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SUPREME COURT
FILED

NOV 21 2014

Frank A. McGuire Clerk

Deputy

November 21, 2014

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,¹ we write in response 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 explained below, the OTCs submit that there is no need to unseal any portion of the administrative record because, with the exception of one footnote in Petitioner City of San Diego's Opening Brief, the parties should be able to publicly file in unredacted form all of the briefs in this appeal.

Although the trial court sealed a small number of excerpts revealing consumer identifying information, the majority of the sealed excerpts of the lengthy

¹ 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 Internetnetwork Publishing Corp. (d/b/a Lodging.com) (collectively, the "OTCs").

administrative record are from 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. Most of the sealed excerpts are not cited or relied upon by Petitioner or any other party in the appellate briefing and orders in this case. And, with one exception, those few sealed excerpts that are referenced by the parties are not cited or quoted in a manner that reveals any sealed content.

The OTCs submit that Petitioner's publicly filed Opening Brief was over-redacted, unnecessarily redacting legal arguments, references to unsealed portions of the administrative record, and paraphrasing statements about sealed portions of the administrative record. None of this material needs to be redacted in the Opening Brief. Of the few remaining redactions in the Opening Brief that *do* quote sealed excerpts of the administrative record, all but one of them misconstrue the underlying documents or otherwise do not reveal the true nature of the sealed content, and thus the OTCs do not object to the filing of these statements in the public record without redaction. The one exception is footnote 15 of the Opening Brief, which quotes and reveals the substance of a unique, confidential, negotiated contract term that one OTC has in its contracts with one hotel chain. That term was properly sealed and should remain sealed in this Court. Thus, but for that one footnote redaction, the Opening Brief may be publicly filed.

The OTCs anticipate the parties will be able to publicly file all remaining briefs without redaction. The OTCs do not anticipate relying on any sealed excerpt of the administrative record in a manner that would require redaction or sealing of any portion of the Answering Brief. The OTCs anticipate Petitioner's Reply Brief, like the Opening Brief, will include few if any sealed materials, and the OTCs will work with Petitioner "to obviate the filing under seal of unredacted versions of the" Reply Brief.

For these reasons, the 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 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). But if it nonetheless were to do so, this Court 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, which included an exhaustive, line-by-line review of the administrative record. At the end of that process, the court entered a detailed, 238-page sealing order setting forth the factual findings and legal conclusions supporting the sealing of each excerpt as confidential, proprietary, or trade secret information. For the reasons set forth in that order 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.

DISCUSSION

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

This Court need not unseal any portion of the administrative record “to obviate the filing under seal of unredacted versions of the briefs” to this Court. With the exception of one lone footnote, the Opening Brief, the Answering Brief, and, the OTCs believe, the Reply Brief, all may be filed in the public record without redaction and without revisiting the sealing order.

The Trial Court Sealed Only Limited Excerpts Of The Voluminous Administrative Record. The administrative record is more than 17,000 pages long, and consists of the documents and evidence submitted in the underlying administrative proceedings challenging assessments San Diego issued to each of the OTCs for transient occupancy taxes, penalties and interest over a nine year period (the “Administrative Record”). In addition to sealing excerpts of confidential contracts between the OTCs and non-party hotels and related testimony, the trial court also sealed excerpts that it held reveal confidential, propriety transaction data and pricing methodologies, non-public revenue and financial data, and trade secret reservation systems.

The Briefs Before This Court. The OTCs do not object to Petitioner filing the Opening Brief in the public record with only one redaction.

Petitioner’s original publicly filed Opening Brief was excessively redacted. For example, Petitioner redacted:

- numerous references to portions of the Administrative Record that were *not* sealed, *e.g.*, Op. Br. at 17-18 (redacting unsealed text from 1JA, T.4, pp. 214-216 and 23AR, T.197, pp. 2590-2591); *id.* at 9 n.3, 15, 21 (redacting sentences and parenthetical cites to unsealed excerpts of the Administrative Record); *id.* at 21 (redacting unsealed information about when a hotel sends an OTC an invoice);
- Petitioner’s own arguments, such as those regarding the legal significance of the hotel-OTC contracts, *e.g.*, Op. Br. at iii, iv, 13, 16, 17, 31, 32, 47, 50, 51 (redacting argument headings); *id.* at 19, 41, 42-43, 46 n.22, 47 (redacting arguments regarding what customers pay or are told about what they pay to obtain a room reservation, and regarding the alleged purpose of certain contract provisions); *id.* at 49

“The purpose of all of these contractual duties is to make sure that the City receives all taxes owed.”); *id.* at 15-16 n.11 (“However, the practicalities of competition render it highly unlikely that customer would ever choose to book a room through an OTC that is charging higher rates than the rates charged by the hotel itself or by other OTCs.”); *id.* at 51 (“These provisions, like those discussed above, render the OTCs directly liable to the City;” “the City is a third-party beneficiary of these agreements”); *see also id.* at 30, 41, 47, 50, 52.

