

Case No. 218400

**IN THE SUPREME COURT OF CALIFORNIA**

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In Re TRANSIENT OCCUPANCY TAX CASES  
CITY OF SAN DIEGO, CALIFORNIA

*Petitioner,*

v.

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

*Respondents.*

SUPREME COURT  
**FILED**

MAR 18 2015

Frank A. McGuire Clerk

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Deputy

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

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

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**RESPONDENTS' REQUEST FOR JUDICIAL NOTICE;  
MEMORANDUM IN SUPPORT; DECLARATION OF DARREL J.  
HIEBER; [PROPOSED] ORDER**

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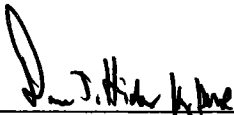
Under California Rules of Court, rule 8.252(a)(2) and Evidence Code Sections 452(d) and 459, in connection with its concurrently filed Answer Brief on the Merits, Respondent Online Travel Companies (“OTCs”) request that this Court take judicial notice of Exhibit A to this Request, which was filed by Steven D. Wolens of the law firm of McKool Smith PC on behalf of the Hawaii Director of Taxation in the Supreme Court of the State of Hawaii (Case SCAP No. 13-0002896), and entitled the Director of Taxation’s Memorandum in Opposition to Appellants/Appellees Motion for Judicial Notice. Mr. Wolens is also counsel of record for the City of San Diego in connection with this appeal.

This Request is based upon the accompanying Memorandum of Points and Authorities, the Declaration of Darrel J. Hieber and Exhibit A attached hereto, and the Answer Brief and other documents filed in this appeal.

Dated: March 17, 2015

SKADDEN, ARPS, SLATE, MEAGHER  
& FLOM LLP

By:

  
\_\_\_\_\_

Darrel J. Hieber

Attorneys for PRICELINE.COM INC.  
and TRAVELWEB LLC

Dated: March 17, 2015

JONES DAY

By:

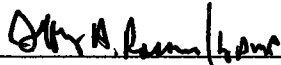
  
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Brian D. Hershman

Attorneys for EXPEDIA, INC.,  
HOTWIRE, INC., HOTELS.COM, L.P.,  
and HOTELS.COM G.P., LLC

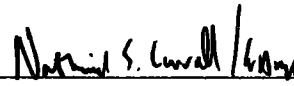
Dated: March 17, 2015

McDERMOTT WILL & EMERY LLP

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CHEAPTICKETS.COM), and  
INTERNETWORK PUBLISHING  
CORP. (D/B/A LODGING.COM)

Dated: March 17, 2015

K&L GATES LLP

By:   
Nathaniel S. Currall  
Attorneys for TRAVELOCITY.COM,  
L.P. and SITE59.COM, LLC

## MEMORANDUM OF POINTS AND AUTHORITIES

As explained in the accompanying Declaration of Darrel J. Hieber, Exhibit A is a true and correct copy of the Director of Taxation's Memorandum in Opposition to Appellants/Appellees Motion for Judicial Notice, filed on February 10, 2015, by the same outside counsel that represents the City of San Diego ("San Diego") here, in Case SCAP No. 13-0002896, before the Supreme Court of the State of Hawaii. Exhibit A was not the subject of judicial notice before the trial court or the Court of Appeal because the document did not exist until after review by this Court was granted.

This document is judicially noticeable under Evidence Code section 452, subdivision (d). That section permits the Court to take judicial notice of "[r]ecords of ... (2) any court of record of the United States or of any state of the United States." (Evid. Code, § 452, subd. (d); see *Szetela v. Discover Bank* (2002) 97 Cal.App.4th 1094, 1098 [taking judicial notice of "part of the record in the court of another state"].)

Exhibit A is a record from the Supreme Court of the State of Hawaii, and therefore is a judicially noticeable record of a "court of record of . . . [a] state of the United States."

