com Inc.; and Site59.com LLC.

The First Amended Complaint alleges the following cases of action, all of which are premised on Santa Monica's interpretation of its transient occupancy tax as requiring payment of tax on the full amount an OTC charges a customer for a hotel room, even though the hotel that furnishes the room to the occupant does not receive the full amount of the payment made by the customer to the OTC: First Cause of Action for Violation of the Santa Monica Municipal Code; Second Cause of Action for Money Had and Received; Third Cause of Action for Conversion; Fourth Cause of Action for Declaratory Relief; Fifth Cause of Action for Violations of California Civil Code section 2223; Sixth Cause of Action for Violation of California Civil Code section 2224; Seventh Cause of Action for Imposition of Constructive Trust; Eighth Cause of Action for Declaratory Relief Regarding Application of Step Transaction Doctrine; Ninth Cause of Action for Liability as Agents Under Civil Code sections 2343 and 2344; Tenth Cause of action as Subagents Under Civil Code sections 2349 and 2351.

Defendant OTCs demur to all causes of action on the ground that the transient occupancy tax defined by the Santa Monica Municipal Code is not calculated based on the amount the OTCs charge hotel customers but rather only on the amount paid to the hotel for room occupancy. The court has considered all of the briefs and arguments of the parties. Defendant OTCs' demurrer is sustained without leave to amend for the reasons stated below.

I. FACTUAL AND PROCEDURAL SUMMARY

The allegations of the City's First Amended Complaint are summarized in the first paragraph:

> Defendant online travel companies ("OTCs") enter into contracts with the City [of Santa Monica] hotels that allow the OTCs to act

> as independent, nonexclusive sales agents for hotels, and that delegate to the OTCs the duties of the collection of TOT [transient occupancy tax] from transients and remittance of that TOT to the City, either directly or indirectly. On behalf of various City hotels, the OTCs sell nightly lodging licenses provided by the hotels. The OTCs are paid commissions for the total amount consumers (. . . "transients") pay to purchase lodging licenses. The OTCs' contracts with hotels dictate the nature, amount and timing of the OTCs' compensation from sales of lodging licenses. The OTCs are not product resellers; the OTCs never obtain or purchase lodging licenses from the hotels for resale to transients. After the sale of a lodging license to a transient under the OTCs' preferred merchant model, an OTC collects all funds from the transient and extracts its sales commission before passing the remaining money to the hotel. In addition to collecting and retaining its sales commission, the OTC collects and retains TOT on the value of this sales commission. The hotel only receives TOT for remittance to the City based on a portion of rather than the total charge for lodging. The City is underpaid TOT because the OTCs keep TOT on the value of their services. This is the source of the principal damages in this action.

In this proceeding, Santa Monica concedes that the OTCs are not hotels. Paragraph 19 of the First Amended Complaint further elaborates on the relationship between the OTCs and City hotels:

> The OTCs maintain their own businesses: they are paid according to the results they produce and consistent with their contracts with the hotels. The OTCs are paid percentage commissions from the total amount [transients] pay to purchase these lodging licenses. The OTCs' contracts with the hotels dictate the nature, amount and timing of the OTCs' compensation.

Chapter 6.68 of the Santa Monica Municipal Code is entitled "Tax on Transients for Occupancy." Section 6.68.020 imposes the tax as follows:

> On and after the effective date of this ordinance, there is hereby imposed and levied on each and every transient a tax equivalent to fourteen percent (14%) of the total amount paid for room rental by or for any such transient to any hotel; which said tax shall be collected from such transient at the time and in the manner hereinafter provided. Said tax is levied for revenue purposes and is

> necessary for the usual financial operation of the City of Santa Monica.

Several of the terms used this section are defined elsewhere in the statute. A "transient" is a person who "either at his own expense or at the expense of another, obtains lodging or the use of any lodging space in any hotel . . . for which lodging or use of lodging space a charge is made." (Santa Monica Municipal Code section 6.68.010(a).) A "hotel" is defined as a public or private hotel or lodging place "within the City of Santa Monica offering lodging, wherein the owner and operator thereof, for compensation, furnishes lodging to any transient . . . ." (*Id.* section 6.68.010(c).) The term "room rental" is defined as follows:

> The total charge made by any such hotel for lodging and/or lodging space furnished any such transient. If the charge made by such hotel to such transient includes any charge for services or accommodations in addition to that of lodging, and/or the use of lodging space, then such portion of the total charge as represents only room and/or lodging space rental shall be distinctly set out and billed to such transient by such hotel as a separate item.

(*Id.* section 6.68.010(d).)

With respect to collection of transient occupancy taxes, section 6.68.040 requires that every person receiving payment for room rental is required to collect the tax from the transient "or from the person paying for such room rental, at the time payment for such room rental be made." The Director of Finance-City Controller of the City of Santa Monica is required "to ascertain the name of every person operating a hotel in the City of Santa Monica, liable for the collection of the tax levied by this ordinance" who fails to collect or pay the tax. (*Id.* section 6.68.120.) Persons who violate the Santa Monica transient occupancy tax ordinance are subject to a penalty of from $25 to $500 "upon conviction thereof . . . ." (*Id.* section 6.68.110.)

As stated above, in June 2010 the City issued assessments against the OTCs under the Santa Monica Code for allegedly unpaid transient occupancy tax and associated penalties in the amount of approximately $3.5 million. Santa Monica filed this action to enforce that assessment.

II. LEGAL ANALYSIS

A. Based on the Plain Language of the Ordinance, the Tax is Calculated Based on the Sum Paid to the Hotel

Determining whether the OTCs are subject to Santa Monica's transient occupancy tax is, of course, an exercise in statutory construction. The California Supreme Court recently succinctly described the process to be used in performing the judicial function of interpreting a statue:

> "Our fundamental task in interpreting a statue is to determine the Legislature's intent so as to effectuate the law's purpose. We first examine the statutory language, giving it a plain and commonsense meaning. We do not examine that language in isolation, but in the context of the statutory framework as a whole in order to determine its scope and purpose and to harmonize the various parts of the enactment. If the language is clear, courts must generally follow its plain meaning unless a literal interpretation would result in absurd consequences the Legislature did not intend. If the statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the statute's purpose, legislative history, and public policy."

(*Bruns v. E-Commerce Exchange, Inc.* (2011) ___ Cal.4th ___, 2011 Cal.LEXIS 1834 at *7-*8, *quoting Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 737.)

We begin with the language imposing the tax. This provision determines the amount of the tax based on the room rental paid "to any hotel . . . ." (Santa Monica Municipal Code section 6.68.020.) The amount of the tax is the total amount of the

"room rental" paid either "by" the transient or "for any such transient." (*Id.*) Thus, the ordinance contemplates that there may be an intermediary in the transaction between the transient and the hotel. The City of Santa Monica, in this proceeding, concedes that the OTCs are not hotels; rather, a hotel is a lodging place in the City of Santa Monica. (*Id.* section 6.68.010(c).) Whether a transient pays a hotel directly, or a transient pays an intermediary which in turn pays room rental "for" the transient, the tax is imposed on the "total amount paid for room rental . . . to any hotel." This provision of the ordinance does not concern itself with the amount paid to the intermediary by the transient, whether that amount be the same as or greater than the amount the intermediary pays the hotel.

The definition of "room rental" also must be considered. "Room rental" is the total amount charged "by any such hotel" for lodging furnished to the transient. (*Id.* section 6.68.010(d).) The City argues that, because the price charged by an OTC to a transient is controlled by the hotel that provides the lodging,[1] the total amount paid by a transient to an OTC should be considered a "total charge made by [a] hotel . . . ." Considered in isolation, the phrase "total charge made by [a] hotel" for lodging furnished to a transient is ambiguous. This phrase might be construed to mean the charge that the hotel determines must be paid to the hotel. Or the phrase might be construed to mean the charge that the hotel dictates must be paid by the transient.

But the definition of "room rental" in section 6.68.010(d) cannot be read in isolation. Courts "'do not examine [statutory] language in isolation, but in the context of the statutory framework as a whole in order to determine its scope and purpose and to harmonize the various parts of the enactment." (*Bruns v. E-Commerce Exchange, supra,* 2011 Cal.LEXIS 1834 at *13, *quoting Coalition of Concerned Communities, Inc. v. City*

[1] In ruling on a demurrer, of course, the court must take the allegations of the complaint as true.

of Los Angeles, supra, 34 Cal.4th at 737.) Section 6.68.020 of the ordinance clarifies that the tax is based on room rental paid "to any hotel." Thus, in order to make sense of the statute as a whole, the phrase "total charge made by [a] hotel" in section 6.68.010(d) must be construed to mean the charge that the hotel determines must be paid to the hotel. It follows that the statute does not concern itself with whether the hotel exercises control over the price charged by reseller or intermediary; the tax is imposed on the amount received by the hotel.

The definition of "transient" in section 6.68.010(a) is consistent with this interpretation. This statutory provision contemplates that a transient may obtain lodging "either at his own expense or at the expense of another . . . ." Again, the enacting body anticipated that an intermediary might pay, on behalf of the transient, the expense of occupying the lodging. Nevertheless, the tax as defined in section 6.68.020 is based on the amount paid "to [the] hotel," without consideration of whether the transient might have paid some different amount to an intermediary.

The language of the ordinance specifying the time when the tax must be collected also is consistent with the interpretation discussed above. Section 6.68.040 provides that "every person" receiving payment for room rental is to collect "the amount of tax hereby imposed," either from the transient or "from the person paying for such room rental," at the time payment for room rental is made. Under the allegations of the First Amended Complaint, the OTCs collect transient occupancy tax from the consumer when the online transaction occurs and the hotel collects transient occupancy tax from the OTC at the time the OTC remits the room rental to the hotel. Given that the quantum of the tax is

defined by section 6.68.020, the collection function appears to operate as the enacting authority intended when applied to the transactions in which the OTCs participate.

The City argues that the second sentence of the definition of "room rental" contradicts an interpretation of the ordinance that bases calculation of transient occupancy tax on the amount paid for room rental "to [a] hotel." That sentence states that if "the charge made by [a] hotel" includes any charge for services or accommodations in addition to use of lodging space, then the portion of the total charge that represents only lodging space rental shall be itemized separately. (*Id.* section 6.68.010(d).) The City characterizes as a "commission" the difference between the room rate charged by the OTC to the consumer and the room rate paid by the OTC to the hotel, and argues that this increment should be separately identified. The City's own argument is inconsistent. The "commission" is taxable only if it is a charge for lodging furnished to the transient. If the "commission" is a charge for some other service, and thus should be separately identified in the consumer's bill, it is not subject to transient occupancy tax.

The second sentence of the definition of "room rental" should be interpreted consistent with the first sentence of that definition. Thus, the "commission" charged by the OTC is not a "charge made *by [a] hotel* to [the] transient" even if the hotel controls the amount of the "commission." (*Id.* section 6.68.010(d) (emphasis added).) Consistent with section 6.68.020, transient occupancy tax is calculated based "room rental" paid "to [a] hotel." (*Id.* section 6.68.020.) Thus, a "charge made by [a] hotel to [a] transient" in the definition of "room rental" must be interpreted to refer to charges that are paid to the hotel. The hotel does not receive the "commission." Moreover, the hotel does not provide the bill for the "commission" to the transient. The second sentence of section

6.68.010(d) governs billing "to [a] transient *by [a] hotel*. . . ." (*Id.* section 6.68.010(d) (emphasis added).) The hotel is not required to separately identify the "commission" on the bill provided to the transient.

B. This Construction of the Ordinance is Consistent with the Apparent Purpose of the Ordinance

The City points out that a hotel must pay taxes based on the full amount a transient pays to a hotel for lodging when the hotel itself pays a commission on the sale to a travel agent or some other person for that person's services in arranging the room booking. The City argues that the economic consequence of such a transaction (when the hotel pays a commission to a travel agent) is the same as the economic consequence of a transaction in which the OTC is paid an amount by a transient that is based on a percentage in excess of the amount the OTC owes to the hotel for the lodging. In effect, the City argues that treating the two types of transactions differently for tax purposes would be an absurdity.

The overall purpose of the transient occupancy tax is to raise revenue for the City of Santa Monica from a particular type of commercial activity taking place in Santa Monica. The tax is imposed only on a hotel or other lodging place physically located "within the City of Santa Monica . . . ." (*Id.* section 6.68.010(c) (definition of "hotel").) The tax "is levied for revenue proposes and is necessary for the usual financial operation of the City of Santa Monica." (*Id.* section 6.68.020.) In order to enforce the ordinance, it is the "duty of the Director of Finance-City Controller to ascertain the name of every person operating a hotel in the City of Santa Monica" that is liable for the tax but fails to collect or pay the tax. (*Id.* section 6.68.120.)

The structure of the transient occupancy tax is a privilege tax based on commercial activity taking place in the City of Santa Monica. The hotel transaction is taxed by the City because the hotel's physical location is in the City. The revenue gained by the entity that provides the physical location (hotel) for occupancy within Santa Monica is the amount paid to the hotel. It is not unreasonable to base a local tax on the revenue of the commercial business that provides the local amenity. Based on the language of the City's ordinance, Santa Monica has done just that.

Of course, a local entity could, as a matter of policy and drafting, construct a different scheme for taxation of transient occupancy. If a city decided to base a transient occupancy tax on the total amount *paid* by the transient for the hotel room (or for the hotel room and any "commission" for the services of an intermediary) there seems to be no reason why such a tax scheme could not be drafted and considered.

A new marketing methodology or other changed circumstances do not provide a basis for a court to rewrite a statute. When interpreting statutes, a court is limited to following the legislature's intent "as exhibited by the plain meaning of the actual words of the law," and the court "has no power to rewrite the statute so as to make it conform to a presumed intention which is not expressed." (*Stephens v. County of Tulare* (2006) 38 Cal.4th 793, 801 (quotation omitted).)

Particularly where a taxing agency has not anticipated a new revenue opportunity, the court may not act to fill what might be perceived as a "gap" in tax coverage. Creation of a larger tax rate or a larger tax base requires voter approval pursuant to Proposition 218 and its implementing legislation. (*See ABCellular LA, LLC v. City of Los Angeles* (2007) 150 Cal.App.4th 747, 763.) "A taxing methodology must be frozen in time until

the electorate approves higher taxes. . . . The Proposition 218 voters rebelled against local government taxes that are moving targets." (*Id.* at 761-762.) Judicial interpretation must not be used as a means to avoid these restrictions.

C. The "Step Transaction Doctrine" Does Not Dictate a Different Result

The City also argues that the "step transaction doctrine" dictates that the OTCs' sales to transients should be taxed based on the total amount paid by the transient. The federal courts and our California state courts have adopted a principle of tax law by which a transaction that is performed in steps may be analyzed according to the end result and overall effect of the transaction, even though a strict tax analysis of each step of the transaction would yield a more favorable result for the taxpayer. This principle is referred to as the "step transaction doctrine." As stated in *Shuwa Investments Corp v. County of Los Angeles* (1991) 1 Cal.App.4th 1635, 1648:

> [W]here the propriety and necessity for multiphase transactions is challenged, the "step transaction doctrine" has been applied to determine whether the transaction should be treated as a whole or whether each step of the transaction may stand alone. The "step transaction doctrine" is a corollary of the general tax principle the incidence of taxation depends upon the substance of a transaction rather than its form. [Citation omitted.]

Several "abstruse" tests have been devised to attempt to define when the "step transaction doctrine" should apply. (*Id.* at 1650.) However, all of these tests are "'only a judicial device expressing the familiar principle that in applying the [tax laws], the substance rather than the form of the transaction is controlling.'" (*Id.* (citing federal authorities).) The leading United States Supreme Court case in this area, *Gregory v. Helvering* (1935) 293 U.S. 465, explains that the doctrine addresses situations in which "the transaction upon its face lies outside the plain intent of the statute. To hold

otherwise would be to exalt artifice above reality and to deprive the statutory provision in question of all serious purpose." (*Id.* at 470, *quoted with approval in Shuwa, supra,* 1 Cal.App.4th at 1650.)

Santa Monica argues that excluding from taxation the amount paid to the OTC by the transient as an increment over and above the wholesale price of the room charged by the hotel operator lies outside the intent of the statute and deprives the Santa Monica ordinance of all serious purpose. This is particularly so, according to the City, because the contractual arrangements between the OTCs and the hotels determine the price that can be charged by the OTCs to the transients. The means to restore rationality to the tax determination, argues the City, is to look at the amount paid by the transient and to tax that amount as the culmination of the transaction.

The problem with this argument is that the language of the Santa Monica ordinance does not support an intention to impose tax on all amounts paid by the transient. Rather, as discussed in detail above, the structure of the tax is based on amounts paid "to [a] hotel," and the ordinance further contemplates that such amount may be tendered to the hotel by an intermediary on behalf of the transient.

It is consistent with the statutory purpose, discerned from the structure and language of the ordinance as a whole, to tax based on the amount received by the hotel rather than on the amount paid by the transient to a middle-man for occupancy of the room and for other services (*e.g.*, obtaining discounts from hotels and providing an on-line reservation system). As discussed above, it is not unreasonable to base a local tax on the revenue of the commercial business that provides the local amenity.

The step transaction doctrine addresses situations in which a series of sham transactions are designed to evade a tax on the overall result of the transaction. The City does not suggest that it is undertaking to prove that the OTCs and the hotels have devised an elaborate internet discount sales mechanism for the purpose of tax avoidance. Both consumers and hotels benefit from the OTCs' marketing, online convenience and discount methodology for sale of excess hotel room capacity. The fact that the Santa Monica ordinance does not tax the value of the service provided by the OTCs does not render the taxing scheme absurd. The fact that without the OTCs' services the hotels might themselves pay for alternative marketing arrangements does not render the transactions between the OTCs and the hotels a "sham."

The step transaction doctrine might reasonably be applied if this court had found that the plain intent of the statute and its purpose was to base a transient occupancy tax on the total amount *paid* by the transient for the hotel room (or for the hotel room and related services). In that instance it could make sense to ignore the individual steps in the marketing and purchase of the hotel room and focus on the payment by the transient and the result of the transaction as a whole. However, the language of the Santa Monica ordinance does not support a conclusion that the purpose of the Santa Monica statute is to base the tax on the amount paid by the transient, as opposed to the amount paid by the transient or an intermediary *to the hotel.*

D. The Demurrer Should Be Sustained in its Entirety

Although the City pleads a number of statutory, equitable and common law causes of action, each of the City's claims is premised on a right to recover transient occupancy tax revenues under Chapter 6.68 of the Santa Monica Municipal Code. Under

this court's interpretation of the Santa Monica ordinance, the City has no right to collect transient occupancy taxes from the OTCs based on the factual allegations of the First Amended Complaint. The City has not suggested that there are any other facts concerning the transactions that could be alleged. Therefore the OTCs' Demurrer must be sustained in its entirety.

ORDER

For the foregoing reasons, the Joint Demurrer of Defendant Online Travel Companies to the City of Santa Monica's First Amended Complaint is sustained without leave to amend.

Dated: March 16, 2011

Carolyn B. Kuhl
Judge of the Superior Court

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re TRANSIENT OCCUPANCY TAX CASES	B230457 (Los Angeles County Super. Ct. No. JCCP 4472)

APPEAL from a judgment of the Superior Court of Los Angeles County. Carolyn B. Kuhl, Judge. Affirmed.

Cristina L. Talley, City Attorney, and Moses W. Johnson, Assistant City Attorney; Kiesel Boucher Larson, Paul R. Kiesel, William L. Larson, and Shehnaz M. Bhujwala; Baron & Budd, Laura J. Baughman, Thomas M. Sims, and Kevin McHargue; McKool Smith, Steven D. Wolens and Gary Cruciani for Defendants and Appellants City of Anaheim et al.

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

Jones Day and Brian D. Hershman for Plaintiffs and Respondents Expedia, Inc., Hotwire, Inc., Travelnow.com, Hotels.com, L.P., and Hotels.com GP, LLC.

Kelly Hart & Hallman, Brian S. Stanger and Chad Arnette for Plaintiffs and Respondents Travelocity.com, L.P. and Site59.com, LLC.

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

In October 2007, the City of Anaheim (City) initiated audits and issued transient occupancy tax assessments (TOT) against respondents, who are online travel service companies (OTCs).[1] The OTCs filed administrative appeals, and the administrative hearing officer concluded that the OTCs were liable for the TOT. The OTCs filed a petition for writ of mandate, which was granted. The City appeals from the decision of the superior court granting the writ of mandate filed by the OTCs and ordering the administrative hearing officer to vacate his ruling, issue a new ruling that the OTCs are not liable for the City's TOT, and set aside the City's assessments.

We find the OTCs are not liable for the TOT under the plain language of the City's TOT ordinance, therefore we affirm the decision of the superior court in full.

FACTS

The City's TOT Ordinance

The City's TOT ordinance imposes a tax of "fifteen percent of the rent" on transients "[f]or the privilege of occupancy of space in any hotel." (Anaheim Mun. Code, § 2.12.010.010).[2]

"Transient" is defined as "any person who exercises occupancy, or is entitled to occupancy, of any room . . . in any hotel." (§ 2.12.005.100.)[3]

"Rent" is defined as "the consideration charged by an operator for accommodations, including . . . (1) unrefunded advance rental deposits or (2) separate charges levied for items or services which are part of accommodations including, but not

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

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

3 Throughout this opinion, the term transient is synonymous with the terms "consumer" and "customer."

limited to, furniture, fixtures, appliances, linens, towels, non-coin-operated safes, and maid service." (§2.12.005.080.)

"Operator" is defined as "any person, corporation, entity, or partnership which is the proprietor of the hotel, whether in the capacity of owner, lessee, sublessee, mortgagee in possession, debtor in possession, licensee or any other capacity." In addition, "[w]here the operator performs its functions through a managing agent of any type or character other than as an employee, the managing agent shall also be deemed an operator and shall have the same duties and liabilities as its principal." (§2.12.005.050.)

OTCs

OTCs are companies that publish comparative information about airlines, hotels and rental car companies on their websites. These companies allow consumers to book reservations with these different travel providers. OTCs do not possess or operate any airlines, hotels, or rental car companies.

The OTCs use what the parties refer to as a "merchant model" when they facilitate hotel reservations for consumers. Under the merchant model, the OTCs first contract with hotels within the City for rooms at negotiated, discounted room rates (wholesale price). The OTCs then mark up the wholesale price to derive the retail price at which they rent hotel rooms to consumers. When a consumer books the room online, he or she is quoted the retail price for the room plus an amount for taxes and fees. The consumer is presented with these line items: the room price, taxes and fees, and the combined total price. Once the consumer pays for a room through an OTC website, the sale of the room is complete. The OTC is the merchant of record. The OTCs establish the room rate, charge the consumer's credit card, and establish cancellation policies.

When a consumer uses an OTC online service to make a reservation, he or she is charged an amount to cover the room rental that will be paid to the hotel, as well as an amount to cover the estimated TOT on that amount. The customer is also charged an amount the OTC retains for providing its online facilitation services. Upon arrival at the hotel, the transient gets the room key and makes arrangements to pay for incidentals directly to the hotel.

The contract between the OTC and the hotel permits the OTC to sell to the consumer the right to occupy a room for a wholesale price that is agreed upon between the hotel and the OTC. However, the rate paid by the consumer is the wholesale rate plus a markup. After it sells the consumer the right to occupy the room, the OTC retains its fee and pays the hotel the wholesale rate and TOT based on the wholesale rate. The hotel then remits the tax to the City. The transient is not informed of the wholesale room rate.

PROCEDURAL HISTORY

Audit proceedings and administrative hearing

In October 2007, the City initiated audit proceedings against the OTCs. On May 23, 2008, the City issued estimated assessments against the OTCs covering an eight-year audit period. Pursuant to section 2.12.060, the OTCs appealed the assessments by way of an application for an administrative hearing filed in June 2008. The administrative hearing took place over eight days between August and December 2008.

On January 28, 2009, the hearing officer issued a decision (administrative decision) finding that the OTCs' room markup and service fees were subject to TOT. Specifically, the hearing officer found that "[t]he liability determination of OTC responsibility for transient occupancy taxes contemplates service fees along with wholesale price . . . and room margin as the total amount the transient pays in rent for the privilege of occupancy." The hearing officer further concluded that OTCs are "operators" pursuant to section 2.12.005, because they "provide key functions and exercise substantial control concerning the provision of these functions." The parties stipulated that the amount of unpaid TOT related to the room markup and service fees, plus interest and penalties, was more than $21 million.

Writ proceedings

The OTCs petitioned for writ of administrative mandamus in the Orange County Superior Court, and subsequently petitioned to have the Orange County proceedings included in the Transient Occupancy Tax Cases, Judicial Council Coordination proceeding No. 4472, pending in Los Angeles Superior Court. The Los Angeles County Superior Court granted the OTCs' request to have the Orange County writ challenges

included in the coordinated proceedings. For the writ proceedings, the OTCs did not challenge the administrative hearing officer's findings of fact, and the trial court accepted the parties' position that "there essentially is no dispute as to the facts concerning the OTCs' mode of doing business."

After extensive briefing and two days of argument, on February 1, 2010, the trial court granted the OTC's motion for judgment granting writ of mandate. The court concluded that, properly interpreted, the TOT ordinance does not impose a tax on the retail price of the rooms offered by the OTCs. The trial court began by recognizing that the TOT ordinance "is a privilege tax -- it is a tax based on the privilege of occupying a hotel room in the City of Anaheim for less than 30 days." Further, the trial court noted, the definition of the tax "focuses on the locus of commercial activity taking place in the City of Anaheim." The court concluded that the "taxable event" is the "non-permanent occupancy of a physical living space."

After considering the purpose and scope of the tax, the trial court turned to the precise language imposing the tax. The measure of tax is the "rent," which is defined as "'the consideration charged by an operator for accommodations.'" Because "rent" is defined in terms of the consideration charged by an operator, the court noted that the definition of the term "operator" was significant. In contrast with the administrative hearing officer, the trial court determined that OTCs are not operators under the definition provided in the ordinance.

The court noted that the definitional section of the ordinance uses the terms "operator" and "proprietor" as synonyms: "'"[o]perator" means any person, corporation, entity, or partnership which is the proprietor of the hotel . . . .'" The court looked up the common definitions of the terms "operator" and "proprietor" and found that both mean "a person or entity that controls and runs a business, in this case, a hotel." The court concluded that OTCs do not "control and run hotels," therefore they are not "operators" or "proprietors" under the plain meaning of the ordinance.

Addressing the City's argument that OTCs could be considered "managing agents" of hotels, the trial court applied the accepted meaning of the term "managing

agent" as it existed in California law when the ordinance was enacted in 1992. Citing *Egan v. Mut. of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 822-823, and *Hobbs v. Bateman Eichler, Hill Richards, Inc.* (1985) 164 Cal.App.3d 174, 193, the court stated that the critical inquiry in determining whether an employee or agent is a managing agent is "'the degree of discretion [the agent] possesses in making decisions that will ultimately determine corporate policy.'" The trial court concluded that the facts found by the administrative hearing officer did not support a finding that the OTCs exercised discretion in making decisions that would ultimately determine the hotels' corporate policies. The trial court noted that "[t]he OTCs have no discretion to determine the price at which the hotels are willing to sell their product and therefore no control of the hotels' corporate pricing policies." In addition, as the administrative hearing officer noted, the hotels determine their own policies with respect to cancellation of a reservation, and the OTCs usually incorporate this policy into its contract with the transient.

Finally, the trial court addressed the constitutional limits on a California city's ability to increase its tax base: "Creation of a larger tax rate or a larger tax base requires voter approval pursuant to Proposition 218 and its implementing legislation. . . . Judicial interpretation may not be used as a means to avoid these restrictions."

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

On February 11, 2010, the City filed a motion for reconsideration of the trial court's order granting the OTCs' writs of administrative mandamus. The trial court denied the motion. First the trial court noted that the motion was improper because the arguments raised therein could and should have been raised in the City's writ motion briefing. The trial court also rejected the City's new legal arguments, finding that they "do not alter the decision this court reached in granting the OTCs' Motion for Judgment Granting the Writ of Mandate."

The trial court allowed the City to file an amended cross-complaint in March 2010, asserting common law and statutory claims. The first amended cross-complaint

contained causes of action for: (1) preliminary and permanent injunction; (2) conversion; (3) violation of Civil Code section 2223; (4) violation of Civil Code section 2224; (5) imposition of a constructive trust; (6) breach of fiduciary duty; (7) fraudulent concealment; (8) money had and received; (9) unjust enrichment; (10) violation of City of Anaheim Ordinance 2.12.020.050; and (11) declaratory relief. On August 30, 2010, the trial court sustained the OTCs' demurrer, dismissing the amended cross-complaint with prejudice. The City's tagalong claims failed because all were largely premised on the OTCs owing TOT on the amounts they charge and retain.

Final judgment in the matter was entered on December 16, 2010. On January 24, 2011, the City filed its notice of appeal.

DISCUSSION

I. Standard of review

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

II. Rules governing statutory construction

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

In determining the intent of the enacting body, we first examine the words of the statute itself. (*California Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 698 (*California Teachers*).) If the language of the statute is clear and unambiguous, there is no need for statutory construction. (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.) However, "the 'plain meaning' rule does not prohibit a court from determining whether the literal meaning of a statute comports with its purpose." (*Ibid.*) "If . . . the terms of a statute provide no definitive answer, then courts may resort to

extrinsic sources, including the ostensible objects to be achieved and the legislative history. [Citation.]" (*People v. Coronado* (1995) 12 Cal.4th 145, 151.) Every statute should be construed "'with reference to the whole system of law of which it is a part so that all may be harmonized and have effect.' [Citation.]" (*Select Base, supra*, 51 Cal.2d at p. 645.) "'We must select the construction that comports most closely with the apparent intent of the [drafters], with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences.' [Citation.]" (*Coronado, supra*, at p. 151.) The purpose of the statute "will not be sacrificed to a literal construction" of any part of the statute. (*Select Base*, at p. 645.)

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

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

III. The City's TOT ordinance

Our first task is to examine the words of the ordinance. (*California Teachers, supra*, 28 Cal.3d at p. 698.) The ordinance provides: "For the privilege of occupancy of space in any hotel, each transient is subject to and shall pay a tax in the amount of fifteen percent of the rent." (§ 2.12.010.010) As set forth below, we find that the words of the statute are clear and unambiguous, and do not reveal an intent to tax service fees and markups charged by the OTCs.

A. The definition of "rent" does not include service fees charged by an OTC

The City focuses its argument on the term "rent," which is defined in the ordinance as "the consideration charged by an operator for accommodations, including

without limitation any . . . separate charges levied for items or services which are part of such accommodations including, but not limited to, furniture, fixtures, appliances, linens, towels, non-coin-operated safes, and maid service." (§2.12.005.080.)

The City argues that the term "rent," as defined by the ordinance, must include the total amount of consideration paid for accommodations -- including the OTCs' profit, room markup and service fees. The City claims that whether the OTCs are "operators" makes no difference to the tax base, because in either event, the OTCs' profits must be considered part of the rent. The City points out that the definition of rent includes "separate charges levied for items or services," and expressly disallows deductions from rent for related services and expenses, including commissions. (§2.12.020.050.)[4]

Further, the City argues, the term "accommodations" is similarly broadly construed to include "'"whatever supplies a want or affords ease, refreshment, or convenience . . . ."' [Citation.]" (*Batt v. City and County of San Francisco* (2010) 184 Cal.App.4th 163, 172.) In *Batt*, the City points out, the provision of parking spaces was part of the "accommodation," even if physically separate from the hotel. Thus, the City argues, the service that the OTCs provide may be considered part of the accommodations.

The City's primary emphasis on the definition of "rent" largely ignores the ordinance's express direction that "rent" only includes "consideration *charged by an operator*." (§ 2.12.005.080, italics added.) The ordinance defines "operator" as "any person, corporation, entity, or partnership which is the proprietor of the hotel . . . ." (§ 2.12.005.050.) The term "proprietor" is not defined in the ordinance itself, therefore we may look to the dictionary definition of that term to discern its ordinary meaning. (*Wasatch Property Management v. Degrate* (2005) 35 Cal.4th 1111, 1121-1122.) The word "proprietor" is defined in the Oxford English Dictionary as "[a] person who owns something, or who has a (usually exclusive) right or title to its use or disposal; an owner,

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[4] Section 2.12.020.050 states: "Nothing contained in this chapter shall be deemed to authorize as a credit against tax any amount paid by the operator to any tour promoter, travel agent, or third party other than the transient. Travel agent commissions are an expense of the operator and may not be deducted from the rent."

esp. of land, or (in later use) of a business." (Oxford English Dict. (3d ed. 2007) <http://www.oed.com/view/Entry/152839?redirectedFrom=proprietor#eid>.) Thus, the term "operator" is defined to mean a person or entity who owns, or has a right or title, to land or a business.

The plain meaning of the term "proprietor" as someone with ownership or possession of a hotel is substantiated by the ordinance's further elaboration on the scope of that term. The ordinance specifies that the "operator" is the "proprietor" of the hotel, "whether in the capacity of owner, lessee, sublessee, mortgagee in possession, debtor in possession, licensee or any other capacity." (§ 2.12.005.050.) These examples of the different possible legal positions which the proprietor may occupy all require either ownership or a right of physical possession of the hotel.[5]

Under the plain meaning of the ordinance, the OTCs cannot be considered to be operators of the hotels for which they provide room reservations. The administrative hearing officer made no findings suggesting that OTCs own, possess, lease, sublease, or otherwise act as the proprietor of any hotels in the City.[6] Therefore the service fees and markups that they charge to transients are not "charged by an operator." Because the OTCs' service fees cannot be considered "consideration charged by an operator for accommodations" (§ 2.12.005.080), such service fees are not within the scope of the ordinance.