- numerous general statements regarding hotel-OTC contract provisions that either do not relate to sealed provisions, or that do not reveal the particular negotiated terms of a sealed provision of the contract (often because the statements mischaracterize the contract terms), *e.g.*, Op. Br. at 13 (“The hotels exercise this right by setting the minimum rent in the rate-parity provisions that appear in almost all of the hotel-OTC contracts.”); *see also id.* at 1, 2, 3, 4, 5, 8, 9 & n.3, 11 & n.7, 13-14 & n.9, 15 & n.11, 16, 17, 31, 32 & n.19, 36, 41, 46 n.22, 47, 48 & nn.24, 25, 49 & n.26, 50 & n.27, 51.

While the OTCs appreciate Petitioner exercising caution when dealing with confidential, proprietary, sealed records, the OTCs do not know or understand the rationale behind most of the redactions Petitioner made to its Opening Brief.² None of the above statements require redaction in the publicly filed Opening Brief.

A few remaining redactions in the Opening Brief do reference sealed excerpts of the Administrative Record. However, the OTCs submit the statements mischaracterize the underlying documents or otherwise do not reveal the true nature of the sealed content. Accordingly, the OTCs do not object to those statements being publicly filed.

There is only one footnote—footnote 15—that must remain redacted from the publicly filed Opening Brief. That footnote quotes and reveals the confidential content of a sealed contract provision. Although Petitioner misleadingly suggests that the provision is contained in “some contracts,” it is specific to one OTC’s confidential contract with one hotel chain. That unique provision was heavily

² Indeed, Petitioner redacted in the Opening Brief statements and assertions that are substantively the same as or similar to statements and assertions it did not redact in its briefing to the Court of Appeal in this action. *E.g., compare* Appellant’s March 15, 2013 Opening Brief (to the Court of Appeal) at 8 (“Hotels often protect themselves from potential liability created by the OTCs’ tax decisions through indemnity provisions in their contracts.”), *with* Petitioner’s Opening Brief at 18 (under indemnity provisions, the OTCs allegedly “agree to indemnify and/or hold harmless hotels against room-tax payment liability”).

negotiated and provides a competitive advantage to the OTC that could be harmed if the provision is disclosed to its competitors (which include the other OTCs in this appeal). The hotel also could be competitively harmed in negotiating contracts with other OTCs if this provision is publicly disclosed. Accordingly, for the reasons set forth below, that provision was properly sealed and should remain sealed in this Court. (*See infra* at II(C); *see also* JA at 1255-1256, 1268, 1271; Exhibit B at Maher Decl. ¶¶ 3, 4, 12, 13, 14.)³

As to the remaining briefs to be filed, the OTCs anticipate the parties filing them in the public record without redaction, just as the parties were able to do with all of the briefs filed with the Court of Appeal. Respondents intend to file their Answering Brief in this Court in the public record without redaction or sealing. The OTCs anticipate that, like its Opening Brief, Petitioner's Reply Brief will include few if any sealed materials, and the OTCs will work with Petitioner to "obviate the filing under seal of unredacted versions of the" Reply Brief.

For these reasons, this Court need not revisit the sealing order or unseal any portion of the Administrative Record to "obviate the filing under seal of unredacted versions of the briefs."

II. This Court Should Not Unseal The Confidential, Proprietary Excerpts Of The Administrative Record That The Trial Court, After Exhaustive Review And Briefing, Held Should Be Sealed.

Because the briefing in this Court may be filed in the public record with only one limited redaction, there is no reason for this Court to undertake the burdensome analysis required in considering whether to unseal any portions of the Administrative Record. But if it nonetheless were to do so, this Court should reach the same result as the trial court, leaving sealed all excerpts of the Administrative Record that the trial court ordered sealed.⁴

A. Legal Standard

Rules 2.550 and 2.551 of the California Rules of Court apply when a party seeks to seal material "used at trial or submitted as a basis for adjudication of matters

³ For the Court's convenience, the OTCs enclose with this letter brief a separately bound copy of the Opening Brief, redacting only footnote 15.