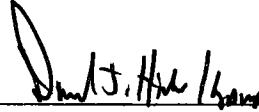
Moreover, Exhibit A is relevant to the issues raised by this appeal. In Exhibit A, San Diego's outside counsel makes representations to the Hawaii Supreme Court explaining the arguments made to this Court in San Diego's Opening Brief. For example, counsel represents that the Opening Brief to this Court should not be read as asserting that the hotel sets (and charges) the OTC's margin and service fee in merchant model transactions (Ex. A, p. 10), explaining that the "OTC alone determines" and charges its margin and service fee. Counsel's representations to another court about the nature of its arguments before this Court is relevant to this Court's consideration of the City's arguments in deciding this appeal.

Thus, the OTCs respectfully request that the Court grant this Request and take judicial notice of Exhibit A to the Declaration of Darrel J. Hieber.

Dated: March 17, 2015

SKADDEN, ARPS, SLATE, MEAGHER  
& FLOM LLP

By:



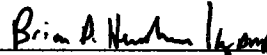
Darrel J. Hieber

Attorneys for PRICELINE.COM INC.  
and TRAVELWEB LLC

Dated: March 17, 2015

JONES DAY

By:



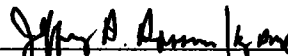
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and HOTELS.COM G.P., LLC

Dated: March 17, 2015

McDERMOTT WILL & EMERY LLP

By:



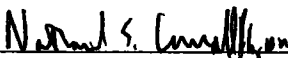
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INTERNETWORK PUBLISHING  
CORP. (D/B/A LODGING.COM)

Dated: March 17, 2015

K&L GATES LLP

By:



Nathaniel S. Currall

Attorneys for TRAVELOCITY.COM,  
L.P. and SITE59.COM, LLC

**DECLARATION OF DARREL J. HIEBER**

I, Darrel J. Hieber, declare that:

1. I am an attorney licensed to practice law in the State of California and this Court, and I am a partner with the law firm of Skadden, Arps, Slate, Meagher & Flom LLP, counsel of record for Respondents priceline.com Incorporated and Travelweb LLC. I make this declaration in support of Respondents' Request for Judicial Notice.

2. I have personal knowledge of the matters set forth herein and am competent to testify to those matters.

3. San Diego's outside counsel, Steven D. Wolens of McKool Smith PC, also is outside counsel representing the Director of Taxation for the State of Hawaii in an appeal before the Hawaii Supreme Court, Case No. SCAP No. 13-0002896.

4. Exhibit A is a true and correct, filed-stamped copy of the Director of Taxation's Memorandum in Opposition to Appellants/Appellees Motion for Judicial Notice (without exhibits), filed on February 10, 2015, before the Hawaii Supreme Court.

5. Exhibit A was not the subject of judicial notice by the trial court or the Court of Appeal because the document was not filed with the Supreme Court of Hawaii until after this appeal had been filed.

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

Executed on March 17, 2015, at Los Angeles, California.

  
\_\_\_\_\_  
Darrel J. Hieber





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Supreme Court  
SCAP-13-0002896  
10-FEB-2015  
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SCAP No. 13-0002896

IN THE SUPREME COURT OF THE STATE OF HAWAII

IN THE MATTER OF THE TAX  
APPEAL

OF

TRAVELOCITY.COM, LP,  
Taxpayer-Appellant-Appellee/Cross-  
Appellant.

And consolidated cases

T. A. No. 11-1-0021 AND  
CONSOLIDATED CASES: (11-1-0022,  
11-1-0023, 11-1-0026, 11-1-0027, 11-1-  
0029, 11-1-0030, 11-1-0031, 11-1-0032,  
11-1-0033, 12-1-0287, 12-1-0288, 12-1-  
0289, 12-1-0292, 12-1-0293, 12-1-0294,  
12-1-0295, 12-1-0297, 12-1-0299 and 12-  
1-0300)

**APPEAL AND CROSS-APPEAL  
FROM THE FINAL JUDGMENT  
DISPOSING OF ALL ISSUES AND  
CLAIMS OF ALL PARTIES, FILED  
ON AUGUST 15, 2013 (AND  
UNDERLYING ORDERS)**

**TAX APPEAL COURT  
HONORABLE GARY W.B. CHANG**

**DIRECTOR OF TAXATION'S MEMORANDUM IN OPPOSITION  
TO APPELLANTS/APPELLEES-CROSS-APPELLANTS'  
MOTION FOR JUDICIAL NOTICE**

