

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP  
300 SOUTH GRAND AVENUE  
LOS ANGELES, CALIFORNIA 90071-3144

TEL: (213) 687-5000  
FAX: (213) 687-5600  
www.skadden.com

SUPREME COURT  
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DEC - 8 2014

CLERK SUPREME COURT

Justices of the Supreme Court of California  
Supreme Court of California  
350 McAllister Street  
San Francisco, California 94102-7303

RE: *In re Transient Occupancy Tax Cases, City of San Diego v.  
Hotels.com, L.P., et al.*, Case No. S218400

Dear Honorable Chief Justice Cantil-Sakauye and Honorable Associate Justices:

On behalf of the Respondent online travel companies,<sup>1</sup> we submit this response to Petitioner City of San Diego's November 21, 2014 letter brief, filed pursuant to the Court's November 6, 2014 order directing the parties to each submit a letter brief addressing whether the Court should "unseal on its own motion, and augment the record to include, those portions of the sealed administrative record in this matter that do not reveal consumers' identities in order to obviate the filing under seal of unredacted versions of the briefs."

As the OTCs demonstrated in their own November 21, 2014 letter brief, there is no need to unseal any portion of the Administrative Record because, with the

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<sup>1</sup> Respondents are priceline.com Inc. (n/k/a The Priceline Group Inc.), Travelweb LLC, Expedia, Inc., Hotwire, Inc., Hotels.com, L.P., Hotels.com GP, LLC, Travelocity.com LP, Site59.com, LLC, Orbitz, LLC, Trip Network, Inc. (d/b/a Cheaptickets.com), and Internetwork Publishing Corp. (d/b/a Lodging.com) (collectively, the "OTCs").

exception of one footnote in Petitioner's Opening Brief, the parties should be able to publicly file in unredacted form all of the briefs in this appeal.

The OTCs further demonstrated that the trial court properly sealed pursuant to Rules of Court 2.550 and 2.551 certain limited excerpts of the Administrative Record. This tax case involves an extremely competitive industry in which the OTCs are not just co-defendants but are also business competitors. The sealed excerpts of the Administrative Record reveal confidential, commercially sensitive, proprietary and trade secret information that OTCs do not disclose to their competitor OTCs, and that the non-party hotels do not disclose to their own hotel competitors. All these considerations were part of the trial court's proper decision to seal particular excerpts of the Administrative Record, and there is no principled reason why this Court should unseal any of those excerpts.

For its part, Petitioner, without explanation and without analysis of any particular sealed excerpt, now reverses the position it took in the trial court and asserts that the *entire Administrative Record* (excluding consumer identity information) should be unsealed. By contrast, in briefing before the trial court on the appropriateness of sealing excerpts of the Administrative Record, Petitioner did not dispute that the OTCs' confidential and proprietary information (including transaction data and pricing methodologies, as well as non-public revenue and financial data) was appropriate for sealing. (*See* JA 1245; OTCs' Nov. 21, 2014 Ltr. Br. at 6-7 & Ex. B at Tab 13.) Petitioner's concession before the trial court was not remarkable – California law requires balancing the public policy in favor of open court records against privacy interests of the parties and non-parties. Thus, Petitioner conceded that the OTCs had met the standards for sealing for all but five of the excerpts the OTCs sought to seal. (*See* JA 1245; OTCs' Nov. 21, 2014 Ltr. Br. at 6-7 & Ex. B at Tab 13.) After conducting a thorough and detailed analysis of the balancing required by law, the trial court agreed with the OTCs and ordered the relevant excerpts sealed. (*See* JA 1241-1492.)

Petitioner's current contention that a wholesale unsealing is appropriate without balancing or analysis is wrong and appears to be based on both an over- and an under-inclusive misunderstanding of the scope of the Sealing Order. *First*, Petitioner appears to mistakenly assume that the Sealing Order covers the entirety of every contract between an OTC and a hotel. Presumably it is that misunderstanding that led Petitioner to redact in its Opening Brief (and in its November 21, 2014 Letter Brief) numerous references to *unsealed* portions of contracts and related testimony in the Administrative Record, general references that did not reveal the content of the confidential, proprietary and trade secret excerpts of contracts that were ordered sealed, and its own arguments about the legal consequences of certain contract provisions. (*See* OTCs' Nov. 21, 2014 Ltr. Br. at 3-4.) The same misunderstanding underlies Petitioner's incorrect assertion in its November 21, 2014 Letter Brief (at 5-8) that the Sealing Order covers general statements about contracts between OTCs and hotels that have been described in the public opinions of three courts. The

Sealing Order does not cover general statements about contract terms, or arguments about the legal import of contract terms. It is limited to only the particular words/numbers, lines or paragraphs that reveal confidential, commercially sensitive, proprietary or trademark information of an OTC-hotel contract or related testimony.