⁴ The OTCs do not understand the Court's order to be a motion *sua sponte* to unseal the administrative record, and for that reason, the OTCs do not set forth herein complete arguments and evidence, but rather, set forth only a brief summary of the reasons the trial court Sealing Order was properly entered and why this Court should reach the same result. Should the Court so move, the OTCs respectfully request an opportunity to fully brief the matter to this Court.

other than discovery motions or proceedings.” Cal. R. Ct. 2550(a)(1) & (3). Those rules provide that a trial court may order records filed under seal upon finding facts that establish: “(1) There exists an overriding interest that overcomes the right of public access to the record; (2) The overriding interest supports sealing the record; (3) A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed; (4) The proposed sealing is narrowly tailored; and (5) No less restrictive means exist to achieve the overriding interest.” 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). The trial court has “considerable” discretion to order confidential information sealed. *See In re Providian Credit Card Cases*, 96 Cal. App. 4th 292, 295 (2002) (The Rules of Court “vest a trial court with a considerable amount of discretion in deciding whether to seal or unseal portions of a judicial record.”).

Under Rule 8.46(b)(1), a record sealed by order of the trial court must remain sealed unless ordered unsealed by the reviewing court. For this Court to unseal any excerpt of the Administrative Record, it would have to undertake the same analysis undertaken by the trial court. *See* Cal. R. Ct. 8.46(e)(5) (“In determining whether to unseal a record, the [reviewing] court must consider the matters addressed in rule 2.550(c)-(e).”).

B. The Superior Court Entered Its 238-Page Sealing Order After Months Of Review Of The Administrative Record, Party Conferences, And Extensive Briefing.

At the administrative hearing, the OTCs submitted materials pursuant to the terms of a stipulation of the parties that protected their confidentiality. (*See* 77AR, T.474 at COSD016483-88.) Thereafter, San Diego lodged the Administrative Record with the trial court conditionally under seal pursuant to California Code of Civil Procedure §1094.6(c) and Rule 2.551(d) of the California Rules of Court.

Following a procedure first established by Los Angeles Superior Court Judge Carolyn B. Kuhl in these coordinated proceedings, the OTCs carefully reviewed the Administrative Record, and isolated only the particular words/numbers, phrases, sentences or paragraphs of the documents in the record that qualified to be sealed under Rules 2.550 and 2.551 of the California Rules of Court. Thereafter, the OTCs filed a Motion to Seal, supported by detailed declarations from each OTC, seeking to seal those excerpts of the Record. The Motion to Seal briefing and supporting evidence totaled more than 4900 pages. Certain non-party hotels filed a joinder in the OTCs’ Motion to Seal for the purpose of protecting the hotels’ interests in maintaining the confidentiality of their contractual and their proprietary interests in documents in the Administrative Record, such as confidential hotel-OTC contracts and testimony related thereto.

As the result of a further meet and confer process established by Judge Elihu M. Berle, San Diego ultimately opposed sealing only five of the excerpts. (See JA 1245.)

On March 12, 2012, after months of work by the parties reviewing the Administrative Record and conferring to narrow the number of excerpts sealed (see JA 1245), extensive briefing, and consideration of the factors for sealing set forth in California Rule of Court 2.550(d), Judge Berle granted the OTCs' Motion to Seal (the "Sealing Order," see JA 1241-1479; see also 1484-1492).⁵ The 238-page Sealing Order sets forth the trial court's findings with respect to each factor in Rule 2.550(d), noting both the rationale for sealing and the evidence supporting the sealing of each excerpt. (JA 1241-1479.)

For the reasons set forth in the Sealing Order and in the OTCs' Motion to Seal, the trial court properly sealed each excerpt.⁶

Most significantly here, many of the excerpts sealed and relevant to the briefing of this appeal (as shown in the briefing to the Court of Appeal and in Petitioner's Opening Brief to this Court) are particular negotiated provisions in confidential contracts between hotels and OTCs, and testimony relating to those particular contract provisions, which the trial court properly held reflected confidential, proprietary, competitively sensitive and trade secret information. Footnote 15 of the Opening Brief is just such a particularly negotiated contract provision, unique to the relationship between one OTC and one hotel chain. For the

⁵ Because neither party intended to cite or rely upon the 4900+ pages of briefing and evidence filed in connection with the Motion to Seal in its briefing the Court of Appeal, that Court entered an order relieving the parties of the obligation to include that material in the Joint Appendix. (A true and correct copy of the Court of Appeal's March 15, 2013 order is annexed hereto as **Exhibit A**).