**DECLARATION OF STEVEN D. WOLENS**

**EXHIBITS A AND B**

**CERTIFICATE OF SERVICE**

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Attorneys for Appellant/Cross-Appellee  
Director of Taxation, State of Hawai'i

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

IN THE MATTER OF THE TAX  
APPEAL  
  
OF  
  
TRAVELOCITY.COM, LP,  
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**TAX APPEAL COURT  
HONORABLE GARY W.B. CHANG**

**APPELLEE/CROSS-APPELLANT DIRECTOR OF TAXATION’S  
MEMORANDUM IN OPPOSITION TO APPELLANTS/APPELLEES  
MOTION FOR JUDICIAL NOTICE**

The Director of Taxation demonstrates below that the “inconsistencies” alleged by the OTCs are not properly the subject of “judicial notice.” Moreover, — as a matter of fact — there are no inconsistencies.

The OTCs are engaged in a ruse with their inapt and inaccurate Motion For Judicial Notice (“Motion”). The ruse is underscored by their assertion that the statements they quote from the California brief were essentially “unreadable” until

recently due to redactions in the previously-filed California brief. In fact, the OTCs' proffered excuse to explain their delay in seeking judicial notice is false.<sup>1</sup>

**I. THE COURT SHOULD NOT TAKE JUDICIAL NOTICE AS A MATTER OF LAW.**

The Motion should be denied because the OTCs are not seeking judicial notice of "*adjudicative facts*" as Hawai'i Evidence Rule ("HRE") 201 allows.

The OTCs improperly ask the Court to take judicial notice of *arguments and statements made by counsel* to the California Supreme Court (on behalf of the City of San Diego), and comparing those arguments to those made by the Director of Taxation to this Court.

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<sup>1</sup> Nothing the OTCs have cited to support their spurious "inconsistency" argument was redacted in California and has been publically available for nearly four months.

On February 3, 2015 – 112 days after San Diego originally filed its Opening Brief in California on October 14, 2014, the OTCs filed the present Motion seeking judicial notice of the California brief. In footnote 1 of the Motion, the OTCs attempt to excuse their nearly four-month delay in seeking judicial notice by arguing that the original brief "was extremely difficult to read because of redactions" and "the OTCs waited to file this motion until that new, readable filing became publicly available." Motion at 1, n.1.

However, the OTCs fail to tell this Court that of the seven sentences that the OTCs plucked from the California brief and quoted in the chart at pages 2-3 of their Motion, *none* was redacted in the original California brief that was publicly filed on October 14. Thus, there is no reason the Motion could not have been filed nearly 4 months ago. See Exhibit A and Declaration of Steven D. Wolens ("Wolens Decl.") hereto.

HRE 201 is designed to save time by allowing a Court to take judicial notice of indisputable *facts*.<sup>2</sup> “The Hawai‘i courts have held that a fact is a proper subject for judicial notice *if it is common knowledge or is easily verifiable*.”<sup>3</sup>

Judicial notice cannot properly be taken of statements or arguments of counsel. How a lawyer characterizes evidence is not a “fact;” it is an argument. While court records are “sources whose accuracy cannot reasonably be questioned,”<sup>4</sup> that does not mean court records are automatically entitled to judicial notice. To the contrary, “[f]actual *allegations, conclusions*, and findings, whether authored by the court, by the parties *or their attorneys*, or by third parties, should not be noticed to prove the truth of the matter asserted, even though the material happens to be contained in court records.”<sup>5</sup>

A lawyer’s characterization of evidence in the record in a California case for a California client—that will be decided under California law—cannot be expected to be identical to a lawyer’s characterization of evidence in the record before this Court on behalf of a Hawai‘i client in a case that will be decided under distinctly different Hawai‘i law.

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<sup>2</sup> Commentary to HRE 201, quoting McCormick § 328 (emphasis added).

<sup>3</sup> Commentary to HRE 201, quoting *Almeida v. Correa*, 51 Hawai‘i 594, 465 P.2d 564 (1970) (emphasis added).

