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Title: Bed Tax Litigation: Short Sheeting the Government

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Bed Tax Litigation: Short Sheeting the Government

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In December 2004, the City of Los Angeles filed a class action lawsuit on behalf of itself and other California municipalities against online travel companies (OTCs) for underpayment of hotel occupancy taxes.[1] This ushered in a wave of similar lawsuits, and there are presently more than 25 pending lawsuits filed against OTCs by municipalities for unpaid hotel occupancy taxes – some as individual claims by a single municipality, and others as statewide class actions.[2] The hotel tax revenues that are allegedly due these municipalities are substantial; for a single large municipality, they can amount to many millions of dollars in unpaid taxes. This article provides an overview of the nature of these hotel tax lawsuits and information to help municipal attorneys determine whether their municipalities may have similar claims for unpaid hotel occupancy taxes.

Traditional vs Online Transactions

Virtually every state has a hotel occupancy tax statute,[3] and thousands of cities and counties across the country have enacted municipal hotel occupancy tax ordinances, sometimes referred to as hotel occupancy tax (HOT) ordinances or transient occupancy tax (TOT) ordinances.[4] Often, these hotel tax revenues are earmarked for use by the local convention and visitors bureaus. While the ordinances may vary from jurisdiction to jurisdiction, they will invariably specify the tax rate, the items that are subject to being taxed, the persons responsible for paying the tax, and the persons or entities responsible for collecting and remitting the tax to the municipality.

In the case of a traditional hotel stay where the consumer makes the reservation with and pays the hotel directly, the tax calculation, collection, and remittance process is straightforward. For example, a consumer who rents a room in a hotel in San Antonio, Texas will pay a 9% city tax, 1.75% county tax, and 6% state tax for a total tax payment of 16.75%. Accordingly, on a room rate of $100, the hotel will collect an additional $16.75 in hotel taxes, and will remit $9.00 in taxes to the City of San Antonio, $1.75 in taxes to Bexar County, and $6.00 in taxes to the State of Texas.

An ever-increasing number of hotel transactions, however, are being booked online through the Internet by OTCs such as expedia, hotels.com, hotwire, travelocity.com, orbitz, priceline.com, and others.[5] This has given rise to an issue

regarding "who" is required to collect and remit the hotel occupancy tax and "what amount" is subject to being taxed.

The predominant way in which the OTCs conduct business is through a "merchant model," so named because the OTC is the "merchant of record" in the credit card transaction between it and the consumer. Under the merchant model, the OTC negotiates a room rate with a hotel at a discounted or "wholesale" price. The OTC "marks up" the wholesale price, and then sells the room to the consumer at the higher "retail" price. It is the OTCs' use of the merchant model that results in reduced tax payments to the states and municipalities. The key fact in the hotel tax lawsuits is that the states and municipalities are paid taxes based only on the *wholesale* room rate that the OTC pays the hotel, as opposed to the *retail* room rate that the consumer pays the OTC. The difference between the wholesale room rate and the retail room rate – the "spread" or the "markup" – is pocketed by the OTC without taxes being paid on that amount.

To illustrate, using the prior example of a hotel stay in San Antonio, assume that a consumer stayed at the same hotel in San Antonio, on the same night, at the same advertised room rate of $100 per night, with the only difference being that the consumer booked his room through an OTC instead of directly with the hotel. Further assume that the hotel offered this room to the OTC at a wholesale rate of $80, and the OTC marked-up this rate by $20 to arrive at the $100 retail rate. Instead of the city, county, and state receiving, collectively, $16.75 in tax payments (16.75% of the $100 retail rate), as they would have received had the reservation been booked directly with the hotel, the tax authorities would only receive $13.40 in tax payments (16.75% of the $80 wholesale rate) if the room is booked through an OTC. The OTCs' litigation position is that the $20 difference is a non-taxable "reservation facilitation service fee," a term that the OTCs have coined in response to the filing of the hotel tax lawsuits.[6]

A second, and less common, way in which OTCs do business is through the "agency model," where the OTCs act like traditional travel agents. Under the agency model, the OTC makes its profit through a commission payment from the hotel, rather than through a markup. For agency model transactions, the hotel, not the OTC, is the merchant of record. For these transactions, the states and municipalities are paid the correct tax amount because the hotel collects and remits hotel taxes based on the amount that the consumer pays to the hotel (as opposed to the wholesale amount that the OTC pays the hotel under the merchant model). Using the initial San Antonio example, in an agency model transaction the OTC would advertise the room on its website for $100. The consumer would pay the hotel at check-in, the $100 room rate plus the combined $16.75 in taxes. The hotel would collect and remit the full $16.75 in taxes to the taxing authorities, and the hotel would pay a commission to the OTC calculated on the $100 room

rate.

The above examples show three different ways in which a consumer could book a hotel stay for a room in San Antonio on the same night, in the same hotel, at the same advertised room rate of $100.[7] If booked either directly with the hotel or through an OTC using the agency model, the total tax payment would be $16.75; if booked through an OTC using the merchant model, the total tax payment would only be $13.40. It is this $3.25 difference in taxes due on the retail amount ($16.75) versus taxes actually paid on the wholesale amount ($13.40) that would represent the total damages claim for the city, county, and state in this example. Given that the OTCs engage in millions of merchant model transactions every year – and given that each such transaction results in a tax underpayment to the applicable states and municipalities – the amount of potential tax underpayments to the taxing authorities is enormous.

The Hotel Tax Lawsuits

Approximately half of the 25 or so pending hotel tax lawsuits have been filed as state-wide class actions;[8] the others have been filed as individual lawsuits. There are two primary theories of liability asserted in these cases. The first is a claim based upon violation of the applicable ordinance. Under this theory, the municipality will need to prove that the OTCs are responsible for collecting and remitting hotel occupancy taxes under the terms of the ordinance. Depending on the language of the applicable ordinance, some municipalities will have better claims than others.[9] The second theory of liability is based on the allegation that, regardless of whether the OTCs are liable for collecting and remitting taxes under the ordinances, the OTCs are, in fact, collecting taxes based on the retail rate but only remitting taxes on the wholesale rate. The causes of action that municipalities have asserted pursuant to this theory include claims for conversion, constructive trust, and unjust enrichment. Under this theory, once the OTCs undertake the obligation to collect the tax, they become obligated to remit the tax to the states and municipalities. Several federal courts have found that the municipality did not state a direct claim for violation of the applicable ordinance because the ordinance was too narrow to extend the tax collection and remittance obligation to the OTCs; however, these courts found that the municipality did state a claim based upon this second theory of liability, *i.e.*, that the OTCs collected the tax and, therefore, were legally obligated to remit it.[10]

Obstacles in Pursuing Claims

The obstacles that municipalities may face in proceeding with these lawsuits can be daunting. Given the vast financial exposure that the OTCs face for unpaid hotel taxes owed to municipalities and states, they have mounted a multi-pronged legal, political, lobbying, and marketing blitz to counter these lawsuits.

On the legal front, the OTCs are represented in these hotel tax lawsuits by a cadre of lawyers from the largest law firms in the country who are vigorously defending these claims. The OTCs' litigation tactics have followed a predictable course. At the outset of the case, the OTCs can be expected to seek a protective order that will limit the use of discovery to that specific case, to try to prevent plaintiffs in the various hotel tax lawsuits from collaborating and sharing information with each other. The OTCs also can be expected to claim that virtually all discovery they provide is "confidential;" therefore, it cannot be publicly disclosed and any reference to such materials must be filed under seal with the court.[11]

The OTCs can also be expected to attempt to bury their adversaries in legal motions. They will invariably file a legal challenge to the viability of the asserted claims, such as a Rule 12(b)(6) motion to dismiss for failure to state a claim.[12] Such motions, however, have met with limited success to date. Seven federal courts have ruled on the OTCs' motions to dismiss, and all seven have denied the motions in whole or in substantial part.[13] Another common legal defense of the OTCs is to claim that the municipality's lawsuit is premature due to a failure to exhaust administrative remedies. Several courts have agreed with the OTCs' exhaustion argument and have dismissed claims on that basis, including claims filed by the City of Philadelphia and the City of Atlanta.[14]

As a result, these lawsuits have been, and will be, very expensive to litigate. The City of San Antonio's lawsuit is a case in point. This lawsuit, filed in May 2006, was the first hotel tax lawsuit to reach the class certification stage, with the federal court recently completing a two-day evidentiary hearing on May 16 and 17, 2007. In preparation for the class certification hearing alone, more than twenty depositions of fact and expert witnesses have been taken, and the OTCs have produced tens of thousands of pages of documents, and electronic data relating to more than three million hotel transactions spread across nine separate databases involving the OTCs in the State of Texas. Moreover, this discovery was obtained only as a result of numerous motions to compel filed by the City of San Antonio, and the vast majority of the discovery that was eventually obtained was only as a result of court orders.