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[5] We reject the City's suggestion that the words "or any other capacity" should be broadly construed to encompass OTCs. When a statute uses a list of items, "'"'"a court should determine the meaning of each by reference to the others, giving preference to an interpretation that uniformly treats items similar in nature and scope.'"'" [Citations.]" (*In re Corrine W.* (2009) 45 Cal.4th 522, 531.) Thus, we interpret the phrase "or any other capacity," as used in section 2.12.005.050, to mean a capacity in which a person or entity might act as the proprietor of a hotel.

[6] In fact, the administrative hearing officer found that OTCs are mere "collection agents for rent."

B. OTCs do not assume the role of operator

The City attempts to fit the OTCs within the definition of "operator." They argue that the OTCs *function* as operators under the merchant model. The City points out that the definition of the term "operator" includes the following language: "Where the operator performs its *functions* through a managing agent of any type or character other than as an employee, the managing agent shall also be deemed an operator and shall have the same duties and liabilities as its principal." (§ 2.12.005.050, italics added.)

The City argues that the ordinance thus takes a "functional approach" to the definition of the term operator. Further, the City argues, the ordinance points out three functions of the operator, all of which the OTCs perform. First, the operator is the one who charges the transient for the room accommodations. (§ 2.12.005.080 ["'Rent' means the consideration charged by an operator for accommodations"].) Second, the operator is the one who collects the TOT from the transient. (§ 2.12.020.010 ["Each operator shall collect the tax to the same extent and at the same time as rent is collected from every transient"].) And third, the operator is the one who provides a transaction receipt to the transient. (§ 2.12.020.010 ["[E]ach transient shall be tendered a receipt for payment from the operator with rent and tax separately stated thereon"].) The City reasons that because the OTCs perform each of these three operator functions, it stands to reason that the OTCs are entities that are intended to be encompassed by the definition of operator.[7]

The City's reasoning is flawed. First of all, the ordinance does not purport to set forth a complete list of the functions of a hotel operator. If the functions of the hotel operator were limited to the three actions listed above, no hotel could function. While the

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[7] In support of this argument, the city relies heavily on an out-of-state case, *City of Goodlettsville v. Priceline.com* (M.D.Tenn. 2009) 605 F.Supp.2d 982, 985.) The ruling in that case was on a motion to dismiss, and the court accepted the allegations as true. The Middle District of Tennessee has now granted summary judgment in favor of all the OTCs. (*City of Goodlettsville v. Priceline.com, Inc.* (M.D.Tenn., Feb. 21, 2011, No. 3:08-cv-00561) 2012 U.S. Dist. LEXIS 21195.) The Middle District of Tennessee ruled that OTCs were not liable for tax under a similar ordinance that imposed a tax on consideration charged by the operator, because OTCs are not hotel operators. (*Id.* at * 43, 45-46.)

ordinance does name certain functions that a hotel operator normally carries out, it does not suggest that one who carries out such actions must be considered a hotel operator. As the trial court correctly noted: "Principles of formal logic demonstrate that when the statement 'If A then B' is a true statement, it is incorrect to conclude that the converse, 'If B then A' must be true. Thus, 'If an entity is a hotel operator, then it must collect transient occupancy tax,' is a true statement; but it is a logical fallacy to conclude that the converse, 'If an entity collects transient occupancy tax, then it must be a hotel operator,' therefore is necessarily true."

Furthermore, the ordinance requires that the operator "file a return with the License Collector on forms provided by the License Collector stating the total rents charged and the amount of tax collected during the immediately preceding calendar month." The operator is also required to remit the full amount of the tax to the License Collector. (§2.12.030.010.) The City does not contend that the OTCs carry out these express functions of the operator. The definition of the term operator does not suggest that an entity that performs *some of* the functions of an operator should be considered to be the operator.

The City cites two cases which, it argues, supports the idea that a functional approach to statutory interpretation is appropriate. *Associated Beverage Co. v. Board of Equalization* (1990) 224 Cal.App.3d 192 (*Associated Beverage*), involved the interpretation of sales tax. The court analyzed the plaintiff's argument that it was not a "'dealer[], distributor[], supervisor[], or employer[]'" of certain of its vending machine customers. (*Id.* at p. 207.) The court began by looking up the dictionary definitions of the terms "distributor" and "dealer." (*Ibid.*) The court focused on the plain meaning of those terms in concluding: "Seven-Up usually acts as a dealer or distributor itself and most of those to whom it sells in the first instance act, in turn, as 'salesmen' in retailing the products to the ultimate consumer. The common dictionary meanings of the words 'dealer' and 'distributor' recognize this manner of doing business." (*Id.* at p. 208.)

Thus, contrary to the City's argument, *Associated Beverage* supports the use of the "usual, ordinary range of meaning" given to words in a statute. (*Associated Beverage, supra*, 224 Cal.App.3d at p. 207.)

In *Bank of America Nat'l Trust & Sav. Assoc. v. State Board of Equalization* (1962) 209 Cal.App.2d 780, Bank of America allowed its customers to purchase checks manufactured by a non-California company called DeLuxe. Customers were able to order the checks through the bank, and the bank charged its customers for the cost of the checks plus an additional fee. (*Id.* at pp. 786-787.) The bank protested the imposition of sales and use tax, arguing, among other things, that it was not a retailer. (*Id.* at p. 790.) The court set forth the definition of "retailer," as a "'person engaged in the business of making sales.'" (*Id.* at p. 794.) It then discussed the meaning of the word "sale," and found that the bank's activities fit under this definition because "there was a sale from DeLuxe to the Bank and a resale from the Bank to its depositor." (*Id.* at p. 795.) After discussing whether the Bank was sufficiently "engaged in the business of" making such sales, the court concluded that "the Bank sold checks for the use of its customers in sufficient quantities to make it a person engaged in the business of selling such checks." (*Id.* at p. 797.) Throughout its analysis, the court remained focused on the words of the statute, concluding that "the Bank was a 'retailer' as . . . contemplated" by the statute. (*Ibid.*) Here, despite the City's arguments to the contrary, we cannot conclude that the OTCs are operators as contemplated by the TOT ordinance.

The plain language of the ordinance reveals that the tax is meant to be imposed on the consideration charged by an operator, meaning a proprietor, or the operator's managing agent. The OTCs are not operators of hotels, and the City's arguments regarding a functional approach do not convince us otherwise. We next address the City's arguments that the OTCs should be considered managing agents of the hotel operators.

C. OTCs are not "managing agents" of the hotels

The City argues that the trial court erred in finding that the drafters of the TOT ordinance intended to restrict the term "managing agent" to its court-interpreted meaning under Civil Code section 3294. The trial court stated:

> "In 1992 when the current Anaheim transient occupancy tax ordinance was enacted, the term 'managing agent' had an accepted meaning under California law. The California legislature had used the term 'managing agent' to define the type of agency relationship that was sufficient for attributing the consequences of an agent's wrongful conduct to a corporate employer for purposes of imposing punitive damages on the employer. (Cal. Civ. Code § 3294.) The California courts had explained that the 'critical inquiry' in determining whether an employee or agent is managerial is 'the degree of discretion [the agent] possesses in making decisions that will ultimately determine corporate policy.' (*Egan v. Mutual of Omaha Ins. Co.*[, *supra*,] 24 Cal.3d [at pp.] 822-823; *accord Hobbs v. Bateman Eichler, Hill Richards*[, *Inc., supra*,] 164 Cal.App.3d [at p.] 193.)"

The City points out that the ordinance does not incorporate the terms of Civil Code section 3294. Instead, the ordinance refers to managing agents "of any type or character" (§ 2.12.005.050), indicating that different types of managing agents may fall within the scope of the provision. Further, the City argues, the term "managing agent" did not receive a settled judicial interpretation until 1999. (See *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 566 (*White*).)

The City points to two older cases, arguing that they use the term managing agent to relate to any agent that exercises discretionary authority. The first is *Charles Erlich & Co. v. J. Ellis Slater Co.* (1920) 183 Cal. 709 (*Erlich*), which discussed whether an individual, H. J. Martin, could be considered a "managing or business agent" of the corporate defendant such that service of process upon Martin constituted service of the corporation. (*Id.* at p. 711.) In concluding that Martin was in fact a managing agent of the corporation, the court noted: "H. J. Martin[] was engaged in purchasing fruit in California for shipment to Chicago, Martin negotiating and making contracts for such purchases with the growers in the southern part of the state, the fruit to be accepted by him f.o.b. California points. He examined the fruit so purchased, and saw to it that it was

packed in accordance with the instructions of the defendant; he arranged with the railroad companies for its shipments; he fixed the wages of employees here; and for the purchase price of fruit, or any other indebtedness incurred here by him for the defendant, he drew sight drafts on the company signed with its name 'per' himself." (*Id.* at pp. 712-713.)

While Martin received some direction from the company, "his duties required the exercise of judgment and discretion." (*Erlich, supra*, 183 Cal. at p. 713.) The OTCs have far less discretion in relation to the hotels. The OTCs do not fix the wages of any of the hotel employees, nor do they draw on the hotels' credit for their own indebtedness. Further, as the trial court pointed out, the OTCs ability to re-price hotel rooms to sell to the public does not determine the hotels' policies with respect to pricing. "The hotels themselves determine how much revenue they will receive from the sale of hotel rooms, including hotel rooms marketed by the OTCs." The OTCs therefore have no discretion to determine the price at which any hotel will sell its product. Unlike Martin, the OTCs do not act as managing agents.

The second case that the City relies upon is *Roehl v. Texas Co.* (1930) 107 Cal.App. 691 (*Roehl*). The defendant corporation brought a motion to quash service on the ground that the individual served, Lorden, was not a managing agent of the corporation. (*Id.* at p. 693.) The motion was denied, and the sole question before the Court of Appeal was whether "delivery of copies of the summons and complaint to Lorden amounted to a valid service upon the appellant corporation." (*Ibid.*) In confirming the trial court's decision that Lorden was a managing agent for the corporation, the court focused on Lorden's management of the San Diego operations of the company, noting that the San Diego establishment was "extensive," reaching "all of San Diego County," and that "so far as can be determined by the public, Lorden is its manager, in full charge within all that area, and that . . . he had been allowed by appellant to go on and make contracts for it, . . . with what, to outward appearance, was the plenary authority which he claimed to have; besides which, in appellant's behalf, he hires and pays appellant's local employees." (*Id.* at pp. 706-707.) Again, the position of the OTCs is distinguishable. OTCs do not have plenary authority to make contracts on behalf of

hotels; instead, the hotels determine the amount they will receive for each hotel room. Further, OTCs do not hire or pay any hotel employees. In sum, neither *Erlich* nor *Roehl* supports the City's position that the OTCs fit under the accepted meaning of the term managing agent in 1992.

The City further contends that the OTCs exercise a degree of discretion that qualifies them as managing agents under any definition. The City advocates a transactional approach to determining the agent's role. The City argues that an agent's discretion should be measured with respect to the transactions at issue, not the operation of the corporation as a whole.

In support of this argument, the City discusses *White, supra*, 21 Cal.4th 563. The City points out that the *White* court found that significant management and supervision is enough to qualify an individual as a managing agent, even where the individual manages only a specific portion of the company's entire business.

The individual agent discussed in *White*, Salla, had a role in the corporation that is not comparable to the OTCs' role vis-a-vis any hotel. As the City points out, Salla was a "zone manager" for Ultramar, managing eight stores and "at least sixty-five employees." (*White, supra*, 21 Cal.4th at p. 577.) The court concluded that "[t]he supervision of eight retail stores and sixty-five employees is a significant aspect of Ultramar's business." (*Ibid.*)

The City has not pointed to any evidence showing what portion of the hotel rooms in the City are booked through OTCs. Therefore we have no comparable evidence of what percentage of bookings constitutes a "significant aspect" of any hotel's business. Even if we had such data, OTCs do not supervise any hotels or any hotel employees. *White* does not direct a conclusion that the OTCs are managing agents.

Finally, the City cites *Textron Financial Corp. v. National Union Fire Ins. Co.* (2004) 118 Cal.App.4th 1061 (*Textron*). Textron sued an insurance company and TRM International, Inc. (TRM), a company hired by the insurance company to "'solicit, bind, write, and administer'" policies for the insurance company's commercial bus program, as well as "'exercise [its] independent judgment as to the time, place and manner of

soliciting insurance and servicing policyholders.'" (*Id.* at p. 1080.) One of the issues on appeal was whether TRM was a managing agent of the insurance company under Civil Code section 3294. The court quoted extensively from *White*, then concluded that TRM was the insurance company's managing agent. The court explained that TRM had "broad discretion over defendant's bus insurance program." (*Textron*, at p. 1080.) This discretion included issuing coverage, verifying coverage, canceling coverage, and advising the insurance company as to whether to deny a certain claim.

The City argues that the functions performed by the OTCs on behalf of the hotels are comparable to those performed by TRM for the insurance company. The OTCs have the power to solicit customers, bind hotels, and collect money. The City contends that the OTCs have near total autonomy in dealing with the transients prior to check-in. Again, we find the analogy flawed. First, issuing an insurance policy is more complex than making a hotel reservation. Presumably, there are a number of factors that must be weighed in determining whether to issue insurance to the particular customer -- factors that involve a great deal of discretion and judgment. Further, while TRM had the authority to cancel policies, the OTCs have no such authority. As the trial court noted, the hotels determine their own cancellation policies, which are incorporated into the contract between the OTC and the transient. In addition, the OTCs do not have unfettered authority to bind hotels. They may only sell the number of hotel rooms that the hotel makes available to them, and must honor the wholesale rate that the hotel decides upon. In sum, *Textron* does not suggest that any OTC should be considered managing agent of any hotel.

D. The City's arguments regarding the timing and means of collection do not change the result

The City attempts to show that the OTCs are avoiding paying TOT by restructuring the way that rent is collected from a transient. Below, we address the City's various arguments regarding the timing and means of collection of TOT.

The City explains that there are five models for the purchase of a hotel room rental, including the merchant model discussed in this case. The City describes the five basic models as follows:

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

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

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

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

5. The fifth model is the OTC merchant model, at issue in this lawsuit. Here, the OTC is the merchant of record. It collects the transient's entire payment at the time the transient's credit card is charged. However, rather than remitting the entire $115 to the hotel, the OTC deducts its profit prior to paying the hotel and prior to calculating the TOT. The OTC first deducts its $20, then calculates the TOT based on the $80 that the hotel will receive. Thus, the total TOT is $12 rather than $15. According to the City, the OTC then pockets the remaining $3 as an additional fee. Based on this example, the City

argues that the OTC merchant model results in significantly different tax results for the same retail transaction.

At the administrative hearing, Chris Soder, president of North American Travel for Priceline.com, Inc., testified regarding the various ways that OTCs do business. Mr. Soder's testimony suggested that the method of doing business between an OTC and a hotel is something that both entities agree upon prior to entering a contract. The City does not suggest that the merchant model structure is illegal on its face or that the hotels are deliberately assisting the OTCs to avoid paying taxes. Under the merchant model as explained in the five examples described above, the hotel receives a lower amount for the hotel room. There is no suggestion that the amount the hotel receives under the merchant model is anything less than what it agreed to charge as its wholesale room rate. Nor does the City argue that hotels are required to charge comparable prices for hotel rooms no matter what the structure of the transaction may be. Because the TOT is based on consideration charged and received by the hotel operator, in a transaction where the hotel charges and receives less rent, a lower total TOT is a rational result.

The City sets forth another example of why the interpretation advanced by the OTCs leads to what it describes as "absurd results." The City refers to this as the "extended stay" example. As explained by the administrative hearing officer:

> "If the transient books through an OTC and then decides to extend his stay at the hotel by booking a second night directly from the hotel, the following is the result: Night one -- $80 net rate, $20 markup, $12 occupancy tax even though the transient paid $100 for the room. Night two -- $100 room rate, $15.00 transient occupancy tax. The OTCs' contention that they are not operators results in significantly different tax outcomes for the same $100 retail transaction for the same night in the same room and hotel."

Again, this hypothetical does not convince us that the plain language interpretation of the statute is absurd. As explained above, the net rate received by the hotel is different on the two nights. The first night, through its agreed-upon price negotiated with the

OTC, the hotel only receives $80. For the second night, the hotel charges and receives $100. Therefore, it makes sense that the TOT differs from the first night to the second.

The City further argues that the total amount of consideration charged *must* include the value of the OTCs' services, since the transient cannot purchase the right to occupy the room without paying the OTCs' service fees in a single, total payment. The City argues that the amount of consideration does not change merely because it is charged by the OTC and not the hotel. However, the TOT ordinance is drafted with a focus on the amount of consideration charged by the operator -- not the total amount of consideration paid out by the transient. If the transient pays money in addition to what is charged by the hotel, that additional amount it is not taxed under the ordinance.

In support of this argument, the City cites two cases, both of which we find distinguishable from the situation presented here. In *Groves v. Los Angeles* (1953) 40 Cal.2d 751, the Supreme Court discussed a tax on the gross receipts of every person in the business of furnishing bail bonds. The language of the statute mandated that every person in the business of """"soliciting, negotiating, effecting, issuing, delivering, or furnishing bail bonds . . . shall pay for each calendar year . . . a license tax""" based on that person's gross receipts. (*Id.* at p. 753.) The question arose as to whether the gross amount received by an agent, who passed a portion back to the insurance company, was taxable. The court concluded that "the full sum received by [the agent] from the one desiring the bail bond is the gross premium for the bond." (*Id.* at p. 760.) However, the case is distinguishable because the statute at issue did not expressly limit the tax to the amount charged by the insurance company. The express limiting language in the City's TOT ordinance leads to a different result here.

In *Hospital Medical Collections, Inc. v. City of Los Angeles* (1976) 65 Cal.App.3d 46, corporate collection agencies brought an action against the City of Los Angeles to recover business taxes paid under protest. The collection agencies had a practice of deducting commissions retained by out-of-state independent collection agencies who collected certain debts on assignment in the area where the debtor was located. The court first discussed the meaning of the term "gross receipts" as used in the statute at issue.

The statute included language suggesting an intention "to include as 'gross receipts' the total amount charged for a particular business transaction, without limitation in the form of requiring actual collection by the taxpayer." (*Id.* at p. 51.) The court concluded that the essential inquiry was whether there was a "'taxable local event.'" (*Ibid.*) The court held that, because the contract of assignment between the local agency and the out-of-city agency occurred in the City of Los Angeles, and the ultimate conclusion of the collection transaction also occurred in the City of Los Angeles, the entire transaction was a local taxable event subject to the municipal business tax. (*Id.* at pp. 54-55.)

In both *Groves* and *Hospital Medical Collections*, the initial inquiry into the language of the statute led to a conclusion that the taxes at issue were not limited to the amount charged by the taxpaying entity. The ordinance at issue here is different, because it specifies that the taxable consideration is limited to that "charged by an operator." (§ 2.12.005.080.)

In sum, none of the City's arguments regarding the timing and means of collection can change the plain meaning of the statute. The OTCs' markups and service fees cannot be considered "consideration charged by an operator for accommodations" (§ 2.12.005.080). Therefore these fees are not within the scope of the ordinance.

E. Application of the step transaction doctrine does not change the express meaning of the statute

The City urges this court to apply an analytical tool known as the "step transaction doctrine." (*Shuwa Investments Corp. v. County of Los Angeles* (1991) 1 Cal.App.4th 1635, 1648 (*Shuwa*).)[8] For the purposes of this argument, the City breaks down the merchant model into two transactions: the OTC/transient transaction, and the hotel/OTC transaction. The City urges us to look at these two "purportedly separate transactions" as

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[8] The trial court denied the City's motion for reconsideration addressing the step transaction doctrine. However, the City argues that the trial court's denial does not affect this court's consideration of the doctrine because we are reviewing undisputed facts de novo. We agree that where a new claim on appeal raises a purely legal question, we have discretion to consider it. (*Trackman v. Kenney* (2010) 187 Cal.App.4th 175, 182.) Accordingly, we elect to briefly address this new, purely legal theory.

a single transaction for the purposes of application of the TOT ordinance. (*Id.* at pp. 1650-1651.) As the *Shuwa* court explained: "In a case such as this, where the propriety and necessity for multiphase transactions is challenged, the 'step transaction doctrine' has been applied to determine whether the transaction should be treated as a whole or whether each step of the transaction may stand alone. The 'step transaction doctrine' is a corollary of the general tax principle the incidence of taxation depends upon the substance of a transaction rather than its form. [Citation.]" (*Id.* at p. 1648.)

In *Shuwa*, the court addressed a transfer of ownership of the ARCO Plaza in Los Angeles. Shuwa sought to acquire 100 percent ownership of the building, while limiting the legal "change in ownership" for property tax purposes to 50 percent. (*Shuwa, supra*, 1 Cal.App.4th at pp. 1640-1641.) The parties structured a three-step transaction to accomplish this goal. (*Id.* at pp. 1641-1643.) Applying the step transaction doctrine, the court found that "it appears the three steps were really component parts of a single transaction. The ultimate result intended from the outset was for Shuwa to acquire *all* of the ARCO Plaza from the present owner, a partnership." (*Id.* at p. 1651.) The court concluded that "the transactions in the case at bar should be stepped together to reveal what actually occurred -- the acquisition by Shuwa of 100 percent of the ARCO Plaza. (*Id.* at p. 1650.)

The *Shuwa* court quoted a leading United States Supreme Court case discussing this doctrine, *Gregory v. Helvering* (1935) 293 U.S. 465, which explained that the step transaction doctrine should be applied where "the transaction upon its face lies outside the plain intent of the statute." (*Id.* at p. 470.)

Unlike the parties in *Shuwa*, the hotels and OTCs have not structured the merchant model transactions for the purpose of avoiding tax liability. Nor do merchant model transactions lie "'outside the plain intent of the statute.'" (*Shuwa, supra*, 1 Cal.App.4th at p. 1650.) The ordinance reveals an intent to tax the amount of consideration charged by the hotel operator. The merchant model is not structured to avoid paying such TOT.

In sum, the merchant model does not consist of a series of sham transactions designed to avoid tax liability. There is no suggestion that any hotel or OTC participates

in the merchant model transactions as a means to avoid paying TOT to the City of Anaheim. Therefore, the step transaction doctrine is inapplicable.

IV. The City's common law and statutory claims against the OTCs

Following the proceedings on the OTCs' petition for writ of mandate, the trial court allowed the City to file an amended cross-complaint, asserting 11 causes of action against the OTCs. On August 30, 2010, the trial court sustained the OTCs' demurrer, dismissing the amended cross-complaint with prejudice. The City has appealed from this ruling. As set forth below, we find that these claims fail because all were premised on the OTCs owing TOT on the amounts they charge and retain.

A. Standard of review

"On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, the standard of review is well settled. The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. [Citations.] The court does not, however, assume the truth of contentions, deductions or conclusions of law. [Citation.] The judgment must be affirmed 'if any one of the several grounds of demurrer is well taken. [Citations.]' [Citation.] However, it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. [Citation.] And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment. [Citation.]" (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966-967.) The legal sufficiency of the complaint is reviewed de novo. (*Montclair Parkowners Assn. v. City of Montclair* (1999) 76 Cal.App.4th 784, 790 (*Montclair*).)

B. Violation of Civil Code sections 2223 and 2224

The City's cross-complaint contained causes of action for violation of Civil Code sections 2223 and 2224. Civil Code section 2223 provides that "[o]ne who wrongfully detains a thing is an involuntary trustee thereof, for the benefit of the owner." Civil Code section 2224 provides: "One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he or she has some

other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it."

In its third cause of action for violation of Civil Code section 2223, the City alleged that the OTCs retained for their own use and benefit the difference between the amounts sufficient to pay TOT on the retail price and fees as collected by them and the amount of the TOT remitted by them based on the wholesale price. The City further argued that "the OTCs in fact collect [TOT] on the full amounts paid by the transients, but only remit taxes on the lesser wholesale amounts. Thus, the OTCs are 'involuntary trustees' of the monies wrongfully detained and said monies are held for the benefit of the City." The City made similar arguments in its fourth cause of action for violation of Civil Code section 2224. Under both causes of action, the City sought "appropriate legal or equitable remedies to prevent the unjust enrichment of the OTCs by causing payment to the City of all amounts wrongfully maintained in the possession of the OTCs as alleged in this cause of action, with appropriate interest, penalties, costs and fees, as allowed by law."

The City's argument is premised on its theory that TOT is owed to the City on the full amount paid by the transient to the OTCs. As we have discussed, this theory is not supported by the plain language of the ordinance. While the City contends that the OTCs collect TOT on the full amount paid by the transient -- and is wrongfully detaining such taxes -- the City has provided no facts showing that it is entitled to this money. Under the statute, the City is only entitled to TOT on the consideration charged by an operator for accommodations. The City is not entitled to any other money detained by the OTCs.

The City has added an argument on appeal based on Civil Code section 2322.[9] Civil Code Section 2322 provides that an agent may not "[v]iolate a duty to which a

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[9] It does not appear that a cause of action based on violation of Civil Code section 2322 was set forth in the amended cross-complaint or addressed by the trial court. Nor has the City argued that it should be granted the right to amend its complaint to assert this new cause of action. However, we will consider this argument because "[w]hen a demurrer is sustained without leave to amend the [plaintiff] may advance on appeal a new

trustee is subject under Section 16002, 16004, 16005, or 16009 of the Probate Code." (Civ. Code, § 2322, subd. (c).) Probate Code section 16002 imposes a duty of loyalty, meaning that agents must exercise their authority in the interest of the principal. Under these statutes, the City argues, the OTCs had a duty to refrain from structuring transactions in order to exclude otherwise taxable rent. The City further argues that damages under Probate Code section 16002, which is incorporated into Civil Code section 2322, are based on "what would have occurred if the trustee had complied with the duty of loyalty (i.e., but for the breach of the duty of loyalty)." (*Uzyel v. Kadisha* (2010) 188 Cal.App.4th 866, 907.)

The City has failed to set forth facts alleging a violation of any duty on the part of the OTCs. The OTCs did not structure the transactions to exclude taxable rent. The uncontested evidence shows that they paid the hotels the full consideration charged by the hotel, plus TOT on that amount. No hotel has brought any cause of action suggesting that an OTC has violated any duty towards the hotel.

Nor have the OTCs violated any duty towards the City. The City argues that with respect to tax collection, the OTCs are agents of the hotels and subagents of the City. Therefore, the City argues, the OTCs have the same duties and obligations as the hotels themselves in calculating and collecting TOT. (See Civ. Code § 2351 [subagent "represents the principal in like manner with the original agent"].) Again, the City has failed to allege any violation of any duty. The OTCs have collected TOT based on the full amount of consideration charged by the hotel operators for accommodations. Nothing further is required under the City's TOT ordinance. The City's statutory causes of action fail to state claims upon which relief can be granted.

C. Money had and received/conversion

"'Conversion is the wrongful exercise of dominion over the property of another. The elements of a conversion claim are: (1) the plaintiff's ownership or right to possession of the property; (2) the defendant's conversion by a wrongful act or

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legal theory why the allegations of the petition state a cause of action. [Citation.]" (*20th Century Ins. Co. v. Quackenbush* (1998) 64 Cal.App.4th 135, 139, fn. 3.)

disposition of property rights; and (3) damages.' [Citation.]" (*Hernandez v. Lopez* (2009) 180 Cal.App.4th 932, 939-940.) In its second cause of action for conversion, the City alleged that it is the sole and rightful owner of the difference between the amounts sufficient to pay TOT on the retail price and fees as collected by the OTCs and the amount of the TOT remitted by the OTCs to the hotels based on the wholesale price. Again, this theory of common law liability is premised on the theory that the OTCs were required to collect TOT on the entire amount paid by the transient -- not the amount of consideration charged by the hotel operator for accommodations. The City has alleged no facts suggesting that it has any right to possession of any converted property that the OTCs wrongfully possess.

Similarly, in its eighth cause of action for money had and received, the City alleged that "[w]hen the OTCs collected [TOT] from transients based upon retail prices charged to transients for hotel rooms, but then remitted [TOT] based only upon wholesale prices paid to hotels, they received money from transients that was intended to benefit the City." In order to properly allege a cause of action for money had and received, the City must allege that the OTCs are indebted to the City in a certain sum for money had and received by the OTCs for the use of the City. (See *Gutierrez v. Girardi* (2011) 194 Cal.App.4th 925, 937.) The City has failed to allege any facts supporting such indebtedness on the part of the OTCs. The OTCs had no obligation to remit to the hotel or the City TOT based on the retail amount paid by the transient. They were only required to remit TOT based on the amount of consideration charged by the hotel operator. Having received this TOT, the City is not entitled to any further amount.

The City has failed to allege facts sufficient to support its causes of action based on conversion and money had and received.

D. Fraud/breach of fiduciary duty

In its sixth cause of action for breach of fiduciary duty, the City alleged that "[t]he OTCs expressly and implicitly assumed a fiduciary duty to hold all moneys collected from transients for [TOT] for the City." The City alleged no facts suggesting that the OTCs stood in a fiduciary relationship with the City. The lack of any such allegations is

fatal to the City's breach of fiduciary duty cause of action. (*Pierce v. Lyman* (1991) 1 Cal.App.4th 1093, 1101 ["In order to plead a cause of action for breach of fiduciary duty, there must be shown the existence of a fiduciary relationship, its breach, and damage proximately caused by that breach"].) Further, the City has failed to allege facts showing that the OTCs or any other entity breached any obligation to remit TOT to the City. The City admits that it has received from hotel operators all TOT on consideration charged by the hotel operator. The City is not entitled to TOT based on any other amounts collected from the transients.

Finally, the City argues that its seventh cause of action for fraudulent concealment should have survived. The City alleged that the OTCs "intentionally concealed and omitted the total amounts of money that they collected and continue to collect from transients for [TOT] purposes." The City further alleged that the OTCs "intentionally concealed and omitted" the fact that they "collected and continue to collect [TOT] based upon retail prices charged to transients, remitting [TOT] based upon wholesale prices paid to hotels, and failing to remit the difference." This cause of action fails for the same reasons explained above regarding the City's other causes of action. First, the City alleges no facts suggesting that the OTCs had an obligation to provide information to the City regarding the total amount of money they collected from transients. Second, to the extent the City alleges that it is owed any money above the TOT remitted on the wholesale price of the hotel room, that argument is legally incorrect under the plain language of the ordinance.

DISPOSITION

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

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
BOREN

_____, J.
ASHMANN-GERST

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re

TRANSIENT OCCUPANCY TAX CASES

B236166

(Los Angeles County Super. Ct. No. SC0108568; JCCP No. 4472)

APPEAL from a judgment of the Superior Court of Los Angeles County. Carolyn B. Kuhl and Elihu M. Berle, Judges. Affirmed.

Kiesel Boucher Larson, William L. Larson and Shehnaz M. Bhujwala; Baron & Budd, Laura J. Baughman and Thomas M. Sims; City of Santa Monica City Attorney's Office, Marsha Jones Moutrie, Joseph P. Lawrence, and Roger C. Rees for Plaintiff and Appellant City of Santa Monica.

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

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

Kelly Hart & Hallman, Brian S. Stanger and Chad Arnette for Defendants and Respondents Travelocity.com LP, Travelocity.com, Inc., and Site59.com LLC.

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

In June 2010, the City of Santa Monica (the city) assessed transient occupancy taxes (TOT) against respondents, who are online travel service companies (OTCs).[1] After the OTCs failed to pay the assessments, the city filed this action seeking to enforce the assessments. The city also asserted claims for conversion, violation of California Civil Code sections 2223, 2224, 2349, and 2351, imposition of constructive trust, breach of fiduciary duty, fraudulent concealment, money had and received, and unjust enrichment. The OTCs demurred to the city's amended complaint (AC), and the trial court sustained the OTCs' demurrer without leave to amend. A judgment dismissing the matter with prejudice was entered on July 26, 2011. The city appeals.

We find that the OTCs are not liable for TOT under the plain language of the city's TOT ordinance, therefore we affirm the trial court's ruling.

FACTS

The city's TOT ordinance

The city's TOT ordinance imposes "on each and every transient a tax equivalent to fourteen percent (14%) of the total amount paid for room rental by or for any such transient to any hotel." (Santa Monica Mun. Code, § 6.68.020.)[2]

"Transient" is defined as "[a]ny person who, for any period of not more than one month either at his own expense or at the expense of another, obtains lodging or the use of any lodging space in any hotel as hereinafter defined, for which lodging or use of lodging space a charge is made." (§ 6.68.010, subd. (a).)

"Hotel" is defined as "[a]ny public or private hotel, inn, hostelry, tourist home or house motel, rooming house or other lodging place within the City of Santa Monica

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1 The OTCs are the following entities: (i) Expedia entities: Expedia, Inc., Hotwire, Inc., Travelnow.com, Hotels.com, L.P., Hotels.com GP, LLC; (ii) Priceline entities: Priceline.com Inc., Travelweb LLC, Lowestfare.com LLC; (iii) Orbitz entities: Orbitz, LLC, Trip Network, Inc. (doing business as Cheaptickets.com), Internet Publishing Corp. (doing business as Lodging.com); and (iv) Travelocity entities: Travelocity.com LP, Travelocity.com, Inc. (now known as Travelocity.com LLC), Site59.com LLC.