*Second*, Petitioner appears to mistakenly assume the Sealing Order covers *only* OTC-hotel contracts and testimony related to those contracts. That is incorrect. In addition to sealing limited excerpts of those contracts and related testimony, the Sealing Order also covers details of transaction data and pricing methodologies, non-public revenue and financial data, and reservation systems, all of which were sealed because they reveal competitively sensitive, confidential, proprietary, trade secret information of the OTCs and non-party hotels. For example, in many OTC-hotel contracts the parties negotiate a percentage discount which establishes the “net rate” for pricing purposes. The percentage discount varies by OTC, and also among the various hotels and hotel chains. The trial court properly determined that this commercially sensitive financial information is appropriate for sealing; indeed Petitioner *conceded this point* before the trial court. Petitioner’s current approach (that there should be wholesale unsealing without the balancing required by law) would expose this highly confidential financial information.

Not only is such a wholesale unsealing legally untenable, it is in no way required to address the issue of public access to the briefing. None of these non-contract-related sealed excerpts are cited or relied upon by Petitioner or any other party in the appellate briefing and orders in this case. In urging this Court to unseal the entire Administrative Record (other than consumer information), Petitioner ignores this other sealed material, and offers no justification whatsoever for why that material should be unsealed. It should not be unsealed.

Because Petitioner misunderstood the scope of the Sealing Order, its assertion that this Court should unseal the entire Administrative Record to allow for open court records is completely misplaced. For the reasons set forth in the OTCs’ November 14, 2014 Letter Brief and herein, (i) this Court need not unseal the Administrative Record to allow the briefs in this appeal to be filed in the public record, and (ii) the public policy in favor of open court records continues to be outweighed with respect to those limited excerpts of the extensive Administrative Record that reveal the OTCs’ and non-party hotels’ confidential, commercially sensitive, proprietary and trade secret information.

## DISCUSSION

**I. As The OTCs Showed, The Parties Can File Their Unredacted Briefs In The Public Record, Without This Court Unsealing Any Portion Of The Administrative Record.**

As the OTCs showed in their November 21 Letter Brief (at 4-5), only a small portion of the sealed excerpts of the lengthy Administrative Record were cited or relied upon by Petitioner or any other party in the appellate briefing and orders in this case. The few sealed excerpts that are cited relate to contracts between OTCs and non-party hotels, and are not cited or quoted in a manner that reveals any sealed content, with the exception of one footnote in Petitioner's Opening Brief. Other than that one footnote, which should be redacted, the Opening Brief may be publicly filed. And the OTCs anticipate the parties will be able to publicly file all remaining briefs without redaction.

**II. The Balance Of Interests Weighs In Favor Of Sealing The Excerpts Of The Record The Trial Court Ordered Sealed, Because They Reveal Confidential, Competitively Sensitive, Proprietary, and Trade Secret Information Of OTCs and Non-Party Hotels.**

Because the briefs to this Court can be filed in the public record with only one footnote in the Opening Brief redacted, this Court need not unseal any portion of the Administrative Record to obviate the filing under seal of unredacted versions of the briefs. Consequently, there is no reason for this Court to undertake the burdensome analysis of each and every sealed excerpt that would be required to unseal the Administrative Record. *See* Cal. R. of Ct. 8.46(e)(5) (a reviewing court considering whether to unseal a record must undertake the same analysis of statutory factors that is required to seal records). However, as the OTCs further showed (OTCs' Nov. 21, 2014 Ltr. Br. at 5-9), if this Court were to undertake that analysis, it should reach the same result as the trial court, leaving sealed the excerpts of the Administrative Record.