In addition to mounting a vigorous legal defense of the hotel tax lawsuits, the OTCs are involved in political and lobbying efforts at the local, state, and national levels to try to pass legislation that would either limit or eliminate their hotel tax liability.[15] These political and lobbying efforts have included attempts to kill these hotel tax lawsuits by obtaining retroactive, legislative immunity from the claims being asserted in the lawsuits, to attempts to shorten statutes of limitations for unpaid hotel taxes, to attempts to persuade municipalities from amending their hotel tax ordinances in ways opposed by the OTCs.[16]

In addition to legislative efforts, the OTCs are actively engaged in a marketing campaign to try to influence public opinion. All of the major OTCs are members of an industry group, the Interactive Travel Services Organization (ITSA), which the OTCs use to promote their message that all these hotel tax lawsuits are based upon a misunderstanding of their business model, that no taxes are due, and that these lawsuits are being driven by "hired plaintiffs' class action lawyers."[17]

Conclusion

Municipal lawyers need to be aware that if their municipality has a hotel tax ordinance on the books, it likely is not receiving its fair share of hotel occupancy taxes from bookings made by OTCs. The result will be either a reduced tax base for the municipality, or a redistribution of the tax burden to other municipal taxpayers who are effectively subsidizing the financial operations of these very profitable OTCs. For municipalities with a large number of hotels within their borders, the lost tax revenues could be substantial – many millions of dollars. For smaller municipalities, the class action procedures provide a legal mechanism that enables municipalities with relatively small claims to join with other municipalities within their state to seek legal redress.

Notwithstanding variances in the language of the municipal hotel tax ordinances across the nation, one thing is constant: for each merchant model hotel transaction for each municipality in the country, each OTC engages in this identical practice of collecting taxes on the retail amount, remitting taxes on the wholesale amount, and failing to pay taxes on the markup. Thus, each municipality that has a hotel occupancy tax ordinance on the books is potentially being short-changed the amount of hotel taxes that it is due.

Notes

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1. *City of Los Angeles, Cal. v. Hotels.com, L.P*, No. BC 326693 (Cal. Super. Ct. Dec. 30, 2004).

2. Priceline.com, Inc., Quarterly Report (Form 10-Q), at 14-17 (May 10, 2007) (listing and discussing pending hotel tax cases). *See* Exhibit 1 for list and status of Bed Tax Litigation.

3. California has no state hotel occupancy tax, only local taxes, while Hawaii has a state tax, but no local taxes. In the vast majority of the states, however, there will typically be both a state hotel occupancy tax, as well as one or more local hotel occupancy taxes.

4. *See* Exhibit 2 for comparison of state and city bed tax laws.

5. While most hotel transactions involving OTCs are made through the Internet, some are made by phone through toll-free numbers provided by the OTCs.

6. Although the OTCs' merchant model has remained essentially the same for years, Defendants have changed the way they describe their model after the first hotel tax lawsuits began to be filed and eschew the terms "buy" or "sell" in favor of terms such as "facilitate." Compare Expedia, Inc.'s 10K for June 30, 2001 ("We sell travel services to our customers under…the merchant model") to Expedia, Inc.'s 10K for December 31, 2005 (Under the merchant model, we facilitate the booking of hotel rooms). *See* 10-K reports at Exhibit 3 and exemplar room rates at Exhibit 9.

7. A standard contract provision between a hotel and an OTC is that the OTC cannot sell the room to a consumer at a price less than the hotel's "best available rate," which, in the above example, is the $100 retail room rate. Thus, on the OTC's website, it would display the "room rate" as $100 (because to advertise a room for less than $100 would be to undercut the hotel's best available rate and violate the OTC's contract with the hotel). Notwithstanding that the OTC is telling the consumer that the "room rate" is $100, the OTC is telling the taxing authorities that the "room rate" is only $80 and, therefore, only $80 is subject to tax.

8. *Supra*, note 1. The first-filed City of Los Angeles lawsuit is a state court class action. All subsequent hotel tax lawsuits that have been filed as class actions have been filed in federal court as a result of the passage of the Class Action Fairness Act (CAFA) in 2005, which expanded federal jurisdiction for certain types of class actions. *See* 28 U.S.C. § 1332 (2005).

9. The following are examples of the persons responsible for collecting and remitting taxes under the applicable ordinances. SAN ANTONIO, TEX., MUNICIPAL CODE § 31-69 (those "owning, operating, managing, or controlling" a hotel); GA. CODE ANN. § 48-13-51(a)(1)(B)(ii) (2006) (hotel "operators"); FINDLAY, OHIO, ORDINANCE § 195.06 ("vendors") ; FAIRVIEW HEIGHTS, ILL., CODE § 36-2-1(B) (hotel "owners"); LEON COUNTY, FLA., CODE art. 3, § 11-46 ("person receiving the consideration for the lease or rental"); GALLUP, N.M., ORDINANCE § 3-2-7 ("vendor"); LOS ANGELES, CAL., MUNICIPAL CODE art. 1.7, § 21.7.2(f) (hotel "operator" defined to include "on-line room sellers, on-line room resellers, and on-line travel agents").

10. *City of Findlay v. Hotels.com*, No. 3:05-CV-7443, slip op. at 4-7 (N.D. Ohio July 26, 2006) (in denying motion to dismiss, court held that OTCs were not "vendors" and, therefore, not directly liable to collect and pay hotel taxes to the

city; but finding that the City had stated a claim based upon the allegation that the OTCs collected but failed to remit taxes on the retail rate); *City of Gallup v. Hotels.com*, No. 06-0549, slip op. at 5-9 (D. N.M. Jan. 30, 2007) (same); *see also, City of Rome v. Hotels.com*, No. 4:05-CV-249, slip op. at 12-13 (N.D. Ga. May 8, 2006) (in denying motion to dismiss, the court did not address the question of whether OTCs were "operators" because the City stated a claim based on the allegation that taxes were being collected by OTCs but not remitted to the City). *See* Exhibit 4 of examples of constructive trust/unjust enrichment in statute or case law.

11. In connection with the class certification hearing held in the City of San Antonio case, the OTCs even filed a motion requesting the court to seal the courtroom to the public. The court, citing First Amendment and openness of the court room issues, denied the motion. *See* Court Order dated May 14, 2007.

12. FED. R. CIV. P. 12(b)(6).

13. *City of Fairview Heights v. Orbitz, Inc.*, No. 05-CV-840 (S.D. Ill. July 12, 2006); *Findlay*, No. 3:05-CV-7443; *Rome*, No. 4:05-CV-249; *Gallup*, No. 06-0549; *City of San Antonio v. Hotels.com*, No. SA-06-CA-381 (W.D. Tex. Mar. 20, 2007); *Pitt County v. Hotels.com*, No. 4:06-CV-30 (E.D. N.C. Mar. 29, 2007); and *City of Leon County v. Hotels.com*, No. 06-21878-CIV (S.D. Fla. Dec. 6, 2006). Subsequently, the cities of Gallup, New Mexico, and Leon County, Florida, voluntarily moved or stipulated to dismissal of their actions without prejudice.

14. *City of Philadelphia v. Hotels.com*, No. 0106023, 122014, 2006 WL 1520749 (Pa. Com. Pl. May 25, 2006) (court determined that it lacked subject matter jurisdiction over the matter on the basis that Tax Review Board had exclusive jurisdiction over disputes concerning local tax liability in the City of Philadelphia; thus, "it the function of the Tax Review Board to determine if the Tax is owed by these Defendants, not this court"); *City of Atlanta v. Hotels.Com, L.P.*, No. No. 2006-CV-114732, 2006 WL 3728957 (Ga. Super. Dec. 11, 2006) (court ruling that the City failed to exhaust "or even offer Defendants an opportunity to partake in the city's administrative hearing process prior to filing suit" and, moreover, that the City's failure "was against longstanding Georgia case law and public policy. As a result, the Court lacks subject matter jurisdiction over this matter and thus, dismisses this complaint").

15. Many of the OTCs are members of the Interactive Travel Services Association (ITSA), whose mandate includes "communicating our industry's positions to Washington policymakers, regulatory agencies and the national media," and "monitor[ing] and influenc[ing] policies that affect the interactive travel services industry." *See* the ITSA website at http://www.interactivetravel.org under "About US" and "Agenda."

16. *See* Exhibit 5, West's Ann. Cal. Rev. and T. Code § 7283.51, limiting statute of limitations to four years, effective 1/1/05; S. 1726 by Schumer and Crapo, Business Activity Tax Simplification Act of 2007, referred to Senate Committee on Finance, similar to S. 2721 and H.R. 1956, 109th Congress (supported by, among others, Cendant Corp., Expedia, Inc., IAC/Interactive Corp.) which would limit U.S. Supreme Court cases establishing nexus over OTCs; amendment being circulated in the 110th Congress to retroactively limit OTC's liability.

17. *See, e.g.*, Press Release, ITSA, San Antonio's Lawsuit Against the Online Travel Companies Is Wrong On The Facts And The Law (May 10, 2006) (*available at* http://www.interactivetravel.org), in which ITSA chastises the City of San Antonio for filing suit, claiming the suit to be "ill-conceived" and a "ready-shoot-aim approach favor[ing] speculative litigation."

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EXHIBIT 1

Hotel Tax Cases

The following summarizes the lawsuits filed by governmental entities against online sellers who have failed to remit hotel occupancy taxes.

I. Statewide Class Actions

City of Fayetteville, Arkansas v. Hotels.com, L.P., et al.: Filed on February 28, 2007 in the Circuit Court of Washington County, Case No. CV-07-567-1. Defendants filed a motion to dismiss on August 7, 2007. The City's response is due on October 1, 2007.

City of Los Angeles, California v. Hotels.com, Inc., et al.: Filed on December 30, 2004 in the Superior Court for the County of Los Angeles, Case No. BC326693. Amended complaints were filed on August 31, 2005 and February 8, 2006. Awaiting decision on the motion to dismiss (a hearing was held on June 11, 2007). On July 12, 2006, the Court granted a petition to coordinate the case with San Diego's action, and both are now before the Superior Court of Los Angeles. On July 27, 2007, the Court stayed the case pending exhaustion of administrative remedies. The parties must file a status report with the Court by January 18, 2008.