2 All further section references are to the Santa Monica Municipal Code, unless otherwise noted.

offering lodging, wherein the owner and operator thereof, for compensation, furnishes lodging to any transient as hereinabove defined." (§ 6.68.010, subd. (c).)

"Room rental" is defined as "[t]he total charge made by any such hotel for lodging and/or lodging space furnished any such transient. If the charge made by such hotel to such transient includes any charge for services or accommodations in addition to that of lodging, and/or the use of lodging space, then such portion of the total charge as represents only room and/or lodging space rental shall be distinctly set out and billed to such transient by such hotel as a separate item." (§ 6.68.010, subd. (d).)

OTCs

OTCs are online travel service companies that publish comparative information about airlines, hotels and rental car companies on their websites, and allow customers to book reservations with such travel providers. OTCs do not possess or operate any airlines, hotels or rental car companies. Instead, as explained in the AC:

> "The OTCs maintain their own businesses; they are paid according to the results they produce and consistent with their contracts with the hotels. On behalf of various City hotels, the OTCs sell nightly lodging licenses provided by the hotels. The OTCs are paid percentage commissions from the total amount [transients] pay to purchase these lodging licenses. The OTCs' contracts with the hotels dictate the nature, amount and timing of the OTCs' compensation."

Further, the OTCs are not product resellers; the OTCs never obtain or purchase the right to occupy a hotel room for resale to transients. In sum, according to the AC, the OTCs "are one of many types of travel intermediaries that provide indirect electronic distribution of hotel lodging licenses."

The OTCs use three primary business models: the agency model, the modified merchant model, and the preferred merchant model.

Under the agency model, the OTCs are paid a commission the same way that travel agents historically have been paid. The OTC makes a room reservation for a customer. The customer pays the hotel directly both for the price of the hotel room and

the TOT based on the total charge for the room rental. The OTCs' commission is taken out of the total charge for the room rental.

Under the modified merchant model, OTCs are authorized by hotels to act as merchants of record for room rentals. The OTCs collect all sums from the transients, then forward all such sums to the hotels. The hotels then pay the OTCs commissions based on the total charge for the room rental. The OTCs' commission is part of the total charge for the room rental.

The OTCs' preferred merchant model is similar to the modified merchant model in that the OTCs are authorized by the hotels to rent rooms to transients and act as merchants of record for these transactions. The OTCs collect all sums from transients, but then retain their sales commission plus an amount equal to TOT on their sales commission before forwarding to the hotel the remaining amounts. It is the preferred merchant model that is at issue in the city's AC. The city alleged that:

> "After the sale of a lodging license to a transient under the OTCs' preferred merchant model, an OTC collects all funds from the transient and extracts its sales commission before passing the remaining money to the hotel. In addition to collecting and retaining its sales commission, the OTC collects and retains TOT on the value of this sales commission. The hotel only receives TOT for remittance to the City based upon a portion of rather than the total charge for lodging. The city is underpaid TOT because the OTCs keep TOT on the value of their services. This is the source of the principal damages in this action."

PROCEDURAL HISTORY

The TOT assessments and the complaint

Pursuant to the city's TOT ordinance, the city assessed the OTCs for back TOT and penalties for the period January 1, 2000 to June 1, 2010. After the OTCs failed to pay the assessments, the city brought an action against the OTCs to enforce them. The operative complaint was the AC, filed on September 16, 2010. The AC alleged causes of action for: (1) violation of the City of Santa Monica Municipal Code; (2) money had and received; (3) conversion; (4) declaratory relief; (5) violations of Civil Code section 2223; (6) violations of Civil Code section 2224; (7) imposition of constructive trust; (8)

declaratory relief regarding application of the step transaction doctrine; (9) agent liability under Civil Code sections 2343 and 2344; and (10) subagent liability under Civil Code sections 2349 and 2351.

The city's action was coordinated with similar actions brought by the cities of Anaheim, San Diego, and other municipalities.

The OTCs' demurrer

On October 8, 2010, the OTCs filed a joint demurrer, arguing that each of the city's causes of action failed as a matter of law. On March 16, 2011, after briefing and argument, the trial court issued its opinion and order on the joint demurrer.

The trial court noted that all of the city's causes of action "are premised on Santa Monica's interpretation of its transient occupancy tax as requiring payment of tax on the full amount an OTC charges a customer for a hotel room, even though the hotel that furnishes the room to the occupant does not receive the full amount of the payment made by the customer to the OTC."

The trial court then undertook an "exercise in statutory construction," beginning with the language imposing the tax. The court noted that the provision determines the amount of tax based on the room rental paid "to any hotel . . . ." (§ 6.68.020.) The court explained "[w]hether a transient pays a hotel directly, or a transient pays an intermediary which in turn pays room rental 'for' the transient, the tax is imposed on the 'total amount paid for room rental . . . to any hotel.'"

The trial court further considered the definition of the term "room rental," noting that the term was defined as the total amount charged "by any such hotel" for lodging furnished to the transient. The court concluded that the phrase "total charge made by [a] hotel" found in section 6.68.010, subdivision (d) must be construed to mean the charge that the hotel determines must be paid to the hotel. Thus, "the statute does not concern itself with whether the hotel exercises control over the price charged by reseller or intermediary; the tax is imposed on the amount received by the hotel."

The trial court also analyzed whether its construction of the ordinance was consistent with the apparent purpose of the ordinance. The court concluded that it was, stating:

> "The overall purpose of the transient occupancy tax is to raise revenue for the City of Santa Monica from a particular type of commercial activity taking place in Santa Monica. The tax is imposed only on a hotel or other lodging place physically located 'within the city of Santa Monica . . . .' (*Id.* section 6.68.010(c) (definition of 'hotel').) The tax 'is levied for revenue [purposes] and is necessary for the usual financial operation of the City of Santa Monica.' (*Id.* section 6.68.020.) In order to enforce the ordinance, it is the 'duty of the Director of Finance-City Controller to ascertain the name of every person operating a hotel in the City of Santa Monica' that is liable for the tax but fails to collect or pay the tax. (*Id.* section 6.68.120.)"

The trial court concluded that the tax is based "on the revenue of the commercial business that provides the local amenity."

The trial court rejected the city's argument that the step transaction doctrine should be applied to conclude that transients should be taxed on the total amount paid out by the transient. The court reasoned, "[t]he problem with this argument is that the language of the Santa Monica ordinance does not support an intention to impose tax on all amounts paid by the transient." Rather, it imposes a tax based on the amounts paid "to [a] hotel."

The trial court concluded that "the City has no right to collect transient occupancy taxes from the OTCs based on the factual allegations of the [AC]." The city did not contend that there were other facts that could be alleged. Therefore the demurrer was sustained in its entirety without leave to amend.

A final judgment of dismissal was filed on July 26, 2011. On September 20, 2011, the city filed its notice of appeal.

DISCUSSION

I. Standard of review

"On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, the standard of review is well settled. The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. [Citations.] The court does not, however, assume the truth of contentions, deductions or conclusions of law. [Citation.] The judgment must be affirmed 'if any one of the several grounds of demurrer is well taken. [Citations.]' [Citation.] However, it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. [Citation.] And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment. [Citation.]" (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966-967.) The legal sufficiency of the complaint is reviewed de novo. (*Montclair Parkowners Assn. v. City of Montclair* (1999) 76 Cal.App.4th 784, 790.)

II. Rules governing statutory construction

The survival of the city's claims against the OTCs turns on the interpretation of the TOT ordinance. Thus, our main task will be to interpret the ordinance.

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

In determining the intent of the enacting body, we first examine the words of the statute itself. (*California Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 698 (*California Teachers*).) If the language of the statute is clear and unambiguous, there is no need for statutory construction. (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.) However, "the 'plain meaning' rule does not prohibit a court from determining whether the literal meaning of a statute comports with its purpose . . . ." (*Ibid.*) "If . . . the terms of a statute provide no definitive answer, then courts may resort

to extrinsic sources, including the ostensible objects to be achieved and the legislative history. [Citation.]" (*People v. Coronado* (1995) 12 Cal.4th 145, 151.) Every statute should be construed "'with reference to the whole system of law of which it is a part so that all may be harmonized and have effect.' [Citation.]" (*Select Base, supra*, 51 Cal.2d at p. 645.) "'We must select the construction that comports most closely with the apparent intent of the [drafters], with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences.' [Citation.]" (*Coronado, supra*, at p. 151.) The purpose of the statute "will not be sacrificed to a literal construction" of any part of the statute. (*Select Base*, at p. 645.)

In interpreting tax statutes, we must find an express intent to impose a tax. The Supreme Court has declared:

> "In every case involving 'the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government, and in favor of the citizen.' [Citations.]"

(*Pioneer Express Co. v. Riley* (1930) 208 Cal. 677, 687.)

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

III. The city's TOT ordinance

Our first task is to examine the words of the ordinance. (*California Teachers, supra*, 28 Cal.3d at p. 698.) The ordinance, which was enacted in 1963, provides:

> "On and after the effective date of this ordinance, there is hereby imposed and levied upon each and every transient a tax equivalent to fourteen percent (14%) of the total amount paid for room rental by or for any such transient to any hotel; which said tax shall be collected from such transient at the time and in the manner hereinafter provided. Said tax is levied for revenue purposes and is necessary for the usual financial operation of the City of Santa Monica." (§ 6.68.020.)

As set forth below, we find that the words of the statute are clear and unambiguous, and do not reveal an intent to tax commissions deducted by the OTCs.

A. The tax imposed by the statute does not include the OTCs' commissions as part of the tax base

The tax imposed by the city on the transient is expressly limited to "the total amount paid for room rental by or for any such transient to any hotel." (§ 6.68.020.) In ascertaining the meaning of this phrase, we look to the plain meaning of the words and their definitions.

First, the tax is only imposed on the amount paid by a transient "for room rental." "Room rental" is defined as "[t]he total charge made by [a] . . . hotel for lodging and/or lodging space furnished any such transient." (§ 6.68.010, subd. (d).) This language expressly limits the taxable amount to the charge made *by the hotel.* A "hotel" is defined as "[a]ny public or private hotel, inn, hostelry, tourist home or house motel, rooming house or other lodging place within the City of Santa Monica offering lodging, wherein the owner and operator thereof, for compensation, furnishes lodging to any transient as hereinabove defined." (§ 6.68.010, subd. (c).) As the city concedes, the OTCs do not own or operate any hotels within the city, nor do they furnish lodging to any transient. Thus, the OTCs' commissions are not included in the taxable amount under the plain language of the statute.

Further, the tax is limited to amounts paid for room rental by the transient "to any hotel." Thus, the taxable amount is limited to that money which is paid to a "lodging place within the City of Santa Monica." (§ 6.68.010, subd. (c).) Reading section 6.68.010, subdivision (d) together with section 6.68.010, subdivision (c), the taxable base is defined as both an amount charged *by* a hotel (§ 6.68.010, subd. (d)), and an amount paid *to* a hotel (§ 6.68.020). This clear language limits the taxable amount to the amount that the hotel itself charges and receives.

This interpretation makes sense and conforms with the purpose of the ordinance. The apparent purpose of the ordinance is "for revenue purposes" for the "financial operation of the City of Santa Monica." (§ 6.68.020.) The tax is limited to the amount

that a transient pays to a hotel located "within the City of Santa Monica." (§ 6.68.010, subd. (c).) The tax specifically targets commercial activity within the City of Santa Monica, for the purposes of raising revenue for the city. There is no stated or implied intention to tax amounts paid to intermediaries or travel agents.

The city claims that this interpretation ignores the ordinance's express statement of intent. The city focuses on the statute's intent to "impose[]" and "lev[y] on each and every transient a tax . . . ." (§ 6.68.020.) The city argues that these words show that the tax applies to the transient's purchase, and should therefore be interpreted to apply to the entire purchase amount paid at the time that the room is rented. In addition, the city points to the first sentence of section 6.68.040, captioned "Collection." The sentence reads, in pertinent part: "[E]very person receiving any payment for room rental with respect to which a tax is levied under this ordinance shall collect the amount of tax hereby imposed from the transient on whom the same is levied or from the person paying for such room rental, at the time payment for such room rental be made." The city suggests that this sentence provides that the TOT shall be collected from the transient at the same time that the transient pays the "room rental." In sum, the city's position is that the drafters of the ordinance intended to impose the TOT on the total amount paid by transients for lodging licenses.

The city's proposed interpretation ignores the plain language of the ordinance. As set forth above, the ordinance does impose tax on a transient, but that tax is specifically limited to amounts paid by the transient *to the hotel for room rental.* The definition of "hotel" is clear: it is a "lodging place within the City of Santa Monica." (§ 6.68.010, subd. (c).) Contrary to the city's argument, the ordinance does not show intent to impose TOT on all amounts paid by the transient. We find that the ordinance does not suggest an intention to apply TOT to amounts paid to, or charged by, an OTC or any entity other than a hotel located within the boundaries of the city.

B. The statute provides for the possibility of intermediary transactions

The city argues that the ordinance does not incorporate or accommodate intermediary transactions such as those carried out by the OTCs. The focus of this

argument is the language in the statute imposing the tax on "the total amount paid for room rental *by or for* any such transient to any hotel." (§ 6.68.020, italics added.) The trial court concluded that, through this language, "the ordinance contemplates that there may be an intermediary in the transaction between the transient and the hotel." Thus, whether the transient pays a hotel directly, or whether a transient pays an intermediary which in turn pays the hotel, the tax is limited to "the total amount paid for room rental . . . to any hotel." (§ 6.68.020.)

The city takes issue with this conclusion. First, the city argues, it suggests that the intermediary will engage in a wholly separate transaction with the hotel, thus taking the focus off the amount paid by the transient. If such a second transaction takes place, the city argues, the intermediary must actually purchase the room license. However, the city points out, the OTCs do not purchase licenses and resell them. The city argues that the trial court was thus improperly branding the OTCs to be resellers.

We disagree with this logic. The ordinance contemplates that the room rental, paid to the hotel, may be paid by the transient or by a person or entity paying on behalf of the transient. That intermediary need not ever own the right to occupy the hotel room. Nor is there any suggestion that room rentals must be limited to a single transaction between the transient and the hotel. The tax is imposed on the amount "paid for room rental by or for any . . . transient." (§ 6.68.020.) This language allows for the use of the preferred merchant model. The transient pays a sum to the OTC, which takes its commission off the top then pays to the hotel the amount of "room rental" for the transient. It is the room rental, paid to the hotel, for the transient, that is taxable.[3]

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[3] The city expresses much concern throughout its briefs that the separate compensation paid to the OTCs is never fully set forth to the transient. Thus, the city complains, the OTCs and the hotels are hiding the tax base, which is unknown to the transient. However, as the city points out, the transient is made aware at the time of purchase that an amount for "taxes and fees" is being charged. As the city admits, this separately charged item conveys to the transient that taxes will be taken care of. The transient may have an incomplete understanding of the tax base, but the city has not been injured by any such obfuscation. The city has received TOT based upon the total amount

The city argues that the OTCs admit that their commission is taxable when the agency model and the modified merchant model transactions are used. Thus, the city argues, the OTCs "constructively admit" that the timing of the payment of their sales commissions should not affect the tax base. The city contends that the nature of a sales commission is not altered by the timing or method of its payment. Because the commission is taxed under the agency model and the modified merchant model, it should be taxable under the preferred merchant model.

Again, we disagree. In this case, the tax is levied on amounts paid by or for a transient to a hotel. If the OTCs' commission is taken before the room rental is paid to the hotel, it is not part of the taxable base. The city does not suggest that the preferred merchant model is illegal or that the hotels, which presumably agree to the structure of the transactions, are deliberately assisting the OTCs to avoid paying taxes. There is no suggestion that the amount the hotel receives is anything less than what it agreed to charge for the room rental. Because the TOT is based on the "total amount paid for room rental by . . . any . . . transient to any hotel," it does not include a commission that is extracted from the transient's payment before the room rental is paid to the hotel.

The city insists that "[a]ny side deal between the hotel and a transactional facilitator (e.g., an OTC) regarding payment of a sales commission is beside the point and does not alter the tax base." In support of this argument, the city cites *Groves v. City of Los Angeles* (1953) 40 Cal.2d 751 (*Groves*). In *Groves*, the Supreme Court discussed a tax on the gross receipts of every person in the business of furnishing bail bonds. The language of the statute mandated that every person in the business of """". . . soliciting, negotiating, effecting, issuing, delivering, or furnishing bail bonds . . . shall pay for each calendar year . . . a license tax . . ."""" based on that person's gross receipts. (*Id.* at p. 753.) The question arose as to whether the gross amount received by an agent, who passed a portion back to the insurance company, was taxable. The court concluded that "the full sum received by [the agent] from the one desiring the bail bond is the gross

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paid for room rental on behalf of the transient to the hotel. The city's complaints on behalf of the transient do not affect our analysis of the plain language of the ordinance.

premium for the bond." (*Id.* at p. 760.) However, *Groves* is distinguishable because the statute at issue did not expressly limit the tax to the amount paid to the insurance company. The express limiting language in the city's TOT ordinance leads to a different result here.

The city next points to the language in the second sentence of section 6.68.010, subdivision (d), which defines "room rental." The sentence reads:

> "If the charge made by such hotel to such transient includes any charge for services or accommodations in addition to that of lodging, and/or the use of lodging space, then such portion of the total charge as represents only room and/or lodging space rental shall be distinctly set out and billed to such transient by such hotel as a separate item."

The city argues that under this language, the OTCs' sales commission would need to be separately stated if it is to be removed from the "total charge" and thus carved out of the tax base. This argument fails because, under the preferred merchant model, the OTCs' commission is not a charge "made by [a] hotel." It is a charge made by a third party intermediary that is not subject to the tax.

Finally, the city argues that the hotels benefit from the value of the OTCs' sales and marketing on their behalf. Citing *Interinsurance Exchange v. State Bd. of Equalization* (1984) 156 Cal.App.3d 606, 614 (*Interinsurance*), the city argues that such service fees should be taxable even though the hotel does not receive them. In *Interinsurance*, the Court of Appeal considered whether a $1 service fee charged for an installment plan of insurance, which was collected and retained by the Automobile Club of Southern California as agent for the Interinsurance Exchange, was taxable as part of the Interinsurance Exchange's "gross premiums." (*Id.* at p. 609.) In doing so, the court analyzed Insurance Code section 1530, which "defines the term 'gross premium' as including 'all sums paid by subscribers in this state by reason of the insurance exchange, whether termed premium deposit, membership fee, or otherwise . . . .'" (*Interinsurance*, at p. 610.) The court concluded that the $1 service fees were "unequivocally part and parcel to 'all sums paid . . . by reason of the insurance exchange.' (Ins. Code, 1530.)"

(*Interinsurance*, at p. 611.) Thus, *Interinsurance* demonstrates that it is the language of the statute that controls. The city's TOT does not purport to tax all sums paid by transients, regardless of how such sums are characterized. Instead, the tax is expressly limited to "the total amount paid for room rental by or for any . . . transient to any hotel." (§ 6.68.020.)

C. The city's agency arguments fail

The city next argues that even if the tax base is measured by the amount received by the hotel, the OTCs' commissions are included in that amount. The city argues that the OTCs function as the hotels' agents. Citing *Metropolitan Life Ins. Co v. State Bd. of Equalization* (1982) 32 Cal.3d 649, 660 (*Metropolitan*), the city concludes that "[w]hat the agent receives, in legal effect the [principal] receives."

The city cites Civil Code section 2295, which defines an agent as "one who represents another, called the principal, in dealings with third persons." The city argues that in preferred merchant model transactions, the OTCs' activities on behalf of the hotels -- promotion and sales of hotels' products -- fit precisely within Civil Code section 2295. The city argues that the OTCs are acting in a representative capacity and not on their own account. The city cites three cases in support of its argument that the OTCs are agents for the hotels.

First, the city cites *Scholastic Book Clubs, Inc. v. State Bd. of Equalization* (1989) 207 Cal.App.3d 734 (*Scholastic*). In *Scholastic*, the plaintiff was engaged in the interstate business of mail order book sales. It had no physical facility, bank account, or regular employees in California. It mailed catalogues to teachers and librarians, who passed on the catalogues to their students. The teachers then collected the orders and returned them to the company. Orders were filled and shipped from a Missouri warehouse. The plaintiff was assessed a use tax deficiency based on its California sales, paid under protest, then brought an action for a refund. (*Id.* at pp. 736-737.) To determine whether the tax was applicable, the *Scholastic* court analyzed the language of the relevant tax code, which taxed any "'retailer engaged in business in this state,'" defined as "'Any retailer having any representative, agent, salesman, canvasser, or

solicitor operating in this state under the authority of the retailer or its subsidiary for the purpose of selling, delivering, or the taking of orders for any tangible personal property.' [Citation.]" (*Id.* at p. 737.) The court concluded that the teachers were acting under Scholastic's authority, "certainly as appellant's agents or representatives." (*Ibid.*)

Bank of America Nat'l Trust & Sav. Assoc. v. State Board of Equalization (1962) 209 Cal.App.2d 780 (*Bank of America*), and *Borders Online v. State Bd. of Equalization* (2005) 129 Cal.App.4th 1179 (*Borders*), set forth similar scenarios. In *Bank of America*, Bank of America allowed its customers to purchase checks manufactured by a non-California company called DeLuxe. Customers were able to order the checks through the bank, and the bank charged its customers for the cost of the checks plus an additional fee. (*Bank of America, supra*, at pp. 786-787.) Under this arrangement, the court held that Bank of America was "an agent for DeLuxe, an undisclosed principal." (*Id.* at p. 796.) Likewise, in *Borders*, an online bookseller utilized bookstores located in California to handle its product returns. (*Borders, supra*, at pp. 1184-1186.) The court concluded that the company that owned the California bookstores was an agent for the online retailer. (*Id.* at pp. 1189-1190.)

The OTCs argue that they do not act as agents for hotels. Unlike the entities found to be agents in the cases described above, the OTCs argue that they act in their own interest, rather than on the hotels' behalf.

We find that we need not determine whether or not the OTCs act as agents for the hotels. Even if the OTCs are agents, the city has not convinced us that the OTCs' commissions must be considered to be money "paid for room rental . . . to any hotel." (§ 6.68.020.)

In support of its argument that money received by an agent must be considered money received by the principal, the city relies mainly on one case, *Metropolitan, supra*, 32 Cal.3d 649. *Metropolitan* concerned employee group medical benefit plans provided by Metropolitan Life known as "Mini-Met" plans. (*Id.* at p. 652.) The Mini-Met plans were an alteration of Metropolitan Life's normal plans in that employers agreed to cover all employee covered medical claims up to a "trigger-point" amount. This arrangement

reduced premiums. (*Id.* at p. 653.) The Insurance Commissioner levied upon Metropolitan Life for unpaid taxes "based upon the sum of the amounts employers paid to Metropolitan as premiums plus the aggregate yearly claims paid to employees from employers' funds." (*Ibid.*) The issue was whether the "pretrigger-point claims payments, although financed by the employers, should be included within the total amount on which Metropolitan must pay a gross-premiums tax." (*Id.* at 659.)

The court began by noting that "[t]he California Constitution imposes a franchise tax 'on each insurer doing business in this state,' measured by the amount of 'gross premiums' which the insurer receives in a particular year. [Citations.]" (*Metropolitan, supra*, 32.Cal.3d at p. 652.) The question was whether the amounts that were never formally paid to Metropolitan should nevertheless be "included within the gross premiums measure of the tax imposed on its business done in California." (*Ibid.*) The court understood the appropriate inquiry to be "whether the purpose of the taxing provisions can best be fulfilled by including amounts paid on pretrigger-point claims within the gross premiums measure of Metropolitan's tax." (*Id.* at p. 656.) In determining the answer to this inquiry, the court analyzed the insurance arrangement. The court reasoned:

> "Metropolitan actually paid claims from the special accounts of the employers pursuant to authorization by the employers. Rather than paying the cost of group insurance directly to Metropolitan, these employers deposited the money into accounts under Metropolitan's control. The payments to employees from such accounts constituted an element of overall cost of the insurance package in the same manner as if those amounts had been paid to Metropolitan as 'premiums' then forwarded to the employees by Metropolitan in satisfaction of the employee claims. For the purpose of calculating the gross premiums tax, we can discover no reasoned basis for distinguishing between the situation here presented and the former arrangement between Metropolitan and the employers. Metropolitan continued to derive substantially the same benefit of doing business in California and should logically have continued to incur the same tax liability." (*Id.* at p. 657.)

The court concluded that the employers were working as agents of Metropolitan, and that Metropolitan was required to pay a gross-premiums tax on the pre-trigger point claims payments. The court discussed *Groves, supra*, 40 Cal.2d 751, and *Allstate Ins. Co. v. State Board of Equal.* (1959) 169 Cal.App.2d 165, to address "the more general question of what amounts are included within the meaning of the term 'gross premiums.'" (*Metropolitan, supra*, 32 Cal.3d at pp. 659-660.) Citing *Groves*, the court set forth the "'basic theory . . . that the amount paid by the insured for the insurance is the premium. . . . What the agent receives, in legal effect the insurer receives.'" (*Metropolitan, supra*, at p. 660.) From *Groves* and the other insurance cases, the court derived a "general rule that the insurer is to be assessed a tax based on the total cost of the insurance coverage provided to the insured." (*Metropolitan*, at p. 660.)

As with the other insurance cases cited by the city, we find that the holding of *Metropolitan* is limited to the insurance context and the specific laws associated with taxes on insurance premiums. The matter before us does not involve an insurance premium, and the language of the tax ordinance in question is expressly limited.

While it is true that in *Metropolitan* the employers were considered to be agents of the insurer, that was not the primary rationale for the court's finding that the pretrigger point claims payments should be included within the gross premium which the insurer received. The rationale was based on a close look at the arrangement, under which the employer and the insurer both had access to the funds, and the traditional view of the meaning of the term "gross receipts" in the insurance context. The city has provided no authority suggesting that this rationale has ever been applied outside of the insurance context. Nor does the city provide any authority for a broad conclusion that every penny an agent receives must legally be considered to have been received by the agent's principal.

We are presented with an ordinance that specifically limits the tax to "fourteen percent (14%) of the total amount paid for room rental by or for any . . . transient to any hotel." (§ 6.68.020.) A "hotel" is specifically defined as a "lodging place within the City of Santa Monica." (§ 6.68.010, subd. (c).) The taxable amount is the amount of money

paid to the hotel. While the cases cited by the city illustrate that in the insurance context, "the amount paid by the insured for the insurance is the premium" (*Metropolitan, supra*, 32 Cal.3d at p. 660), there is simply no room to interpret this TOT ordinance as reaching any amount other than that which is paid directly to the hotel.

Even if the OTCs are agents for the hotels, claims against an agent are limited to what the claimant is entitled to demand from the principal. "[A] claim under [Civil Code] section 2344 against the agent is limited to what the claimant is entitled to demand from the principal." (*Garrison v. Edward Brown & Sons* (1944) 25 Cal.2d 473, 482.)[4] The OTCs charge and retain their commissions for their own benefit, not for the benefit of the hotels. The hotels have no claim to the commissions. The city has not alleged that any hotel within the city is liable for the TOT assessed against the OTCs, or for any portion thereof. Because the city has no claim against the hotels -- the alleged principals -- the city has no claim against the OTCs. Under the circumstances, the city's agency arguments fail.

D. The step transaction doctrine is not relevant and does not change the result

The city urges this court to apply an analytical tool known as the "step transaction doctrine." (*Shuwa Investment Corp. v. County of Los Angeles* (1991) 1 Cal.App.4th 1635, 1647-1648 (*Shuwa*).) For the purposes of this argument, the city breaks down the preferred merchant model into four phases: (i) the transient pays all amounts ("room rate" plus "taxes and fees") to the OTC; (ii) the OTC then removes and retains the two components of its sales commission -- the contractually dictated portion of the "room rate" and the "fees" portion of "taxes and fees" -- and sua sponte an amount equivalent to TOT on its sales commission; (iii) the OTC then forwards the net-of-commission amount for the room license and TOT based on that net-of-commission amount, to the hotel; (iv)

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[4] Civil Code section 2344 provides: "If an agent receives anything for the benefit of his principal, to the possession of which another person is entitled, he must, on demand, surrender it to such person, or so much of it as he has under his control at the time of demand, on being indemnified for any advance which he has made to his principal, in good faith, on account of the same; and is responsible therefor, if, after notice from the owner, he delivers it to his principal."

the hotel then remits the quantum of TOT received from the OTC to the city. Each phase is dependent upon the others in sequence; they are mutually dependent and inherently intertwined steps in achieving the sale.

The city argues that, because the OTCs' commissions are part of the tax base in both the agency and modified merchant model transactions, they must also be part of the tax base under the preferred merchant model transactions. The city argues that the step transaction doctrine prevents transactional ordering to alter the amount of the tax base.

The step transaction doctrine was explained by the *Shuwa* court as follows:

> "In a case such as this, where the propriety and necessity for multiphase transactions is challenged, the 'step transaction doctrine' has been applied to determine whether the transaction should be treated as a whole or whether each step of the transaction may stand alone. The 'step transaction doctrine' is a corollary of the general tax principle the incidence of taxation depends upon the substance of a transaction rather than its form. [Citation.]"

(*Shuwa, supra*, 1 Cal.App.4th at p. 1648.)

In *Shuwa*, the court addressed a transfer of ownership of the ARCO Plaza in Los Angeles. Shuwa sought to acquire 100 percent ownership of the building, while limiting the legal "change in ownership" for property tax purposes to 50 percent. (*Shuwa, supra*, 1 Cal.App.4th at pp. 1640-1641.) The parties structured a three-step transaction to accomplish this goal. (*Id.* at pp. 1639-1643.) Applying the step transaction doctrine, the court found that "it appears the three steps were really component parts of a single transaction. The ultimate result intended from the outset was for Shuwa to acquire *all* of the ARCO Plaza from the present owner, a partnership." (*Id.* at p. 1651.) The court concluded that "the transactions in the case at bar should be stepped together to reveal what actually occurred -- the acquisition by Shuwa of 100 percent of the ARCO Plaza." (*Id.* at p. 1650.)

The *Shuwa* court explained that three independent tests govern application of the step transaction doctrine: end result; interdependence; and binding commitment. (*Shuwa, supra*, 1 Cal.App.4th at pp. 1650-1653.) The city argues that the OTCs'

preferred merchant model structure readily satisfies each of the three tests. Further, the city argues, independent business considerations do not justify the preferred merchant model structure. Because an alternative transactional structure exists -- the modified merchant model -- under which the integrity of the tax is preserved, the chosen multi-phase transactional structure must be viewed as a transactional manipulation to avoid tax liability.

We find that the step transaction doctrine is inapplicable. The *Shuwa* court quoted a leading United States Supreme Court case discussing this doctrine, *Gregory v. Helvering* (1935) 293 U.S. 465 (*Gregory*), which explained that the step transaction doctrine should be applied where "the transaction upon its face lies outside the plain intent of the statute." (*Id.* at p. 470.) Unlike the parties in *Shuwa*, the hotels and OTCs have not structured the preferred merchant model transactions for the purpose of avoiding tax liability. Nor do preferred merchant model transactions lie "'outside the plain intent of the statute.'" (*Shuwa, supra*, 1 Cal.App.4th at p. 1650.) The ordinance reveals an intent to tax the "amount paid for room rental by or for any . . . transient to any hotel." (§ 6.68.020.) The preferred merchant model is not structured to avoid paying such TOT.

The city argues that the step transaction doctrine is not focused on a series of sham transactions but on multi-phase transactions that should be considered as a whole in analyzing their overall tax effects. We disagree with this interpretation of the relevant case law. The transaction in *Gregory* was described as "an elaborate and devious form of conveyance masquerading as a corporate reorganization, and nothing else." (*Gregory, supra*, 293 U.S. at p. 470.) The language used by the court shows a focus on the fraudulent nature of the transaction, which "upon its face [lay] outside the plain intent of the statute." (*Ibid.*) The *Shuwa* court quoted *Kuper v. Commissioner* (5th Cir. 1976) 533 F.2d 152, 158-159 (*Kuper*), which stated "for this Court to permit taxpayers randomly to piece together the various provisions of the Code unhampered by any limits on the artificiality of their constructions would leave the Congressional[ly enacted] taxing scheme in shambles." The *Shuwa* court indicated that the series of transactions at issue in that case was similarly designed to improperly and artificially avoid tax. Thus, in order

for the step transaction doctrine to apply, it is necessary that the transactions at issue be designed as "'unacceptable artifice'" rather than "'valid tax planning.'" (*Shuwa, supra*, 1 Cal.App.4th at p. 1655, quoting *Kuper, supra*, at pp. 158-159.) No such devious intent is apparent in the structure of the preferred merchant model -- nor does it in fact avoid the payment of TOT.

In sum, the preferred merchant model does not consist of a series of sham transactions designed to avoid tax liability. There is no suggestion that any hotel or OTC participates in the merchant model transactions as a means to avoid paying TOT to the city. Nor has the city been harmed by any underpayments. Therefore, the step transaction doctrine is inapplicable.

IV. Because the TOT ordinance does not impose tax on the OTCs' commissions, the city's causes of action fail as a matter of law

We have determined that the city's TOT ordinance does not impose tax on the commissions that an OTC collects and retains prior to forwarding the amount of room rental to a hotel. As set forth below, the city's remaining claims against the OTCs fail under this interpretation of the ordinance.