⁶ The OTCs enclose with this letter brief as **Exhibit B** true and correct copies of the briefing and supporting declarations filed in connection with the Sealing Order, including the hotels' joinder in the OTCs' Motion to Seal. To avoid burdening the Court, the OTCs have not included the voluminous charts and under-seal exhibits to the supporting declarations. The sealed exhibits consist of each page of the Administrative Record containing material the OTCs sought to seal, and highlighted the precise text to be sealed. The charts are similar in form to the trial court's Sealing Order, setting forth the evidentiary and legal basis for sealing each excerpt. Should this Court deem it necessary to support the continued sealing of any excerpts of the Administrative Record, the OTCs respectfully request the record be augmented with the complete briefing (including the under seal exhibits, which should remain under seal) pursuant to Rule 8.155(a)(1)(A).

reasons set forth in the Sealing Order (JA 1255-1257; *see also* OTCs' Mot. to Seal at 22-25), the trial court properly sealed particular negotiated provisions of the confidential contracts between OTCs and hotels.

In particular, the trial court properly held that these confidential contracts “contain information regarding markets, pricing and rate methodologies, negotiated provisions concerning liability and indemnity, participating hotels, rates and the duration of various agreements,” and those terms “are commercially sensitive and subject to a privacy interest, because they include proprietary information and trade secrets that, if disclosed, could cause substantial competitive harm to the OTC or hotel entities.” (JA 1255.) The court further held that the OTCs had demonstrated an overriding interest in sealing the contract provisions at issue and had shown they and/or the hotels could be economically and competitively harmed if competitors had access to these records. (JA 1256.) Finally, by isolating and seeking to seal only those particular, sensitive, negotiated provisions, and excerpts of testimony relating thereto, the court held that the proposed sealing was narrowly tailed and no less restrictive means of protecting the information existed. (*Id.*)

By sealing only the excerpts of the Administrative Record that reflected confidential, proprietary, trade secret information in the OTC-hotel contracts, and testimony relating directly to those contract excerpts, the trial court properly struck the balance between the OTCs' and non-party hotels' interests and the public's interest in open court records. This Court need not revisit, nor should it overturn, that balance.

As to the remainder of the sealed information that is cited in the appellate briefing in this case, there likewise is no reason for this Court to reconsider sealing – let alone unseal – those excerpts. In particular,

- The trial court properly sealed non-public revenue and financial information, which revealed for example, the performance of different business lines in a particular market over time, and calculations of the OTCs' margin or mark up (*see* JA 1260-1261; *see also* OTCs' Mot. to Seal at 20-21);
- The trial court properly sealed information revealing the OTCs' confidential, proprietary pricing methodologies, including the OTCs' transaction data, which for every reservation, reflects the hotel at which the reservation was made, and the various components charged to consumers and paid to hotels in connection with the reservation (*see* JA 1260-1261; *see also* OTCs' Mot. to Seal at 10-18);
- The trial court properly sealed each OTCs' hotel selection algorithms, which are competitively sensitive proprietary trade secrets (*see* JA 1260; *see also* OTCs' Mot. to Seal at 18-20).

None of the above information is cited or relied upon in the Opening Brief, and will not be cited or relied upon by the OTCs, and it should not be unsealed by this Court.

C. **Even If This Court Were To Unseal Some Excerpts Of The Administrative Record, Unsealing The Entire Administrative Record Is Unnecessary And Inappropriate.**

If, despite the above, the Court nonetheless concludes that any excerpts of the Administrative Record referenced in Petitioner's Opening Brief should be unsealed, the OTCs submit that the remedy should not be to unseal the *entire* Administrative Record. Rather, the OTCs respectfully request that Petitioner be permitted to publicly file its Opening Brief, and that the parties be allowed to meet and confer regarding which sealed excerpts should be unsealed.

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,

A handwritten signature in black ink, appearing to read "Darrel J. Hieber", with the initials "SLW" written in the bottom right corner of the signature.

Darrel J. Hieber

cc: See attached service list

No. B243800
CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT
DIVISION 2

In Re Coordinated Proceeding Special Title (Rule 2.550(c))
TRANSIENT OCCUPANCY TAX CASES

CITY OF SAN DIEGO, CALIFORNIA

Appellant,

v.