City of Jacksonville, Florida v. Hotels.com, L.P. et al.: Filed on July 28, 2006 in the Circuit Court, Fourth Judicial Circuit, Duval County, Case No. 2006-CA-005392. Awaiting decision on the motion to dismiss (filed on April 12, 2007).

Leon County, Florida and Doris Maloy, Leon County Tax Collector v. Hotels.com, L.P. et al.: Filed on July 27, 2006 in the Southern District of Florida., Civ. No. 06-21878. Voluntarily dismissed on February 23, 2007.

City of Rome, Georgia, et al., v. Hotels.com L.P., et al.: Filed November 18, 2005 in the Northern District of Georgia, Civ. No. 05-249. On May 8, 2006, the Court denied defendants' motion to dismiss the excise tax, Conversion, Unjust Enrichment and Georgia Uniform Deceptive and Unfair Trade Practices Act claims. The motion was granted as to the Georgia Sales and Use Tax claim. An amended complaint, naming additional plaintiffs, was filed on June 7, 2006. On February 9, 2007, defendants moved for summary judgment. On May 10, 2007, the Court denied Defendants' summary judgment motion. The Court subsequently stayed the case pending the City's compliance with the Georgia Excise Tax Act's requirement that the City estimate, assess, and attempt to collect the excise tax before proceeding further with the litigation. The parties must report back to the Court regarding their attempts to comply with the Georgia Excise Tax Act on August 28, 2007.

City of Fairview Heights, Illinois v. Orbitz, Inc., et al.: Filed on October 5, 2005 in the Circuit Court, Twentieth Judicial Circuit, St. Clair County. Removed to the Southern District of Illinois, Civ. No. 05-840, on November 28, 2005. On July 12, 2006, the Court denied defendants' motion to dismiss plaintiffs' tax claim under Fairview Heights Code §36-2-2. The motion was granted as to the Illinois Consumer Fraud and Deceptive Practices Act, Unjust Enrichment and Conversion claims. The Court also denied Plaintiffs' motion for remand. Defendants have filed their answers and the parties are currently conducting discovery. On August 1, 2007, the City moved for class certification. Defendants' response is due on September 4, 2007.

Lake County Convention and Visitors Bureau, Inc. and Marshall County, Indiana v. Hotels.com, L.P. et al.: Filed on June 12, 2006 in the Northern District of Indiana, Civ. No. 06-207. An amended complaint was filed on August 17, 2006. On October 26, 2006, the Counties voluntarily dismissed their case against some of the Defendants. The remaining Defendants filed a motion to dismiss on November 3, 2006. On July 27, 2007, the case was reassigned to a different judge. The parties are awaiting a ruling on the motion to dismiss.

City of Gallup, New Mexico v. Hotels.com, L.P. et al.: Filed on May 17, 2006 in Eleventh Judicial District Court, McKinley County. Removed to the District of New Mexico, Case No. 06-CV-549, on June 26, 2006. On January 30, 2007, the Court granted in part and denied in part defendants' motion to dismiss. On April 18, 2007, the Court granted plaintiffs' motion to dismiss its own lawsuit. A new complaint was filed on July 7, 2007 in the District of New Mexico, Case No. 07-CV-644. Defendants answered on August 27, 2007.

County of Nassau, New York v. Hotels.com, L.P. et al.: Filed on October 24, 2006 in the Eastern District of New York, Civ. No. 06-5724. On August 17, 2007, the district court dismissed the case without prejudice for lack of subject matter jurisdiction. The Court held that Nassau County should have exhausted certain administrative procedures prior to filing suit. The County is evaluating its options in response to the ruling.

Pitt County, North Carolina v. Hotels.com L.P., et al.: Filed December 1, 2005 in the North Carolina General Court of Justice, Superior Court Division. Removed to the Eastern District of North Carolina, Civ. No. 06-00030, on February 13, 2006. On March 29, 2007, the Court denied the defendants' motion to dismiss. On April 13, 2007, the defendants filed a motion for reconsideration or certification of an interlocutory appeal. The Court held a hearing on this motion on July 31, 2007, and subsequently dismissed the case. The County is evaluating its options in response to the ruling.

City of Findlay, Ohio v. Hotels.com L.P., et al.: Filed October 25, 2005 in the Common Pleas Court of Hancock County. Removed to the Northern

District of Ohio, Civ. No. 05-7443, on November 22, 2005. On July 26, 2006, the Court denied defendants' motion to dismiss as to the transient tax, Constructive Trust and Conversion claims. The motion was granted as to the Ohio Consumer Sales Practices Act claim. Defendants have filed their answers and the parties are currently conducting discovery. Although discovery is temporarily suspended, the parties have completed some written discovery and taken a number of depositions. The City recently filed an amended complaint removing its class action claims. Defendants' answer is due on September 4, 2007.

Cities of Columbus and Dayton, Ohio et al v. Hotels.com, L.P. et al.: Filed on August 8, 2006 in the Southern District of Ohio and transferred to Northern District of Ohio, Civ. No. 3:07 CV 2117, in July 2007. On July 23, 2007, the Court granted the motion to dismiss as to Court VI (claim under Ohio Deceptive Trade Practices Act seeking declaratory judgment) and denied it with respect to all other causes of action: Count I (violation of the occupancy tax ordinances); Count II (unjust enrichment); Count III (claim for monies had and received); Count IV (Conversion); Count V (imposition of a constructive trust); and Count VII (damages). Although discovery is temporarily suspended, the parties have completed some written discovery and taken a number of depositions. The Cities recently filed an amended complaint removing their class action claims. Defendants' answer is due on August 31, 2007.

City of Orange, Texas v. Hotels.com, L.P. et al.: Filed on July 18, 2006 in the Eastern District of Texas, Civ. No. 06-0413. Awaiting decision on the motion to dismiss (filed on September 12, 2006). The City voluntarily dismissed its claims against Maupintour Holding, LLC on August 6, 2007.

City of San Antonio, Texas v. Hotels.com, L.P. et al.: Filed on May 8, 2006 in the Western District of Texas, Civ. No. 06-0381. On March 20, 2007, the Court denied defendants' motion to dismiss. The City moved for class certification on August 28, 2006. The City conducted a two day evidentiary hearing on May 16 and 17, 2007. The parties completed post-hearing briefing on July 13, 2007. Awaiting decision on the motion for class certification.

Louisville/Jefferson County Metro Government v. Hotels.com, L.P. et al.: Filed on September 21, 2006 in the Western District of Kentucky, Civ. No. 3:06-480. The Court denied Defendants' motion to dismiss on August 10, 2007. Defendants' answer is due on September 13, 2007.

II. Individual Actions Filed on Behalf of Cities and Counties

City of San Diego, California v. Hotels.com, L.P. et al.: Filed on February 9, 2006 in the Superior Court, San Diego County. This case has been coordinated with the City of Los Angeles' action. On July 27, 2007, the Court stayed the case pending exhaustion of administrative remedies. The parties must file a status report with the Court by January 18, 2008.

Miami-Dade County, Florida and Ian Yorty, Miami-Dade County Tax Collector v. Internetwork Publishing Corp., et al.: Filed on September 21, 2006 in the Circuit Court, 11th Judicial Circuit for Miami-Dade County, Case No. 2006-019187-CA-01. During the motion to dismiss hearing on January 17, 2007, the Court indicated that it was going to dismiss six of the seven claims brought by the County. The County filed a notice of voluntary dismissal on January 18, 2007. The County is currently assessing unpaid taxes against the online travel companies on the basis of submissions received from the companies.

Orange County, Florida v. Expedia, Inc. et al.: On August 2, 2006, the case was remanded to the Circuit Court for the Ninth Judicial District in Orange County, Case No. 2006-CA-2104 Div. 39. On February 2, 2007, the Court granted defendants' motion to dismiss. On February 19, 2007, the Court denied the plaintiff's motion for rehearing, but granted the motion for clarification, stating that the Court's earlier dismissal order was without prejudice. An amended complaint was filed on March 9, 2007. On April 9, 2007, defendants filed a motion to dismiss or, in the alternative, stay the lawsuit.

City of Atlanta, Georgia v. Hotels.com, L.P. et al.: Filed on March 29, 2006 in the Superior Court of Fulton County. On December 11, 2006, the Court dismissed the lawsuit. An appeal is pending.

Columbus, Georgia v. Hotels.com, Inc. et al.: Removed to the Middle District of Georgia, Civ. No. 4:06-CV-79, on July 12, 2006. Defendants filed their answers on July 26, 2006. The case is proceeding against the Defendants.

City of Chicago, Illinois v. Hotels.com, L.P. et al.: Filed on November 1, 2005 in the Circuit Court of Cook County, Case No. 2005-L-051003. Awaiting decision on the motion to dismiss (filed on January 31, 2006 and heard on January 16, 2007).

City of Branson, Missouri v. Hotels.com, L.P., et al.: Filed December 28, 2006 in the Circuit Court of Greene County, Case No. 106CC5164. On August 30, 2007, the parties are scheduled to have oral argument on the Defendants' motion to dismiss (filed on April 23, 2007).