The trial court and parties undertook extensive motion practice on the sealing issue, including an exhaustive, line-by-line review of the Administrative Record, which led the court to enter the detailed, 238-page Sealing Order. (*See* OTCs' Nov. 21, 2014 Ltr. Br. at 6-7 & Ex. B; JA 1241-1492.) That Order set forth the factual findings and legal conclusions supporting the sealing of each excerpt as confidential, proprietary, or trade secret information. For those reasons and as further shown in the OTCs' Motion to Seal and supporting declarations, the trial court properly sealed those excerpts of the Administrative Record. This Court should not unseal them.

In arguing that this Court should unseal the entire Administrative Record (other than consumer information), Petitioner does not attempt to examine the factual or legal basis for sealing a single sealed excerpt. Instead, it argues that: (1) public

policy supports the unsealing, and in particular, other California cities might be interested in this case because it implicates potential tax revenue; and (2) the entire Administrative Record can be unsealed because publicly-available court decisions describe some of the terms of OTC-hotel contracts. Neither argument justifies unsealing even the cited contract excerpts, let alone the vast majority of the sealed excerpts in the Administrative Record that are not cited.

A. **With Respect To The Limited Excerpts Of The Administrative Record The Trial Court Ordered Sealed, The OTCs Demonstrated That Privacy Interests Outweighed The Public Interest In Open Access**

Petitioner spends half of its Letter Brief reciting the general policy favoring public access to open court records and arguing that the alleged interest in this case by the public and other California cities (dozens of which are represented by the same outside counsel representing Petitioner here) is so strong that it favors unsealing the Administrative Record. (Petitioner's Nov. 21, 2014 Ltr. Br. at 2-5.) Petitioner is wrong for two reasons.

*First*, even assuming Petitioner were correct that other California cities have an interest in this case to evaluate their own potential tax claims against the OTCs, or that potential amici have an interest in reviewing the full briefing to decide whether to weigh in, this Court need not unseal the Administrative Record to advance those interests. As noted above, the many portions of the Opening Brief that Petitioner wrongly assumed needed to be redacted were not actually implicated by the narrow Sealing Order. The contract provisions that Petitioner argues are relevant to deciding this case are either not sealed or are discussed in the briefing in a general manner that does not reveal the particular confidential negotiated terms of any given contract. (See OTCs' Nov. 21, 2014 Ltr. Br. at 3-4, 7-8.) Thus, with the exception of one footnote in the Opening Brief, the briefs in this appeal should be available to the public in unredacted form— as were all of the briefs the parties filed with the Court of Appeal.<sup>2</sup>

Moreover, Petitioner does not and cannot argue that any city might have an interest in the vast majority of the sealed excerpts of the Administrative Record that neither party even mentions in their briefing to the appellate courts. Those *uncited* excerpts include, among other things, each OTCs' transaction data for every single reservation at a hotel in *San Diego* over a nine-year period; expert reports using that *San Diego*-specific financial data to calculate the dollar amounts of taxes allegedly owed to *San Diego*; each hotel's confidential net rate charged for furnishing the hotel

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<sup>2</sup> For the same reasons, nothing in Petitioner's November 21, 2014 Letter Brief needs to be redacted to comply with the Sealing Order, and it can be made part of the public record in wholly unredacted form.

room to the transient; confidential, proprietary hotel/room selection algorithms; non-public financial information; and additional confidential, commercially sensitive, negotiated contract terms set forth in contracts between particular hotels or hotel chains and particular OTCs.<sup>3</sup>

In short, the public interest in open access to court records is served in this appeal.

*Second*, Petitioner's argument fails because it analyzes only one of the two interests that must be *balanced* when considering sealing court records. Petitioner focuses *solely* on the undisputed public policy favoring open court records. But Petitioner wholly ignores that California law, including the California Constitution, also recognizes a right to privacy to a party's confidential financial affairs. *See generally Valley Bank of Nevada v. Superior Court*, 15 Cal. 3d 652 (1975). To protect that right to privacy, courts are permitted to seal records where it is shown that the public's right of access is overcome by an overriding interest in protecting the information, that the latter interest will be prejudiced if the information is not sealed, and that the proposed sealing of the record is narrowly tailored and no less restrictive means exists to protect the information. *See* Cal. R. Ct. 2.550(d). *See also NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 20 Cal. 4th 1178, 1217-18 (1999) (establishing these requirements for sealing).