In addition to its claim for violation of the ordinance, the city brought claims against the OTCs for money had and received; conversion; violations of Civil Code sections 2223 and 2224; imposition of constructive trust; declaratory relief; agents' liability under Civil Code sections 2343 and 2344; and breach of fiduciary duties. For the reasons set forth below, each claim must fail as a matter of law.

A. Money had and received/conversion

In its second cause of action for money had and received, the city alleged that the OTCs "have become indebted to the plaintiff City of Santa Monica for the assessed amounts plus interest and penalties since the dates of the assessments." The city has failed to allege any facts supporting such indebtedness on the part of the OTCs. As explained above, the OTCs had no obligation to remit to the hotel or the city TOT based on their commissions under the preferred merchant model. They were only required to

remit TOT based on the amount paid for room rental on behalf of the transient to the hotel. Having received this TOT, the city is not entitled to any further amount.

"'Conversion is the wrongful exercise of dominion over the property of another. The elements of a conversion claim are: (1) the plaintiff's ownership or right to possession of the property; (2) the defendant's conversion by a wrongful act or disposition of property rights; and (3) damages.' [Citation.]" (*Hernandez v. Lopez* (2009) 180 Cal.App.4th 932, 939-940.) In its third cause of action for conversion, the city alleged that it is the sole and rightful owner of the difference between the TOT due on the total charge for lodging and the TOT remitted by the OTCs to the hotels. Again, this theory of common law liability is premised on the theory that the OTCs were required to remit TOT on their commissions under the preferred merchant model. This premise is incorrect, and the city has alleged no facts suggesting that it has any right to possession of any converted property that the OTCs wrongfully possess.

The city has failed to allege facts sufficient to support its causes of action based on conversion and money had and received.

B. Violations of Civil Code sections 2223 and 2224

Civil Code section 2223 provides that "[o]ne who wrongfully detains a thing is an involuntary trustee thereof, for the benefit of the owner." Civil Code section 2224 provides that "[o]ne who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he or she has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it."

In its fifth cause of action for violation of Civil Code section 2223, the city alleged that the OTCs wrongfully detained funds due and owing to the city. The city further argued that "the OTCs collected from transients TOT on the total charge for lodging but retained a portion of such collections." The city made similar arguments in its sixth cause of action for violation of Civil Code section 2224. Under both causes of action, the city sought "appropriate legal or equitable remedies to prevent the unjust enrichment of the OTCs by causing payment to the City of all amounts wrongfully maintained in the

possession of the OTCs with appropriate interest, penalties, costs and fees, as allowed by law."

The city's argument is premised on its theory that TOT is owed to the city on the commissions retained by the OTCs prior to forwarding the room rental and TOT to the hotel. As we have discussed, this theory is not supported by the plain language of the ordinance. Under the ordinance, the city is only entitled to TOT on the total amount paid for room rental by or for a transient to a hotel. The city is not entitled to any money retained by the OTCs.

C. Imposition of constructive trust

In its seventh cause of action for imposition of constructive trust, the city alleged that "the TOT collected but not remitted by the OTCs belonged to the City and was in the possession and under the control of the OTCs. The OTCs have taken this property for their own use and benefit, thereby depriving the City of the use and benefit thereof." Again, this cause of action is based on the erroneous premise that the OTCs must pay TOT on their commissions under the preferred merchant model. The plain language of the statute undermines this position, and the cause of action must fail.

D. Liability as agents under Civil Code sections 2343 and 2344; liability as subagents under Civil Code sections 2349 and 2351

In its ninth cause of action, the city alleged that the OTCs acted as agents of the hotels. Therefore, the city alleged, "the OTCs' charge of the room rate to the transient is made on behalf of and is in fact the total charge made by the hotel for its room license." By virtue of their status as agents for the hotels, the city alleged, the OTCs have received money from transients for the benefit of the hotels, and the OTCs continue to improperly control money to which the city is entitled.

As set forth above, even if they are considered to be agents of the hotels, the OTCs have not acted improperly. The amount of TOT is calculated based on the amount paid for room rental on behalf of the transient to the hotel. Under the facts alleged, the OTCs have transmitted the room rental, plus the proper TOT on that amount, to the hotels. The

OTCs' commissions are not taxable, therefore the OTCs have not improperly retained any money belonging to the hotel or to the city.

The same analysis applies to the city's claims under its tenth cause of action for liability as subagents. The OTCs' commissions are not part of the taxable base amount. The OTCs have not wrongfully retained any money from either the hotels or the city. The causes of action based on agent and subagent liability thus fail as a matter of law.

DISPOSITION

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

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
BOREN

_____, J.
ASHMANN-GERST

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES, CENTRAL DISTRICT

Coordination Proceeding Special Title (Rule 1550(b))

TRANSIENT OCCUPANCY TAX CASES.

Included actions:

CITY OF LOS ANGELES, CALIFORNIA v. HOTELS.COM, L.P., et al.
Los Angeles Superior Court Case No.: BC326693

CITY OF SAN DIEGO, CALIFORNIA v. HOTELS.COM, L.P.
San Diego Superior Court Case No. GIC861117

PRICELINE.COM INCORPORATED and TRAVELWEB LLC v. CITY OF ANAHEIM, et al.
Orange County Superior Court Case No. 30-2009-00244120

EXPEDIA, INC. v. CITY OF ANAHEIM, et al.
Orange County Superior Court Case No. 30-2009-00244175

TRIP NETWORK, INC., et al. v. CITY OF ANAHEIM, et al.
Orange County Superior Court Case No. 30-2009-00244232

CASE NO. JCCP 4472

Assigned for all purposes to
Hon. Elihu M. Berle

NOTICE OF CALIFORNIA SUPREME COURT'S DENIAL OF REVIEW IN ANAHEIM AND SANTA MONICA ACTIONS

ORBITZ, LLC v. CITY OF ANAHEIM, et al.
Orange County Superior Court Case No. 30-2009-00244240

TRAVELOCITY. COM LP, et al. v. CITY OF ANAHEIM, et al.
Orange County Superior Court Case No. 30-2009-00244139

HOTELS.COM, L.P. v. CITY OF ANAHEIM, et al.
Orange County Superior Court Case No. 30-2009-00244176

HOTWIRE, INC. v. CITY OF ANAHEIM, et al.
Orange County Superior Court Case No. 30-2009-00244195

HOTWIRE, INC. v. CITY AND COUNTY OF SAN FRANCISCO, et al.
San Francisco Superior Court Case No. CGC 09-488289

EXPEDIA, INC. v. CITY AND COUNTY OF SAN FRANCISCO, et al.
San Francisco Superior Court Case No. CGC 09-488292

PRICELINE.COM INCORPORATED, et al. v. CITY AND COUNTY OF SAN FRANCISCO, et al.
San Francisco Superior Court Case No. CGC 09-509573

TRAVELOCITY.COM, L.P., et al. v. CITY AND COUNTY OF SAN FRANCISCO, et al.
San Francisco Superior Court Case No. CGC 09-489356

CITY OF SANTA MONICA v. EXPEDIA, INC., et al.
Los Angeles Superior Court - West Case No. SC108568

CITY AND COUNTY OF SAN FRANCISCO v. SAN FRANCISCO HILTON UNION SQUARE, et al.,
San Francisco Superior Court Case No. CGC-11-510705

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TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT, on January 23, 2013, the Supreme Court of the State of California denied the City of Anaheim's petition for review of the Court of Appeal's November 1, 2012 opinion in *Hotels.com, L.P. v. City of Anaheim, et al.*, Appeal No. B230457, thereby rendering that decision—which affirmed this Court's judgment—now final. *See* Cal. R. Ct. 8.532(b)(2)(A). A copy of the Supreme Court's Appellate Courts Case Information page showing this disposition is attached as Exhibit A.

PLEASE TAKE FURTHER NOTICE THAT, on January 23, 2013, the Supreme Court of the State of California denied the City of Santa Monica's petition for review of the Court of Appeal's November 1, 2012 opinion in *City of Santa Monica v. Expedia, Inc., et al.*, Appeal No. B236166, thereby rendering that decision—which affirmed this Court's judgment—now final. *See* Cal. R. Ct. 8.532(b)(2)(A). A copy of the Supreme Court's Appellate Courts Case Information page showing this disposition is attached as Exhibit B.

Dated: January 25, 2013

Respectfully submitted,

JONES DAY

By: Erica L. Reilley
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LAI-3184284v2

EXHIBIT A

Appellate Courts Case Information

CALIFORNIA COUR
THE JUDICIAL BRANCH OF CALIFOR

Supreme Court

Change court

Attention: Supreme Court database and email registration will be offline from 07:00AM Sunday, January 27 to 06:00PM Sunday, January 27 for server maintenance. Your patience is appreciated.

Court data last updated: 01/23/2013 11:05 AM

Disposition

IN RE TRANSIENT OCCUPANCY TAX CASES
Case Number S207192

Only the following dispositions are displayed below: Orders Denying Petitions, Orders Granting Rehearing and Opinions. Go to the Docket Entries screen t information regarding orders granting review.

Case Citation: none

Date	Description
01/23/2013	Petition for review denied

Click here to request automatic e-mail notifications about this case.

EXHIBIT B

Appellate Courts Case Information

CALIFORNIA COUR
THE JUDICIAL BRANCH OF CALIFOR

Supreme Court

Change court

Attention: Supreme Court database and email registration will be offline from 07:00AM Sunday, January 27 to 06:00PM Sunday, January 27 for server maintenance. Your patience is appreciated.

Court data last updated: 01/23/2013 11:05 AM

Disposition

IN RE TRANSIENT OCCUPANCY TAX CASES
Case Number S207199

Only the following dispositions are displayed below: Orders Denying Petitions, Orders Granting Rehearing and Opinions. Go to the Docket Entries screen f information regarding orders granting review.

Case Citation: none

Date	Description
01/23/2013	Petition for review denied

Click here to request automatic e-mail notifications about this case.

PROOF OF SERVICE

I am a citizen of the United States and employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 555 South Flower Street, Fiftieth Floor, Los Angeles, California 90071-2300.

On January 25, 2013, I served the following document electronically in accordance with the Court's ruling governing the *City of Los Angeles, California, et al. v. Hotels.com, L.P., et al.* (and Related Cases) matters requiring all documents to be served upon interested parties via Lexis eService System:

NOTICE OF CALIFORNIA SUPREME COURT'S DENIAL OF REVIEW IN ANAHEIM AND SANTA MONICA ACTIONS

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on January 25, 2013 at Los Angeles, California.

Linnea Kempf

No. B243800
CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT
DIVISION 2

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

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I.
INTRODUCTION

This statutory interpretation case involving the City of San Diego's transient occupancy tax (TOT) ordinance (Ordinance)[1] presents a central issue: What amount is subject to tax?

The trial court correctly identified this issue: "The central issue in the dispute between the parties is whether the 'rent' on which the San Diego Transient Occupancy Tax is calculated is the amount charged by the hotel to the Online Travel Companies, or the amount charged by the Online Travel Companies to the person who occupies the hotel room, the transient." (RT, p. 145:7-12.)

Under the plain meaning of the Ordinance, the trial court erred in holding the Ordinance's tax base—Rent—was the former amount (the "net rate") and not the latter (the "retail rate").

Answering the question turns on the Ordinance's definition of Rent[2]: "Rent" is "the ***total consideration charged to a Transient as shown on the guest receipt for the Occupancy of a room*** ... in a Hotel," which includes "all receipts ... and services of any kind or nature without any deduction therefrom." (§ 35.0102 [definition of Rent].)[3] Under the plain meaning of Rent, TOT must be due on the retail rate.

As stated, Rent is based on the "total consideration charged to a Transient." (§ 35.0102.) "Total" means "total." In the "merchant transactions"

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[1] The Ordinance is located at Chapter 3, Article 5, Division 1, sections 35.0101 through 35.0138, of the San Diego Municipal Code. All undesignated section references are to the Ordinance, which is attached as Exhibit 1.

[2] The Ordinance capitalizes certain words to reflect they have the meaning ascribed to them in the Ordinance or other provisions of the San Diego Municipal Code. This brief maintains the capitalization to indicate the words are being used with the same meaning.

[3] Emphases is added by counsel unless otherwise noted.

at issue here, the online travel company (OTC)[4] "charges" the Transient for the room amount; the Transient responds to the "charge" by paying the room amount to secure Occupancy. The amount charged and paid is the retail rate, not the net rate. An objective test as to the taxable amount is contained within the definition of Rent: the amount "as shown on the guest receipt for the Occupancy of a room." (*Ibid.*) The OTC (not the hotel) provides the guest receipt in merchant transactions, and the amount stated on the receipt is always the retail rate, not the net rate. That retail rate is what is taxed under the Ordinance.

II.
THE INTENT AND OPERATION OF THE ORDINANCE

A. The Ordinance Only Taxes Transients' Payment of Rent to Purchase Occupancy.

The Ordinance contains an unambiguous statement of legislative intent and purpose: "It is the purpose and intent of the City Council that there shall be imposed a tax on Transients." (§ 35.0101, subd. (a).) The Ordinance defines a Transient as "any Person who exercises Occupancy, or is entitled to Occupancy, ... for a period of less than one (1) month." (§ 35.0102.) The OTCs never exercise Occupancy and, therefore, are never Transients. (See 28 AR, T. 213, p. 003945:13-25; 30 AR, T. 218, p. 004373.)[5]

The Ordinance's taxing formula is straightforward: the tax rate of 10.5 percent is multiplied by the tax base, Rent. (§§ 35.0103-35.0106, 35.0108.)

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[4] The OTCs are: Priceline.com Incorporated, Travelweb LLC, Expedia, Inc., Hotwire, Inc., Travelnow.com, Hotels.com, L.P., Hotels.com GP, LLC, Travelocity.com, L.P., Site59.com, LLC, Orbitz, LLC, Trip Network, Inc. (doing business as Cheaptickets.com), and Internetwork Publishing Corp. (doing business as Lodging.com).

[5] In citations to the administrative record and joint appendix, the first number references the volume, the second number references the tab, and the third number references the Bates-page numbers.

"Rent" is "the total consideration charged to a Transient as shown on the guest receipt for the Occupancy of a room ... in a Hotel." (§ 35.0102.)

The definitions of Transient and Rent are each rooted in the Transient's purchase of Occupancy. "Occupancy" is "the use or possession, or the right to the use or possession of any room or portion thereof, in any Hotel ...." (§ 35.0102.) Rent is only quantified by the total amount paid by a Transient for Occupancy as stated on the Transient's guest receipt; it does not exist and is not quantified in any other circumstance. The Ordinance only taxes Transients' purchases of Occupancy, hence the tax is a "transient occupancy tax."

The guest receipt documents the Rent and TOT charged and collected from Transients, as each must be separately stated on the receipt. (§ 35.0112, subd. (c) ["amount of tax charged each Transient shall be separately stated from the amount of Rent charged"].) This allows the Transient (the tax obligor) to calculate whether he or she is paying the proper tax. It also provides the City a ready mechanism for TOT audit.

B. Other Sections Further the Legislative Intent, Tax Base, and Taxable Transaction.

Further sections explain the Ordinance's stated "purpose and intent" to "impose[] a tax on Transients." (§ 35.0101, subd. (a).) The TOT imposed and due "constitutes a debt owed by each Transient to the City which is extinguished only by payment to the Operator or to the City." (§ 35.0110, subd. (a).) The Transient shall pay TOT when Rent is paid. (*Id.*, subd. (b).) And, "unpaid tax shall be due upon each Transient's ceasing to occupy a room." (*Id.*, subd. (d)).

These provisions reinforce the Transient's purchase of Occupancy is the only taxed transaction under the Ordinance. Only Transients pay Rent, the tax base.

C. "Operators" (Or Their Designees) Charge Transients Rent and TOT, Collect Rent and TOT from Transients, and Account For and Remit TOT to the City.

The taxable transaction occurs when a Transient purchases Occupancy in any Hotel in the City of San Diego. (§§ 35.0102 ["Hotel," "Occupancy," "Rent"]; 35.0103-35.0106, 35.0108.) "Hotel" is defined as a physical structure "occupied, or intended or designed for Occupancy, by Transients for dwelling, lodging, or sleeping purposes, and is held out as such to the public." (§ 35.0102.)

Section 35.0112, subdivision (c), mandates Rent and TOT charges must be itemized on the Transient's guest receipt:

> The amount of tax ***charged*** each Transient shall be separately stated from the amount of Rent ***charged***, and each Transient shall receive a receipt for payment from the Operator.

As pertinent, "charged" as used in the Ordinance has this dictionary meaning:

> (1): to fix or ask as fee or payment <*charges* $50 for an office visit>
> (2): to ask payment of (a person) <*charge* a client for expenses>

(Merriam-Webster Online Dictionary (2013), http://www.merriam-webster.com/dictionary/charge.)

To acquire Occupancy, Transients must pay the charged Rent and TOT. The Ordinance uses the phrase "Rent charged by the Operator" to signify that Operators have the obligation under the Ordinance to charge Rent. The Ordinance defines "Operator" in pertinent part:

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

(§ 35.0102.) Besides being the "charging" entity, "Operators" are the conduits through which TOT is collected, accounted for, reported and remitted for the

benefit of the City. (§§ 35.0102 [Operator definition]; 35.0110, subd. (a) [Transient's tax debt extinguished by payment to Operator]; 35.0112 [Operators' collection and accounting duties]; 35.0114 [Operators' duties of remitting and reporting].)

In OTC merchant hotel transactions, however, Operators contractually delegate certain of these functions to the OTCs. In particular, the Operators delegate to the OTCs the Ordinance functions of charging and collecting Rent and TOT from the Transients as well as providing a guest receipt for Rent and TOT to the Transients. (§§ 35.0102, 35.0110, subd. (a), 35.0112, subd. (c).) The Ordinance does ***not*** forbid or limit Operators from working with others to carry out Operators' functions, which is what occurs when hotels use the OTCs to market and assist in selling rooms out of hotels'—not OTCs'—inventories.

The Ordinance does ***not*** provide that Rent may be increased, decreased, or otherwise affected by post-sale conduct by Operators and third parties, such as the OTCs. Rent is ***always*** the "total consideration" charged to the Transient for Occupancy as shown on the Transient's guest receipt without any deduction therefrom.

III.
THE STRUCTURE OF MERCHANT TRANSACTIONS DOES NOT SUPPORT A DIFFERENT TAX BASE.

A. The OTCs Are Not Resellers; They Sell on Commission for Hotels Out of Hotels' Room Inventories.

The OTCs do not purchase hotel rooms for resale. Rather, hotels provide OTCs with rights to connect to computer systems that allow the OTCs to access hotels' room inventories. (2 AR, T. 3, p. 013745:4-17; 3 AR, T. 5, p. 014032:12-19; 18 AR, T. 82, p. 001333; 20 AR, T. 107, pp. 001822-001823; 28 AR, T. 213, pp. 003889:13-20, 003841:15-003842:13; 34 AR, T. 238, 005319:23-005320:10.) The OTCs assist hotels in selling rooms out of

hotels'—***not*** OTCs'—inventories by independently marketing those rooms. (See 2 AR, T. 4, pp. 013802:14-013803:8; 3 AR, T. 5, p. 014014:14-25; 18 AR, T. 80, p. 001321.) As compensation, the contracts between the hotels and OTCs provide that the OTCs shall receive a ***sale commission*** from what the Transient pays for Occupancy. (See 3 AR, T. 5, pp. 013860:17-013861:15; 17 AR, T. 62, pp. 000982, 000985-00986; 26 AR, T. 211; pp. 003587:7-003588:1; 18 AR, T. 82, p. 001335; 16 AR, T. 57, 000912-000913; 26 AR, T. 211, pp. 000912-000913; 34 AR, T. 237, p. 000520 at 35:3-12.)

B. The OTCs Function Under Contractual Grants of Authority Provided by Hotels.

Whatever term applies to the OTCs' role for hotels—agents, sales agents, independent sales agents, representatives, designees—the OTCs operate under ***contractual grants of authority*** from hotels. Among others, those contracts provide for the OTCs' right to, and quantification of, their sale commissions. (See 2 AR, T. 4, pp. 013799:4-013801:10; 17 AR, T. 62, pp. 000982, 000985-000986; 18 AR, T. 85, pp. 001371-001372.) The OTCs do not sell for their own accounts out of their own inventories; they sell for hotels' accounts out of hotels' inventories.

C. In Acting Under Contractual Grants of Authority from Hotels, the OTCs Employ Three Room-Sale Models.

The OTCs employ three room-sale models: (1) agency (3 AR, T. 5, pp. 013861:21-013862:4; 26 AR, T. 209, pp. 003207:7-003208:3; 36 AR, T. 240, p. 005617:2-20; 38 AR, T. 260, p. 001239); (2) modified-merchant (36 AR, T. 240, pp. 005619:9-005620:23; 37 AR, T. 241, p. 005888:16-25); and (3) merchant (36 AR, T. 240, pp. 005618:10-005619:8; 38 AR, T. 260, p. 012039).

Under each, the OTC's compensation (sale commission) is set by contract with the hotel as a portion of the Transient's room payment. After the Transient's purchase of Occupancy and hotel stay, in a ***later, post-occupancy***

transaction, the OTC and hotel ***divide the Rent*** paid by the Transient, which are all amounts other than those designated as TOT. (38 AR, T. 260, p. 012039; 38 AR, T. 276, p. 012221; 34 AR, T. 237, p. 005204 at 34:22-35:12; 25 AR, T. 206, p. 002934:5-24.)

Hotel-Direct Transactions: When Transients purchase Occupancy directly from hotels (hotel-direct), Rent (the room-purchase amount as reflected on the guest receipt) is the tax base. (§ 35.0102 [Rent].) If the Transient pays a room rate of $100 for Occupancy and the tax rate is 10.5 percent, then the Transient pays $110.50 for Occupancy and TOT. The City of San Diego (City) receives $10.50 in TOT. (See 2 AR, T. 4, pp. 013811:23-013812:11; 34 AR, T. 238, pp. 005270:1-13.)

Agency Transactions: In agency transactions, after the Transient has made a reservation through an OTC's website, the Transient pays the OTC-quoted room rate and TOT to the hotel at check-in. After the Transient's hotel stay, in the post-occupancy transaction, the hotel forwards a commission to the OTC, the amount of which is determined by the contract between them. Using the same numbers, the hotel remits $10.50 of TOT to the City. (See 2 AR, T. 4, p. 013812:13-18; 36 AR, T. 240, pp. 005617:2-005618:2.)

Modified-Merchant Transactions: In modified-merchant transactions, the Transient pays the OTC-charged room rate and TOT to the OTC. The "guest receipt" supplied the Transient by the OTC lists the paid "room rate" and "taxes and fees" amounts. Under the contract between the OTC and hotel, the OTC forwards ***all*** the money received from the Transient to the hotel. After the Transient's hotel stay, in the post-occupancy transaction, the hotel forwards the OTC's commission to it. Using the same numbers, the hotel remits $10.50 of TOT to the City. (See 3 AR, T. 6, pp. 014072:13-014074:11; 37 AR, T. 241, pp. 005890:11-005892:22.)

The OTCs do not dispute that the taxable transaction and tax base for hotel-direct, agency, and modified-merchant transactions are identical. Under

each, there is only one purchase of Occupancy—the Transient's. (See §§ 35.0103-0106, 35.0108 ["each Transient is subject to and shall pay"].) Under each, the tax base, Rent, is the total amount paid by the Transient to secure Occupancy, as reflected on the Transient's guest receipt. (§ 35.0102 [Rent].)

Merchant Transactions: In merchant transactions, the Transient pays the room rate and TOT to the OTC. The "guest receipt" supplied the Transient by the OTC lists the paid "room rate" and "taxes and fees" amounts. After the Transient's hotel stay, in the post-occupancy transaction, the OTC deducts its commission from the room-rental proceeds received from the Transient. The OTC is contractually allowed to retain all the Transient's room charges above a certain amount forwarded to the hotel, the "net rate." The OTC's commission is referred to as the "margin." The "net rate" plus the "margin" equals the "room rate" charged the Transient as reflected on the receipt supplied the Transient by the OTC.

For merchant transactions only, the OTCs forward to the hotel TOT based on the "net rate," not the "retail rate." (See 2 AR, T. 4, pp. 013812:19-013813:2; 17 AR, T. 62, p. 000984; 28 AR, T. 213, p. 003958:11-23; 37 AR, T. 241, pp. 005852:17-19, 005873:12-17.) Contractually, it is the OTCs, not the hotels, who make this critical decision on whether to calculate and remit TOT on the net rate or the retail rate. (See 7 AR, T. 11, pp. 014849:24-014851:25; 3 AR, T. 5, pp. 013922:17-20, 013964:16-013965:5.) The trial court cited with approval the Hearing Officer's finding that "the OTCs fashioned their business model without consideration of the TOT ordinances." (RT, p. 137:17-19.) Thus, to the extent the OTCs correctly determined that TOT was only due San Diego on the net rate, it was the result of dumb luck and not reasoned analysis of the actual language of the San Diego Ordinance.

Hotels often protect themselves from potential liability created by the OTCs' tax decisions through indemnity provisions in their contracts. (See 3 AR, T. 5, p. 013923:7-18; 34 AR, T. 238, pp. 005311:16-05312:517; 29 AR,

T. 215, pp. 004127:16-004128:8; 17 AR, T. 67, p. 001060; 18 AR, T. 82, p. 0013307; 20 AR, T. 102, p. 001721.)

To support this disparate tax outcome, the OTCs contend the taxable transaction is not based on the Rent paid by the Transient for Occupancy, but is based on the post-occupancy transaction between the hotels and OTCs. This contention improperly transforms Rent—the Transient's room price as stated on the Transient's guest receipt—to the "net rate."

Using the same numbers, and assuming a "net rate" of $80 on the $100 room, the OTC's "margin" (i.e., its commission) is $20. The hotel remits $8.40 to the City because that is all it obtained for TOT from the OTC (10.5% of $80). The OTC retains the $2.10 difference ($10.50 minus $8.40), which is TOT, as additional profit.[6] (See 26 AR, T. 211, pp. 003587-003588:5; 34 AR, T. 238, p. 005270:1-17.) This is the source of the City's damages.

IV.
THE CITY'S ASSESSMENTS OF THE OTCS WERE UPHELD AFTER A PROTRACTED ADMINISTRATIVE HEARING, AND THEN IMPROPERLY VACATED BY THE TRIAL COURT.

A. The OTCs Administratively Challenged the City's TOT Assessments.

The City assessed the OTCs for back TOT, interest, and penalties. (See § 35.0117 [assessment procedures].) The OTCs employed the Ordinance's administrative hearing procedures to challenge the assessments. (See § 35.0118.) The administrative hearing officer (Hearing Officer) issued a

[6] Instead of the $2.10 being remitted to the City as part of the TOT, the OTC re-labels this $2.10 as a "service fee" and pockets this amount along with the $20 margin. (See 2 AR, T. 3, p. 0130749:16-25; 20 AR, T. 103, p. 001768; 20 AR, T. 105, 001790; 26 AR, T. 211, pp. 003587:7-003588:5; 34 AR, T. 238, p. 005270:1-17.) The irony is that in merchant transactions the OTCs make substantially more money, as compared to agency and modified-merchant transactions, while the City receives substantially less TOT in merchant transactions.

comprehensive 29-page decision (1 JA, T. 4, pp. 000195-000223) upholding the assessments.

B. The Administrative Hearing Officer's Decision Was Consistent with the Ordinance's Intent, Purpose, and Function.

The Hearing Officer concluded the OTCs owed TOT on their commissions in merchant transactions. (1 JA, T. 4, pp. 000205, 000206, 000212, 000217.)

The Hearing Officer recognized that the Ordinance's wording does not support post-sale diminishment of the tax base:

> Read *in toto*, it is clear that, in promulgating the Ordinance, the City Council intended to collect TOT on all monies charged to the Transient for the privilege of Occupancy of a given hotel room. In context, it is also clear that the City Council anticipated that all due TOT would be paid as a straight pass-through from the Transient to the Operator to the City *without reduction and without exception*. In other words, whatever the Transient pays for the right of Occupancy would be the basis upon which TOT would be calculated and paid to the City on behalf of a Transient by the Operator.

(1 JA, T. 4, pp. 000203-000204, second italics added.)

> Logically, if the Operator enters into contractual agreements with third parties that result in the hotel owner receiving (and paying to the City) less than 100% of what it is that the Transient is charged for the privilege of Occupancy, then the Transient becomes the victim of such contractual agreements because the Transient is no longer fully protected from his or her tax obligation under the Ordinance. The failure of the Transient to fulfill his or her tax obligation arises from the nature of the relationship between the hotel's owner and the third party OTC, and should not be construed as any shortfall in the Ordinance or in the failure of the Transient to attempt compliance with his or her taxpaying obligations.

(1 JA, T. 4, p. 000204.)

The Hearing Officer recognized that the Transient's receipt becomes misleading and meaningless in merchant transactions if the Ordinance is interpreted to remove the OTC's commission from the tax base in the post-occupancy transaction between the OTC and hotel allocating the Transient's room-purchase amount:

> [T]he only guest receipt provided to the Transient is the receipt the Transient receives from the OTC .... A fair reading of the Ordinance and consideration of its intent yields the reasonable conclusion that the Transient's taxpaying obligation would be extinguished upon payment of the total consideration charged to the Transient, as shown on the guest receipt received from the OTCs. ... OTCs do not apprise Transients that only ***part*** of the Transient's TOT obligations will be paid to the City by the hotel, but that the balance is due and owing from the Transient directly to the City. **See** Ordinance, Section 35.0110 regarding Transient's obligation to pay TOT to the City.

(1 JA, T. 4, p. 000205, emphasis by Hearing Officer.)

The Hearing Officer reviewed the collaborative operations and relationships between the hotels and the OTCs in merchant transactions. (1 JA, T. 4, pp. 000207-000208.) He concluded:

> Therefore, with respect to this essential function of the TOT administrative process, the OTCs are the Operator, or they share Ordinance obligations with the Operator, or they are the agent for the Operator in providing the receipt which reflects the price of the room, the taxes being charged, and the OTC service fees.

(1 JA, T. 4, p. 000209.)

The Hearing Officer also noted that: "In the carefully defined contractual relationships between hotels and OTCs, an essential function of being a proprietor—that of managing all aspects of a reservation system as to certain groups of Transients—is delegated to the OTCs." (1 JA, T. 4, p. 000210, footnote omitted.)

The Hearing Officer concluded that the OTCs' commissions in merchant transactions are fully taxable under the Ordinance:

> [T]he OTCs have been and are responsible under the Ordinance for paying TOT on the "mark ups" and service fees they charge to their Transient customers. In summary, such conclusion is reached upon consideration of legislative intent, practical consideration and application of the Merchant Model marketing process, attention to the Transient's obligation to pay TOT to the City directly or through a third party, and analysis of the terms in the Ordinance such as "Rent" and "Operator."

(1 JA, T. 4, p. 000217.)

C. The Trial Court's Interpretation for Merchant Transactions was Erroneous.

The trial court granted the OTCs' writ of mandate, nullifying the administrative decision. It concluded the Ordinance's tax base was not the "total consideration charged to a Transient" as "Rent" is defined in the Ordinance, but was the post-occupancy amount received by the hotel after the OTC subtracted its commission. (RT, p. 160:3-10.) The trial court concluded that the Ordinance's use of the phrase "Rent charged by the Operator" in the tax imposition sections of the Ordinance (§§ 35.0103-35.0106, 35.0108) allows the deducting of the OTCs' commissions from the tax base. (RT, 157:18-23.)

The trial court's interpretation was error that should be corrected in this Court's de novo review.

First, it frustrates the Ordinance's express legislative "purpose and intent" to impose a tax on the ***Transient*** (§ 35.0101, subd. (a)) by replacing it with a tax on the ***OTC***.

Second, the definition of Rent is rendered meaningless. Rent is no longer the "total consideration charged to a Transient," but becomes the amount obtained by the hotel in the post-occupancy transaction in which the hotel and OTC contractually allocate the Transient's room-purchase proceeds. Moreover, the trial court's interpretation effectively strikes the "guest receipt" provision from the Ordinance. The guest receipt the OTC provides the

Transient is for the retail rate. This is the way it is designed to work. The amount shown on the guest receipt is supposed to be the same amount as Rent. This enables the Transient to know the amount he is being charged for Rent and provides the City with an efficient and objective method for verifying Rent if an audit occurs.

Under the trial court's interpretation that Rent is the net rate, the guest receipt requirement loses all meaning. Now, the amount stated on the receipt the OTC provides the Transient is an unknown combination of taxable Rent and non-taxable service fees. The Transient no longer knows the amount of Rent he is being charged and no longer can determine whether enough tax is being recovered to satisfy his obligation to the City. The City no longer can use the guest receipt in an audit since it no longer sets forth the tax base. Rent can no longer be objectively measured by the amount "as shown on the guest receipt" because that amount—the retail rate—is no longer Rent under the trial court's interpretation.

Third, the trial court's interpretation taxes the wrong event. It fails to tax the Transient's purchase of Occupancy, but instead taxes the post-occupancy revenue sharing between the OTC and hotel, a transaction having nothing to do with the Transient or Occupancy.