City of Philadelphia, Pennsylvania v. Hotels.com, L.P. et al.: Filed on July 12, 2005 in the Court of Common Pleas for Philadelphia County, Case 2005 No. 860, and removed to the Eastern District of Pennsylvania, Civ. No. 05-4391. On October 11, 2005, the Court granted plaintiff's motion for remand. On May 25, 2006, the Court of Common Pleas granted defendants' motion to dismiss for lack of subject matter jurisdiction.

Cumberland County, North Carolina v. Hotels.com, L.P., et al.: Filed on December 4, 2006 in the General Court of Justice, Superior Court Division,

Cumberland County, Case No. 06 CVS 10630. Awaiting decision on the motion to dismiss (filed on February 12, 2007). On April 4, 2007, the Court consolidated the Wake County, Dare County, Buncombe County and Cumberland County lawsuits.

Dare County, North Carolina v. Hotels.com, L.P., et al.: Filed on January 26, 2007 in the General Court of Justice, Superior Court Division, Dare County, Case No. 07 CVS 56. On April 4, 2007, the Court consolidated the Wake County, Dare County, Buncombe County and Cumberland County lawsuits.

Buncombe County, North Carolina v. Hotels.com, L.P., et al.: Filed on February 1, 2007 in the General Court of Justice, Superior Court Division, Buncombe County, Case No. 7 CV 00585. On April 4, 2007, the Court consolidated the Wake County, Dare County, Buncombe County and Cumberland County lawsuits.

City of Charleston, South Carolina v. Hotels.com, L.P. et al.: Filed on April 26, 2006 in the Court of Common Pleas, Ninth Judicial Circuit. Removed to the District of South Carolina, Civ. No. 06-1646, on May 31, 2006. On April 23, 2007, the Court set a trial date of April 7, 2008. On April 26, 2007, the Court consolidated this case with the Town of Mt. Pleasant lawsuit. Awaiting decision on the motion to dismiss (filed on June 4, 2007).

Town of Mount Pleasant, South Carolina v. Hotels.com, L.P. et al.: Filed on May 23, 2006 in the Court of Common Pleas, Ninth Judicial Circuit. Removed to the District of South Carolina, Civ. No. 06-2087, on July 21, 2006. Consolidated with City of Charleston's action in the District of South Carolina, Civ. No. 06-1646. Awaiting decision on the motion to dismiss (filed on June 4, 2007).

City of North Myrtle Beach, South Carolina v. Hotels.com, L.P. et al.: Filed on August 28, 2006 in the Court of Common Pleas, Fifteenth Judicial Circuit. Removed to the District of South Carolina, Civ. No. 06-3063, on October 27, 2006. Awaiting decision on the motion to dismiss (filed on December 1, 2006). On January 7, 2007, the City moved to remand the case to state court. After the parties had fully briefed this issue, but before oral argument, the City withdrew its motion to remand on August 28, 2007.

City of Myrtle Beach, South Carolina v. Hotels.com, LP, et al.: Filed on February 2, 2007 in the Court of Common Pleas, Fifteenth Judicial Circuit, County of Horry, Case No. 2007 CP26-0738. Awaiting decision on the motion to dismiss (filed on April 30, 2007).

Horry County, South Carolina v. Hotels.com, LP, et al.: Filed on February 2, 2007 in the Court of Common Pleas, Fifteenth Judicial Circuit,

County of Horry, Case No. 2007 CP26-0737. Awaiting decision on the motion to dismiss (filed on April 23, 2007).

City of Houston, Texas v. Hotels.com, L.P., et al.: Filed on March 5, 2007 in the District Court of Harris County, 270th Judicial District, Case No. 2007-13227. Defendants filed their answers on April 30, 2007. The Court denied all of the Defendants' special exceptions, except for one special exception requiring the City to amend its petition to state the maximum amount of damages claimed. The City intends to amend its petition in the near future.

City of Bellingham, Washington v. Hotels.com, L.P. et al.: Filed on September 25, 2005 in the Superior Court of Washington, Whatcom County. The action was voluntarily dismissed on February 17, 2006.

EXHIBIT 2

COMPARATIVE ANALYSIS OF STATE AND MUNICIPAL BED TAX LAWS

CITY OF SAN ANTONIO

1. WHAT IS TAX APPLIED TO?

"There is hereby levied a tax upon the cost of or consideration paid for a sleeping room or sleeping facility furnished by any hotel." SAN ANTONIO, TEX., CODE OF ORDINANCES § 31-68(a).

"[T]he price of, or value received for, the right to use a sleeping room, bed, or dormitory space or other sleeping facility in a hotel, ..." *Id.* § 31-66.

2. WHO IS REQUIRED TO COLLECT?

"Every person owning, operating, managing or controlling any hotel shall collect the tax imposed under this article and pay same to the city tax collector with the report required hereinafter." *Id.* § 31-69(a).

3. REQUIRED TO DISCLOSE TO CUSTOMER?

No requirement.

4. ADMINISTRATIVE REMEDY?

Legal action: Any hotel occupancy tax account that has been delinquent for over 60 days shall be referred to the city attorney "for the purpose of filing a suit to enjoin the hotel owner, operator, manager, and other persons in control from operating any hotel in the City of San Antonio until the tax is paid and/or the report filed. This remedy shall be in addition to the remedy of a collection suit and in addition to the municipal court criminal complaint that may be filed for each violation of this article." *Id.* § 31-74.

5. STATUTE OF LIMITATIONS?

None. *See* TEX. TAX CODE ANN. § 351.004(b) (incorporating TEX. CIV. PRAC. & REM. CODE ANN. § 16.061, which provides that "[a] right of action of this state or a political subdivision of this state, including a county, [or] an incorporated city or town . . ." is not barred by statutes of limitation).

6. INTEREST?

10%. SAN ANTONIO, TEX., CODE OF ORDINANCES § 31-73(d).

7. PENALTY?

First penalty: "[H]e shall pay five (5) percent of the unremitted delinquent tax as a late penalty if the report is not submitted or the tax is not remitted by the last day of the calendar month in which they are due; provided that the penalty shall never be less than five dollars ($5.00). *Id.* § 31-73(b).

Monthly penalty: "After the first calendar month of delinquency, he shall pay an additional five (5) percent of the unremitted tax on the first day of each delinquent month; provided that the penalty shall never be less than five dollars ($5.00)." *Id.* § 31-73(c).

8. TAX RATE?

Total tax charged: 16.75%
City: 9%. *Id.* § 31-68(b).
County: 1.75%. TEX. TAX CODE ANN. § 352.003.
State: 6%. *Id.* § 156.052.

1. WHAT IS TAX APPLIED TO?

Oklahoma

4.5% of the "gross receipts" or "gross proceeds" of each "sale" of "[s]ervice of furnishing rooms by hotel, apartment hotel, public rooming house, motel, public lodging house, or tourist camp." OKLA. STAT. ANN. tit. 68, § 1354(A)(7).

"Gross receipts" and "gross proceeds" are defined as "the total amount of consideration, including cash, credit, property and services, for which personal property or services are sold, leased or rented, valued in money, whether received in money or otherwise." *Id.* § 1352(12).

A "sale" is defined as including "the transfer of either title or possession of tangible personal property for a valuable consideration regardless of the manner, method, instrumentality, or device by which the transfer is accomplished in this state." *Id.* § 1352(22).

San Diego

Each operator shall collect the tax imposed by Chapter 3, Article 5, Division 1, to the same extent and at the same time as the Rent is collected from every Transient. SAN DIEGO, CAL. MUNICIPAL CODE ch. 3, art. 5 § 35.0112.

"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. "Rent" includes charges for utility and sewer hookups, equipment, (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. "Rent" includes all receipts, cash, credits, property, and services of any kind or nature without any deduction there from. *Id.*

Obligation to tax on retail cost of the room? Yes. *Id.* §§ 35.0103 – 35.0106 & 35.0108.

Florida

> **Obligation to tax on the retail cost of the room?** Yes – "A tax is hereby levied in an amount equal to 6 percent of and on the total rental charged for such living quarters or sleeping or housekeeping accommodations by the person charging or collecting the rental." FLA. STAT. ANN. § 212.03(1).

Mississippi

> **Obligation to tax on retail cost of the room?** Yes. "Any person liable for a privilege tax levied and assessed by this chapter...shall add the amount of such tax due by him to the sales price or gross income . . . ." MISS. STAT. ANN. § 27-65-31.

Broward County

> **Obligation to tax on retail cost of the room?** Yes – "[A] tax is hereby levied in an amount equal to six percent of and on the total rental charged for such living quarters or sleeping or housekeeping accommodations by the person charging or collecting the rental." FLA. STAT. ANN. § 212.03(1).

Minnesota

> The "sale price" is defined as "the measure subject to sales tax, and means the total amount of consideration, including cash, credit, personal property, and services, for which personal property or services are sold, leased, or rented, valued in money, whether received in money or otherwise." MINN. STAT. ANN. § 297A.61(7).

Alabama

> **"There is levied and imposed**, in addition to all other taxes of every kind now imposed by law, **a privilege or license tax upon every person, firm, or corporation engaging in the business of renting or furnishing any room or rooms, lodging, or accommodations to transients in any hotel, motel, inn,** . . . **by the application of the rate of five percent of the charge for such room, rooms, lodgings, or accommodations, including the charge for use or rental of personal property** . . . ." ALA. CODE § 40-26-1 (emphasis added).