That is precisely the showing that the OTCs made with respect to each of the limited excerpts of contracts, testimony, expert reports and other documents that were sealed because they revealed competitively sensitive, confidential, proprietary, trade secret information of the OTCs and non-party hotels. (*See* OTCs' Nov. 21, 2014 Ltr Br. at 6-9 & Ex. B at Tabs 1-12, 14; JA 1241-1492.). Petitioner does not

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<sup>3</sup> It is particularly ironic and unjust for Petitioner to urge that the mere presence of a document in the Administrative Record strips it of confidentiality when it becomes part of the court record. Of course, that is not the law: Court records may be sealed where, as here, the requirements of Rule 2.550 and 2.551 of the California Rules of Court are met. Further, such a result would encourage precisely the abusive behavior Petitioner engaged in here: submitting to the hearing officer thousands of pages of confidential documents and testimony the OTCs and hotels provided during discovery, which Petitioner never cited or relied upon, and then later arguing those confidential documents should be public merely because they are required by law to be submitted to the courts *in toto* under California Code of Civil Procedure §§ 1094.5(a) and 1094.6(c), and Rule 8.123 of the California Rules of Court. Such a result is especially unjust here where the OTCs were compelled to produce their confidential information only as a result of an assessment by San Diego that both the trial court and Court of Appeal deemed unlawful.

and cannot make *any* argument whatsoever to overcome this showing with respect any one of the sealed excerpts of the Administrative Record.

**B. Public Court Decisions Generally Describing OTC-Hotel Contract Terms Do Not Reveal Sealed Excerpts Of The Administrative Record And Therefore Do Not Justify Unsealing Any Portion Of The Administrative Record.**

Petitioner argues that a few publicly-filed court decisions reveal certain terms of OTC-hotel contracts and therefore “[t]here [i]s [n]o [n]eed [f]or [s]ealing [h]ere.” (Petitioner’s Nov. 21, 2014 Ltr. Br. at 5.) Petitioner’s argument is again based on a misunderstanding of the Sealing Order and in any event, does not justify the wholesale unsealing of the entire Administrative Record Petitioner now urges.

Petitioner highlights decisions from three courts that it claims reveal contract terms that are covered by the Sealing Order. Not surprisingly, Petitioner relies on decisions from two trial courts and one appellate court that have ruled in favor of the taxing authority, but declines to draw this Court’s attention to the overwhelming majority of decisions by courts nationwide that have rejected similar attempts to impose hotel tax liability on OTCs, including the three unpublished decisions by the California Court of Appeal in these related cases (Anaheim, Santa Monica and the underlying San Diego decision), and decisions by appellate courts in fourteen other cases. Indeed, in almost *every case nationwide* addressing “operator” ordinances similar to San Diego’s, the court held that the OTCs are *not liable* for transient occupancy taxes. *See, e.g., Pitt Cnty. v. Hotels.com, L.P.*, 553 F.3d 308, 313 (4th Cir. 2009) (“OTCs are not hotel “operators” liable for tax because they “[do] not physically provide the rooms” and “have no role in the day-to-day operation or management of the hotels.”).<sup>4</sup>

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<sup>4</sup> *Accord City of Birmingham v. Orbitz, LLC*, 93 So. 3d 932, 936 (Ala. 2012) (upholding trial court’s ruling that “the [OTCs] are not engaged in the business of renting or furnishing any room or rooms in any hotel”); *Louisville/Jefferson Cnty. Metro Gov’t v. Hotels.com, L.P.*, 590 F.3d 381, 388 (6th Cir. 2009); *City of Columbus, Ohio v. Hotels.com, LP*, 693 F.3d 642 (6th Cir. 2012); *City of Bowling Green v. Hotels.com, L.P.*, 357 S.W.3d 531, 533 (Ky. Ct. App. 2011) (pet. for rev. denied, 2012 Ky. LEXIS 228 (Ky., Feb. 15, 2012)) (“The OTCs d[o] not provide physical accommodations . . . .”); *City of Philadelphia v. City of Philadelphia Tax Review Bd.*, 37 A.3d 15 (Pa. Commw. Ct. 2012), alloc. denied, 50 A. 3d 1253 (Pa. 2012); *City of Houston v. Hotels.com, L.P.*, 357 S.W.3d 706, 714-15 (Tex. Ct. App. 2011) (OTCs, unlike hotels, do “not have rooms or occupancy” as even city conceded “the OTCs do not have the right to use or possess hotel rooms” (emphasis omitted)); *St. Louis Cnty. v. Prestige Travel, Inc.*, 344 S.W.3d 708, 714 (Mo. 2011) (OTCs “not liable” because they do “not