<sup>4</sup> HRE 201(b)(2).

<sup>5</sup> Bowman, *Hawai‘i Rules of Evidence Manual*, 2014-15 ed., § 201-5[4], citing *Ditto v. McCurdy*, 98 Hawai‘i 123, 130, 44 P.3d 274, 281 (2002) and *State v. Kotis*, 91 Hawai‘i 319, 342, 984 P.2d 78, 101 (1999) (emphasis added).

Under the guise of “judicial notice,” the OTCs attempt to re-argue their case four months after this Court heard oral argument on October 2, 2014. For these reasons, as well as the others addressed below, the OTCs’ request for judicial notice should be denied.

**II. EVEN IF JUDICIAL NOTICE OF SAN DIEGO'S BRIEF IS TAKEN, STATEMENTS MADE BY COUNSEL ON BEHALF OF SAN DIEGO ARE NOT MADE ON BEHALF OF HAWAI'I AND HAVE NO BEARING UPON THIS HAWAI'I CASE.**

As shown below, counsel made no inconsistent arguments in California and Hawai'i “regarding how the model works.”<sup>6</sup> As a threshold matter, however, even if counsel had made inconsistent arguments in the two proceedings, the OTCs fail to explain the relevance to this appeal. The Hawai'i Tax Director had no involvement whatsoever in the San Diego case and *vice versa*. The Hawai'i and San Diego cases are separate lawsuits, with separate records on appeal, and that involve completely different statutes/ordinances and different legal theories. Here, the only relevant representations are those made by counsel on behalf of the Hawai'i Tax Director; statements made by counsel on behalf of the City of San Diego are legally irrelevant to this Hawai'i case.

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<sup>6</sup> Motion at 2.

**III. COUNSEL DID NOT MAKE ANY “INCONSISTENT ARGUMENTS”; RATHER, THE OTCs HAVE ATTEMPTED TO MANUFACTURE INCONSISTENCIES THROUGH SELECTIVE AND OUT-OF-CONTEXT SNIPPETS FROM LENGTHY BRIEFS.**

The OTCs do *not* assert that any of the four “Hawai‘i arguments” appearing in the chart at pages 2-3 of their Motion are unsupported by evidence in the Hawai‘i record. The reason is simple: each statement finds voluminous evidentiary support in the Hawai‘i record. That is what matters.

Instead, the OTCs lift seven sentences from a 62-page California appellate brief and five sentences from 79 pages of Hawai‘i appellate briefs as examples of alleged inconsistencies. In fact, there are no inconsistencies; only attempts by the OTCs to take counsel’s statements out of context to try to manufacture inconsistencies.

**Alleged Inconsistency #1: Who “rents” the room and charges for occupancy?**

The transient pays rent to the OTC to obtain the privilege of occupancy.

Counsel has consistently argued in both Hawai‘i and California that the sole rental transaction is the one between the OTC and the transient in which *the OTC sells the privilege of occupancy to the transient.*

|   |   |
|---|---|
| <p><u>California</u><br/>         “The second transactional step – when the customer <i>clicks the ‘book’ button on the OTCs’ website and pays rent in order to obtain the privilege of</i></p> | <p><u>Hawai‘i</u><br/>         “Based upon contractual rights the hotel delegates to the OTC, it is the OTC (not the hotel) that is the party to the rental transaction with the transient and,</p> |
|---|---|

|   |   |
|---|---|
| <p><i>occupancy</i> – is the only event that gives rise to the room tax.” (37)<sup>7</sup> “[T]he privilege of Occupancy [is] a privilege that can only be obtained by the customer by <i>paying the amount of rent reflected on the OTC’s website.</i>” (38)</p> | <p>therefore, <i>it is the OTC (not the hotel) who rents hotel rooms to transients and transfers the right of occupancy to transients.</i>” TAT OB at 10.<sup>8</sup></p> |
|---|---|

Thus, the OTCs’ central argument in their Motion – that the California brief “directly contradicts the Director’s representations regarding *who* provides the right of occupancy in merchant model transactions” – is demonstrably false. Motion at 1 (emphasis in original).