2. WHO IS REQUIRED TO COLLECT?

Los Angeles

"Operator" (Pre-2004): "[M]eans the person who is proprietor of the hotel, whether in the capacity of owner, lessee, mortgagee in possession, licensee, or any other capacity. **Where the operator performs his functions through a managing agent of any type or character other than an employee, the managing agent shall also be deemed an operator for the purposes of this article and shall have the same duties and liabilities as his principal.** Compliance with the provisions of this article by either the principal or the managing agent shall however, be considered to be compliance by both." LOS ANGELES, CAL. MUNICIPAL. CODE ch. 2, art. 1.7 § 21.7.2(f) (emphasis added).

"Operator"(Post-2004): "[M]eans the person who is either the proprietor of the hotel or any other person who has the right to rent rooms within the hotel, whether in the capacity of owner, lessee, mortgagee in possession, licensee or any other capacity. The owner or proprietor who is primarily responsible for operation of the hotel shall be deemed to be the principal operator**. If the principal operator performs or assigns its functions, in whole or in part, through a managing agent, a booking agent, a room seller, or room reseller, or any other agent or contractee, including but not limited to on-line room sellers, on-line room reseller, and on-line travel agents, of any type or character other than an employee, those persons shall be deemed to be secondary operators.** A secondary operator shall be deemed an operator for purposes of this article and shall have the same duties and liabilities as the principal operator, including, but not limited to the collection and remittance of the full amount of the tax owed under the provision of this article to the City. A secondary operator may satisfy its obligations under the provisions of this article by submitting the full amount of tax due under this article...either directly to the Director of Finance or through the principal operator. The principal operator may satisfy any potential liability it may have for taxes owed by a secondary operator by entering into a legally binding agreement with that secondary operator to remit the portion of the tax owed by the secondary operator directly to the City. Upon request the principal operator shall provide the Director of Finance with copies of any such agreements." *Id.* (emphasis added).

Oklahoma

A "vendor" must collect tax from a "consumer" or "user." OKLA. STAT. ANN. tit. 68, § 1361(A).

A "vendor" is defined as including:

(a) Any person making sales of tangible personal property or services in Oklahoma. *Id.* § 1352(28)(a).

(c) Any person who solicits business by employees, independent contractors, agents, or other representatives or by distribution of catalogs or other advertising matter, and thereby makes sales to persons within Oklahoma of tangible personal property or services. *Id.* § 1352(28)(c).

City of Findlay, Ohio

"Vendor" means "the person who is the owner or operator of the hotel and who furnishes the lodging." FINDLAY, OHIO, CODIFIED ORDINANCES § 195.03(d).

San Diego

Each operator shall collect the tax imposed by Chapter 3, Article 5, Division 1, to the same extent and at the same time as the Rent is collected from every Transient. SAN DIEGO, CAL. MUNICIPAL CODE ch. 3, art. 5 § 35.0112(a).

"Operator" means the Person who is the proprietor of the Hotel, Recreational Vehicle park, or Campground, 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. *Id.* § 35.0102.

Florida

Person Required to Collect Taxes: The dealer. FLA. STAT. ANN. § 212.07(1)(a). ("The privilege tax herein levied measured by retail sales shall be collected by the dealers from the purchaser or consumer.")

Dealer: "[A]ny person who leases, or grants a license to use, occupy, or enter upon . . . sleeping or housekeeping accommodations in hotels . . . ." *Id.* § 212.06(2)(j).

Mississippi

Person Required to Collect Taxes: The Seller. MISS. STAT. ANN. § 27-65-31.

"Seller": "[A]ny person making sales, leases or rentals of personal property or services." *Id.* § 27-68-3(f).

Broward County

"The person receiving the consideration for such rental or lease (hereinafter 'dealer') shall receive, account for, and remit the tax to the director of Finance and Administrative Services Department or his/her designee, at the time and in the manner provided for persons who collect taxes under [FLA. STAT. ANN. § 212.03]." BROWARD COUNTY, FLA., MUNICIPAL CODE, art. II § 31 ½-16(7).

Illinois

"(a) A tax is imposed upon persons engaged in the business of renting, leasing or letting rooms in a hotel at the rate of 5% of 94% of the gross rental receipts from such renting, leasing or letting, excluding, however, from gross rental receipts, the proceeds of such renting, leasing or letting to permanent residents of that hotel and proceeds from the tax imposed under subsection (c) of Section 13 of the Metropolitan Pier and Exposition Authority Act." 35 ILL. COMP. STAT § 145/3.

"Rent" or "Rental": "the consideration received for occupancy, valued in money, whether received in money or otherwise, including all receipts, cash, credits and property or services of any kind or nature." *Id.* § 145/2(6).

Minnesota

In Minnesota, "retailers" are required to collect and remit sales tax. A "retailer" is defined as "any person making sales, leases, or rentals of personal property or services." MINN. STAT. ANN. § 297A.61(9).

A "sale" is defined as including "the furnishing for a consideration of the following services: . . . (2) lodging and related services by a hotel, rooming house, resort, campground, motel, or trailer camp and the granting of any similar license to use real property in a specific facility, other than the renting or leasing of it for a continuous period of 30 days or more under an enforceable written agreement that may not be terminated without prior notice." *Id.* § 297A.61(3)(g)(2).

The retailer maintains a place of business in the state and makes retail sales in the state. *Id.* § 297A.66(2). A retailer maintains a place of business in Minnesota if it: (1) has an office in the state; or (2) has a representative physically operating in the state for any purpose. *Id.* § 297A.66(1)(a).

The retailer makes retails sales from outside the state to a destination within Minnesota and the retailer "engages in the regular or systematic soliciting of sales from potential customers in this state by:

(1) distribution, by mail or otherwise, of catalogs, periodicals, advertising flyers, or other written solicitations of business to customers in this state;

(2) display of advertisements on billboards or other outdoor advertising in this state;

(3) advertisements in newspapers published in this state;

(4) advertisements in trade journals or other periodicals, the circulation of which is primarily within this state;

(5) advertisements in a Minnesota edition of a national or regional publication or a limited regional edition in which this state is included as part of a broader regional or national publication, which are not placed in other geographically defined editions of the same issue of the same publication;

(6) advertisements in regional or national publications in an edition, which is not by its contents geographically targeted to Minnesota, but which is sold over the counter in Minnesota or by subscription to Minnesota residents;

(7) advertisements broadcast on a radio or television station located in Minnesota; or

(8) any other solicitation by telegraphy, telephone, computer database, cable, optic, microwave, or other communication system." *Id.* § 297A.66(3)(a).

Alabama

"There is levied and imposed, in addition to all other taxes of every kind now imposed by law, a privilege or license tax upon every person, firm, or corporation engaging in the business of renting or furnishing any room or rooms, lodging, or accommodations to transients in any hotel, motel, inn, tourist camp, tourist cabin, or any other place in which rooms, lodgings, or accommodations are regularly furnished to transients for a consideration, . . . in an amount to be determined by the application of the rate of five percent of the charge for such room, rooms, lodgings, or accommodations, including the charge for use or rental of personal property . . . ." ALA. CODE § 40-26-1.

3. REQUIRED TO DISCLOSE TO CUSTOMER?

Florida

Requirement to disclose amount of bed tax to customer on bill? Yes – "A dealer shall, as far as practicable, add the amount of the tax imposed under this chapter to the sale price, and the amount of the tax shall be separately stated as Florida tax on any charge ticket, sales slip, invoice, or other tangible evidence of sale." FLA. STAT. ANN. § 212.07(2).

Broward County

Requirement to disclose amount of bed tax to customer on bill? Yes – "A dealer shall, as far as practicable, add the amount of the tax imposed under this chapter to the sale price, and the amount of the tax shall be separately stated as Florida tax on any charge ticket, sales slip, invoice, or other tangible evidence of sale. Such tax shall constitute a part of such price, charge, or proof of sale which shall be a debt from the purchaser or consumer to the dealer, until paid, and shall be recoverable at law in the same manner as other debts." *Id.*

Los Angeles

Requirement to disclose amount of bed tax to customer on bill? Yes. "The amount of tax shall be separately stated from the amount of the rent charged and each transient shall receive a receipt for payment from the operator." LOS ANGELES, CAL., MUNICIPAL CODE ch. 2, § 21.7.5.

San Diego

Requirement to disclose amount of bed tax to customer on bill? Yes, the transient tax and the amount of the rent shall be stated separately. Transients shall receive a receipt from the operator showing payment. SAN DIEGO, CAL., MUNICIPAL CODE ch. 3, art. 5 § 35.0112(c).

Cleveland

Requirement to disclose amount of bed tax to customer on bill? "The vendor shall state and charge the transient occupancy tax to the transient guest separately from the charge for the lodging and on any record thereof, at the time when the occupancy is arranged or contracted and charged for, and upon every evidence of occupancy or any bill or statement or charge made for occupancy issued or delivered by the vendor." CLEVELAND, OHIO, MUNICIPAL CODE, tit. XVII, § 193.06(a).

New York City

"The tax to be collected shall be stated and charged separately from the rent and shown separately on any record thereof . . . ." 19 RCNY § 12-08(a) and NY ADMIN. CODE § 11-2502(f).

Minnesota

The sales tax must be separately stated on a customer's bill. MINN. STAT. ANN. § 297A.77(2).

The sales tax must be separately stated on a customer's bill. MINNEAPOLIS, MN., CODE OF ORDINANCES art. XII, § 16.950.

4. ADMINISTRATIVE REMEDY?

Oklahoma

The Tax Commission must comply with the following administrative procedures when assessing unpaid tax:

(a) If a taxpayer fails to pay tax or to file a return, the Tax Commission can determine the amount of tax due. OKLA. STAT. ANN. tit. 68, § 221(A). If necessary, the Tax Commission can examine the taxpayer's books, conduct hearings, and subpoena witnesses to testify at the hearings. *Id.* §§ 206 & 207.