In any event, as is evident from even a cursory review of Petitioner's Letter Brief, the decisions Petitioner cites – like Petitioner's Opening Brief – describe contract terms in a general manner or otherwise do not reveal the sealed content of any particular contract in Administrative Record. The Sealing Order covers only the limited particular words/numbers, lines or paragraphs of the contracts that the trial court held reveal confidential, commercially sensitive, proprietary or trade secret information of the OTCs or non-party hotels. The Sealing Order does not preclude any party from discussing in general terms the types of contract provisions that the parties have included in their appellate briefing in this case.

Petitioner includes in its Letter Brief only two specific contract provisions that were quoted in two of the publicly filed court decisions. With respect to the first quote (*see* Petitioner's Nov. 21, 2014 Ltr. Br. at 7 (see last quote of second full bullet point)), Petitioner fails to note that the court there specifically stated that it had "omitted the name of the hotel for confidentiality purposes." *Columbus v. Expedia, Inc.*, No. SU-06-CV-1794-7, 2008 WL 4448800, at n.4 (Sept. 22, 2008). The second quote (*see* Petitioner's Nov. 21, 2014 Ltr. Br. at 8 (see last quote of top paragraph)) is from a contract that is not even in the Administrative Record.

Moreover, even if those public decisions had revealed sealed excerpts of OTC-hotel contracts (they did not), it still would not justify the blanket unsealing of the *entire* Administrative Record that Petitioner now urges. At most, it would require analysis of *each* sealed contract excerpt to see if its confidential content was revealed in a public court decision.

Further, as shown, in addition to sealing excerpts of OTC-hotel contracts and related testimony, the Sealing Order also covers excerpts of the Administrative

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provide sleeping rooms"); *Louisville/Jefferson County Metro. Gov't v. Hotels.com, L.P.*, 590 F.3d 381, 387 (6th Cir. 2009) ("[T]he [OTCs] in the present case do not physically control or furnish the rooms they advertise."); *City of Branson v. Hotels.com, LP*, 396 S.W.3d 378 (Mo. Ct. App. 2013); *Alachua County, et al. v. Expedia.com, et al.*, 110 So. 3d 941, 946 (Fla. Dist. Ct. App. 2013), *review granted* (OTCs lack "sufficient control of the property to be entitled to grant possessory or use rights," and "do not grant possessory or use rights in hotel properties owned or operated by third-party hoteliers"); *Leon County v. Expedia, Inc., et al.*, 128 So. 3d 81 (Fla. Dist. Ct. App. 2013) (*per curiam*); *Broward County, Fla. v. Orbitz, LLC*, 35 So. 3d 415, (Fla. Dist. Ct. App. 2014) (*per curiam*); *Expedia, Inc. v. City and County of Denver, Colorado*, No. 13CA0779 (Colo. Ct. App. July 3, 2014); *Wake County v. Hotels.com, L.P.*; *Buncombe County v. Hotels.com, L.P.*; *Dare County v. Hotels.com, L.P.*; and *Mecklenburg County v. Hotels.com, L.P.*, No. COA13-594 (N.C. Ct. App. Aug. 19, 2014).

Record the trial court held reveal confidential, propriety transaction data and pricing methodologies, non-public revenue and financial data, and trade secret reservation systems. Petitioner offers no argument for why this Court should undertake the analysis of the various sealing factors set forth in Rule 2.550(d) with respect to those non-contract-related excerpts, let alone any argument that could show those sealing factors were not met. As the OTCs have shown, this Court need not undertake that analysis, but if it did, it should not unseal those excerpts. (*See* OTCs' Nov. 21, 2014 Ltr. Br. at 5-9.)