The OTCs do not obtain any right of room occupancy.

The OTCs cite as another example of an alleged “inconsistent” statement made in California the following: “The OTCs did not obtain any right of room occupancy.” (45). But, the *identical* statement appears in the Director’s Hawai‘i brief.

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<sup>7</sup> Emphases in quoted passages from the California and Hawai‘i briefs are added unless otherwise noted. Numbers in parentheses refer to page numbers of the City of San Diego’s opening brief in the California appeal. See Ex. 1 to Motion. The California brief is sometimes also cited as “Cal. OB.”

<sup>8</sup> The JEFS docket numbers for the briefs referenced herein are as follows: The Director’s TAT Opening Brief (TAT OB): Dkt 43; Director’s GET Answering Brief (GET AB): Dkt 64; Director’s TAT Reply Brief (TAT RB): Dkt 106; The OTCs’ GET Opening Brief (OTC GET OB): Dkt 29; OTCs’ TAT Answering Brief (OTC TAT AB): Dkt 56; OTCs’ GET Reply Brief (OTC GET RB): Dkt 108.



|   |   |
|---|---|
| <u>California</u><br>“The OTCs do not obtain any right of room occupancy.” (45) | <u>Hawai‘i</u><br>“The OTC is not an occupant and never obtains any right of occupancy in an OTC-Controlled Sale.” TAT OB at 17, ¶33. |
|---|---|

Ironically, the OTCs *agree* that the OTCs—themselves—are never occupants and do not obtain any right of room occupancy.<sup>9</sup>

**Alleged Inconsistency #2: “Who is the ‘principal;’ who is the ‘agent’”?**

In OTC-Controlled Sales, it is undisputed that there is no contract between the hotel and transient.<sup>10</sup> The only contract to which the transient is a party is the rental contract with the OTC. *Id.* Thus, the “principals” to that contract are the OTC and transient. In fact, the OTCs have admitted in their SEC filings and elsewhere that the OTC “acts as a principal” and “bypasses intermediaries” in OTC-Controlled Sales.<sup>11</sup>

The record is also clear that in OTC-Controlled Sales, the hotel delegates the tax collection duty to the OTCs who then collect the tax from the transient on the hotel’s behalf.

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<sup>9</sup> “The OTCs do not possess (or even have the right to possess) any hotels or hotel rooms[.]” OTC AB at 1.

<sup>10</sup> TAT OB at 15, ¶13.

<sup>11</sup> *See* record cites at TAT OB at 4 and 8.

|   |  |
|---|--|
| <p><u>California</u><br/>The OTCs must collect and remit room tax because many of the hotel-OTC contracts obligate them to do so.” (47)</p> | <p><u>Hawai‘i</u><br/>“The hotel contractually delegates numerous ‘day-to-day’ responsibilities the hotel would otherwise perform itself, including ... tax collecting.” TAT OB at 13, ¶3.</p> |
|---|--|

On that basis, San Diego has argued that the OTCs were the limited agents of the hotels for tax collection purposes.<sup>12</sup> That is an issue under California law based upon a legal theory that San Diego has pursued. It is not an issue before this Court as the Director has argued that the OTCs are directly liable to remit tax to the State because they are “TAT operators” under the TAT’s unique and expansive operator definition.<sup>13</sup> The fact that the Hawai‘i Tax Director and the City of San Diego have different legal theories of liability based on very different statutory language does not mean that counsel was inconsistent in describing “how the model works.” It works the same everywhere.

**Alleged Inconsistency #3: “Who determines the ‘rent’ charged to the customer?”**

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<sup>12</sup> Cal. OB at 53, n.29.

<sup>13</sup> In Hawai‘i, the second half of the “Operator” definition is exceedingly broad and applies to “*any person engaging or continuing in any service business which involves the actual furnishing of transient accommodations.*” HRS §237D-1. By contrast, San Diego’s ordinance essentially defines the “operator” as the “hotel proprietor,” and San Diego did not argue to the California Supreme Court that the OTCs were “operators” based upon that definition. Another key difference in the two cases is that whether the OTCs function as “travel agents” in OTC-Controlled Sales is a key issue in Hawai‘i, but is a non-issue in California, because the San Diego ordinance does not use the term “travel agent.”