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

Respondents.

COURT OF APPEAL - SECOND DIST.
FILED

MAR 13 2013

JOSEPH A. LANE

Clerk

J. HATTER

Deputy Clerk

Appeal from the Superior Court of
the State of California for the County of Los Angeles
The Hon. Elihu M. Berle, Department 323
Case Numbers:
JCCP4472; GIC891117

**JOINT MOTION FOR CLARIFICATION AND [PROPOSED]
ORDER ON MOTION FOR CLARIFICATION**

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TO THE HONORABLE COURT OF APPEAL:

Appellants and Respondents jointly request clarification regarding the application of California Rule of Court 8.46(c)(2). Specifically, the parties respectfully request that the Court provide guidance on whether Rule 8.46(c)(2) requires "[a]ll documents filed in the trial court supporting or opposing" a motion to seal be included in the Joint Appendix where (1) the record on appeal includes records sealed by the trial court; and (2) no party intends to raise as an issue in this appeal the sealing of those records.

INCORPORATED MEMORANDUM

Appellants and Respondents request clarification from the Court regarding an issue that has arisen with respect to the Joint Appendix. Appellants and Respondents have agreed in principle to prepare and submit a Joint Appendix. Because the record on appeal contains records sealed by the trial court, including portions of the administrative record, Respondents believe that the express terms of Rule of Court 8.46(c)(2) require that the Joint Appendix include "[a]ll documents filed in the trial court supporting or opposing the motion" to seal. The total volume of such documents is approximately 4,900 pages.

While the parties intend to cite to portions of the sealed records, neither Appellants nor Respondents intend to cite to or otherwise

rely on any of the documents filed in support of, or in opposition to, the motion to seal in connection with this appeal. Thus, Appellants believe that including these documents conflicts with Rule of Court 8.124(b)(3)(A), which instructs the parties to exclude from the Joint Appendix any documents that are unnecessary for proper consideration of the issues on appeal. Accordingly, Appellants propose that none of the documents filed in support of, or in opposition to, the motion to seal be included in the Joint Appendix.

In order to resolve the perceived conflict between Rules 8.46(c)(2) and 8.124(b)(3)(A), and to avoid the potential of burdening the Court with thousands of pages of documents not directly related to the issues on appeal, the parties respectfully a ruling that will resolve whether the documents identified in Rule 8.46(c)(2) must be included in the Joint Appendix.

Dated: March 12, 2013

SKADDEN, ARPS, SLATE, MEAGHER
& FLOM LLP

By: Darrel J. Hieber / JKH
Darrel J. Hieber
Attorneys for Respondents,
PRICELINE.COM INC. and
TRAVELWEB LLC

//

Dated: March 12, 2013

JONES DAY

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Dated: March 13, 2013

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PROPOSED ORDER

This Court has read and considered the Joint Motion for Clarification regarding the parties' proposed Joint Appendix on appeal. Notwithstanding the provisions of California Rules of Court 8.46(c)(2), the parties need not include in their Joint Appendix the trial court motion to seal certain documents, nor any papers filed in opposition to or in support of the motion. The parties agree that these documents are unnecessary for proper consideration of the issues on appeal. California Rules of Court 8.124(b)(3)(A).

BOREN, P.J.

Dated: _____, 2013

Presiding Justice

COURT OF APPEAL - SECOND DIST.

FILED

MAR 15 2013

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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 **November 21, 2014**, I served the foregoing document described as:

**RESPONDENT ONLINE TRAVEL COMPANIES' LETTER BRIEF IN
RESPONSE TO THE COURT'S NOVEMBER 6, 2014 ORDER**

on the interested parties in this action addressed as follows:

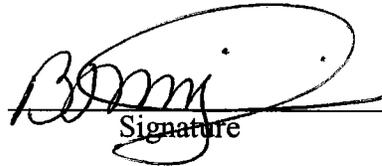
SEE ATTACHED SERVICE LIST

(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.

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

Executed on **November 21, 2014**, at Los Angeles, California.

Brigitte S. Travaglini
Type or Print Name


Signature

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<p>The Hon. Elihu M. Berle Los Angeles Superior Court Central Civil West Division 600 South Commonwealth Ave., Dept. 323 Los Angeles, CA 90005</p>	<p>California Courts of Appeal Second Appellate District 300 S. Spring St. Los Angeles, CA 90013</p>
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