Fourth, the trial court's decision ignores the hotels' grants of authority to OTCs to market and sell hotels' room licenses for sale commissions and to collect Rent and TOT from the Transient and provide a receipt to the Transient. Those contractual grants of authority cause the OTCs to step into the shoes of the hotels and perform marketing, sales, tax and Rent collection, and receipt functions usually supplied by hotels. But the delegation of these functions by the hotels to the OTCs cannot change the taxable transaction or tax base under the Ordinance. The OTCs' sale commissions remain taxable as they are part of Rent—i.e., the "total consideration charged to a Transient" for Occupancy. (§ 35.0102 [Rent].)

V.
STANDARD OF REVIEW AND RULES OF STATUTORY CONSTRUCTION

The OTCs do not dispute the Hearing Officer's findings of fact for purposes of the underlying cross-motions and, by extension, this appeal. (See RT, 138:15-17.)

With no factual dispute, interpreting the Ordinance is a pure issue of law reviewed de novo. (*People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432.)

The California Supreme Court recently again stated that ascertaining legislative intent to effectuate a law's general purpose is the "fundamental task" of statutory interpretation: "As in any case involving statutory interpretation, our fundamental task here is to determine the Legislature's intent so as to effectuate the law's purpose. [Citation.]" (*In re C.H.* (2011) 53 Cal.4th 94, 100-101, internal quotes and citation omitted.)

In determining the intent of the legislative body, the court must first examine the words of the statute itself. (*California Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 698.) If the language of the statute is clear and unambiguous, there is no need for statutory construction. (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.) However, "the 'plain meaning' rule does not prohibit a court from determining whether the literal meaning of a statute comports with its purpose."(*Ibid.*)

Every statute should be construed "with reference to the whole system of law of which it is a part so that all may be harmonized and have effect." (*Select Base Materials v. Board of Equalization* (1959) 51 Cal.2d 640, 645.) "We must select the construction that comports most closely with the apparent intent of the lawmakers, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences." (*People v. Coronado* (1995) 12 Cal.4th 145, 151.) The

purpose of the statute "will not be sacrificed to a literal construction" of any part of the statute. (*Select Base Materials*, *supra*, 51 Cal.2d at 645.)

VI.
ARGUMENT

A. The Ordinance's Tax Base is Defined in a Fashion Materially Different from Those in Anaheim's and Santa Monica's TOT Ordinances.

"Rent"—the tax base under San Diego's TOT Ordinance—materially differs from the tax base under either Anaheim's or Santa Monica's TOT ordinances. Any judicial interpretations of the tax base under those ordinances are not instructive here.

Anaheim's tax base, "rent," is defined in pertinent part as "the consideration charged by an operator for accommodations." (Anaheim Mun. Code, § 2.12.005.080.)

While Anaheim's "rent" definition focuses on the "consideration ***charged by an operator***," San Diego has the opposite orientation in focusing on the "consideration ***charged to a Transient.***" (§ 35.0102.) In its City of Anaheim decision, this Court placed great weight on the inclusion of "charged by an operator" within the definition of "rent."

- "Because 'rent' is defined in terms of the consideration charged by an operator, the [trial] court noted that the definition of 'operator' was significant." (Anaheim Opn., p. 5)[7]
- "The City's primary emphasis on the definition of 'rent' largely ignores the ordinance's express direction that 'rent' includes 'consideration *charged by an operator.*'" (Anaheim Opn., p. 9, Court's italics.)

[7] *In re Transient Occupancy Tax Cases* (Anaheim), B230457, filed November 1, 2012.

- "However, the TOT ordinance is drafted with a focus on the amount of consideration charged by the operator -- not the total amount of consideration paid out by the transient." (Anaheim Opn., p. 20.)
- "The ordinance at issue here is different [than *Groves* and *Hospital Medical Collections*][8], because it specifies that the taxable transaction is limited to that 'charged by an operator.'" (Anaheim Opn., p. 21.)
- "The OTCs have collected TOT based on the full amount of consideration charged by the hotel operators for accommodations. Nothing further is required under the City's TOT ordinance." (Anaheim Opn., p. 25)

Unlike Anaheim's ordinance, San Diego's "Rent" definition is tied to a specific document and an expressly, objectively stated measure: the "total" amount "as shown on the ***guest receipt***." (§ 35.0102.) This objective standard for measuring "Rent" is a unique feature of San Diego's Ordinance.

There is not a reasoned argument under San Diego's Ordinance that Rent—"total consideration charged to a Transient as shown on guest receipt for the Occupancy of a room"—may be limited to the "net rate" obtained by the hotel in merchant transactions.

As to Santa Monica, the tax base is "the total amount paid for room rental by or for any such transient ***to any hotel***" (Santa Monica Mun. Code, § 6.68.020), and that "room rental" is defined as "[t]he total charged made by any such hotel for lodging ... furnished any such transient." (Santa Monica Mun. Code, § 6.68.010(d).) In its City of Santa Monica decision, this Court placed primary emphasis on the "to any hotel" and "by any such hotel" language in ruling that TOT under Santa Monica's ordinance was limited to the net rate.

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[8] Referencing *Groves v. Los Angeles* (1953) 40 Cal.2d 751, and *Hospital Medical Collections, Inc. v. City of Los Angeles* (1976) 65 Cal.App.3d 46.

- The definition of "room rental" contains language that "expressly limits the taxable amount to the charge *made by the hotel.*" (Santa Monica Opn., p.9, Court's italics.)[9]

- [T]he ordinance does impose a tax on a transient, but that tax is specifically limited to amounts paid by the transient *to the hotel for room rental.*" (Santa Monica Op., p. 10, Court's italics.)

By contrast, San Diego's "Rent" definition is not limited to amounts going "to any hotel" or charges "by any such hotel."

B. "Rent" Includes All Consideration Charged To and Paid By the Transient for Occupancy.

Three sentences comprise Rent's definition. (§ 35.0102 .) Each serves a distinct purpose. The first sentence defines the nature and source of Rent. The second and third sentences provide examples and broadly described categories, respectively, of what Rent "includes."

1. The First Sentence: Quantifying Rent

The first, and most important, sentence quantifies Rent:

> "Rent" means the total consideration charged to a Transient as shown on the guest receipt for the Occupancy of a room, or portion thereof, in a Hotel, or a space in a Recreational Vehicle Park or Campground.

(§ 35.0102.)

The sentence expansively defines Rent's breadth—"the ***total*** consideration charged"—and identifies the document for ascertaining the amount of Rent—the Transient's "guest receipt." Unlike Anaheim's ordinance, Rent is not limited to amounts "charged by the operator." Unlike Santa Monica's ordinance, Rent is not limited to amounts paid "to any hotel." The plain language of Rent in the San Diego Ordinance applies to the total

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[9] *In re Transient Occupancy Tax Cases* (Santa Monica), B236166, filed November 1, 2012.

consideration charged to a Transient for Occupancy. In a merchant transaction, the hotel charges nothing to the Transient (other than incidentals); therefore, the amounts of the consideration "charged to a Transient" for Occupancy must be, and can only be, the amounts the ***OTCs*** charge the Transients (under the authority granted the OTCs by hotels), as that is when and what the Transient pays in total for Occupancy.

The total charges on the Transient's receipt for the purchase of Occupancy ***exclusively*** quantify Rent and are multiplied by 10.5 percent to derive the TOT owed the City.

The trial court sidestepped the guest receipt provision by miscasting the City's argument:

> The City of San Diego argues that the Online Travel Companies must be operators because they are the only entities providing a receipt. ... [¶] However, providing customers with a receipt does not necessarily transform OTCs into Operators. ... [¶] It may be that the recording and receipt practices have not been consistent with the San Diego ordinance. However, this case is about whether the Online Travel Companies are operators such that they are liable for uncollected Transient Occupancy Taxes. The case is not about receipt violations or recording violations.

(RT, pp. 159:6-160:1.) The trial court suggests that the City's primary argument regarding the guest receipt was in support of its contention that the OTCs are Operators. That is incorrect. The "guest receipt" provision appears in the definition of Rent, not the definition of Operator. The City's primary argument was that the guest receipt provides an objective means for measuring Rent. The receipt the OTCs provide the Transients identifies the "retail rate" paid for Occupancy and not the "net rate." Thus, the City argued that the receipt establishes that the tax base is the retail rate. The trial court ignored this argument.

In addition, the trial court suggests that the City is complaining about a technical violation of the receipt requirement. That too is incorrect. The City's assessments were not based upon any technical receipt violations.

The trial court invoked the well-established rule of construction that "[c]ourts must give significance to every word, phrase, and sentence in pursuance of the legislative purpose. A construction making some words surplusage is to be avoided." (RT, p. 157:15-16.) The trial court then violated this very rule in that the Rent definition becomes surplusage due to the tax imposition sections—§§35.0103-35.0106, 35.0108—somehow installing the "net rate" as the tax base for merchant transactions, which "net rate" is nowhere stated on the Transient's receipt or otherwise to the Transient or the hotel. The "guest receipt" provision quantifying Rent becomes a dead letter.

2. The Second Sentence: Examples of Items Included in Rent

The second sentence provides a non-exclusive list of common items provided to Transients whose values must be in the taxable Rent:

> "Rent" ***includes*** charges for utility and sewer hookups, equipment, [sic] (such as rollaway beds, cribs and television sets, and similar items), and in-room services (such as movies and other services not subject to California taxes), valued in money, whether received or to be received in money, goods, labor, or otherwise.

(§ 35.0102.)

This sentence clarifies that hotels cannot, as they have attempted to in the past, subtract food, amenities, utilities, blankets, wash rags, soap, television, glassware, linens, stationary, shampoo, or shower caps from the tax base.[10] Use of "includes" unambiguously indicates that taxable Rent must

[10] See *S&R Hotels, LLC v. Calcasieu Parish School Board Sales & Use Tax Department* (La. App. 3d Cir. 2006) 945 So. 2d 875 [food related charge taxable under occupancy tax statute]; *Helmsley Enterprises, Inc. v. Tax Appeals Tribunal* (3d App. Div. N.Y. 1993) 187 A.D.2d 64 [hotel room cannot

include these items notwithstanding their itemization on the Transient's receipt.

The trial court ignored the word "includes" by incorrectly stating that the second sentence of Rent "specifically delineates the types of services that are taxed" and then noting that none of these include "fees paid to a third party for reservation services." (RT, p. 158:14-16.) The City does not rely upon the second sentence of Rent in arguing that the OTCs' services are part of the tax base. Rather, the City relies on the core definition of Rent contained in the first sentence, as well as the "catch-all" provision contained in the third sentence.

3. The Third Sentence: "Catch-all" Description of Included Categories

The third sentence provides a "catch-all" list of broadly described categories included in the taxable Rent which may not be peeled off through separate charges:

> "Rent" includes ***all*** receipts, cash, credits, property, and services of ***any kind or nature without any deduction*** therefrom.

(§ 35.0102.)

The third sentence contains broad categories and makes clear that Rent applies not only to "cash" consideration, but non-cash consideration including all "credits, property, and services." The categories all relate to the "total consideration charged" for "Occupancy of a room" and are therefore included

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be split between the room and provided room amenities]; *Greensburg Motel Assoc. v. Indiana Dept. of State Revenue* (Ind. Tax. Ct. 1994) 629 N.E.2d 1302 [utility service]; *Sine v. State Tax Commission* (Utah 1964) 390 P.2d 130 [blankets, wash rags, soap, etc.]; *Telerent Leasing Corp. v. High* (N.C. App. 1970) 174 S.E.2d 11 [television sets]; *Kentucky Board of Tax Appeals v. Brown Hotel Co.* (Ky. 1975) 528 S.W.2d 715 [glassware, linens, etc.]; *Florida Hotel and Motel Assoc. v. Florida, Dept. of Rev.* (Fla. App. 1994) 635 So. 2d 1044 [towels, sheets, stationary, etc.]; *Adamar of New Jersey v. Division of Taxation* (1997) 17 N.J. Tax 80 [soap, shampoo, shower caps, etc.], aff'd, (1999) 18 N.J. Tax 70.

in that which is taxed. The sentence functions as a broadly stated "catch-all" that furthers the Ordinance's purpose of capturing the "total consideration" paid by the Transient for Occupancy. The drafters emphasized the sweeping nature of this "catch-all" provision by including all forms of consideration "of any kind or nature without any deduction therefrom."

By contrast, the trial court provided an unsupported and one-sided interpretation of the third sentence of Rent:

> As far as the last sentence is concerned, which sentence is, "'Rent' includes all ***receipts***, cash, credits, property ..." ***that refers to whatever consideration the transient might be giving in lieu of money for occupancy***.
>
> The sentence reads "'Rent' includes all receipts"—not charges—"Rent includes all receipts, cash, credits, property ..."
>
> For example, a transient who has bartered services in exchange for occupancy would still be taxed on the value of those services, whether he or she has paid for it in terms of cash or other kind of property."

(RT, p. 158:17-28.)

The trial court erroneously restricted the third sentence of Rent to consideration "the transient might be ***giving***" in lieu of money. However, the third sentence applies equally to consideration "the transient might be ***receiving***" from the hotel operator. The trial court ignored the language which states that "receipts" are "of ***any*** kind or nature" and improperly limited Rent to what the Transient might be "giving" in lieu of money.

San Diego concurs with the trial court's example of a Transient who barters services. For example, if a Transient repaired the hotel manager's car and in return the manager offered the Transient a free night's lodging in the hotel in lieu of paying the normal room rate of $100, San Diego would still be entitled to TOT on the $100 value of the room.

Assume the following example: The hotel manager offers the honeymoon suite as a wedding present to his best friend who just got married. In this example, the Transient would still owe TOT on $100, notwithstanding that no money changed hands.

Another example might be a "loyalty" program where the hotel offers a guest one free night for every five paid nights. The City would be entitled to collect 10.5% of the value of the room for the "free" night.

Another example might be where the guest receives a "credit" for $20 upon check-out from the manager due to some complaint the guest had regarding the room. The City would still be entitled to collect 10.5% of the full value of the room, which amount could not be reduced for this $20 "credit."

The point is that whether the Transient is ***giving*** non-monetary consideration (auto repairs) or ***receiving*** non-monetary consideration (a wedding present, a "loyalty" program reward, or a room credit), San Diego is entitled to collect 10.5% from the Transient for the value of the room.

The trial court improperly limited the "catch-all" third sentence of Rent to examples where the Transient is "giving" consideration" when it applies equally to examples where the Transient is "receiving" consideration.

The trial court's attempted dichotomy between "receipts" and "charges" makes no sense. The Transient could "receive" non-monetary consideration from the hotel or the hotel could "receive" non-monetary consideration from the Transient. In either case, to the extent that the non-monetary consideration reduces the amount of money that otherwise would have been paid by the Transient for the hotel room, the third sentence of the definition of Rent is intended to ensure that TOT is collected on the non-monetary consideration.

Moreover, the third sentence lists five specific items—"receipts, cash, credits, property, and services"—but the trial court quotes the sentence by replacing the word "services" with an ellipses. "'Rent' includes all receipts, cash, credits, property..." (RT, p. 158:18-19.) Of all the five specifically

enumerated items, the word "services" is the most germane because it is the OTCs' "services" that are at issue.

"[S]ervices" as used in the Rent definition captures the OTCs' marketing and sales services for hotels under the hotels' grants of authority to OTCs to market and sell hotels' room inventories for a sale commission. The trial court's replacement of the word "services" with an ellipses is telling. Quite literally, the trial court struck the word "services" from the Rent definition.

C. The Ordinance Taxes Only the Transient's Purchase Transaction.

1. Sale of a Room License Always Involves a Transient Paying a Charged Retail Rate.

There is no dispute how hotel-direct and OTCs' agency, modified-merchant, and merchant transactions operate. Whether a Transient purchases a room directly from a hotel or under any of the OTCs' three transactional models, sale of a room license ***always*** involves a Transient paying a charged retail rate—here, Rent—to purchase Occupancy and paying TOT. Under any room-purchase scenario, the Transient is always presented with (i.e., "charged") a retail room rate and tax which he must pay to secure Occupancy. The Transient's payment of the room rate and TOT constitutes the room-purchase transaction. It is the taxed transaction as the Ordinance ***only*** taxes Transients' room-purchase transactions. The taxed amount only includes the Rent paid by the Transient for Occupancy as shown on a guest receipt, which must separately state Rent and TOT. (§ 35.0112, subd. (c).)

After the Transient pays Rent and TOT, he obtains the right to Occupancy. The definition of Rent makes it clear—"the total consideration charged to a Transient as shown on the guest receipt for the Occupancy of a room ... in a Hotel ...." (§ 35.0102.) In merchant transactions, the only entities

that "charge" Rent to a Transient for Occupancy are the OTCs under the contractual grants of authority provided them by hotels.

In all the room-purchase scenarios, whether direct with the hotel or with an OTC, the ***only*** taxable transaction is the Transient's purchase of Occupancy by paying charged Rent. The language of the Ordinance does not support any other taxable transactions.

2. The Ordinance Does Not Permit the Operator or the Operator's Designee to Alter the Tax Base.

Rent is ***only*** defined as "the total consideration charged to a Transient as shown on the guest receipt for the Occupancy of a room," with Rent's final two sentences further defining and reinforcing Rent's broad breadth. Once the Transient pays Rent and TOT, the Hotel room sale has occurred, and the tax base has been set as the Rent paid, as reflected on the Transient's guest receipt.

Nowhere does the Ordinance provide that dealings between Operators and third-persons after the Transient's purchase may alter the tax base stated on the Transient's receipt. Rent is defined as what the Transient paid for Occupancy as reflected on the guest receipt. Rent's definition contains no mention or reference to Operators. (See § 35.0102.) An Operator's (or an Operator's designee) post-room-sale dealings do not affect the Ordinance's defined tax base—Rent; the taxable purchase transaction is the Transient's purchase of Occupancy by his payment of Rent. (See §§ 35.0112-35.0115.)

3. When the Hotel Receives the "Net Rate" in Merchant Transactions, It is Neither a Purchase Transaction Nor a Charge for Rent.

The OTCs' and the trial court's position is that the "net rate" is the tax base in OTCs' merchant transactions.

However, the Ordinance does not suggest that the post-occupancy allocation of money between the OTC and hotel can alter the Ordinance's taxable transaction and reduce the tax base.

The "net rate" comes into play in merchant transactions only after the purchase transaction occurs—the Transient's payment of Rent to acquire Occupancy. Once that purchase transaction has occurred, the hotel and OTC use their contractual formula to allocate between them the Transient's room-purchase proceeds to compensate the OTC for helping to sell the Hotel room to the Transient. The hotel gets the "net rate," the OTC gets the "margin," and the Transient previously paid both, as a total "room rate" to the OTC as Rent for Occupancy.

The process whereby the hotel receives the "net rate" is not a taxable Transient-purchase transaction for Occupancy as dictated by the Ordinance. (See §§ 35.0101, subd. (a) [legislative intent and purpose], 35.0102 ["Rent," "Occupancy"], 35.0103-0106, 35.0108 [tax imposed].)

Post-occupancy allocation of the Transient's Rent payment does not create another taxable transaction, as there is no taxable purchase of Occupancy due to that allocation. OTCs do not purchase Occupancy by forwarding the "net rate" to the hotel or otherwise. As discussed below, the trial court, as well as this Court in the City of Anaheim case, recognize that the only transaction involving "Occupancy" occurs when the OTCs sell the right of Occupancy to Transients.

Therefore, the post-occupancy transactions between hotels and the OTCs do not involve the sale of "Occupancy," which has already occurred. The only taxable purchase in merchant transactions is the Transient's payment to the OTC of the charged retail rate—Rent—to acquire Occupancy. The "net rate" is not paid to purchase Occupancy. The Transient has already paid for and secured Occupancy.

D. "Rent Charged By the Operator" Does Not Change the Tax Base.

"Rent charged by the Operator" (§§ 35.0103-0106, 35.0108) does not allow the Ordinance's tax base—Rent—to switch in merchant transactions from the amount Transients pay to secure Occupancy to hotels' receipt of the "net rate." There is nothing about the role of the phrase "Rent charged by the Operator" in the functioning of the Ordinance to indicate that phrase alters the definition of the tax base, Rent, in any circumstances. (See § 35.0102 [definition of Rent].)

The Ordinance is titled the "Transient Occupancy Tax" (see San Diego Municipal Code, ch. 3, art. 5, div. 5 [providing title]), with the definition of Rent being the "total consideration" paid by the Transient for a hotel room as shown on the Transient's "guest receipt" (§ 35.0102 [definition of Rent].) The Ordinance pertains to Transients' purchases of Occupancy in Hotels, with "Transients," "Occupancy" and "Hotel" being defined terms. (See § 35.0102 [definitions].) The taxable transaction is a mathematical formula based exclusively on the Transient's purchase of Occupancy, with the Transient's room-purchase amount multiplied by 10.5 percent to determine the TOT owed. (§§ 35.0103-0106, 35.0108.)

In order to purchase Occupancy, the Transient must interact with someone with power to confer Occupancy. The Ordinance labels such a "Person" (defined at § 11.0210)[11] an "Operator" of the Hotel (physical structure). Operators have sufficient control over selling Occupancy in the Hotel such that they are held responsible under the Ordinance for the

[11] § 11.0210 defines "Person" as "any natural person, firm, joint venture, joint stock company, partnership, association, club, company, corporation, business trust, organization, or the manager, lessee, agent, servant, officer or employee of any of them or any other entity which is recognized by law as the subject of rights or duties."

collecting, accounting, and remitting TOT for the benefit of the City. (§§ 35.0113-35.0115, 35.0121, 35.0137, 35.0138.)

"Rent charged by the Operator" refers to the entity or entities interacting with Transients sufficient to "charge" Rent and sell Occupancy to Transients.

Nothing in the Ordinance prohibits Operators from outsourcing functions to third parties to facilitate room sales. The definition of Operator "includes" the defined term "Person." San Diego's expansive definition of "Person" incorporated into the definition of "Operator" reflects the understanding that the hotel "Operator"—the "proprietor"—may associate with any number of individuals or entities in performing its duties as Operator. That is precisely what happens in a merchant transaction in which the Operator contractually delegates numerous duties and functions to the OTCs.

Among other things, the hotels delegate to the OTCs the duty to "charge" Transients on the hotels' behalf. The OTCs by contract stand in the shoes of their hotel principals to charge for and collect Rent for Occupancy. The trial court recognized that the contracts between the OTCs and hotels granting the OTCs authority to market and assist in selling hotels' room licenses (RT, pp. 134:28-135:17) also dictate who collects the Rent: "***Under these contracts***, when the OTC sells to the customer or transient the occupancy privilege through the OTC Internet site ... the OTC charges the ... transient ...." (*Id.* at p. 135:3-8.) The trial court succinctly summarized what the OTCs do for hotels: "OTCs market hotel rooms of numerous hotel operators to transients and then handle all financial aspects of the rental." (*Id.* at p. 149:8-10.) The OTCs must charge retail room rates consistent with the limitations set forth in their contracts with hotels, which stipulate that the OTCs cannot undercut hotels on room price. (4 AR, T. 7, pp. 014241:24-014242:7; 17 AR, T. 64, p. 001016; 26 AR, T. 210, pp. 003427:24 - 003425:11; 34 AR, T. 238, pp. 005280:8-005281:10.)

Since the OTCs' only hotel product for sale are the room licenses in the hotels' room inventories and not the OTCs' own inventories, the OTCs' room sales are for the hotels' accounts. The OTCs sell on commission—earning their commissions when they sell rooms.

In both modified-merchant and merchant transactions, hotels contract with the OTCs to quote retail room rates to Transients, with the OTCs collecting Rent and TOT from Transients at the time of booking. The OTCs make the sale for the hotel. The OTCs and hotels then each take their cut.

The OTCs do not have to be Operators to carry out this role of "charging" because it is assigned to them by the hotels, who are Operators, and the OTCs contractually agree to assume the "charging" and "collecting" roles. To the extent these roles implicate legal obligations imposed by the Ordinance, the OTCs have voluntarily assumed them. The OTCs' contractually provided role as "charging" entities does not alter the Ordinance's tax base or taxing formula.

1. In Interpreting the "Rent Charged by the Operator" Language in the Tax Imposition Provisions, the Trial Court Failed to Harmonize the Rent Definition.

As previously noted, a cardinal rule of statutory construction is that every statute should be construed "with reference to the whole system of law of which it is a part so that all may be harmonized and have effect." (*Select Base Materials v. Board of Equalization*, *supra*, 51 Cal.2d at 645.) Here, the trial court made no attempt to harmonize its interpretation of the "Rent charged by the Operator" language to the definition of Rent. Quite the opposite. The trial court's interpretation of the "Rent charged by the Operator" language effectively struck the Rent definition from the Ordinance.

The trial court held that the City's argument concerning the definition of Rent "ignores the modifying phrase in the 'Tax Imposed' provisions of the San Diego Code, that is, the phrase 'charged by the operator,' meaning fees

that are charged by the operator set forth in [section] 35.0103." (RT, p. 156:21-24.)

In fact, the definition of Rent is not "modified" by the tax imposition sections. The trial court failed, and did not even attempt, to harmonize the definition of Rent—§ 35.0102—and the tax imposition sections—§§ 35.0103-35.0106, 35.0108. Instead, the trial court focused solely on the "Rent charged by the Operator" language in the "tax imposition" sections to the exclusion of the actual definition of Rent. No attempt at harmonization was made. Rather, the definition of Rent becomes mere surplusage under the trial court's interpretation.

Had the trial court attempted to harmonize the Rent definition and the tax imposition sections, it would have found the task an easy one. With the Rent definition as a starting point, the tax base indisputably is the "retail rate," not the "net rate" for two primary reasons.

First, Rent is the total consideration "***charged to a Transient*** ... for the ***Occupancy*** of a room." By definition, Rent must be a transaction involving "a Transient" and this transaction must be for "Occupancy" of a room. The transaction between the OTC and the Transient for the "retail rate" satisfies both requirements: (1) the Transient is a party to this transaction; and (2) the OTC-Transient transaction is the only one involving Occupancy. By contrast, the post-occupancy, revenue-splitting transaction between the OTC and the hotel involves neither the Transient nor Occupancy. Instead, it is a "post-occupancy" transaction in which the OTC and hotel divide between them the rental payment made by the Transient. By the time the OTC pays the hotel the "net rate," the Transient's Occupancy has long since occurred. This post-occupancy transaction between the hotel and the OTC cannot magically transform "Rent" into something other than what has already been established in the retail transaction between the OTC and the Transient.

Second, the Rent definition provides an objective means of determining what constitutes "Rent"—namely, the consideration "***as shown on the guest receipt*** for the Occupancy of a room." There is no dispute that the only transaction in which a guest receipt is provided is the one between the OTC and the Transient and the amount shown on the guest receipt is the "retail rate" paid by the Transient for Occupancy and not the "net rate."

According to the trial court, however, the "Rent charged by the Operator" language changes the carefully constructed definition of Rent contained in the Ordinance.

The Ordinance specifically addresses two entities: the Operator and the Transient. In merchant transactions—as well as agency and modified-merchat transactions—a third-party intermediary is introduced into the equation: the OTC. Third-party intermediaries are not expressly referenced in the Ordinance. Yet, no one contends that the Ordinance does not apply to transactions involving OTCs, including merchant transactions. Otherwise, entire OTC transactions would go untaxed, and not even the OTCs take this position. Rather, the OTCs come within the purview of the Ordinance by implication because the Ordinance does not limit Operators using third-party intermediaries, such as travel agents and OTCs, to help sell their inventory.

What actually happens is that the hotel Operator delegates functions to the OTCs. The Ordinance identifies certain functions that the Operator is to perform and, per agreement, certain of these functions are delegated by the Operator to the OTC. They include charging and collecting Rent and TOT, and providing a guest receipt to the Transient. In performing these functions, the OTCs are acting under contractual grants of authority from the hotels.

In a hotel-direct transaction, Rent is charged by the Operator to the Transient. There is no dispute that the taxable amount is the retail rate charged to, and paid by, the Transient. In an OTC merchant transaction, Rent is charged by the OTC to the Transient. The Transient pays the Rent to the OTC.

The OTC is merely acting as the hotel's agent or representative in performing the "charging" and "collecting" functions under the Ordinance.

The hotel can act directly with the Transient, as in a hotel-direct transaction, by directly "charging" the Transient the retail rate for the room, or indirectly, as in merchant transactions, by delegating the "charging" function to the OTC.

In a merchant transaction, "Rent charged by the Operator" does not ***literally*** apply since the hotel does not directly charge the Transient anything—instead, the hotel's designee, the OTC, charges pursuant to its contractual grant of authority to do so from the hotel. Moreover, the amount the hotel obtains from the OTC is not Rent since the OTC never is granted the right of Occupancy.

What happens in a merchant transaction is that the hotel delegates its Rent-charging function to the OTC. From the Transient's perspective, it is paying the same amount in the above examples for Rent ($100) regardless of whether it is being charged Rent directly by the hotel as in the hotel-direct transaction or is being charged Rent by the hotel's designee, the OTC, in a merchant transaction. The tax base—Rent—does not change simply because the hotel performs the "charging" function directly in a hotel-direct transaction and indirectly, through the OTC, in a merchant transaction.

The trial court erred in answering the "central issue" by finding that the taxable transaction was the one between the hotel and the OTC. It can't be. The hotel-OTC transaction does not involve the Transient and does not involve Occupancy—both of which are indispensable elements of Rent.

Thus, Rent is established at the time of the OTC-Transient transaction. The tax imposition language—"Rent charged by the Operator"—is not designed to change the definition of Rent. Rather, in the two-party construct of the Ordinance, which involves only the hotel Operator and the Transient, it

merely identifies the "charging party" (the Operator) just like the definition of Rent identifies the "charged party" (the Transient).

Merchant transactions introduce a third party intermediary into the mix. The Court must apply the statutory interpretation tools to arrive at the interpretation that gives effect to the intent of the drafters; harmonizes the Ordinance so that all provisions are given effect and none are rendered surplusage; and promote the general purpose of the statute and avoid absurd consequences. The Court must not sacrifice the purpose of the statute to a literal construction. The purpose and intent is to tax the Transient's retail rate charged, and then paid, to secure the Transient's privilege of Occupancy.

E. The OTCs' Arguments Do Not Justify a Reduced Tax Base Based on the OTC-Hotel Post-Occupancy Transaction.

The OTCs make three arguments to support a reduced tax base for merchant transactions. All are unsupportable.

1. The OTCs' Commissions Are Not For the Alleged Value of Their Services Provided Transients.

The OTCs mischaracterize the nature of their sale commissions in merchant transactions. They seek to sow confusion by mischaracterizing the nature of their commissions. Throughout, the OTCs suggest their commissions are, in reality, a separate charge for their services to Transients and are therefore not taxable. Such allegations in the OTCs' consolidated writ of mandate include:

- "In contrast to the rental amount, the margin and service fee amounts are paid to Priceline (which does not own or possess any hotel accommodations) and not to the hotel operator (who does own or possess the hotel structure). *No part of these amounts is remitted to the hotel for occupancy of a room.*" (1 JA, T. 4, pp. 000132-000133 [¶ 91].)
- "Both the mark-up and the Service Fee are paid to Orbitz (which does not own, manage, or possess any hotel accommodations) and not to the

actual operator of the hotel (which does possess such accommodations). (1 JA, T. 4, p. 000163 [¶ 223, italics added].)

Such statements in the OTCs' writ of mandate seek to portray the OTCs' commissions in merchant transactions as being separate from the taxable total paid by the Transient for Occupancy. It is a false characterization.

The OTCs' quoted "room rate" to the Transient is comprised of the "net rate" and "margin." That "room rate" and the "fee" packaged with the TOT amount comprise the "total consideration" paid by the Transient for Occupancy in merchant and modified-merchant transactions. The amount of the "margin" is directly dictated by the contracts between the hotels and OTCs. (See 3 AR, T. 5, pp. 013894:25-013895:11; 4 AR, T. 7, p. 014238:6-8; 17 AR, T. 62, pp. 000982, 000985-000986; 17 AR, T. 71, pp. 001158-001162; 18 AR, T. 80, p. 001302; 19 AR, T. 90, 001483.) The "margin" and any OTC "fee" are an included portion of the "Rent." They are part of the "total consideration" stated to and paid by the Transient for Occupancy. Again, the "margin" and "net rate" come about only as the ***mechanism for allocating*** the "room rate" so that the OTC may receive its commission for assisting in the sale of the hotel room to the Transient.

There are no separately billed services. The OTCs provide their services to Transients for free. OTCs provide websites in which consumers are provided tools to view information regarding various hotels and to comparison shop. Consumers can comparison shop or "surf" the OTCs' websites for unlimited time for free.

The OTCs' commissions are granted by hotels for facilitating room sales. Other than amounts designated for TOT, ***all*** of a Transient's payment in merchant transactions is for Occupancy—i.e., to pay the retail amount to purchase Occupancy, the right to occupy and use a hotel room. All of such amount is taxable Rent.

2. "Rent" is Never the "Net Rate;" "Rent Charged By the Operator" Never Signifies the "Net Rate".

The OTCs contend that the "Rent charged by the Operator" language in the tax imposition sections of the Ordinance—sections 35.0103-35.0106, 35.0108—trumps the actual definition of Rent in defining the tax base. The OTCs urge that the post-occupancy, revenue-sharing arrangement between the hotel and OTC reduces the tax base to the net rate.

"Rent charged by the Operator" does not refer to or signify the "net rate." Rather, the phrase directly refers to Rent, the tax base. "Rent" charged cannot be changed to mean "net rate" charged. Rent is not and can never be the "net rate."