Counsel has been consistent in its description of the “rent-charging” process.

In both Hawai‘i and California, counsel acknowledges that the hotel owns the building and the Hotel-OTC Contracts typically set a “*minimum*” floor price that the OTC must charge for the room rate to avoid the OTC undercutting the hotel on the hotel’s price.

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| <p><u>California</u><br/>“<i>The hotels own the rooms</i> and dictate the <i>minimum rent</i> that a customer must pay to obtain the privilege of occupying one of them.” (3) “These [OTC-Hotel] agreements contain ‘<i>rate parity</i>’ provisions establishing a minimum amount of rent that the hotels require the OTCs to charge customers.... These provisions ensure that the OTCs do not <i>undercut the rental prices</i> at which the hotels sell their rooms directly to the public.” (8-9).</p> | <p><u>Hawai‘i</u><br/>“So clearly <i>the hotel</i> in the first instance, it owns the – it <i>owns the building</i>. It has the right to determine who it’s going to allow to sell occupancy or not. There’s no dispute about that, but contractually between the OTC and the hotel, the hotel parts with that right.” (Excerpt of transcript of oral argument at 31.) “[T]here’s a <i>rate parity</i> clause that requires – the hotels say we don’t want you to <i>undercut us on pricing</i>, so if the hotel’s best available rate is \$100, they require the OTC to likewise charge at least \$100, but the OTC can charge more.” (Excerpt of transcript of oral argument at 113.)<sup>14</sup></p> |
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The OTCs’ quote from the California brief that appears in their chart at page 2 – “As owners, the hotels have the right to dictate the amount of rent that a customer will be charged for a room” – is highly misleading because this sentence appears immediately following the heading “*Rate-parity provisions* establishing

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<sup>14</sup> A copy of the foregoing excerpts from the transcript of the oral argument is attached as Exhibit B hereto. See Wolens Decl.

the *minimum* room rate that the OTCs must charge their customers.” (Cal. OB at 13).<sup>15</sup>

The OTCs’ quote from the Hawai‘i brief that appears in their chart at page 2 – “[T]he amount the OTCs charge for a hotel room is determined exclusively by the OTCs, a fact which reflects the OTCs’ independence from the hotels in OTC-Controlled Sales” – is entirely accurate because this refers to the *total* amount (not the *minimum* amount) that the OTC charges the transient for the room reservation. In that regard, the evidence in Hawai‘i establishes that under the OTC-Hotel Contracts, *the OTC* determines the total price the transient pays for the reservation because the OTC alone determines (1) the amount of the “markup” and thus the amount of the room rate, (2) the amount of the “service” fee, and (3) the amount of tax to collect.<sup>16</sup> Nothing in the San Diego brief contradicts this point.

#### **Alleged Inconsistency #4: Do the OTCs and hotels “divide” income?**

Hawai‘i counsel has consistently described the invoicing process that takes place between the OTC and the hotel following the transient’s stay as a “post-

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<sup>15</sup> Based upon the very different statutory language in California versus Hawai‘i, “rate parity” clauses are central to San Diego’s legal argument, but are not relevant to the Director’s. As such, rate-parity clauses and minimum-pricing were not addressed in the Hawai‘i briefs. In response to a question from this Court at oral argument, the Director’s counsel described rate-parity clauses in exactly the same manner as San Diego has described their operation in the California brief. See quote from the transcript of the argument in the table above and Ex. B hereto.

<sup>16</sup> TAT OB at 14, ¶¶ 5-7 and 17, ¶ 27.

occupancy transaction” involving a mere “*exchange of money*” between a debtor (the OTC) and a creditor (the hotel).