### CONCLUSION

For all of these reasons, with the exception of one footnote in the Opening Brief, the parties may file their briefs in this appeal in the public record without redaction. Accordingly, this Court need not repeat the months of work done by the parties and the trial court below in deciding which excerpts of the Administrative Record should be sealed, nor should it do so. The Sealing Order was properly entered and should not be overturned.

Respectfully,



Darrel J. Hieber

SLW

cc: See attached service list

**PROOF OF SERVICE**

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 **December 8, 2014**, I served the foregoing document described as:

**RESPONDENT ONLINE TRAVEL COMPANIES' RESPONSE TO  
PETITIONER CITY OF SAN DIEGO'S NOVEMBER 21, 2014  
LETTER BRIEF [PER COURT'S NOVEMBER 6, 2014 ORDER]**

on the interested parties in this action addressed as follows:

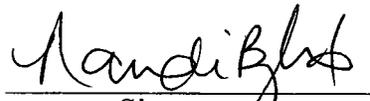
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Executed on **December 8, 2014**, at Los Angeles, California.

Nandi Berglund  
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Signature

<p>Daniel F. Bamberg  Jon E. Taylor  City of San Diego  Office of the City Attorney  1200 Third Avenue, Suite 1100  San Diego, CA 92101  Tel.: (619) 533-5800  Fax: (619) 533-5856</p> <p>Irving H. Greines, Esq.  Kent L. Richland  Cynthia E. Tobisman, Esq.  David E. Hackett, Esq.  Greines, Martin, Stein &amp; Richland LLP  5900 Wilshire Blvd., 12<sup>th</sup> Fl.  Los Angeles, CA 90036  Tel.: (310) 859-7811  Fax: (310) 276-5261  Email: ctobisman@gmsr.com</p> <p>William L. Larson, Esq.  Paul R. Kiesel, Esq.  Kiesel, Boucher &amp; Larson, LLP  8648 Wilshire Boulevard  Beverly Hills, CA 90211  Tel.: (310) 854-4444  Fax: (310) 854-0812  Email: larson@kbla.com</p> <p>Laura J. Baughman  Thomas M. Sims, Esq.  Baron &amp; Budd, PC  3102 Oak Lawn Avenue, Suite 1100  Dallas, TX 75219  Tel: (214) 521-3605  Fax: (214) 520-1181  Email: lbaughman@baronbudd.com</p> <p>Steven D. Wolens, Esq.  Gary Cruciani, Esq.  McKool Smith Hennigan  300 Cresecent Court, Ste. 1500  Dallas, TX 75201  Tel: 214-978-4000  Fax: 214-978-4044</p>	<p>Counsel for City of San Diego</p>
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<p>Brian D. Hershman, Esq.  Erica L. Reilley, Esq.  Jones Day  555 South Flower Street  Fiftieth Floor  Los Angeles, CA 90071-2300  Tel.: (213) 489-3939  Fax: (213) 243-2539  Email: bhershman@jonesday.com</p>	<p>Expedia, Inc., Hotwire, Inc.,  Hotels.com, L.P., and Hotels.com  GP, LLC</p>
<p>Brian S. Stagner, Esq.  Chad Arnette  Kelly Hart &amp; Hallman LLP  201 Main Street, Suite 2500  Fort Worth, TX 76102  Tel.: (817) 332-2500  Fax.: (817) 878-9280  Email: brian.stagner@khh.com  chad.arnette@khh.com</p> <p>Nathaniel S. Currall  K&amp;L Gates  1 Park Plaza, 12<sup>th</sup> Floor  Irvine, CA 92614  Email: nathaniel.currall@klgates.com</p>	<p>Travelocity.com LP and  Site59.com, LLC</p>
<p>Jeffrey Rossman, Esq.  McDermott Will &amp; Emery LLP  227 West Monroe Street  Chicago, IL 60606  Tel.: (312) 372-2000  Fax.: (312) 984-7700  Email:jrossman@mwe.com</p>	<p>Orbitz, LLC, Trip Network, Inc.  (d/b/a Cheaptickets.com), and  Internetwork Publishing Corp.  (d/b/a Lodging.com)</p>

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