(b) The Tax Commission must then send the taxpayer a copy of its proposed assessment of unpaid tax. *Id.* § 221(A).

(c) Within 60 days, the taxpayer can file a written protest with the Tax Commission challenging the proposed assessment. *Id.* § 221(C). The taxpayer can also request a hearing concerning his protest. *Id.* § 221(D).

(d) If the taxpayer does not file a protest within 60 days, the proposed assessment becomes final and absolute. *Id.* § 221(E). However, the taxpayer can still challenge the assessment within one year of it becoming final and absolute, but he must show by a preponderance of the evidence that the assessment is clearly erroneous. *Id*.

(e) The Tax Commission must hold the hearing "as soon as practicable." OKLA. STAT. ANN. tit. 68, § 221(D).

(f) Following the hearing, the Tax Commission must send the taxpayer written notice of its decision concerning the taxpayer's protest. *Id.* § 221(G).

(g) The taxpayer then has 30 days to appeal the Tax Commission's decision to the Oklahoma Supreme Court. *Id*.

Section 215 of the Tax Code authorizes the Tax Commission to sue to collect unpaid tax, penalties, and interest in any court of competent jurisdiction. *Id.* § 215. However, the Oklahoma Supreme Court recently held that section 215 does not authorize the Tax Commission to sue before completing the administrative assessment process. *State ex rel. Okla. Tax Com'n v. Texaco Exploration & Production,* 131 P.3d 705, 709 (Okla. 2005).

However, Section 223 of the Tax Code does authorize the Tax Commission to bypass the administrative process and sue to collect unpaid tax, penalties, and interest when:

> A taxpayer fails to file a return. OKLA. STAT. ANN. tit. 68, § 223(E) ("In the case of a failure to file a report or return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.").

Florida

Authority: "The department shall administer and enforce the assessment and collection of the taxes, interest, and penalties imposed by [Chapter 212]." FLA. STAT. ANN. § 212.18(2).

Issuance of Warrant/Execution/Garnishment: The department shall issue a warrant for the full amount due, plus interest and penalties, of any delinquent taxes under Chapter 212. The department may also issue a tax execution and may have a writ of garnishment. *Id.* § 212.15(4).

Jurisdiction: "All suits brought hereafter by the department against any retailer, dealer, or vendor for any violation of this chapter, and for the purpose of effecting collection of any tax due from any dealer, including garnishment proceedings regardless of the amount, shall be brought thereon in the circuit courts of this state having jurisdiction of the subject matter." *Id.* § 212.151(1).

Jeopardy Findings and Assessments: "The department shall generally exhaust reasonable collection efforts prior to making a jeopardy finding or assessment...the department need not exhaust collection efforts or may exhaust only those efforts consistent with the jeopardy . . . ." *Id.* § 213.732(1-2).

Ohio

The tax commissioner may make an assessment against the vendor "based upon any information in the commissioner's possession." OHIO ST. ANN. § 5739.13(A). The commissioner may make an assessment against any vendor who fails to file a return or to remit the proper amount of tax imposed by Chapter 5739. *Id*. If based on the information available, it appears that the vendor owes more tax that it has paid, the commissioner may audit a sample of that vendor's sales for a representative period in order to ascertain a per cent of taxable transactions or the effective tax rate and the commission may issue an assessment based on the findings of that audit. *Id*. "The commissioner shall make a good faith effort to reach agreement with the vendor or consumer on selecting a representative sample." *Id*. The Commissioner must then give the vendor written notice of the assessment pursuant to 5703.37. *Id.* Upon receiving the commissioner's assessment, the vendor then has 60 days to file a written petition for reassessment. *Id*. at § 5739.13(B). If a vendor files a valid petition, "the commissioner shall proceed under section 5703.60." *Id*.

Los Angeles

Assessment of taxes. If the Director of Finance determines that any transient occupancy tax is due to the City, he may give notice of assessment of the tax. The notice "shall separately set forth the amount of any tax known by the Director of Finance to be due or estimated by the Director of Finance, after full consideration of all information within his knowledge concerning the business and activities of the person assessed, to be due...and shall include the amount of any penalties or interest accrued on each amount to the date of the notice of assessment." LOS ANGELES, CAL., MUNICIPAL CODE ch. 2, § 21.16(a).

San Diego

Determination of Tax by City Treasurer. "If any operator shall fail or refuse to collect the tax or to make, within the time provided in this Article, any report or remittance of said tax or any portion thereof required by this Article or if such 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." SAN DIEGO, CAL., MUNICIPAL CODE ch. 3, art. 5 § 35.0117(a).

New York City

The Commissioner of Finance must comply with the following administrative procedures when attempting to collect unpaid taxes:

(a) The Commissioner of Finance estimates the amount of tax due. NYC ADMIN. CODE § 11-2506.

(b) The taxpayer must be given written notice of the amount of tax due. *Id.*

(c) That notice will finally and irrevocably fix the amount of tax due unless the taxpayer within 90 days: (1) files a petition with the Tax Appeals Tribunal requesting a hearing; and (2) serves the petition on the Commissioner of Finance. *Id.*

(d) After that hearing, the taxpayer can appeal an adverse decision to the Tax Appeals Tribunal sitting en banc. *Id.*

(e) The en banc Tax Appeals Tribunal must give the taxpayer written notice of its decision. *Id.*

Minnesota

The Tax Commissioner must comply with the following administrative procedures when assessing unpaid tax:

(a) If a taxpayer fails to file a return, the Tax Commissioner can: (1) make and file a return for the taxpayer; or (2) issue an order of assessment. MINN. STAT. ANN. § 270C.33(3). To determine the amount of tax due, the Tax Commissioner can examine the taxpayer's place of business, copy his books and records, and depose witnesses. *Id.* § 270C.31(1)-(5).

(b) The Tax Commissioner must then send the taxpayer the order of assessment and a notice that: (1) describes the taxpayer's appeal rights; (2) lists the amount of tax, interest, and penalties due; and (3) explains the basis for the assessment. *Id.* § 270C.33(2) & (3).

(c) Within 60 days, the taxpayer can file a written appeal with the Tax Commissioner challenging the assessment. *Id.* § 270C.35(4). Within that 60-day period, the taxpayer can request an extension of the deadline for filing an appeal, and the Commissioner can grant an extension of up to 30 days. *Id.* § 270C.35(5).

(d) If the taxpayer does not file an appeal within 60 days, the Commissioner can sue to recover the unpaid taxes. *Id.* § 270C.61(1)(a).

(e) The Tax Commissioner must rule on the taxpayer's appeal and notify the taxpayer of its decision. MINN. STAT. ANN. § 270C.35(6).

(f) The taxpayer can appeal the Tax Commissioner's decision to the Tax Court. *Id.* § 271.09.

(g) The taxpayer can then appeal the decision of the Tax Court to the Supreme Court within 60 days after receiving notice of the decision. *Id.* § 271.10.

Suing to Recover Unpaid Taxes:

If a taxpayer does not file an appeal within 60 days of the notice date, the Tax Commissioner can sue to recover unpaid taxes. *Id.* § 270C.61(1)(a). In such an action, the Commissioner's order of assessment is presumed to be valid, and the taxpayer has the burden to prove that the assessment is incorrect or invalid. *Id.* § 270C.61(5).

If a taxpayer does file an appeal within 60 days of the notice date, the Tax Commissioner must wait until the appeal is resolved before suing to recover unpaid taxes. *See id.* §§ 271.09 & 271.10.

Mobile, Alabama

(a) In any case where a person subject to paying a license tax as provided herein fails to do so, the revenue director shall be authorized to assess and determine the amount of taxes due using the best information available either by return filed or by other means.

(b) The taxpayer **shall be notified** by registered or certified mail, or by personal service, of the amount of any such

assessment, and of his right to appear before the revenue director on a day named not less than twenty (20) days from the date of notice and to show cause why such assessment shall not be made final. Such appearance may be made by agent or attorney.

MOBILE, ALA., CODE OF ORDINANCES § 34-56 (emphasis added).

Birmingham, Alabama

Pursuant to Section 40-2A-7(b)(2) Code of Alabama 1975, any preliminary assessment must be entered within three (3) years from the due date of the return, or three (3) years from the date the return was filed with the department, whichever is later, or if no return is required to be filed, within three (3) years of the due date of the tax, except as follows:

(1) A preliminary assessment may be entered at any time if no return is filed as required, or if a false or fraudulent return is filed with the intent to evade tax;

(2) A preliminary assessment may be entered within six (6) years from the due date of the return or six (6) years from the date the return is filed with the department, whichever is later, if the taxpayer omits from the taxable base an amount properly includable therein which is in excess of twenty-five percent (25%) of the amount of the taxable base stated in the return.

BIRMINGHAM, ALA., ORDINANCE 02-113, §11.3.

5. STATUTE OF LIMITATIONS?

Oklahoma

The Tax Commission must assess unpaid sales tax within 3 years from the date of the filing of a return. OKLA. STAT. ANN. tit. 68, § 223(A). However, there are no time limitations on the Tax Commission's ability to assess unpaid taxes and/or to commence proceedings to collect them when:

(c) A taxpayer fails to file a return. *Id.* § 223(E).