"Net rate" (the amount the OTC forwards to the hotel after first retaining its commission) cannot be construed as Rent ("total consideration charged to a Transient as shown on the guest receipt for the Occupancy of a room"). "Net rate" plus "margin" equals the OTCs' "room rate," which together with the OTCs' additional "fees," comprise the amount paid by the Transient to an OTC for Occupancy. The "net rate" is ***never*** the total amount paid by the Transient for Occupancy.

Only Transients purchase the right of Occupancy. The Transient's purchase of Occupancy is the only room-purchase transaction. Only this transaction is subject to the TOT.

Hotels allow OTCs to sell out of hotel's room inventories, not for the "net rate," but for "retail rates." The hotels control room pricing by contractually prohibiting the OTCs from offering hotels' rooms at prices lower than those then offered by the hotels. (17 AR, T. 64, p. 001016; 26 AR, T. 210, pp. 003427:24-003428:11; 34 AR, T. 248, pp. 005280:8-005281:10.) The OTCs cannot undercut the hotels on price. To avoid being non-competitive on price, OTCs rarely charge room rates greater than those of hotels and other OTCs. The OTCs' verified, consolidated writ states: "Each hotel establishes

and maintains complete control of their room rates and room availability ...." (1 JA, T. 4, p. 000133-000134 [¶ 94].) This accounts for why the Internet screen shots and other evidence show hotels' and OTCs' room rates to nearly always be the same. (See, e.g., 3 AR, T. 5, p. 013866:2-21; 24 AR, T. 202, p. 002723 at 202:13- 204:10.) Thus, "Rent charged by the Operator" in the Ordinance's tax imposition sections include not only the "net rate" but also the "margin" because the hotel operator ***contractually requires*** these amounts be "charged" to the Transient.

The OTCs tell this Court that the "room rate" subject to tax is the "net rate," yet the OTCs' websites universally advertise the "room rate" as being the "retail rate" charged to and paid by Transients to secure Occupancy, which is the only taxable purchase transaction. (See 3 AR, T. 5, pp. 013865:2-013867:19.) If the OTCs did otherwise, they would be in immediate breach of their contracts with the hotels, which require the OTCs to charge Transients a "room rate" that is no lower than the amount the hotel directly charges the Transient. (17 AR, T. 64, p. 001016; 26 AR, T. 210, pp. 003427:24-003428:11; 34 AR, T. 248, pp. 005280:8-005281:10.)

The "net rate" is part of the ***mechanism for allocating*** Transients' retail room payments in merchant transactions in order to compensate OTCs. For merchant transactions, the OTCs and hotels have agreed upon a process where the hotel will obtain a stated amount of the Transient's room-purchase proceeds and the OTC may keep the remainder. That stated amount is the "net rate." It has nothing to do with setting the retail rate upon which Occupancy is sold.

The tax base, Rent, is couched as the "total consideration" for "Occupancy." Since it is Transients who pay Rent and TOT, and who occupy hotel rooms, the Transient's purchase transaction is the only one that is, or could be, taxed under all transactional models, including merchant transactions. "Rent charged by the Operator" does not change this reality, but

reinforces it. In merchant transactions, the OTCs must price to the retail market as their principals, the hotels, contractually require. This OTC-pricing and selling at retail rates are not only contractually dictated, but also dictated by the market. OTCs cannot underprice the market because neither the market nor hotels will allow it.

"Rent" in "Rent charged by the Operator" cannot be reasonably construed to refer to the "net rate," as Rent is for Occupancy and always refers to the Transient's taxable purchase transaction and the amount the Transient pays to secure Occupancy as reflected on the Transient's "guest receipt," which is never the "net rate."

3. The Trial Court (and this Court in the Anaheim Case) Correctly Held that the OTC Sells to the Transient the Right to Occupy the Hotel Room.

The OTCs contend they merely "facilitate" the hotel reservation and do not sell the right to occupy which, they argue, can only be granted by the hotel operator. But the trial court in this case, as well as this Court in the City of Anaheim case, have held to the contrary.[12]

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[12] Also, the trial court misstated the record in asserting that "[i]t is undisputed that the OTCs do not control ... the hotels." (RT, p. 149:2-3.) The trial court's statement is unsupported by any record citation. None existed because the City made no such concession. In fact, one of the City's retained counsel was the McKool Smith law firm. This was the same firm that was lead counsel for the City of San Antonio in a federal class action on behalf of more than 170 Texas cities. To date, the San Antonio case is the only transient occupancy tax case to be tried to a jury. Question One presented to the jury was "do the OTCs control the hotels." Following a month-long trial, a unanimous, twelve-person jury answered "YES" to this question. The trial court entered findings of fact and conclusions of law upholding the jury verdict. Given that McKool Smith had succeeded in persuading the fact finder in the San Antonio case that the OTCs "control the hotels," it would have been nonsensical for it to abandon this argument and concede in the San Diego action that the OTCs do not control hotels. It never happened. Yet, the trial court erroneously stated that "control" was undisputed. In fact, the same "control" evidence that was

Significantly, both the trial court and this Court found the OTC—not the hotel—is the party that rents hotel rooms to Transients for the privilege of occupancy. According to the trial court, "the OTC sells to the customer or transient ***the occupancy privilege***" (RT, p. 135:4-5) and "***[a]fter the occupancy of the hotel room has been completed*** ... the OTC remits to the hotel the wholesale price of the room" (*id.* at p. 135:13-15).

According to this Court, "the OTCs then mark up the wholesale price to derive the retail price at which ***they rent hotel rooms to consumers***. ... Once the consumer pays for a room through an OTC website, ***the sale of the room is complete***. ... After it ***sells the consumer the right to occupy the room***, the OTC retains its fee and pays the hotel the wholesale rate and TOT based on the wholesale rate." (Anaheim Opn., pp. 3 and 4)

These findings are critical. They repudiate the OTCs' contention in these consolidated TOT cases that the transaction between them and the Transients does not involve a rental or sale of the room to the Transients and does not confer the right of occupancy to the Transients.

Under the San Diego Ordinance, identifying the transaction in which the right of occupancy is conferred is vital. Since (1) Rent is the "total consideration charged to a Transient ... for the ***Occupancy*** of a room," and (2) since this Court agrees it is ***the OTC*** who "sells the consumer the right to occupy the room," then it necessarily follows that the OTC-Transient transaction is the relevant one for identifying what constitutes "Rent."

The trial court and this Court recognized the transaction between the hotel and the OTC was a post-occupancy transaction—"***after*** the occupancy of the hotel room has been completed" (per the trial court) and "***[a]fter*** [the OTC] sells the consumer the right to occupy the room" (per this Court). As such,

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presented in the San Antonio case was presented to the San Diego Hearing Officer.

Rent does not reach "post-occupancy transactions" such as the one between the OTC and the hotel.

The transaction conferring Occupancy is the Transient's room-purchase, which is never priced at the "net rate" and the "net rate" is never the amount paid by the Transient to the hotel to secure Occupancy. In marketing and selling room licenses to Transients out of hotels' inventories in merchant transactions, the OTCs do not sell room licenses for the "net rate." Again, the "net rate" only comes about as part of the ***mechanism for allocating Transients' room-rental payments*** to compensate the OTCs—i.e., pay their sale commissions. The "net rate" has nothing to do with pricing what the right of Occupancy will be sold for by OTCs to Transients. ***In a merchant transaction, there is never a room-purchase transaction where a hotel room is priced and sold to a Transient for the "net rate."***

* * *

Proper application of the Ordinance fully supports the taxable transaction and tax base in merchant transactions remaining the same as with hotel-direct, agency, and modified-merchant transactions. There is no basis under the Ordinance or otherwise supporting the material changes to the taxable transaction and tax base advanced by the OTCs for merchant transactions ***only***.

Forwarding the "net rate" by OTCs to hotels is irrelevant to the Transient's purchase of Occupancy by paying Rent and TOT to the OTCs. The trial court erred when it concluded that the post-occupancy, revenue-allocating transaction between hotels and OTCs establishes the taxable purchase transaction and the tax base in merchant transactions.

F. The Trial Court Erred In Failing to Apply the Express Statement of Legislative Intent and Purpose.

While the trial court conceded the Ordinance taxes Transients (RT, p. 134:21-24) and later quoted section 35.0101's statement of legislative intent

that the Ordinance "impose[s] a tax on Transients" (*id.* at pp. 141:25-142:1), it never referred to or analyzed the Ordinance's legislative intent or general purpose within its interpretation of the Ordinance. The trial court's failure to give any credence to the express statement of legislative intent and purpose contained in the Ordinance was a critical error. As previously noted, California law provides that the "fundamental task" of a court in a statutory interpretation case "is to determine the Legislature's intent so as to effectuate the law's purpose. [Citation.]" (*In re C.H.*, *supra*, 53 Cal.4th at 100-101.) Here, the legislative intent was express, yet ignored.

G. OTCs Need Not Be Operators For Their Liability to Lie.

1. Operators May Work with the OTCs to Charge, Collect, Report, and Remit TOT.

The Ordinance does not prohibit Operators designating or assigning some of their duties for charging, collecting, reporting, or remitting TOT to third parties such as OTCs.

Transients must pay TOT with the Rent. (§ 35.0110, subd. (b).) Operators or their designees must:

(1) simultaneously collect Rent and TOT from Transients (§ 35.0112, subd. (a));

(2) separately state Rent and TOT on Transients' receipts (*id.*, subd., (c));

(3) account for the total tax collected monthly (*id.*, subd. (f), (g)); and

(4) account for, report and remit taxes collected to the City (§ 35.0114).

Between them, hotels (undisputable Operators) and the OTCs perform these functions, albeit inadequately for merchant transactions.

2. The OTCs Are Not Required to be Classified as "Operators" Under the Ordinance For Their Liability to the City to Lie.

By now, it should be evident that the payment of Rent occurs when a Transient responds to a "charge" for Rent and TOT by tendering payment for the charged Rent and TOT to acquire Occupancy. The Transient tenders payment of the Rent and TOT to either an Operator or an entity designated by the Operator, such as an OTC, to receive the Rent and TOT.

The Ordinance defines the "Operator" as the "proprietor" of the physical structure, the Hotel, or "a managing agent, a resident manager, or a resident agent, of any type or character, other than an employee without management responsibility." (§ 35.0102.)

When the OTCs operate in either of agency, modified-merchant, or merchant transactions, they do so under contractual grants of authority provided them by indisputable Operators. There is no dispute that the parties contracting with the OTCs fit the Ordinance's definition of Operators.

Through the contracts between them, those Operators imbue the OTCs with the rights to "charge" Transients Rent and TOT. The Ordinance imposes no limitations on Operators assigning the powers of "charging" and collecting Rent to OTCs. This is precisely what occurs when Operators allow the OTCs to quote (charge) and collect retail "room rates"—i.e., Rent—on their websites in modified-merchant and merchant transactions. The OTCs ***do not*** have to be Operators to carry on these contractually provided Rent-charging powers provided them by indisputable Operators.

Since the Ordinance does not limit Operators from delegating these charging and collecting powers over Rent, it is a false argument, as the OTCs make, that the OTCs must be Operators for them to have such charging and collecting powers.

In exercising these delegated charging and collecting powers for Rent, the OTCs must also properly perform the ministerial functions under the Ordinance of adequately charging, collecting, accounting for, and remitting TOT. These ministerial functions, as a matter of law, may properly be delegated. In *Los Angeles Gas and Electric Corp. v. City of Los Angeles* (1912) 163 Cal. 621, the California Supreme Court clarified that the ministerial duties of tax assessment and collection may be assigned. (*Id.* at 626.) The case involved a challenge to a City of Los Angeles ordinance that required payment of a "quarterly license in advance based upon the income, in each instance, of the preceding quarter, because obviously it would be impossible to determine such income in advance." (*Id.* at 624.) The ordinance provided that a City clerk had the power to perform the calculation based on the prior quarter's income to ascertain the license fee. The appellant challenged propriety of the clerk having the power to make the calculation. (*Id.* at 625.) The Court concluded the delegation to the clerk was proper because exercising the delegated powers "do not involve judgment or discretion, but are merely mechanical or ministerial." (*Id.* at 626.)

The same is true here. The Operators lawfully delegated to the OTCs the powers to "charge" and collect TOT. Ascertaining the TOT to charge and collect is a ministerial mathematical calculation under the Ordinance. The total Rent charged to and paid by the Transient is multiplied by 10.5 percent to calculate the TOT due from the Transient. (See §§ 35.0101, subd. (a); 35.0102; 35.0103-35.0106, 35.0108.) This calculation does not involve judgment or discretion, as it is unambiguously mandated by the Ordinance. Yet, as noted, OTCs decide themselves to violate this ministerial, non-discretionary act of calculation by not multiplying the percentage times Rent, but instead multiplying it by the net rate, even though that is never referenced or suggested by the Ordinance.

Finally, as explained above: the OTCs' sale commissions in merchant transactions derive from, and their amounts are dictated by, the contracts between hotels (Operators) and the OTCs; and those sale commissions are an undifferentiated part of the Rent charged to and paid by Transients to secure Occupancy. These important facts pertaining to the taxability of the OTCs' sale commissions in merchant transactions are not dependent upon the OTCs being Operators.

VII.
THE COMPLAINT'S CAUSES OF ACTION ALL REMAIN UNDER A PROPERLY INTERPRETED TAX BASE.

Since the OTCs' commissions are part of Rent in merchant transactions and because the OTCs collect and retain amounts at least equal to the TOT on their commissions, the causes of action from San Diego's Third Amended Complaint (2 JA, T. 8, pp. 286-330) allow the City the pleaded causes of action and remedies under a properly interpreted tax base, Rent.

VIII.
CONCLUSION: THE WRIT SHOULD HAVE BEEN DENIED AND THE CITY'S MOTION DENYING THE WRIT GRANTED.

The essence of the trial court's conclusion was that "charged by the Operator" from sections 35.0103-35.0106, 35.0108 allowed for transactional manipulation of Rent that resulted in taxation of the wrong transactions and the wrong amounts, outside of anything defined or prescribed in the Ordinance.

The OTCs' sale commissions in merchant transactions is part of the bundled amounts paid by Transients for Occupancy and it is therefore taxable under the Ordinance.

The City's motion to deny the OTCs' writ should have been granted, and the OTCs' counter-motion denied. Reversal of the judgment is warranted.

DATED: March 15, 2013

Respectfully Submitted,

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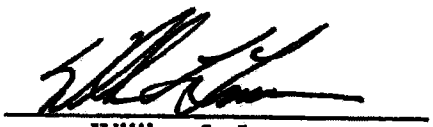
CERTIFICATION AS TO LENGTH OF BRIEF

I, William L. Larson, counsel for Appellant, declare under penalty of perjury under the laws of the State of California that the word count for this Brief, excluding Table of Contents, Table of Authorities, Proof of Service and this Certification is 12,874 words as calculated utilizing the word count feature of the Microsoft Word 2010 software used to create this document.

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

Executed March 15, 2013, at Beverly Hills, California.



William L. Larson

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and **not a party to this action.** I am employed in the County of Los Angeles, State of California. My business address is 8648 Wilshire Boulevard, Beverly Hills, CA 90211-2910.

On March 15, 2013, I served true copies of the following document(s) described as **APPELLANT'S OPENING BRIEF** on the interested parties in this action as follows:

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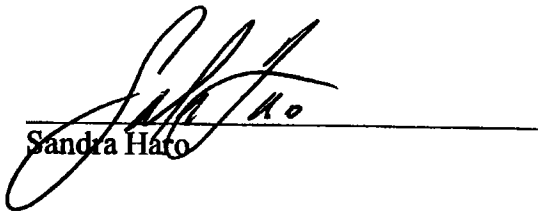

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SECOND APPELLATE DISTRICT
DIVISION 2

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 Superior Court of
the State of California for the County of Los Angeles
Hon. Elihu M. Berle, Judge
Case Number: GIC861117
(Judicial Council Coordination Proceedings No. JCCP 4472)

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I. INTRODUCTION

In the *Anaheim* case[1], this Court held that "[t]he measure of tax is the 'rent.'" (Anaheim Opn., p. 5.) San Diego agrees. San Diego measures its transient occupancy tax (TOT) by its Rent[2] definition. The OTCs, however, disregard this central holding in *Anaheim* and ignore the Rent definition in measuring the tax. This is the nub of the dispute on appeal. Should Rent be enforced as written (San Diego's position and this Court's position in *Anaheim*) or disregarded (the OTCs' and trial court's position)?

In *Anaheim*, this Court recognized that in merchant model transactions, by contract, "the hotel permits the OTC to sell the consumer the right to occupy a room," the OTCs are the entities that "rent hotel rooms to consumers," and "[w]hen a consumer pays for a room through an OTC website, the sale of the room is complete." (Anaheim Opn., pp. 3-4.)

Following are the critical questions and answers that answer the central issue on appeal: What amount is subject to tax under the Ordinance[3] for merchant transactions?

- What amount constitutes Rent under the Ordinance? Rent is "the total consideration charged to a Transient as shown on the guest receipt for the Occupancy of a room." (San Diego Municipal Code § 35.0102 [first sentence of Rent].)[4]

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[1] *In re Transient Occupancy Tax Cases* (Anaheim), JCCP 4472, case no. B230457, filed November 1, 2012.

[2] As does the AOB, this brief capitalizes certain words to reflect they have the meaning ascribed to them in the San Diego Municipal Code.

[3] As does Appellant's Opening Brief, the Reply Brief designates the "Ordinance" as referring to the City of San Diego's TOT ordinance located at San Diego Municipal Code, Chapter 3, Article 5, Division 1, sections 35.0101 through 35.0138.

[4] All undesignated section references are to the Ordinance, which was attached as Exhibit 1 to the Opening Brief.

- Does the Ordinance provide an objective way to measure Rent? Yes, the amount shown on the guest receipt. (See § 35.0102 [first sentence of Rent].)

- In merchant transactions, who provides the "guest receipt" to the Transient? The OTC.

- What amount does the OTC-provided guest receipt show as being the charge for Occupancy? The retail rate, not the net rate.

- What is the legal significance of the OTC issuing a guest receipt that shows the room rate as the retail rate and not the net rate? It constitutes an admission by the OTCs that taxable Rent is the retail rate.

- May the cost of the OTCs' services be deducted from Rent? No, Rent includes "all services of any kind or nature without any deduction therefrom." (§ 35.0102 [third sentence of Rent].)

The OTCs hinge their entire argument on the tax imposition provision in the Ordinance, which states the tax is 10.5% of the "Rent charged by the Operator." (§§ 35.0103-0108.) The OTCs contend this language somehow converts the taxable amount from the "retail rate" shown on the guest receipt to the "net rate" that the hotels charge the OTCs weeks or months after the rental transaction between the OTCs and Transients. There are several fundamental flaws in the OTCs' argument.

First, in a merchant transaction (unlike a hotel-direct or agency transaction) the hotel Operator does not charge Rent. Instead, the hotel delegates the Rent-charging function to the OTC and contractually requires the OTC to charge the Transient (at a minimum) the retail rate for the hotel room. The "Rent charged by the Operator" language does not literally apply in a merchant transaction because it is the OTC, not the hotel Operator, who charges Rent.

Second, because the "the sale of the room is complete" upon the OTC charging the Transient's credit card, the later, post-occupancy payment of money by the OTC to the hotel does not modify the taxable retail rental amount established at the moment of sale to the Transient. When the OTC transmits a portion of the sale proceeds to the hotel, that transmittal does not magically undo the amount of Rent paid by the Transient to the OTC weeks or months earlier.

Third, the OTCs try to equate the "Rent charged by the Operator" phrase as describing the net rate charged by the hotel to the OTC. However, the amount the hotel charges the OTC is not Rent. The Transient is the renter who pays Rent, not the OTC. (See §§ 35.0102 [definition of Transient: Transient "exercises Occupancy, or is entitled to Occupancy"]; *id.* [first sentence of Rent definition]; 35.0110, subd. (a) [TOT is "debt owed by each Transient"].) Rent is payment for "Occupancy of a room." (§ 35.0102 [Rent definition].) The Transient pays for Occupancy, not the OTC. At the moment the OTC charges the Transient's credit card—the point at which the taxable transaction is complete and fixed—the hotel has no involvement in the transaction. No possible interpretation supports the notion that tax is due only on the net rate paid in a later, secondary transaction not involving the Transient.

In this statutory interpretation case, this Court should place great weight on how each party applies (or fails to apply) the relevant rules of statutory construction to merchant transactions. San Diego's interpretation is faithful to each of the rules of statutory construction, while the OTCs disregard them.

San Diego's interpretation implements the express "purpose and intent" of the Ordinance to impose TOT on Transients. (§ 35.0101.) The OTCs' interpretation negates this express purpose and intent by imposing

the tax on the OTC and its post-sale transaction with the hotel splitting the Transient's rental proceeds.

San Diego's interpretation honors the express legislative intent to tax "the privilege of Occupancy." (§ 35.0103.) The OTCs' interpretation negates this legislative intent by taxing a post-occupancy transaction that is a mere exchange of money between the OTC and hotel and does not involve the privilege of Occupancy.

San Diego's interpretation harmonizes all provisions of the Ordinance. It harmonizes the Rent definition with the tax imposition provision. The OTCs' interpretation does not even attempt to harmonize the Ordinance, and it eviscerates the Rent definition. Rent is no longer measured by the total consideration charged to a Transient; the guest receipt provision is eliminated as if it never existed; and the alleged value of the OTCs' services is excluded from (instead of included in) Rent.

San Diego's interpretation produces the logical and reasonable result in which economically identical transactions receive the same tax treatment. Also, the Transient (taxpayer) knows the tax base (the retail rate) upon which tax is owed. The OTCs' interpretation produces absurd results in which OTC merchant transactions are taxed at a reduced rate compared to otherwise identical OTC agency and modified-merchant transactions. Another absurdity is the Transient owes tax on an amount (the net rate) that is undisclosed and unknowable to him.

Applying the plain language of the Ordinance to the OTCs' merchant transactions establishes that the tax base—Rent—equals the amount the Transient pays the OTC for the privilege of Occupancy without deduction. No other reasonable interpretation exists.

II. THE PLAIN LANGUAGE OF THE ORDINANCE MEASURES RENT AS THE TOTAL CONSIDERATION CHARGED TO A TRANSIENT AS SHOWN ON THE GUEST RECEIPT WITHOUT ANY DEDUCTION OF ANY KIND OR NATURE.

A. As this Court Has Held, the Measure of Tax is Based on the Definition of Rent.

"The measure of tax is the 'rent,'...." (Anaheim Opn., p. 5.) San Diego agrees the measure of tax in all these coordinated Transient Occupancy Tax Cases is determined by the cities' definitions of "rent."

In deciding what amount was subject to tax, this Court in *Anaheim* properly focused on the term that establishes the tax base: the definition of "rent." This Court made repeated references to Anaheim's "rent" definition in ultimately deciding the OTCs' compensation was not taxable because "rent" was defined as "the consideration charged by an operator" for accommodations. (See Anaheim Opn., pp. 2-3, 5, 8-10, 20-21 [discussing rent definition].) By contrast, the *Anaheim* decision contained no discussion of Anaheim's tax imposition provision found at Anaheim Municipal Code section 2.12.010.010. After quoting the tax imposition provision along with various other ordinance provisions (see Anaheim Opn., p. 2), this Court never again mentioned Anaheim's tax imposition provision.

B. The OTCs and the Trial Court Avoid Any Meaningful Discussion of the Rent Definition; Instead, They Read the Rent Definition Out of Existence.

The Respondents' Brief cites California case law for the proposition that "[a] statute should be construed so that effect is given to all its provisions, [and] so that no part will be inoperative or superfluous, void or insignificant." (RB, p. 28.) San Diego could not agree more. Yet, the OTCs violate the rule by rendering the entire definition of Rent inoperative and void. Under the interpretation offered by the OTCs and the trial court, Rent

is no longer "the total consideration charged to a Transient." Rather than Rent "including" all services of any kind or nature without deduction, Rent "excludes" the OTCs' services, the amount hotels allow OTCs to retain from the rental proceeds. And the guest receipt provision in the Rent definition is vaporized.

The Respondents' Brief mostly avoids any meaningful discussion of Rent. When the OTCs discuss Rent, they offer an unsupportable interpretation belied by Rent's plain language.

1. The First Sentence: "Total Consideration Charged to a Transient"

The OTCs do not discuss the Ordinance's key provision—the first sentence of the Rent definition—until page 34 of the Respondents' Brief, and, when they do, it is a superficial, one and one-half page discussion.

After quoting the first sentence of the Rent definition, the OTCs then state: "As shown, the entity that possesses (and can transfers [sic] possession of), and can charge for 'Occupancy,' is the hotel 'Operator.'" (RB, p. 34.) In their 44-page brief, this one sentence constitutes the entire OTCs' discussion of the pivotal "total consideration charged to a Transient" language in the Rent definition. Moreover, the OTCs' statement is a *non sequitur*.

The OTCs undertake no analysis of the actual language in the Rent definition—"total consideration charged to a Transient"—and fail even to suggest how this language could be interpreted as applying to the net rate and not the retail rate. Instead, the OTCs offer unsupported conclusions belied by the Ordinance's plain language. The OTCs assert that "San Diego's Ordinance is not structured to impose tax on the total amount paid by a transient related to a hotel room reservation." (RB, p. 23.) To the contrary, that is ***exactly*** how it is structured. The definition of Rent

expressly states it is "the total consideration charged to a Transient as shown on the guest receipt for the Occupancy of a room."

The OTCs' interpretation is that tax is due only on a portion of the consideration charged to a Transient (the amount equal to the net rate), but the plain language applies to the "total" consideration charged to the Transient. The OTCs offer no explanation why "total" should be stricken and replaced with "partial."

Realizing the Rent definition nowhere mentions Operator, the OTCs try to shoehorn the Operator into the Rent definition by stating the hotel Operator is the entity that "can charge for 'Occupancy.'" (RB, p. 34.) This statement is meaningless. The hotel Operator "can" charge for Occupancy, and in hotel-direct and agency transactions does charge for Occupancy. However, an OTC also "can" and "does" charge for Occupancy in the prepaid merchant transactions that are the subject of this appeal. (See Anaheim Opn., p. 3 [the OTCs "charge the consumer's credit card" at which point "the sale of the room is complete."].)

2. The First Sentence: "As Shown on the Guest Receipt"

San Diego's definition of Rent is unique among all California cities in objectively defining Rent by reference to the amount "as shown on the guest receipt." (§ 35.0102.) This presents an insoluble problem for the OTCs because the room rental amount "shown on the guest receipt" in merchant transactions is the ***retail room rate***—not the net rate. (See 1 JA, T. 4, p. 000200 [administrative decision].) Rent's "guest receipt" language is the OTCs' Achilles Heel. The trial court had no answer for it. The OTCs have no answer for it. It provides an objective measure of Rent. It unequivocally establishes the tax base.

The Operator must provide a guest receipt to the Transient. (§ 35.0112, subd. (c).) In merchant transactions, the hotel Operator

contractually delegates to the OTC the function of issuing the guest receipt to the Transient. Under this contractual grant of authority, the OTC creates and issues the guest receipt to the Transient for the retail room rate. (See 1 JA, T. 4, p. 000200-000201 [administrative decision]; 3 AR, T. 5, pp. 013848:13-013849:6; 36 AR, T. 240, pp. 005744:25- 005745:6; 6A AR, T. 10, pp. 014730:13-014731:23.) The OTCs could have issued a guest receipt to the Transient in an amount equal to the net rate, but they don't. That decision has profound legal consequences. It constitutes a binding admission by the OTCs.

The OTCs issue a guest receipt for the retail room rate and not the net rate for several reasons.

First, the OTCs' business practice is never to disclose the net rate to Transients, but rather to keep the net rate secret. (See 1 JA, T. 4, p. 000201[administrative decision]; 2 AR, T. 4, pp. 013810:15 – 013811:8; 6 AR, T. 10, pp. 104732:10-25, 014733:10-12; 17 AR, T. 62, p. 00988.)

Second, the standard "rate parity" clauses in the OTC-Hotel contracts require an OTC to charge the Transient a minimum room rate no less than the hotel's best available rate for a given hotel room on a given night. (See 3 AR, T. 5, pp. 013865:24-013867:4; 17 AR, T. 64, p. 001016; 26 AR, T. 210, pp. 003427:24-003428:11.) If a hotel is charging a $100 room rate in a certain hotel in a hotel-direct transaction, the OTC must charge at least $100 for that same hotel room in a merchant transaction. If the OTC charged less than $100, the OTC would be in breach of its contract with the hotel. To avoid an admitted breach, the OTC-issued guest receipt shows the room rate as the $100 retail rate and not the $80 net rate.

Neither the trial court nor the OTCs tries to harmonize the guest receipt provision. Both read it out of existence.

As discussed in San Diego's Opening Brief, the trial court did not address San Diego's actual argument—the guest receipt provision is critical

to interpreting the Rent definition because it provides an objective means for measuring Rent. (AOB, p. 18.) Instead, the trial court addressed a straw man argument it created in which it recast San Diego's "guest receipt" argument as dealing primarily with the Operator definition or technical receipt violations. (See RT, pp. 159:6-160:1.) As explained in the Opening Brief, that was not San Diego's argument regarding the guest receipt requirement in the Rent definition. (AOB, pp. 18-19.)

The OTCs replace the guest receipt language with an ellipsis when quoting the Rent definition. "'Rent' means only 'the total consideration charged to a Transient ... for the Occupancy of a room.'" (RB, p. 17.) The actual Rent definition reads, "'Rent' means the total consideration charged to a Transient ***as shown on the guest receipt*** for the Occupancy of a room.'" (§ 35.0102.)[5]

Neither the trial court nor the OTCs have a coherent argument relating to the guest receipt requirement in Rent's definition and the guest receipt's quantification of Rent. The OTCs state (correctly) that the "Ordinance requires only one entity—the 'operator'—to provide a guest receipt." (RB, p. 35.) That is true, but is also singularly unhelpful to the OTCs. The hotel does not provide a guest receipt to the Transient in merchant transactions, but rather delegates the receipt function to the OTC who then issues a guest receipt to the Transient showing the retail rate as the room rate. (See 1 JA, T. 4, pp. 00200-000201 [administrative decision]; 3 AR, T. 5, pp. 013848:14-013851:16; 18 AR, T. 85, p. 001375; 36 AR, T. 240, pp. 005744:4-005745:16.) The OTCs' observation that the Ordinance imposes the guest receipt requirement on the Operator provides no support to the OTCs' argument that Rent is equal to the net rate. (See 1 JA, T. 4, pp. 00200-000201.)

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[5] Emphases supplied by counsel unless otherwise noted.

The OTCs have no answer for the core definition of Rent—"the total consideration charged to a Transient as shown on the guest receipt for the Occupancy of a room." Three undeniable truths exist when applying the OTCs' merchant hotel operations to Rent. First, it is the OTC (not hotel) who "charge[s] ... a Transient" for the room. Second, it is the OTC (not the hotel) who provides the guest receipt to the Transient. Third, the OTCs themselves report the "consideration" for the Occupancy of the room "as shown on the guest receipt" as the ***retail rate*** (not the net rate).

3. The Second Sentence: Examples of Goods and Services Included as Rent

The second sentence of the Rent definition includes a non-exclusive list of examples of certain types of goods and services taxable as Rent. This list includes certain goods and services that existed when the current version of San Diego's Ordinance was enacted in 1988 that the drafters wanted to specify were taxable. Of the three sentences comprising the Rent definition, the second sentence is not germane because this appeal does not involve the specific examples referenced in the second sentence. As stated in the Opening Brief, "[t]he City does not rely upon the second sentence of Rent in arguing that the OTCs' services are part of the tax base. Rather, the City relies on the core definition of Rent contained in the first sentence, as well as the 'catch-all' contained in the third sentence." (AOB, p. 20.)

In the Respondents' Brief, the OTCs assert that the "City misconstrues the [second] sentence as though it states 'all services are subject to tax, including ....'" (RB, p. 36.) San Diego's Opening Brief does not make this assertion regarding the second sentence of Rent. (However, the third sentence of Rent does expressly tax "all services".) Again, the second sentence merely gives a non-exclusive list of taxable goods and services includable as Rent, nothing more and nothing less.

4. The Third Sentence: "Catch-all" Phrase for Services of Any Kind or Nature

The third sentence of the Rent definition (the "catch-all" sentence) puts an exclamation point behind the broad sweep of the Rent definition in stating that, "Rent includes all receipts, cash, credits, property, and services of any kind or nature without any deductions therefrom."

The OTCs provide "services" in merchant transactions for which they are compensated by hotels from, in large measure, a portion of the Rent. Rent is expressly defined as including "***all services***" of "***any*** kind or nature without ***any*** deduction." The catch-all phrase is not limited to services provided by the hotel, but includes services provided by third parties such as the OTCs—"all ... services of any kind or nature." The City Council could not have said it any more clearly than they did in drafting the broadest possible catch-all language.

Both the trial court and the OTCs offer a cribbed interpretation of this catch-all sentence.