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| <p><u>California</u><br/>A merchant model/OTC-Controlled Sale transaction consists of three transactional steps, including “(3) the <i>post-occupancy exchange of money</i> between the OTC and the hotel.” (36)</p> | <p><u>Hawai‘i</u><br/>“The Payment Transaction Between The OTC And Hotel Involves A <i>Mere Exchange Of Money</i>. The hotel invoices the OTC for the hotel stay, typically <i>after the transient has checked-out.</i>” TAT OB at 17, ¶31.</p> |
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The OTCs’ Motion seeks to trump up an inconsistency between the statements in the California brief that generically refer to these monies being “*divvied up*” between the OTC and hotel and the statements in the Hawai‘i briefs that the OTC and hotel do not “*divide income*” pursuant to the “income-dividing” provisions found at HRS §237D-1 of the TAT and HRS §237-18(g) of the GET. There is no inconsistency.

Under the “income dividing” statutes in the GET and TAT, “divide” is a critical and undefined statutory term that is used in connection with a specific type of transaction involving travel agents “[w]here [1] transient accommodations are furnished through arrangements [2] made by a travel agency or tour packager [3] at non-commissioned negotiated contract rates and [4] the *gross income is divided* [5] between the operator of transient accommodations on the one hand and the travel

agency or tour packager on the other hand.”<sup>17</sup> The Director argued and submitted voluminous evidence that when engaging in OTC-Controlled Sales the OTCs are not functioning as travel agents and the income they receive from transients is not “divided” with the Hotel as that term is used in HRS §237D-1 and HRS §237-18(g).

By contrast, there is no comparable “income-dividing” provision in the San Diego ordinance, and it is not an issue in that case. The OTCs’ suggestion that counsel’s generic use of the term “divvied up” in the California brief is inconsistent with counsel’s arguments in Hawai‘i is false; the latter term had no connection to the “income-dividing” provision in Hawai‘i law.

#### **IV. CONCLUSION.**

For all the foregoing reasons, it is respectfully submitted that the OTCs’ Motion should be denied. Moreover, even if judicial notice were allowed, the noticed material is attributable only to San Diego, not Hawai‘i. Finally, San Diego’s statements are not, in fact, inconsistent with Hawai‘i’s position in this case.

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<sup>17</sup> HRS §237-18(g) (bracketed numbers and emphasis added); *see also* HRS §237D-1 (“gross rental” or “gross rental proceeds” definition).

DATED Honolulu, Hawai'i, February 10, 2015.

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SCAP No. 13-0002896

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

IN THE MATTER OF THE TAX APPEAL

OF

TRAVELOCITY.COM, LP,  
Taxpayer-Appellant-Appellee/Cross-  
Appellant.

And other consolidated cases

T. A. No. 11-1-0021 AND CONSOLIDATED  
CASES: (11-1-0022, 11-1-0023, 11-1-0026, 11-  
1-0027, 11-1-0029, 11-1-0030, 11-1-0031, 11-1-  
0032, 11-1-0033, 12-1-0287, 12-1-0288, 12-1-  
0289, 12-1-0292, 12-1-0293, 12-1-0294, 12-1-  
0295, 12-1-0297, 12-1-0299 and 12-1-0300)

**APPEAL AND CROSS-APPEAL FROM  
THE FINAL JUDGMENT DISPOSING OF  
ALL ISSUES AND CLAIMS OF ALL  
PARTIES, FILED ON AUGUST 15, 2013  
(AND UNDERLYING ORDERS)**

**TAX APPEAL COURT  
HONORABLE GARY W.B. CHANG**

**DECLARATION OF STEVEN D. WOLENS**

I, STEVEN D. WOLENS, hereby declare:

1. I am an attorney at law and a principal at the law firm of McKool Smith P.C. whose offices are located at 300 Crescent Court, Suite 1500, Dallas, Texas 75201, Telephone: (214) 978-4000 and Facsimile: (214) 978-4044.

2. I am one of the attorneys representing the City of San Diego ("San Diego") in *In Re Transient Occupancy Cases*, Cal. Sup. Ct. No. S218400 ("California Appeal"). My law firm is one of five firms (including the San Diego City Attorney's Office) representing San Diego. I am also one of the attorneys representing the Director of Taxation of the State of Hawai'i and have been admitted *pro hac vice* in this appeal.