Florida

"5 years after the date the tax is assessed or becomes delinquent, whichever is later. No action may be begun to collect any tax after the expiration of the lien securing payment of the tax." FLA. STAT. ANN. § 95.091(1)(a).

Ohio

While the general statute of limitations is four years, there is no bar to seeking to collect taxes when "the tax commissioner has substantial evidence of amounts of taxes collected by a vendor from consumers on retail sales, which were not returned to the state" or when the vendor has failed to file a return as required by section 5739.12. OHIO ST. ANN. § 5739.16(A), (A)(1)-(2).

Broward County

"5 years after the date the tax is assessed or becomes delinquent, whichever is later. No action may be begun to collect any tax after the expiration of the lien securing the payment of the tax." FLA. STAT. ANN. § 95.091 (1)(a).

Los Angeles

Within four years of the date the taxes were to be paid. ". . . except in the case of fraud or the failure of a property owner to file a transient occupancy tax return . . . ." CAL REV. & TAX. CODE § 7283.51.

Illinois

The Department of Revenue cannot issue a notice of tax liability for gross receipts received by an operator more than 3 years ago. 35 ILL. COMP. STAT. § 120/5.

There are no time limitations when the taxpayer fails to file a return or when he consent to the late filing of a notice of tax liability. *Id.*

Minnesota

The Commissioner must assess unpaid tax within 3 1/2 years after the date a return is filed. MINN. STAT. § 289A.38(1). However, the Commissioner can assess unpaid tax at any time when: (1) a

taxpayer files a false or fraudulent return; or (2) a taxpayer fails to file a return. *Id.* § 289A.38(5).

Alabama

In any case where a person subject to paying a license tax as provided herein fails to do so, the revenue director shall be authorized to assess and determine the amount of taxes due using the best information available either by return filed or by other means. MOBILE, ALA., CODE OF ORDINANCES § 34-56.

The taxpayer shall be notified by registered or certified mail, or by personal service, of the amount of any such assessment, and of his right to appear before the revenue director on a day named not less than twenty (20) days from the date of notice and to show cause why such assessment shall not be made final. Such appearance may be made by agent or attorney. *Id.*

6. INTEREST?

Florida

"When any dealer, or other person charged herein, fails to remit the tax, or any portion thereof, on or before the day when such tax is required by law to be paid, there shall be added to the amount due interest at the rate of 1 percent per month of the amount due from the date due until paid. Interest on the delinquent tax shall be calculated beginning on the 21st day of the month following the month for which the tax is due, except as otherwise provided in this chapter." FLA. STAT. ANN. § 212.12(3).

Los Angeles

"In addition to the penalties imposed, any person who fails to pay any tax required to be paid... shall pay interest on the amount of the tax, exclusive of any penalty, from the date on which the tax first became delinquent until the date it is paid, during each calendar year at the rate per month, or fraction thereof, determined by dividing by 12 the sum of the average Federal short-term rate during the months of July, August, and September of the prior calendar year plus 3 percentage points." LOS ANGELES, CAL., MUNICIPAL CODE ch. 2 § 21.05(e).

7. PENALTY?

Oklahoma

Civil Penalties: The Tax Commission can assess the following penalties:

> Failure to file a return: a penalty equal to 25% of the unpaid tax. OKLA. STAT. ANN. tit. 68, § 217(C).

Florida

There will be a penalty of 10% of the total tax due if not more than 30 days late. An additional 10% will be added for each additional 30 day period, or fraction thereof, during which the failure continues, not to exceed a total penalty off 50% of the total tax due for each period. FLA. STAT. ANN. § 212.12(2)(a)-(b). "A person who willfully attempts in any manner to evade any tax, surcharge, or fee imposed under [Chapter 212] or the payment thereof is, in addition to any other penalties provided by law, liable for a specific penalty in the amount of 100 percent of the tax, surcharge, or fee, and commits a felony of third degree . . . ." *Id.* § 212.12(2)(e). Finally, anyone required to "collect, truthfully account for, and pay over . . . any tax enumerated in . . . chapter 212 and who willfully fails to collect such tax or truthfully account for and pay over such tax or willfully attempts in any manner to evade or defeat such tax or the payment thereof . . . shall, in addition to other penalties provided by law, be liable to a penalty equal to twice the total amount of the tax evaded or not accounted for or paid over. The penalty imposed hereunder shall be in addition to any other penalty imposed or that should have been imposed under the revenue laws of this state, but shall be abated to the extent that the tax is paid." *Id.* § 213.29.

Ohio

A penalty up to fifty percent of the amount will be assessed against a person "whom the tax commissioner believes has collected the tax but failed to remit it to the state . . . ." OHIO ST. ANN. § 5739.133(A)(2).

Broward County

"There will be a penalty of 10% of the total tax due if not more than 30 days late. An additional 10% will be added for each additional 30 day period, or fraction thereof, during which the

failure continues, not to exceed a total penalty of 50% of the total tax due for each period." Tourist Development Tax Frequently Asked Questions, Broward County, Fla, **available at** http://www.co.broward.fl.us/revenue/rvi01000.htm (last visited Aug. 30, 2007); FLA. STAT. ANN. § 212.12 (2)(a).

Los Angeles

Original Delinquency: 5% of the amount of the tax in addition to the amount of the tax. LOS ANGELES, CAL., MUNICIPAL CODE ch. 2 § 21.05(b)(1).

Continued Delinquency: An additional 5% shall be added to the original 5% for a total of 10% on the last day of the month that the tax was due. *Id.* § 21.05(b)(2)(i).

1 Month of Delinquency: An additional 5% for a total of 15%. *Id.* § 21.05(b)(2)(ii).

2 Months of Delinquency: A fourth penalty of 5% for a total of 20%. *Id.* § 21.05(b)(2)(iii).

3 Months of Delinquency: A penalty of 20% in addition to the 20% that has already accumulated for a total of 40%. *Id.* § 21.05(b)(2)(iv).

Mobile, Alabama

"In the event any person required to file a monthly tax report and render said gross receipts license tax imposed by this chapter shall fail to file said tax report or shall fail to pay the total gross receipts license tax levied by this article, due on or before the twentieth day of the month, the gross receipts license tax of such person, levied by this article is hereby increased by five (5) percent of the amount which would otherwise be due for each thirty (30) days they shall be delinquent, or fraction thereof, but no gross receipts license tax levied by this article shall be increased by more than twenty-five (25) percent because of delinquent payments." MOBILE, ALA., CODE OF ORDINANCES § 34-105.

EXHIBIT 3

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 10-K

ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(d) OF
THE SECURITIES EXCHANGE ACT OF 1934
For the Fiscal Year Ended December 31, 2003

INTERACTIVECORP
(Exact name of registrant as specified in its charter)

Commission File No. 0-20570

Delaware	**59-2712887**
(State or other jurisdiction of incorporation or organization)	(IRS Employer Identification No.)
152 West 57th Street, New York, New York	**10019**
(Address of Registrant's principal executive offices)	(Zip Code)

(212) 314-7300
(Registrant's telephone number, including area code)

Securities registered pursuant to Section 12(b) of the Act:
None
Securities registered pursuant to Section 12(g) of the Act:
Common Stock, $.01 par value
Warrants to Acquire One Share of Common Stock
Warrants to Acquire 1.93875 Shares of Common Stock

Some states and localities impose a transient occupancy or accommodation tax, or a form of sales tax, on the use or occupancy of hotel accommodations Hotel operators generally collect and remit these taxes to the various tax authorities. Consistent with this practice, when a customer books a room through one of the IACT's travel services, the hotel charges taxes based on the room rate paid to the hotel and IACT recovers an equivalent amount from the customer. IACT does not collect or remit taxes on the portion of the customer payment it retains, and some jurisdictions have questioned IACT's practice in this regard. While the applicable tax provisions vary among the jurisdictions, IACT believes it generally has sound arguments that it is not required to collect and remit such taxes. IACT is engaged in discussions with tax authorities in various jurisdictions to resolve this issue, but the ultimate resolution in any particular jurisdiction cannot be determined at this time. IAC does not believe, however, that the amount of liability of IACT on account of this issue, if any, will have a material adverse effect on its past or future financial results.

IACT has established a reserve with respect to potential occupancy tax liability for prior periods, consistent with applicable accounting principles and in light of all current facts and circumstances. IACT's reserves represent its best estimate of the contingent liability related to occupancy tax in respect of prior periods. A variety of factors could affect the amount of the liability (both past and future), which factors include, but are not limited to, the process of moving Expedia and Hotels.com toward common business practices, increasing cooperation between them as a result of the acquisition by IAC of the publicly-held shares of Expedia and Hotels.com in 2003 (including whether to pursue joint resolutions with one or more jurisdictions), the number of, and amount of revenue represented by, jurisdictions that ultimately assert a claim and prevail in assessing such additional tax or negotiate a settlement, changes in statutes and the timing of all of the foregoing. IAC notes that there are more than 7,000 taxing jurisdictions, and it is not feasible to analyze the statutes, regulations and judicial and administrative rulings in every jurisdiction. Rather, IACT has obtained the advice of state and local tax experts with respect to tax laws of certain states and local jurisdictions that represent a large portion of IACT's hotel revenue. In addition, IACT continues to engage in a dialog with and receive feedback from certain state and local tax authorities. IAC will continue to monitor the issue closely and provide additional disclosure, as well as adjust the level of reserves, as developments warrant. The reserve balance at December 31, 2003 is $13.2 million as compared to $10.4 million at December 31, 2002.