The trial court did two things that were clear error in discussing the catch-all sentence: First, when quoting it, the trial court literally struck the word "services" by replacing it with an ellipsis. (RT, p. 158:18-19 ["Rent includes all receipts, cash, credits, property ...."].) Second, the trial court arbitrarily narrowed its scope by stating it "refers to whatever consideration the transient might be ***giving*** in lieu of money for occupancy." (RT, p. 158:19-21.) As discussed in the Opening Brief, the catch-all sentence applies equally to services the Transient might be ***receiving*** and giving (although nearly always will be receiving). (AOB, pp. 21-22.)[6]

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[6] The trial court's hypothetical example of a Transient who supplies "bartered" services to the hotel in lieu of paying Occupancy is an odd example because such a transaction would seemingly be a rare occurrence. (RT, p. 158:25-28.) Transients do not "give" services to the hotel. What they give is money, whether via a credit card, cash, or a check. By contrast,

The OTCs deflect any direct discussion of Rent's guest receipt provision. Instead they cite to provisions in the Ordinance imposing the records retention requirement on the Operator, and the OTCs then argue that "[t]hese provisions reinforce that only an 'operator' charges 'Rent' for a transient's occupancy of a room, as an operator is responsible for maintaining records." (RB, pp. 35-36.) Not only does this argument fail to address the guest receipt provision, the factual premise that "only an 'operator' charges 'Rent'" (RB, p. 35) has already been rejected by this Court in its *Anaheim* decision. (Anaheim Opn., pp. 3-4 ["[t]he OTCs ... rent hotel rooms to consumers" and "the OTCs ... charge the consumer's credit card"].)

The OTCs parrot the trial court's finding that the catch-all sentence is limited to amounts the Transient might be "giving" as opposed to "receiving." They state in a footnote that the "City makes no attempt to explain how, or under what circumstances, a hotel operator would provide a customer with 'cash' in connection with a room rental" which, according to the OTCs, confirms the catch-all sentence is limited to "forms of payment received by the hotel operator." (RB, p. 37, fn. 20.) San Diego does not dispute that "cash" as used in the catch-all sentence would typically be something the Transient would be "giving" to the hotel. Conversely, the word "credits" as used in the catch-all sentence—which immediately follows the word "cash"—would typically be something the Transient would be "receiving" from the hotel.

The words "cash" and "credits" confirm San Diego's point: the catch-all sentence applies to items that the Transient might give to the hotel

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both the hotel Operator and the OTCs are in the service business. Thus, as it relates to the word "services" as used in the catch-all sentence, a Transient would almost always be "receiving" services from the hotel Operator or OTC not "giving" services to them per the bartered services example.

("cash"), might receive from the hotel ("credits"), and might either give to or receive from the hotel ("services"). However, be they "given" or "received," their value is taxable Rent under the Ordinance.

Courts are not at liberty to change the meaning of ordinances by adding or subtracting words or phrases, but rather effect must be given to all its provisions so that none are rendered inoperative or void. (See *Torrey Hills Cmty. Coal. v. City of San Diego* (2010) 186 Cal. App.4th 429, 440.) The trial court, by striking the word "services" and limiting the catch-all sentence to consideration the transient might be "giving," violated this basic rule of construction.

C. The Ordinance Contains an Express Purpose and Intent to Impose the Tax on the Transient.

The OTCs mischaracterize San Diego's argument as being premised on the "supposed unexpressed intent" or "supposed implied intent." (RB, p. 24.) To the contrary, San Diego's argument relies on the Ordinance's "express intent" and the plain language. The express intent, as reflected in the beginning of the Ordinance, states: "It is the ***purpose and intent*** of the City Council that there shall be imposed a ***tax on Transients***." (§ 35.0101.)

San Diego is faithful to this express purpose and intent by arguing TOT should be imposed on the Transient. In a merchant transaction, the only transaction to which the Transient is a party is the OTC-Transient transaction based on the retail rate. The OTCs ignore the City Council's stated purpose and intent to impose a tax on the Transient by shifting the tax to one imposed on the OTC. The OTCs argued, and the trial court agreed, that the OTC-Hotel transaction based on the net rate was the taxable transaction. The trial court re-wrote the purpose and intent of imposing a tax on "Transients" to imposing a tax on "online travel companies."

The express purpose and intent to impose a tax on Transients is also embodied in the title of the Ordinance: "Transient Occupancy Tax."

Chapter and section headings are given "considerable weight" in interpretation. (See *People v. Superior Court* (2001) 25 Cal.4th 703, 728.) By basing the tax on the Transient's purchase of Occupancy, San Diego's interpretation preserves the character of the tax as a Transient Occupancy Tax. The OTCs' interpretation—which applies the TOT to the OTCs' net rate payment—transforms the tax to one not imposed on the "Transient" and not imposed on "Occupancy."

III. "RENT CHARGED BY THE OPERATOR" IN THE TAX IMPOSITION PROVISION DOES NOT REDUCE RENT TO THE NET RATE AMOUNT.

A. The OTCs' Argument Rests on a Mischaracterization of the Merchant Model—This Court Has Already Concluded that the OTC (not the Hotel) is the Entity that "Charges Rent."

In any hotel room-rental transaction, there is only one rental transaction and one charge for Rent. In hotel-direct and agency transactions, that rental transaction takes place between the hotel and the Transient. However, in modified-merchant and merchant transactions, that rental transaction takes place between the OTC and the Transient. In *Anaheim*, this Court repeatedly emphasized this point. (See Anaheim Opn., pp. 3-4 ["the hotel permits the OTC to sell the consumer the right to occupy a room"; the OTCs "rent hotel rooms to consumers" and "charge the consumer's credit card."; "[w]hen a consumer pays for a room through an OTC website, the sale of the room is complete."])

In merchant transactions, it is established there is no Rent "charged by" the hotel Operator to the Transient; rather, the hotel Operator delegates the Rent-charging function to the OTC. Yet, the Respondents' Brief persists in the myth that the hotels are the entities that charge Rent. This is a critical flaw in the OTCs' argument because their "Rent Charged by the Operator" argument is premised on the mistaken notion that the hotels, not the OTCs,

are the Rent-charging entities in merchant transactions. Because this Court has already recognized it is the OTCs, not the hotels, who charge Rent in merchant transactions, the OTCs' "Rent Charged by the Operator" argument collapses.

At page 29 of the Respondents' Brief, the OTCs begin and end one paragraph with mutually inconsistent statements regarding San Diego's alleged position regarding the OTCs selling the right to hotel occupancy. The OTCs begin the paragraph by (incorrectly) asserting that "the City concedes the OTCs do not themselves have rooms or occupancy to sell" while they end the paragraph by (correctly) stating San Diego's position (and this Court's holding in *Anaheim*), which is that the OTCs ***do*** sell the right to occupancy in their transactions with their customers. (RB, p. 29.)

The Ordinance is a Transient ***Occupancy*** Tax. It taxes hotel Occupancy. The defined term Occupancy is incorporated into both the Rent definition and the tax imposition provision. It is critical to identify which transaction involves Occupancy—"the right to the use or possession of any [hotel] room." (§35.0102.) Only the OTC-Transient transaction involves Occupancy. Transients purchase Occupancy from the OTCs. (AOB, pp. 25, 29, 34) The OTC-Hotel transaction does not involve Occupancy. (*Ibid.*)

As San Diego's Opening Brief noted, both the trial court below and this Court in the *Anaheim* case expressly and correctly held that the OTC—not the hotel—is the party that rents hotel rooms to Transients for the privilege of occupancy in merchant transactions. (AOB, p. 37.) The trial court found that "the OTC sells to the customer or transient the occupancy privilege." (RT, p. 135:4-5.) This Court found that "the OTCs ... rent hotel rooms to consumers"; "[o]nce the consumer pays for a room through an OTC website, the sale of the room is complete" and that the OTC "sells the consumer the right to occupy the room." Anaheim Opn., pp. 3 and 4.) The importance of these findings cannot be overstated. Because the OTC-

Transient transaction is the one in which the OTC sells the consumer the right of occupancy in which the sale of the hotel room is complete, it can only be the OTC-Transient transaction that is the taxable transaction.

The OTCs wholly mischaracterize the operation of the merchant model by stating that the "OTCs *are* intermediaries, serving as a conduit between the buyer of 'Occupancy'—the 'Transient,' and the seller of 'Occupancy'—the 'Operator,' *i.e.* the hotel." (RB, p. 29, emphasis in original.) While this accurately describes the OTCs' ***agency*** model—the Transient is the buyer of Occupancy, the hotel is the seller of Occupancy, and the OTC is the intermediary—it mis-describes the OTCs' ***merchant*** model. In merchant transactions, the Transient continues to be the buyer of Occupancy but the ***OTC*** (not the hotel) is the seller of Occupancy. The hotel is removed entirely from the purchase and sale transaction for Occupancy.

In a hotel-direct or agency transaction, the hotel Operator is the "seller of Occupancy" because the purchase and sale transaction is between the hotel and the Transient, and the hotel is the merchant of record. In both modified-merchant and merchant transactions, however, the OTC is the "seller of Occupancy" because the purchase and sale transaction is between the OTC and the Transient, the OTC is the merchant of record, and the only items that the hotel sells to the Transient are incidentals after check-in.

The OTCs' mischaracterization of the operation of the merchant model continues with the following confused statement:

> Thus, a customer is not only involved in his/her transaction with an OTC, but also is involved (though not directly) in the transaction with the hotel—the transaction in which "occupancy" is purchased, just as the hotel is involved (though not directly) in the transaction with the customer—the transaction in which the customer obtains a room reservation issued by the hotel.

(RB, p. 30) Everything about the above sentence is factually inaccurate. The Transient is ***not*** involved, directly or indirectly, in the OTC-Hotel transaction. Rather, the Transient is a complete stranger to the OTC-Hotel transaction. The statement that the OTC-Hotel transaction is "the transaction in which 'occupancy' is purchased" is inaccurate. The OTC-Hotel transaction is a post-occupancy transaction that merely involves the exchange of monies between the OTCs and hotels. It has nothing to do with Occupancy. The hotel is ***not*** involved, directly or indirectly, in the OTC-Transient transaction. The hotel is a complete stranger to the OTC-Transient transaction. Further, the assertion that the OTC-Transient transaction involves the Transient obtaining a room reservation "issued by the hotel" is inaccurate. The OTC, not the hotel, issues the room reservation to the Transient, and the hotel is removed from the reservation process in merchant transactions.

B. Per the "Rate Parity" Contract Provisions, the Hotels Require the OTCs to "Charge" Rent in an Amount at Least Equal to the Retail Room Rate.

Hotels delegate the Rent-charging function to the OTCs in merchant transactions. This contractual delegation of authority from the hotel to the OTC is not unfettered but comes with strings attached. The "rate parity" provisions are standard provisions in the OTC-Hotel contracts. They provide the OTC must charge a ***minimum*** room rental rate at least equal to the "best available rate" the hotel charges its own customers on a given night in a given hotel for a comparable room. (See 3 AR, T. 5, pp. 013865:24-013867:4; 17 AR, T. 64, p. 001016; 26 AR, T. 210, pp. 003427:24-003428:11.)

If the hotel's best available rate in a hotel-direct transaction is $100, the OTC is required to charge a minimum room rate of $100 in an OTC merchant transaction. While the hotel contract would allow the OTC to

charge more than the hotel charges, as a practical matter, the OTCs nearly always charge the exact same amount for the room rental in a merchant transaction as the hotel charges in a hotel direct transaction. (See 3AR, T. 5, p. 013866:2-21; 24 AR, T. 202, p. 002723 at 202:13-204:10.)

The OTCs want to treat Rent as only the net rate amount (say $80) and treat the OTC's commission ($20) as mere compensation for its services allegedly unrelated to, and not a part of, Rent. However, that is not how the hotels look at it. Per the OTC-Hotel contracts, the hotels consider the entire $100 room amount charged to the Transient to be Rent. In the above example, because the hotel is charging Rent of $100 in a hotel-direct transaction, the OTC must charge Rent of at least $100 in a merchant transaction. In the post-occupancy transfer of money between the OTC and the hotel, the OTC remits a portion of Rent to the hotel (the net rate) and the OTC retains a portion of Rent for itself. However, the amount of Rent is fixed when the sale of the room is complete when the Transient's credit card is charged. Rent means the "total consideration charged to a Transient" and not the consideration "received by the Operator."

Not only does the hotel consider the retail rate (not the net rate) to be Rent, so too does the Transient. Prior to purchasing the room, the Transient is told by the OTC that the room rental will cost $100. After the purchase transaction is complete, the OTC confirms the room rental amount is $100 by issuing the Transient a guest receipt in that amount. The OTC never discloses the $80 net rate amount to the OTC.

Likewise, the OTCs' actual business practices, as contrasted to their litigation position, confirm they too treat Rent as the retail rate. The best evidence of this is the OTCs' voluntary decision to issue a guest receipt to the Transient that reports the room rental charge as the retail rate.

To reiterate, in merchant transactions, the hotel Operator does not charge the Transient Rent, but delegates the Rent-charging function to the

OTC, and requires that the OTC charge the Transient an amount at least equal to the hotel's best available room rate. In virtually all cases, the OTC sets the retail rate it charges the Transient in an amount identical to the hotel's best available rate to avoid being uncompetitive. The OTC confirms Rent is the retail rate by issuing the Transient's guest for that amount.

C. The Tax Imposition Provision Reads "Rent Charged by the Operator" not "Rent Received by the Operator.

The tax imposition provision upon which the OTCs place total reliance reads "Rent ***charged by*** the Operator" (see §§ 35.0103-35.0108) but the OTCs flip the language to read the "Rent ***received by*** the Operator." While it may be true that, in merchant transactions, the amount eventually "received by" the hotel Operator is the net rate amount, the tax imposition provision does not base the TOT on the Rent "received by" the Operator. Instead, it bases the TOT on the Rent "charged by" the Operator. The "charged by" versus "received by" language in the tax imposition provision is an important distinction ignored in the Respondents' Brief.

The "Rent charged by the Operator" provision does not literally apply to a merchant transaction because the hotel Operator does not directly charge Rent to anyone. Under a contractual grant of authority, the OTC charges Rent. As the OTCs concede, the hotel "indirectly" (i.e. through the OTC) charges Rent to the Transient. "As shown, the hotel does charge the transient for the room in merchant model transactions—indirectly through the OTC." (RB, p. 35.) The OTCs acknowledge that the hotel delegates the Rent-charging function to the OTCs. The Rent that the hotel "indirectly charges," however, is the retail rate because, as discussed, the rate parity contract provisions require the OTC to charge Rent equal to the retail rate.

IV. THE CITY HARMONIZES THE RENT DEFINITION AND TAX IMPOSITION PROVISIONS WHILE THE OTCS EVISCERATE THE RENT DEFINITION AND OFFER AN INTERPRETATION THAT YIELDS ABSURD RESULTS

The battleground on appeal involves two Ordinance provisions: the Rent definition and the tax imposition provision. In its Opening Brief, the City analyzes both at length. (See AOB, pp. 15-25 [Rent definition]; 26-28 [tax imposition provision]; 28-38 [interplay between Rent definition and tax imposition provision].) The City harmonizes the Rent definition and tax imposition provision in a manner that gives effect to both, promotes the express purpose and intent of the Ordinance, and avoids an interpretation that leads to absurd consequences.

In their Respondents' Brief, the OTCs take a fundamentally different approach. While devoting slavish attention to the "Rent charged by the Operator" language of the tax imposition provision, they virtually ignore the Rent definition, spending less than one and one-half pages discussing its core definition. (RB, pp. 36-38.) The OTCs do not try to harmonize the Rent definition and tax imposition provision. Instead, they opt for an "elimination not harmonization" approach to statutory construction. They eliminate key words and phrases in the Rent definition, including the word "total" in "total consideration," as well as eliminating entirely the guest receipt provision and the catch-all sentence.

The OTCs' accusation that San Diego's Opening Brief adopts an "erase the language you don't like" method (RB, p. 25) misses the mark, but does accurately describe the OTCs' approach. The OTCs "don't like" that Rent is defined as the "total consideration charged to a Transient." They really don't like the catch-all sentence that applies to "all services" of "any kind or nature without any deduction." And they really, really don't like that Rent is objectively measured as the amount "shown on the guest

receipt," which is the retail rate. The OTCs' solution: "erase the language" they don't like.

A. The Ordinance is Easily Harmonized by Folding the Rent Definition Into the Tax Imposition Provision.

The tax imposition provision includes the defined terms "Occupancy," "Rent," and "Operator." By importing the relevant portions of these defined terms into the tax imposition provision, it would read:

> For the privilege of the use or possession of any room in any Hotel located in the City of San Diego, each Transient is subject to and shall pay a tax in the amount of 10.5% of the total consideration charged to a Transient as shown on the guest receipt for the use or possession of any room, without any deduction therefrom, charged by the proprietor of the Hotel.

Breaking this down into its constituent parts yields the following observations:

First, the privilege being taxed is the use or possession of a hotel room in San Diego by the Transient. This follows the Ordinance being a "Transient Occupancy Tax." The trial court erred by shifting the taxable privilege from the Transient's use or possession of the hotel room to the OTCs' payment of money to the hotel which (i) has nothing to do with the Transient and (ii) has nothing to do with the use or possession of the room.

Second, the tax is based on the "total consideration" that is "charged to a Transient" as "shown on the guest receipt" and "without any deduction." "Total" means "total" and the "total" consideration refers to the retail room rate not the net rate. This is reinforced by the language stating Rent is the amount "charged ***to a Transient***" as compared to Anaheim's rent definition which was the "consideration charged ***by an operator***" (see Anaheim Opn., p. 9.) That the tax is due on the retail rate is reinforced by the language stating Rent is "without any deduction." Finally, the *coup de*

grace is the "guest receipt" provision that objectively measures Rent as the retail rate per the OTCs' own business practices.

Third, the "charged by the proprietor/operator" language does not unravel the carefully constructed Rent definition and reduce the tax base to the net rate. A literal application of the "Rent charged by the Operator" clause in merchant transactions would mean that no tax is due because the hotel proprietor does not charge the Transient (or the OTC) any consideration for the use or possession of the room. The only amount the proprietor charges the Transient is for incidentals during the hotel stay. The only amount the proprietor charges the OTC is the net rate amount, which is not for the use or possession of the room because the OTC never obtains the right to use or possess the room. Also, a literal application of the "Rent charged by the Operator" clause renders the guest receipt provision a dead letter because the Operator does not provide the Transient a room receipt, only the OTC does so.

So, the "Rent charged by the Operator" language does not and cannot result in reducing the tax from the retail rate to the net rate. What indisputably happens in a merchant transaction is the hotel Operator contractually delegates the Rent-charging and receipt-providing functions to the OTCs. The "Rent charged by the Operator" should be read as "Rent charged by ***the OTCs on behalf of*** the Operator." This follows the OTCs' position that "[n]othing in San Diego's Ordinance prohibits a hotel operator from contracting with a third party to collect rent or taxes on its behalf" (RB, p. 23) and it accurately describes what happens in a merchant model transaction. With that, the tax imposition provision would now read:

> For the privilege of the use or possession of any room in any Hotel located in the City of San Diego, each Transient is subject to and shall pay a tax in the amount of 10.5% of the total consideration charged to a Transient as shown on the guest receipt for the use or possession of any room, without

any deduction therefrom, charged by ***the OTCs on behalf of*** the proprietor of the Hotel.

By recognizing the simple and uncontroverted facts that (i) the OTC acts for the hotel Operator in charging Rent in merchant transactions and (ii) nothing in the Ordinance prohibits the hotel Operator from delegating the Rent-charging function to the OTC, it becomes clear that the "Rent charged by the Operator" language at the end of the tax imposition provision does not have the talismanic effect of reducing the tax base from the retail rate to the lower net rate only in merchant transactions.

B. Application of the Rules of Statutory Construction to the Ordinance Language.

In its *Anaheim* and *Santa Monica*[7] opinions, this Court laid out the rules governing statutory construction. (Anaheim Opn., pp. 7-8; Santa Monica Opn., pp. 7-8.) Several rules have particular application when applied to interpreting the Rent definition and the tax imposition provision.

First, "the 'plain meaning' rule does not prohibit a court from determining whether the ***literal*** meaning of a statute comports with its purpose." (Anaheim Opn., p. 7.) The tax imposition provision, which incorporates the phrase "Rent charged by the Operator," does not permit a literal interpretation because the hotel Operator does not charge Rent in a merchant transaction, but rather delegates the Rent-charging function to the OTC. Neither side advocates a "literal" interpretation of the "Rent charged by the Operator" language in the tax imposition provision because it would yield the absurd result of zero tax being due on merchant transactions.

Second, "[e]very statute should be construed 'with reference to the whole system of law of which it is a part so that all may be ***harmonized*** and have effect.'" (Anaheim Opn., p. 8.) San Diego's Opening Brief discusses

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[7] *In re Transient Occupancy Tax Cases* (Santa Monica), JCCP 4472, case no. B236166, filed November 1, 2012.

the Rent definition and tax imposition provision as applied to the factual operation of the merchant model and harmonizes these provisions to give effect to both and disregard neither. In the Respondents' Brief, the OTCs do not even feign an attempt at harmonization. The OTCs eviscerate the Rent definition so Rent is no longer "the total consideration charged to a Transient," the "guest receipt" provision is abolished, and the "catch-all" third sentence disappears.

Third (as discussed further below), the construction must be adopted that "promot[es] rather than defeat[s] the general purpose of the statute, and avoid[s] an interpretation that would lead to ***absurd consequences***." (Anaheim Opn., p. 8.) When applying the plain language of the Ordinance to the OTCs' different business models, the City should receive the same tax payment when the Transient is charged the same room rate. Yet, the OTCs' merchant model results in the absurd consequence of the City receiving a lower tax payment in a merchant transaction as compared to an economically identical agency or modified-merchant transaction.

C. Application of the OTCs' Different Business Models to the Ordinance Language Produces Absurd Results for Merchant Transactions Only.

The only two entities addressed in the Ordinance are the Operator and the Transient. The OTCs make this same point. (RB, p. 20.) The definition of Rent is focused on the consideration "charged to a Transient" while the tax imposition provision addresses the consideration "charged by the Operator."

1. The OTCs' Interpretation Produces the Absurd Result of Economically Identical Transactions Resulting in Different Tax Treatments.

Hotel-Direct Transactions. In a hotel-direct transaction, the "charged to a Transient" and "charged by the Operator" language are two ways of

describing the same transaction. The hotel Operator and Transient are the only two entities involved in the room-rental transaction. The hotel Operator is the "charging" party, and the Transient is the "charged" party. In a hotel-direct transaction, Rent is "charged by the Operator" and is "charged to a Transient." There is no conflict between the tax imposition provision ("charged by the Operator") and the definition of Rent ("charged to a Transient").

Agency Transactions. In a traditional travel agency transaction of the type that travel agents have facilitated for decades, and which is replicated in an OTC agency transaction, the travel agent/OTC is introduced into the equation. However, the travel agent/OTC merely makes the hotel reservation and passes it on to the hotel Operator who charges the Transient the room rental upon check-in. In a traditional travel agent/OTC agency transaction, the hotel Operator remains the "charging" Party, and the Transient remains the "charged" party. Again, there is no conflict between the tax imposition provision ("charged by the Operator") and the definition of Rent ("charged to a Transient").

OTC Modified-Merchant and Merchant Transactions. The OTCs' modified-merchant and merchant transactions mark a fundamental change in the nature of the room-rental transaction. It is imperative to identify the rental transaction because it is Rent upon which the TOT is owed. There is one rental transaction. There are two parties to that rental transaction: the Transient and the OTC. These are "pre-paid" models where the OTC (not the hotel) "charges" the Transient for the room rental. The hotel Operator does not charge the Transient or the OTC any money for the room rental. In these transactions, while the Transient remains the "charged" party, the OTC replaces the hotel Operator as the "charging" party. The "charged to a Transient" language in the Rent definition still correctly identifies the Transient as the "charged" party. However, the "charged by the Operator"

language in the tax imposition provision no longer accurately identifies the "charging" party.[8] In OTC modified-merchant and merchant transactions a disconnect arises between the actual operation of the modified-merchant and merchant model (in which Rent is charged by the OTC) and the express language of the Ordinance (in which Rent is charged by the Operator).

The question becomes how to properly interpret the Ordinance in light of this disconnect between the actual operation of the OTC modified-merchant and merchant transactions and the literal language of the Ordinance.

One potential interpretation is that OTC modified-merchant and merchant transactions are outside the scope of the Ordinance entirely because Rent is not "charged by the Operator." Since the Ordinance imposes TOT equal to 10.5% of the "Rent charged by the Operator" and since the Operator charges no Rent, then 10.5% of zero is zero. Under this "literal" interpretation of the Ordinance, OTC modified-merchant and merchant transactions are not contemplated by the Ordinance, and the entire transaction is tax-free. However, no one, not even the OTCs, advances this literal interpretation of the Ordinance.

Instead, the OTCs offer one interpretation for modified-merchant transactions (which results in the City being paid the TOT in full) but a different interpretation for merchant transactions (which results in the City being paid the TOT on a lower amount).

For modified-merchant transactions, the OTCs concede that the Rent definition controls—"the total consideration charged to a Transient as shown on the guest receipt for the Occupancy of a room"—is the amount subject to the TOT. If the "retail room rate" is $100, the guest receipt will

[8] For purposes of this analysis, it is assumed that the "Operator" is the hotel and not the OTC.

show a $100 charge, and the OTCs agree the City is due TOT on $100. The OTCs do ***not*** argue that the "Rent charged by the Operator" language in the tax imposition provision results in the OTCs' compensation being excluded from the tax base.

For merchant transactions, however, the OTCs take an entirely different tack. For these transactions—and only for these transactions—the OTCs argue the definition of Rent is irrelevant and that tax is not due on "the total consideration charged to a Transient as shown on the guest receipt for the Occupancy of a room." If the "retail room rate" is $100, the guest receipt will continue to show a $100 charge, but the OTCs now no longer agree the City is due tax on $100. The OTCs ***do*** argue that the "Rent charged by the Operator" language in the tax imposition provision results in the OTCs' compensation being excluded from the tax base. As to merchant transactions—and only merchant transactions—the OTCs argue tax is due only on the lower, net rate amount.

The OTCs never explain the disparate tax results between a modified-merchant and merchant transaction, and in their Respondents' Brief they don't even try. In modified-merchant and merchant transactions, the hotel Operator does not directly "charge" the Transient anything. In both models, the hotel Operator delegates the Rent-charging function to the OTC. In both models, the OTC charges the Transient the full $100 retail room rate when the hotel reservation is made.

In modified-merchant and merchant model transactions, the amount "charged to a Transient" is the same $100. The guest receipt that the OTC provides to the Transient in both instances will be for $100. The "Rent charged by the Operator" is zero, while the Rent "charged by the OTC" acting for the hotel Operator in both instances is $100. There is no rhyme or reason in modified-merchant transactions why the full $100 retail rate is the taxable amount and the OTCs' retained compensation is fully taxed, yet in

merchant transactions the lower net rate is the taxable amount and the OTCs' retained compensation is excluded from taxation.

The first potential interpretation—in which a strictly literal interpretation of "Rent charged by the Operator" is applied such that zero tax is due on merchant transactions—makes no sense and is advocated by no one.

The second interpretation—in which "Rent charged by the Operator" reduces the tax base for merchant transactions by the OTCs' compensation but does not reduce the tax base for the OTCs' modified-merchant or agency transactions and the OTCs' compensation remains fully taxable—likewise makes no sense but is the one advocated by the OTCs.

A third interpretation is the one advanced by San Diego and is the only interpretation that makes sense and is faithful to the plain language of the Ordinance and the pertinent rules of statutory construction. Under San Diego's interpretation, all transactions that are substantively identical receive the same tax treatment. Rent is a constant, as it should be. Rent is for ***all*** transactions—hotel-direct, agency, modified-merchant, and merchant—"the total consideration charged to a Transient as shown on the guest receipt for the Occupancy of a room." In the real world, the "guest receipt" provided to the Transient for all these transactions would identify the $100 retail rate as being the rental charge.

The OTCs, however, argue that the "Rent charged by the Operator" language in the tax imposition provision of the Ordinance yields a different tax result for merchant transactions ***only*** as compared to all other transactions. Yet, the OTCs fail to explain why. The "Rent charged by the Operator" language cannot explain this disparate tax outcome in modified-merchant versus merchant transactions because the Rent-charging operates identically in both transactions; the hotel Operator charges the Transient nothing while the OTC charges the Transient $100.

The OTCs make two points in response to San Diego's discussion concerning the OTCs' different business models and the absurd result produced under the merchant model.

First, the OTCs misrepresent San Diego's position. The OTCs incorrectly state that "the City concedes" that "in a merchant model transaction, the hotel charges a lower amount for occupancy of a room" and the OTCs cite to pages 8 and 9 of San Diego's Opening Brief for this supposed "concession." (RB, p. 34.) Pages 8 and 9, however, say nothing of the kind. In discussing the OTCs' three business models, San Diego's point was the exact opposite of this supposed concession; namely, all three models are functionally identical with the Transient paying the same amount and the hotel and OTC receiving the same amount in all three examples. (See AOB, pp. 6-9.)

Second, the OTCs engage in the fiction that "in a transaction where the hotel charges less, the tax is less." (RB, p. 34.) That is not how the models operate. Returning to the merchant versus modified-merchant examples in the Opening Brief, in both examples the hotel charged the Transient nothing for Occupancy while the OTC charged the Transient the same $100 retail room rate. In both examples, the hotel and OTC divided the $100 with $80 going to the hotel and $20 to the OTC. The OTC's suggestion that the hotel "charged less for occupancy" in the merchant transaction as compared to the modified-merchant transaction is inaccurate. In both cases, the hotel did not directly charge anything for occupancy, but rather contractually delegated the "charging" function to the OTC and the OTC "charged" a room rate of $100, and the OTC provided the hotel guest with a guest receipt reflecting a room charge of $100.[9]

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[9] In *Anaheim*, this Court discussed the five different business models for the purchase of a hotel room rental and concluded there was no absurd result under the merchant model "[b]ecause TOT is based on consideration

2. The OTCs' Interpretation Produces the Absurd Result that the Transient/Taxpayer Owes an Amount that is Unknown and Unknowable.

There is a single taxpayer under the Ordinance—the Transient. (§ 35.0103 ["each Transient is subject to and shall pay a tax"]; § 35.0110 [the TOT "constitutes a debt owed by each Transient to the City"; "[e]ach Transient shall pay any tax imposed"].) The trial court's and OTCs' construction results in an anomaly in which the taxpayer, the Transient, is taxed on an amount that is both unknown and unknowable to the Transient. That is because the amount that the OTCs argue is the tax base under the Ordinance—the net rate—is never disclosed to the Transient. The Transient is placed in the untenable position of being legally responsible to San Diego for paying the proper amount of TOT while never knowing the amount of TOT he owes and whether he has satisfied his tax obligation to the City. If ever there was an absurd result, this is it.

V. THE SAN DIEGO ORDINANCE MATERIALLY DIFFERS FROM THE ANAHEIM ORDINANCE.

The OTCs ask this Court to rubber stamp the result from the Anaheim case and apply it to this case because San Diego's Ordinance is allegedly "substantively identical" to Anaheim's Ordinance. (RB, p. 1.)[10] That is wishful thinking on the OTCs' part. In its Opening Brief, San Diego discussed the material differences between the San Diego and Anaheim

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charged and received by the hotel operator." (Anaheim Opn., p. 18.) In San Diego, by contrast, TOT is based on the amount "charged to a Transient as shown on the guest receipt." The discussion of the five business models—when applied to San Diego's Rent definition—does produce an absurd result for the reasons discussed in the Opening Brief and this Reply Brief.

[10] As discussed below, San Diego does not dispute the substantial similarity of the San Diego and Anaheim ordinances regarding their respective definitions of "operator." However, other provisions, most notably the "rent" definitions, do materially differ between the two ordinances.

ordinances regarding the most significant term in each ordinance—the definition of "rent." (AOB, pp. 15-17.) Notwithstanding the supposed "substantively identical" ordinances, the Respondents' Brief contains no analysis comparing the "rent" definitions in the two ordinances. The reason is obvious: any such discussion would only highlight the differences.

As discussed in the Opening Brief, San Diego's and Anaheim's "rent" definitions materially differ; in fact, they are opposites:

- San Diego: "the total consideration ***charged to a Transient*** as shown on the guest receipt for the Occupancy of a room . . . in a Hotel"

- Anaheim: "the consideration ***charged by an operator*** for accommodations"

The rent definitions in the two ordinances are reversed—consideration charged "to a Transient" versus consideration charged "by an operator." In *Anaheim*, this Court focused on this important distinction. "[T]he [Anaheim] TOT ordinance is drafted with a focus on the amount of consideration charged by the operator—not the total amount of consideration paid out by the transient." (Anaheim Opn., p. 20.)[11] San Diego is an example of an ordinance whose focus is on the "total amount of

[11] The trial court (Judge Carolyn Kuhl) in *Anaheim* made this same observation in stating that: "Because the [Anaheim Ordinance] defines 'rent' as 'the consideration charged by an operator for accommodations,' the amount charged by the OTCs is not 'rent.'" (2 JA, T. 10, p. 000469.) However, Judge Kuhl noted, "If a city decided to base a transient occupancy tax on the total amount *paid* by the transient for the hotel room (or for the hotel room and related services) there seems to be no reason why such a tax scheme could not be drafted and considered." (2 JA, T. 10, p. 000473.) The San Diego Ordinance—with an emphasis on what the Transient has paid as opposed to the Operator has charged—is the embodiment of the type of ordinance that Judge Kuhl signaled could lead to a different result than Anaheim. (Judge Kuhl was reassigned before San Diego was decided in the trial court; she was replaced by Judge Elihu M. Berle.)

consideration paid out by the transient." When placed in the proper context of the materially different "rent" definitions in San Diego as compared to Anaheim, this Court's decision in *Anaheim* supports San Diego's argument that the TOT is based on the total amount paid by the Transient and not the reduced net rate amount.

San Diego's Rent definition, unlike Anaheim's, identifies a specific document that supplies an objective measure for Rent: the guest receipt. San Diego's Rent definition also has the broadest possible catch-all phrase that covers "all services of any kind or nature without any deduction" while Anaheim's "rent" definition has no comparable catch-all provision.

In *Anaheim*, this Court quoted with approval the trial court's reasoning that "[b]ecause 'rent' is defined in terms of the consideration charged by an operator, the court noted that the definition of the term 'operator' was significant." (Anaheim Opn, p. 5.) This Court likewise centered its "rent" analysis in Anaheim on the presence of the word "operator" in the "rent" definition. "The City's primary emphasis on the definition of 'rent' largely ignores the ordinance's express limitation that 'rent' only includes 'consideration *charged by an operator*." (*Id.*, p. 9, emphasis is the Court's.) The San Diego Ordinance, however, does not even mention Operator in its Rent definition; Operator is not relevant in interpreting San Diego's Rent definition.

Even the trial court acknowledged the differences that exist between the San Diego and Anaheim ordinances. While the *Anaheim* case was pending before this Court, the OTCs filed with the trial court a Motion to Stay proceedings in the San Diego case (and San Francisco case) until this Court decided the Anaheim appeal. The OTCs argued that "the TOT ordinances of the various California cities are substantially similar if not identical" and, therefore, this Court's *Anaheim* decision would be "informative if not dispositive" of the issues in San Diego (and San

Francisco). (See 4/12/2011 Motion to Stay, pp. 1 and 14, attached as Exhibit 1 to accompanying appendix and request for judicial notice.) The trial court found the San Diego (and San Francisco) ordinances "are different than the ordinance that exists in the Anaheim case" and denied the stay motion. (5/25/2011 hearing transcript, p. 88, lines 18-25, attached as Exhibit 2 to accompanying appendix and request for judicial notice.)

VI. THE OTCS ARE LIABLE TO SAN DIEGO AS AGENTS OF THE HOTEL OPERATORS.

A. The Hearing Officer Found the OTCs Are Agents of the Hotels and that Finding Must Be Accepted as Correct.

Whether an agency relationship has been created is a question of fact. (*Violette v. Shoup* (1993) 16 Cal.App.4th 611, 619.)[12] The hearing officer in San Diego's administrative proceedings against the OTCs (Hearing Officer) expressly found that "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" in merchant transactions. (1 JA, T. 4, p. 000207 [administrative decision], emphasis in original.) The OTCs do not and cannot challenge the Hearing Officer's factual findings, but rather concede that "like the trial court, this Court must accept the hearing officer's factual findings as correct." (RB, p. 10.) There is nothing for this Court to decide on the issue

[12] "An agent 'is anyone who undertakes to transact some business, or manage some affair, for another, by authority of and on account of the latter, and to render an account of such transactions.' [Citation.] 'The chief characteristic of the agency is that of representation, the authority to act for and in the place of the principal for the purpose of bringing him or her into legal relations with third parties.' [Citations.]" *Violette*, 16 Cal.App.4th at 620.

whether the OTCs are "agents" of the hotels. It has been conclusively established that they are the hotels' agents.[13]

The OTCs concede their agency role when they acknowledge that "[n]othing in San Diego's Ordinance prohibits a hotel operator from contracting with a third party to collect rent or taxes on its behalf." (RB, p. 23.) That is precisely what happens in a merchant transaction. The hotel Operator contracts with the OTC to collect Rent and taxes on the hotel Operator's behalf.

B. San Diego Has Consistently Argued that the OTCs are Liable as the Hotels' Agents.

The OTCs can be liable under the Ordinance because they are Operators or because they are agents of the hotel Operators. At the administrative hearing and trial court, San Diego argued both liability theories. (2 JA, T. 9, pp. 000372-000388.) San Diego's primary argument was based on agency. (*Id.*, pp. 000372-000378, 000381-000388.) In light of this Court's *Anaheim* decision,[14] which found the OTCs were not proprietors or managing agents under Anaheim's Ordinance, San Diego

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[13] This Court did not address the "agency" issue in its *Anaheim* decision. In its *Santa Monica* decision, this Court did discuss that city's agency allegations. (Santa Monica Opn., pp. 14-18.) That discussion was dicta as this Court never made a determination on the agency issue and expressly stated: "We find that we need not determine whether or not the OTCs act as agents for the hotels. Even if the OTCs are agents, the city has not convinced us that the OTCs' commissions must be considered to be money 'paid for room rental . . . to any hotel.'(§ 6.68.020.)" (*Id.*, p. 14.)

[14] In *Anaheim*, this Court held that the OTCs were neither "proprietors" nor "managing agents" under Anaheim's definition of "operator." (Anaheim Opn., 9-17.) San Diego, like Anaheim, defines an Operator as being the "proprietor" or "managing agent." (§ 35.0102 [definition of Operator.]) San Diego acknowledges that its Operator definition is sufficiently similar to Anaheim's that there was a high likelihood this Court would conclude that the OTCs likewise are neither proprietors nor managing agents under San Diego's definition.

does not argue on appeal the OTCs are proprietors or managing agents under San Diego's ordinance.[15]

However, San Diego continues to assert the OTCs are liable as agents of the hotel Operators who act on the hotels' behalf under contractual grants of authority. (See AOB, pp. 5-7, 13, 26-28 [OTCs operate under contractual grants of authority from the hotels and are liable regardless of whether they are labeled as agents, sales agents, independent sales agents, representatives, or designees].)

The OTCs completely mischaracterize San Diego's position by contending the City "did not raise its 'non-operator' theory of liability" at the administrative hearing or trial and "cannot do so for the first time on appeal." (RB, pp. 3, 19-20, 22.)[16] The OTCs have it backwards. San Diego is not "raising" a new theory of liability, it is "dropping" a liability theory.

C. San Diego Need Not Prove the OTCs Are Operators to Prevail.

The OTCs dramatically assert that "San Diego's concession that the OTCs are not hotel 'operators' is the death knell for its assessments." (RB, p. 3.) Not so. The OTCs can either be liable to San Diego as the Operator or the agent of the Operator. San Diego relies on the latter basis for liability, and the OTCs do not (and cannot) contest on appeal their status as the hotels' agents.

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[15] In Respondents Brief, the OTCs note that on appeal San Diego does not argue the OTCs are hotel Operators (RB, p. 2), but the OTCs then waste six pages arguing the OTCs are neither proprietors nor managing agents (RB, pp. 11-17.)

[16] Contrary to the OTCs' argument, San Diego expressly advanced a "non-operator" theory of liability in the below proceedings: **"[I]rrespective of their status as Operators under the Ordinance, the OTCs . . . have the same duties and obligations as do the hotels . . . ."** (2JA, T. 9, p. 000383, emphasis in original.)

This Court's discussion at page 18 of its *Santa Monica* decision is instructive: "Even if the OTCs are agents for the hotels, ***claims against an agent are limited to what the claimant is entitled to demand from the principal***. '[A] claim under [Civil Code] section 2344 against the agent is limited to what the claimant is entitled to demand from the principal.'" (*Garrison v. Edward Brown & Sons* (1944) 25 Cal.2d 473, 482)." (Santa Monica Opn, p. 28.)

Civil Code section 2344, cited in the above *Garrison* quote, reads:

> If an agent [the OTC] receives anything for the benefit of his principal [the hotel], to the possession of which another person [the City] is entitled, he [the OTC] must, on demand, surrender it to such person [the City] ....

(Civ. Code, § 2344.)

In *Santa Monica,* this Court suggested that section 2344 would not benefit Santa Monica because the Court had already determined tax was due only on the net rate and, therefore, the net rate was all that Santa Monica was "entitled to demand from the principal," the hotel.

Section 2344, however, is very relevant to the present appeal because San Diego is entitled to payment of the TOT on the total amount the OTC charges the Transient and is not limited to payment of TOT on the net rate. As this Court recognized in *Santa Monica,* section 2344 allows the City to recover for "claims against an agent" (the OTC) whatever the City would be "entitled to demand from the principal" (the hotel). Because San Diego would be entitled to demand[17] the hotel Operator to remit tax on the

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[17] Section 2344 is based on what a party is "entitled to demand" not what that party has actually "demanded." Thus, the question is not whether San Diego has demanded TOT from the hotels by issuing an assessment or filing a lawsuit against them (it has not), the question is whether San Diego would be entitled to demand TOT from the hotels by way of assessment or suit (it would). Section 2344 allows a party such as San Diego to sue the

"total consideration charged to a Transient," San Diego is entitled to recover this same amount of tax directly from the OTC.

Section 2344 dovetails with the language of the Ordinance and the operation of the merchant model. By contract, the hotel delegates to the OTC its Operator duties of charging Rent (§ 35.0102), collecting taxes and Rent (§ 35.0112(a) and (b)), and issuing a guest receipt (§ 35.0112(c)). It is the OTC that determines how much Rent to charge (Anaheim Opn., p. 3 ["The OTCs establish the room rate."]), the OTC that decides to collect taxes on the net rate (3 AR, T. 5, pp. 01322:17-21; 7 AR, T. 11, pp. 014849:24-014851:25), and the OTC that decides to issue a guest receipt in a room amount equal to the retail rate (1 JA, T. 4, p. 000200; 6 AR, T. 10, pp. 01473:13-014731:23). If the OTC is derelict in any of these duties—such as collecting and remitting taxes on the inadequate net rate instead of the total amount it collects from the Transient—it makes perfect sense under section 2344 that the OTC would be equally liable with the hotel Operator for any tax liability exposure.

Several cases have mentioned or interpreted section 2344, the most important being *Summit Financial Holdings, Ltd. v. Continental Lawyers Title Co.* (2002) 27 Cal.4th 705. In *Summit Financial*, the California Supreme Court framed the issue: "The question presented by this case is whether an escrow holder owes a duty of care to a nonparty to the escrow based on an assignment to that nonparty by another nonparty to the escrow." (*Id.* at 707-708.) In analyzing the issue, the Court addressed a Court of Appeal case upon which the trial court had based its decision, *Builders' Control Service of No. Cal., Inc. v. North American Title Guar. Co.* (1962) 205 Cal.App.2d 68, which substantively addressed section 2344.

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principal (the hotel) or to sue the agent (the OTC) to the same extent as it could have sued the principal.

The Supreme Court in *Summit Financial* cited and quoted from *Builders' Control Service* with approval and made the following statements regarding the proper application of section 2344:

> *Builders' Control Service* stands for the proposition only that an agent's obligation to disburse proceeds held by the agent for its principal is coextensive with the principal's obligation to disburse those proceeds to the assignee.

(*Summit Financial*, 27 Cal.4th at 714.) The word "coextensive" indicates that the scope of the third party's rights vis-à-vis the agent is identical to its rights against the principal.

> *Builders' Control Service* holds only that an agent's knowledge of an assignment by its principal obligates the agent to honor the principal's assignment.

(*Ibid.*)

For each of these statements, both courts—*Builders' Control Service* and *Summit Financial*—utilized section 2344 as the source of the agent's duty to the third party. In both cases, the agent's duty to the third party arose through the principal's assignment of contractual rights to a third party. The rationale becomes even more compelling if, as here, the agent (an OTC) is aware the property it holds for the benefit of its principal (the hotel) is owed to a third party (the City) as a matter of law, not just by dint of contract.

Here, because the hotels must remit the collected TOT to the City and because the OTCs know of this obligation, the OTCs, as collection agents for the hotels, have a legal duty under section 2344 to pay the City the full measure of TOT due under the Ordinance. The OTCs' voluntary decision to step into the shoes of the hotel Operator and assume the Operator's' duties under the Ordinance to charge Rent, provide a guest receipt, and collect Rent and taxes has legal consequences.

The Georgia Supreme Court in *Expedia, Inc. v. City of Columbus* (2009) 285 Ga. 684, 688 reached the same conclusion regarding Expedia's liability to the city to remit taxes on the retail room rate based on its voluntary decision to serve as tax collector under the merchant model. The Court held Expedia was liable to remit tax to the City of Columbus on the retail rate, regardless of the ordinance, because "Expedia, of its own accord, has contracted with hotels to collect taxes belonging to the City and, having done so, it has rendered itself accountable to the City's tax authorities for remission of taxes it has actually collected."

VII. THE RULE CONSTRUING AMBIGUITIES IN FAVOR OF TAXPAYERS HAS NO APPLICATION HERE.

Both sides agree the Ordinance is unambiguous. The OTCs emphasize their proposed constructions, as adopted by the trial court, are "the *only* constructions" consistent with the plain meaning of the Ordinance. (RB, p. 39, emphasis in original.) Notwithstanding their argument that the Ordinance is unambiguous, the OTCs then argue they are entitled to prevail because if the Ordinance is ambiguous, it "must be construed strictly against the taxing authority and in favor of the asserted taxpayer." (RB, pp. 39-40.)

The "ambiguity" rule has no application here for several reasons. First, as both sides agree, the Ordinance is unambiguous. Second, if the Ordinance were ambiguous, the ambiguity rule applies only in favor of "the taxpayer" (RB, pp. 39-40), but in merchant transactions the Transient is the taxpayer and the OTC is the tax collector.[18] The OTCs ignore that they are

[18] See, e.g., § 35.0103 ["each Transient is subject to and shall pay a tax"]; § 35.0110 [the TOT "constitutes a debt owed by each Transient to the City"; "[e]ach Transient shall pay any tax imposed"]; see also *City of San Antonio v. Hotels.com* (W.D. Tex., July 1, 2011) 2011 U.S. Dist. LEXIS 72665 at ¶28 ["Under the merchant model, the consumer/occupants are the taxpayers and *the OTC's are the tax collectors*," emphasis in original]; *Village of*

not the taxpayers and cite no California law for the proposition that the ambiguity rule applies in favor of the "tax collector." Third, under California law, the ambiguity rule is subservient to the other fundamental rules of construction, most particularly legislative intent. (See *City of Los Angeles v. Belridge Oil Co.* (1954) 42 Cal.2d 823, 827.)

VIII. PROPOSITION 218 IS NOT IMPLICATED BECAUSE THE ORDINANCE'S TAX BASE IS NOT CHANGED BY HOW THE OTCS EMPLOY THEIR MERCHANT MODEL.

Respondents' Brief asserts that "[t]hrough its new expanded constructions, San Diego seeks to 'impose' and 'increase' its tax to apply to new and different entities and revenue amounts" in violation of Proposition 218. (RB, p. 42.) The OTCs' argument is unavailing because the TOT assessments of the OTCs did not impose, extend or increase the Ordinance's tax base. Further, San Diego never changed its transient tax calculation methodology. Proposition 218 is not implicated.

Proposition 218, the "Right to Vote on Taxes Act," was passed by the electorate during the general election in November 1996. (*Barratt American, Inc. v. City of San Diego* (2004) 117 Cal.App.4th 809, 815.) As pertinent here, Proposition 218 added Article XIIIC to the California Constitution[19], which pertains to general and special taxes. Subdivision 1(a) of Article XIIIC provides that a "general tax" is one imposed for "general

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Rosemont, Illinois v. Priceline.com (N.D. Ill., Oct. 14, 2011) 2011 US Dist. LEXIS 119231 at*10 ["the taxpayers are the room rentors"]; *City of Chicago, Illinois v. Hotels.com* (Cir. Ct. Ill. June 21, 2013) No. 2005 L 051003 at 18 [Any attempt to portray the taxpayer as someone other than the hotel guest "is intellectually dishonest. [The OTCs] do not have the luxury or right to put themselves in the shoes of the taxpayer."], see accompanying appendix and request for judicial notice.)

[19] Proposition 218 also added Article XIIID to the California Constitution, which pertains primarily to assessments, fees, and charges that are property-related services imposed as an incident of ownership of real property. (See Cal. Const., art. XIIID.)

governmental purposes." (Cal. Const., art. XIIIC, § 1(a).) TOT under the Ordinance is a general tax. Subdivision 2(b) of Article XIIIC provides in pertinent part:

> No local government may impose, extend, or increase any general tax unless and until that tax is submitted to the electorate and approved by a majority vote. A general tax shall not be deemed to have been increased if it is imposed at a rate not higher than the maximum rate so approved.

Shortly after Proposition 218 was adopted, the Proposition 218 Omnibus Implementation Act of 1997 (the "Implementation Act") was enacted. (Gov. Code § 53750 et seq.; *Barratt, supra*, 117 Cal.App.4th at 816.) The first section of the Implementation Act—Government Code section 53750—provides its numerous definitions are provided "for purposes of Article XIIIC and XIIID of the California Constitution and this article." (Gov. Code § 53750.) Important defined terms from section 53750 for the analysis here are "extended" and "increased."

Unlike the terms "extend" and "increase," the Implementation Act does not define "impose." Context, however, is important: In Article XIIIC, subdivision 2(b), "impose" is immediately followed by "extend" and "increase," which are defined in the Implementation Act. Plain meaning suggests that "impose" refers to imposing the tax in the first instance. Because San Diego's TOT predated for many years the assessments of the OTCs, the assessments did not impose San Diego's TOT.

When applied to an existing tax such as San Diego's TOT, the Implementation Act defines "extended" as a "decision by an agency to *extend the stated effective period for the tax* ...." (Gov. Code, § 53750, subd. (e).) Under the Implementation Act, "agency" includes a "local government" such as the City of San Diego. (*Id.*, subd. (a).)

San Diego's TOT does not have a "stated effective period." It applies to each Transient's non-exempt occupancy of a hotel room in San

Diego for less than 30 days (*see* §§ 35.0102 [definition of "Transient"]; 35.0111 [Exemptions]).) TOT is implicated upon the sale of the room by the OTC to the Transient; it therefore does not have an expiration date or an effective period. The Ordinance (which provided for and implemented San Diego's TOT) was effective when adopted by San Diego, and the Ordinance applied during the entire period of the City's assessments of the OTCs and continues to apply. Because the TOT did not have a limited period of existence, San Diego's assessments against the OTCs could not extend it. With the assessments of the OTCs, San Diego did not extend its TOT in violation of section 2(b) of Article XIIIC of the California Constitution.

Both the second sentence of subdivision 2(b) of Article XIIIC and the Implementation Act define the circumstances when a general tax is "increased" and circumstances when it is not. For the entire OTCs' assessment period, San Diego's tax rate was 10.5 percent and it was the rate employed in the assessments. Since the assessments did not impose a higher rate, they did not increase San Diego's TOT in contravention of the second sentence of subdivision 2(b) of Article XIIIC. (See Cal. Const., art. XIIIC, § 2(a).)

One provision of the Implementation Act defines a tax increase for purposes of Article XIIIC as "a decision by an agency that ... [i]ncreases any applicable *rate* used to calculate the tax ...." (Gov. Code, §53750, subd. (h)(1)(A), italics added.) San Diego's assessments of the OTCs were based upon the 10.5 percent rate, which predated the assessments. It remains San Diego's tax rate. Because the rate that San Diego used remained the same and did not increase, San Diego did not contravene this provision of the Implementation Act.

Another provision of the Implementation Act defines a tax increase as "a decision by an agency that ... [r]evises the *methodology* by which the

tax ... is calculated, if that revision results in an increased amount being levied on any person ...." (Gov. Code, §53750, subd. (h)(1)(B), italics added.) "Methodology" in this subdivision "refers to a mathematical equation for calculating taxes that is officially sanctioned by a local taxing entity." (*AB Cellular LA, LLC v. City of Los Angeles* (2007) 150 Cal.App.4th 747, 763.) Before San Diego issued its assessments against the OTCs, the approved methodology it used to calculate the owed TOT was that set forth in the Ordinance—Rent multiplied by the tax rate of 10.5 percent. This was the same methodology used in San Diego's assessments of the OTCs. After the assessments, the methodology remained the same.

Another provision of the Implementation Act provides that a tax increase does not occur if (1) the tax rate does not increase beyond the level that the local government approved previously, and (2) the tax calculation methodology that the local government approved previously is not revised to cause an increase in the amount levied on any person. (Gov. Code, §53750, subd. (h)(2)(B).) As to this subdivision, San Diego's assessments of the OTCs did not increase the TOT.

The final provision of the Implementation Act addressing what is a tax increase provides that if a person's actual tax payments are higher than they would have been when the local government approved the tax, the tax is *not* deemed to have increased unless the higher payments are due to an increased rate or revised tax methodology. (Gov. Code, §53750, subd. (h)(3).) As explained, San Diego's tax rate and officially sanctioned tax calculation methodology were unaffected by issuing assessments against the OTCs. San Diego's assessments against the OTCs were based on enforcement of the Ordinance against the OTCs and did not involve an increased rate or change of officially sanctioned methodology.

IX. CONCLUSION

As this Court correctly and succinctly put it in the *Anaheim* decision: "The measure of tax is the 'rent.'" (Anaheim Opn., p. 5.) As this Court correctly observed in *Anaheim*, the sole rental transaction is the transaction between the OTC and the Transient and that "when a consumer pays for a room through an OTC website, the sale or the room is complete." (*Id.*, p. 3.)

Here, under the plain language of the Rent definition (i.e., the "measure of tax"), tax is owed on the "total consideration charged to a Transient as shown on the guest receipt." Tax is due not only on the net rate, but also on the OTCs' mark-up and fees; combined they equal Rent.

The post-occupancy exchange of money that takes place between the OTC and hotel weeks or months after the sale of the room is complete and well after the measure of tax is established with the Transient's purchase cannot result in an after-the-fact readjustment to the rental amount that establishes the tax base.

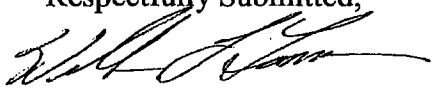
For all the reasons discussed in the Opening Brief and Reply Brief, the OTCs' "live or die" argument that "Rent charged by the Operator" in the tax imposition language somehow magically means Rent is no longer the "measure of tax" but is reduced to the net rate amount the OTC pays the hotel is fatally flawed.

The Hearing Officer found the OTCs the hotels' agents. That finding, as the OTCs' concede, binds this Court. As agents, the OTCs are liable to San Diego under California law to the same extent as their principals, the hotels, would be liable to San Diego. Because the hotels are liable to pay tax on Rent as defined in the Ordinance, so too are the OTCs.

The trial court's decision should be reversed, and San Diego's motion to deny the OTCs' writs of mandate should be granted. The trial court's decisions sustaining the demurrers should also be reversed.

DATED: August 5, 2013

Respectfully Submitted,



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CERTIFICATION AS TO LENGTH OF BRIEF

I, Thomas H. Peters, counsel for Appellant, declare under penalty of perjury under the laws of the State of California that the word count for this Brief, excluding Table of Contents, Table of Authorities, Proof of Service and this Certification is 13,922 words as calculated utilizing the word count feature of the Microsoft Word 2010 software used to create this document.

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

Executed August 5, 2013, at Beverly Hills, California.

Thomas H. Peters, Esq.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Los Angeles, State of California. My business address is 8648 Wilshire Boulevard, Beverly Hills, CA 90211-2910.

On August 5, 2013, I served true copies of the following document(s) described as **APPELLANT'S REPLY BRIEF** on the interested parties in this action as follows:

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By Email pursuant to California Rules of Court, Rule 8.212(c)(2)

Supreme Court of California
350 McAllister Street
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2d Civ. No. B243800

CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT
DIVISION 2

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

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I.
INTRODUCTION

The City of San Diego requests rehearing because the Opinion cites and relies on unpublished opinions: *In re Transient Occupancy Tax Cases* (Nov. 1, 2012, B230457) [nonpub. opn.] ("Anaheim Opinion") and *In re Transient Occupancy Tax Cases* (Nov. 1, 2012, B236166) [nonpub. opn.] ("Santa Monica Opinion," together with the Anaheim Opinion, the "Unpublished Opinions").

While it is understandable that during the litigation, the Court and the parties referred to the recent unpublished decisions of this Court in the other transient occupancy tax cases, an opinion deciding a case based on applicable law should not be premised on unpublished law that cannot be cited. Accordingly, the Court should grant rehearing to eliminate all references to the Unpublished Opinions. The Court should issue a new opinion which makes no reference or citation to any unpublished dispositions.

In addition, in order to avoid the same problem in the future, the Court should also publish the new opinion in this case so that everyone, including the Court, can properly cite and address the Opinion. Indeed, there are additional municipalities across the State with similar claims against the same online travel companies involving the transit occupancy tax ordinances that will become part of the coordinated proceedings. The litigants and tribunals in those future cases should be able to rely on or distinguish the Court's reasoning in the Opinion without running afoul of the rules.

II.
WHY THE COURT SHOULD GRANT REHEARING AND PUBLISH THE OPINION

A. The Opinion Improperly Cites And Relies Upon Unpublished Opinions

The Opinion cites and heavily relies on the Unpublished Opinions, particularly the Anaheim Opinion. For example, the Opinion compares the arguments made by San Diego to the arguments made in the Anaheim and Santa Monica matters. (See Opn. 7-9, 14-18.) And the Opinion relies upon its prior analysis in the Unpublished Opinions, stating that the Court is making the same determinations in the present case for the same reasons as it did in those matters. (See, e.g., Opn. 7, 8, 10, 16.)

The Opinion's reference to and reliance upon the Unpublished Opinions is improper. California Rules of Court, rule 8.115(a) expressly prohibits courts and parties from citing or relying on opinions not certified for publication, except as specified by rule 8.115(b): "[A]n opinion of a California Court of Appeal or superior court appellate division that is not certified for publication or ordered published must not be cited or relied on by a court or a party in any other action." (Cal. R. Court 8.115(a).) The only exceptions to this rule are (1) when the opinion is relevant as law of the case, res judicata, or collateral estoppel; or (2) when the opinion is relevant to a criminal or disciplinary action. (Cal. R. Court 8.115(b).) This case does not involve any criminal disciplinary action. Nor do any of the other exceptions apply here.

The doctrine of res judicata applies only when the same parties or their privies litigate based upon the same issues. (See *Clark v. Lesher* (1956) 46 Cal.2d 874, 880.) San Diego was not a party to either the Santa Monica or Anaheim matters. Nor is San Diego in privity with those

municipalities. "Privity involves a person so identified in interest with another that he represents the same legal right." (*Dawson v. Toledano* (2003) 109 Cal.App.4th 387, 399.) San Diego, in pursuing its right to recover transient occupancy taxes under its own municipal ordinances, should not be bound principles enunciated by this Court in an unpublished decision resolving rights of different entities under their own ordinances.

Nor does collateral estoppel apply. That doctrine provides only that "an issue necessarily decided in prior litigation may be conclusively determined as against the parties thereto or their privies . . . in a subsequent lawsuit on a different cause of action." (*Vandenberg v. Superior Court* (1999) 21 Cal. 4th 815, 828.) Again, since San Diego was neither a party to the Santa Monica or Anaheim matters, nor in privity with either of those municipalities, there can be no collateral estoppel.

Finally, the Anaheim and Santa Monica Opinions, which arose out of completely separate proceedings from those at issue here, are not "law of the case" here. The "law of the case" doctrine "deals with the effect of the first appellate decision on the subsequent retrial or appeal: The decision of an appellate court, stating a rule of law necessary to the decision of the case, conclusively establishes that rule and makes it determinative of the rights of the same parties in any subsequent retrial or appeal in the same case." (*Gyerman v. United States Lines Co.* (1972) 7 Cal.3d 488, 498.) Santa Monica and Anaheim are not San Diego; the Santa Monica and Anaheim matters did not involve an appeal by San Diego and San Diego was not a party to those matters. Accordingly, the "law of the case" doctrine is inapposite here.

Since none of the exceptions to Rule 8.115(b)(1) applies, the Opinion could not properly cite to or rely upon the Unpublished Opinions. Accordingly, the Court should grant rehearing to strike all references to

those unpublished dispositions. The Court should issue a new opinion relying solely on matters that may be cited under the rules.

B. To Provide Guidance In Future Cases, The Opinion Should Be Published So That Litigants And Courts May Discuss The Court's Reasoning In This Case Without Running Afoul Of The Rules.

The Opinion meets the requirements for publication because it both involves legal issue of continuing public interest and it advances a new interpretation of an ordinance. (See Cal. Rules of Court, rule 8.1105(c)(4) & (6).)

First, the Opinion involves issues of ongoing interest to municipalities all across the State. The San Diego action is just one of the numerous coordinated Transient Occupancy Tax Cases "in which certain cities have sought to impose liability on online travel companies (OTCs) for transient occupancy tax (TOT)." (Opn. 2; see also July 17, 2006 Coordination Order.) Since this Court has been designated as the only appellate court to review transient occupancy tax decisions, this Court's reasoning and analysis should be published to allow all similarly situated California municipalities to evaluate their TOT ordinances and claims and to advance arguments to this Court based on citable authority.

Indeed, the reach of the issues involved in the Opinion is staggering. There are more than 450 jurisdictions in California that levy a locally administered TOT.[1] There are 50 California municipalities who have filed similar claims.[2] Moreover, on December 9, 2013, the City and County of

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[1] See Dean Runyan Associates "*California Travel Impacts by County 1992-2011, 2012 Preliminary State & Regional Estimates*", p. 101, found at http://www.deanrunyan.com/doc_library/CAImp.pdf.

[2] See Expedia, Inc. Form 10-K for the fiscal year ended December 31, 2011, pp. 35 and 36, found at http://www.sec.gov/Archives/edgar/data/1324424/000119312514039090/d648005d10k.htm. These include the cities of Los Angeles, San Diego, San Francisco, West Hollywood, South Lake Tahoe, Palm Springs, Monterey, Sacramento, Long Beach, Napa, Newport Beach, Oakland, Irvine, Fresno, La Quinta, Dana Point, Laguna Beach, Riverside, Eureka, La Palma, Twenty-nine

San Francisco filed its notice of appeal with this Court from an adverse summary judgment ruling before Judge Berle.

Each of the municipalities with TOTs should not have to proceed as though this Court has not decided issues that are pertinent; they should be able to cite this Court's interpretation of San Diego's TOT ordinance. Especially in light of the Court's failure to publish the Anaheim and Santa Monica opinions, it is critical that the San Diego opinion be published to provide guidance to each municipality as it contemplates its individual claims against the OTCs.

Second, the Opinion undeniably advances a new interpretation of TOT ordinances. If the Court orders the Opinion published, it will become the first precedential California decision to interpret words in a TOT ordinance—i.e., "rent," "occupancy," and "operator"—that are ubiquitous in the ordinances of municipalities across the State. That interpretation will impact the 50 California municipalities with similar claims, as well as the other California municipalities with TOT ordinances that have not yet filed claims.

The bottom line: Publication of the Opinion will provide necessary guidance to municipalities across the State, as well as a means for those municipalities and tribunals to discuss this Court's prior reasoning without running afoul of the publication rules.

III.
CONCLUSION

The Court should grant rehearing to eliminate all references and citations to the Unpublished Opinions. In addition, to prevent the same

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Palms, Laguna Hills, Garden Grove, Corte Madera, Santa Rosa, Manhattan Beach, Huntington Beach, Ojai, Orange, Sacramento, Sunnyvale, Truckee, Walnut Creek, Bakersfield, Carlsbad, Carson, Cypress, San Bruno, Lompoc, Mammoth Lakes, Palm Springs, San Jose, Santa Barbara, Bishop, Buena Park, Milpitas, Palmdale, Santa Rosa, and Pasadena, California; the county of Monterey, California.

problem from arising in future cases, the Court should order the new opinion in this case published. Litigants and courts across the State should be able to cite the Opinion so that they can address this Court's reasoning, as it applies to the TOT ordinances at issue in those future cases.

DATED: March 20, 2014

Respectfully Submitted,

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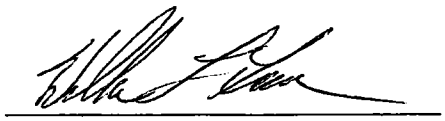
CERTIFICATION AS TO LENGTH OF BRIEF

I, William L. Larson, counsel for Appellant, declare under penalty of perjury under the laws of the State of California that the word count for this Brief, excluding Table of Contents, Table of Authorities, Proof of Service and this Certification is 1,360 words as calculated utilizing the word count feature of the Microsoft Word 2010 software used to create this document.

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

Executed March 20, 2014, at Los Angeles, California.



William L. Larson

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I am over the age of 18 years and not a party to this action. A business address for me is 601 South Figueroa, Suite 2370, Los Angeles, California 90017.

On March 20, 2014, at the above-stated place of business, I served the foregoing document described as APPELLANT'S PETITION FOR REHEARING AND REQUEST FOR PUBLICATION, on the interested parties in this action by placing a true and correct copy thereof in sealed envelopes for collection and deposit in the United States Postal Service, with postage fully prepaid thereon, addressed as follows:

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

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on the interested parties in this action addressed as follows:

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☒ **(BY US MAIL)** I am readily familiar with the firms' practice for the collection and processing of correspondence for mailing with the United States Postal Service and the fact that the correspondence would be deposited with the United States Postal Service that same day in the ordinary course of business; on this date, the above-referenced correspondence was placed for deposit at Los Angeles, California and placed for collection and mailing following ordinary business practices.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on **May 27, 2014,** at Los Angeles, California.

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Signature

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