It is possible that some jurisdictions may introduce new legislation regarding the imposition of occupancy taxes on businesses that arrange booking of hotel accommodations, but to date the Company is aware of only one jurisdiction that has introduced such legislation, and its passage faces opposition and uncertainty.

SECURITIES AND EXCHANGE COMMISSION

WASHINGTON, D.C. 20549

FORM S-4

REGISTRATION STATEMENT
UNDER
THE SECURITIES ACT OF 1933

IAC/INTERACTIVECORP

(Exact Name of Registrant as Specified in its Charter)

Delaware	4833	59-2712887
(State or Other Jurisdiction of Incorporation or Organization)	(Primary Standard Industrial Classification Code Number)	(I.R.S. Employer Identification Number)

152 West 57th Street
New York, New York 10019
(212) 314-7300
(Address, including Zip Code, and Telephone Number, including Area Code, of Registrant's Principal Executive Offices)

EXPEDIA, INC.

(Exact Name of Registrant as Specified in its Charter)

Delaware	4700	20-2705720
(State or Other Jurisdiction of Incorporation or Organization)	(Primary Standard Industrial Classification Code Number)	(I.R.S. Employer Identification Number)

3150 139th Avenue SE
Bellevue, Washington 98005
(425) 679-7200
(Address, including Zip Code, and Telephone Number, including Area Code, of Registrant's Principal Executive Offices)

Gregory R. Blatt, Esq.
Executive Vice President, General Counsel and Secretary
IAC/InterActiveCorp
152 West 57th Street
New York, New York 10019
(212) 314-7300
(Name, Address, including Zip Code, and Telephone Number, including Area Code, of Agent For Service)

Copy to:
Pamela S. Seymon, Esq.
Wachtell, Lipton, Rosen & Katz

Some states and localities impose a transient occupancy or accommodation tax, or a form of sales tax, on the use or occupancy of hotel accommodations. Hotel operators generally collect and remit these taxes to the various tax authorities. Consistent with this practice, when a

customer books a room through one of Expedia's travel services, the hotel charges taxes based on the room rate paid to the hotel, Expedia pays those taxes invoiced by the hotel and Expedia recovers an equivalent amount from the customer. Expedia does not remit occupancy taxes on the portion of the customer payment it retains, and some jurisdictions have questioned Expedia's practice in this regard. While the applicable tax provisions vary among the jurisdictions, Expedia generally believes that it is not required to remit such occupancy taxes. Expedia is engaged in discussions with tax authorities in various jurisdictions to resolve this issue, but the ultimate resolution in all jurisdictions cannot be determined at this time. Expedia does not believe, however, that the amount of liability of Expedia on account of this issue, if any, will have a material adverse effect on its past or future financial results. Expedia has established a reserve with respect to potential occupancy tax liability for prior and current periods, consistent with applicable accounting principles and in light of all current facts and circumstances. Expedia's reserves represent its best estimate of the contingent liability related to occupancy tax in respect of prior and current periods. A variety of factors could affect the amount of the liability (both past and future), which factors include, but are not limited to, the number of, and amount of revenue represented by, jurisdictions that ultimately assert a claim and prevail in assessing such additional tax or negotiate a settlement and changes in relevant statutes. Expedia notes that there are more than 7,000 taxing jurisdictions in the United States, and it is not feasible to analyze the statutes, regulations and judicial and administrative rulings in every jurisdiction. Rather, Expedia has obtained the advice of state and local tax experts with respect to tax laws of certain states and local jurisdictions that represent a large portion of Expedia's hotel revenue. It is possible that some jurisdictions may introduce new legislation regarding the imposition of occupancy taxes on businesses that arrange the bookings of hotel accommodations. Expedia will continue to monitor the issue closely and provide additional disclosure, as well as adjust the level of reserves, as developments warrant. The reserve balance at December 31, 2004 and 2003 is $14.1 million and $13.2 million, respectively. Additionally, Expedia and certain of its businesses are involved in occupancy tax related litigation, which is discussed in "—Description of Business—Legal Proceedings—Litigation Relating to Hotel Occupancy Taxes."

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 10-K

Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934

/X/

For the fiscal year ended December 31, 2004

OR

// **Transition Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934**

Commission file number 1-12175

SABRE HOLDINGS CORPORATION
(Exact name of registrant as specified in its charter)

Delaware	**75-2662240**
(State or other jurisdiction of incorporation or organization)	(I.R.S. Employer Identification No.)
3150 Sabre Drive **Southlake, Texas** (Address of principal executive offices)	**76092** (Zip Code)

Registrant's telephone number, including area code **(682) 605-1000**

Securities registered pursuant to Section 12(b) of the Act:

Title of each class	**Name of exchange on which registered**
Class A common stock, par value $.01 per share	New York Stock Exchange

Securities registered pursuant to Section 12(g) of the Act:

NONE
(Title of Class)

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days. Yes /X/ No / /.

Indicate by check mark if disclosure of delinquent filers pursuant to Item 405 of Regulation S-K (§ 229.405 of this chapter) is not contained herein, and will not be contained, to the best of registrant's knowledge, in definitive proxy or information statements incorporated by reference in Part III of this Form 10-K or any amendment to this Form 10-K. / /

Indicate by check mark whether the registrant is an accelerated filer (as defined in Rule 12b-2 of the Act). Yes /X/

State and local tax issues have the potential to have an adverse effect on our financial condition and results of operations.

Some state and local taxing authorities impose taxes on the sale, use or occupancy of hotel room accommodations, which are called transient, occupancy, accommodation, sales or hotel room taxes. Hotel operators generally collect and remit these occupancy taxes. Consistent with that practice, when a customer books a net rate, or "merchant," hotel room through one of our travel services, we collect from the customer an amount sufficient to pay the hotel its room charge and the occupancy taxes on that charge, as well as additional amounts representing our fees.

We do not collect or remit occupancy taxes on our fees. Some tax authorities claim that occupancy taxes should be collected on some or all of the fees. We believe there are strong arguments that our fees are not subject to occupancy taxes (although tax laws vary among the jurisdictions). We are attempting to resolve this issue with tax authorities in various jurisdictions, but we cannot predict the resolution in any particular jurisdiction.

We have established a reserve for potential occupancy tax liability, consistent with applicable accounting principles and in light of all current facts and circumstances. The reserve represents our best estimate of our contingent liability for occupancy taxes. A variety of factors could affect any actual liability for occupancy taxes, such as the number of jurisdictions that prevail in either assessing additional occupancy taxes or negotiating a settlement with us, the fees potentially subject to tax in each jurisdiction, changes in applicable tax laws, and the timing of any or all of the foregoing. The amount of our liability on occupancy taxes could exceed that reserve, which could have a material adverse effect on our financial results.

EXHIBIT 4

CONSTRUCTIVE TRUST/UNJUST ENRICHMENT

1. *City of Findlay v. Hotels.com*, 441 F. Supp. 2d 855 (7/26/06). "even when taxing statute fixes no liability, the collector is responsible for its payment to proper taxing authority so long as the collection purports to be a collection of taxes.

2. *City of Rome, Georgia v. Hotels.com, LP*

3. Involuntary Trustee. One who wrongfully details a thing is an involuntary trustee thereof, for the benefit of the owner. West's Ann. Cal Civ. Code § 2223.

4. Wrongful Act. 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. West's Ann. Cal. Civ. Code § 2224.

5. Any sum or sums collected or accrued or required to be collected or accrued in Section 1350 et seq. of this title shall be deemed to be held in trust for the State of Oklahoma, and, as trustee, the collecting vendor or holder of a direct payment permit as provided for in Section 1364.1 of this title shall have a fiduciary duty to the State of Oklahoma in regards to such sums and shall be subject to the trust laws of this state. 68 OKL. ST. ANN. § 1361 F.

C

United States District Court,
N.D. Ohio,
Western Division.
CITY OF FINDLAY, Plaintiff,
v.
HOTELS.COM, L.P., et al., Defendant.
No. 3:05 CV 7443.

July 26, 2006.

Background: City filed putative class action alleging that online travel companies underpaid taxes on hotel lodging. Companies moved to dismiss.

Holdings: The District Court, Katz, J., held that:
(1) companies were not "vendors" for purposes of city ordinance requiring vendors to collect and remit occupancy taxes;
(2) fact issues remained as to whether companies collected excess transient and excise taxes; and
(3) city was not required to make demand on companies for return of taxes before asserting conversion claim.
Motion granted in part and denied in part.

West Headnotes

[1] Innkeepers 3
213k3 Most Cited Cases

[1] Innkeepers 4
213k4 Most Cited Cases
Under Ohio law, online travel companies that contracted with hotels for rooms at negotiated discounted room rate and resold those rooms to general public were not "vendors," for purposes of city ordinance requiring vendors to collect and remit occupancy taxes, regardless of ordinance's purpose and intent, where ordinance defined "vendor" as "owner or operator of hotel."

[2] Statutes 245
361k245 Most Cited Cases
Under Ohio law, if statute defining subject of taxation is ambiguous, ambiguity must be resolved in favor of taxpayer.

[3] Taxation 2807
371k2807 Most Cited Cases
Under Ohio law, even when taxing statute fixes no liability, collector is responsible for its payment to proper taxing authority so long as collection purports to be collection of tax. Ohio R.C. § 5739.02(E).

[4] Federal Civil Procedure 1831
170Ak1831 Most Cited Cases
Issue of whether online travel companies collected transient and excise taxes based on hotel room rates actually paid by their customers, but remitted to city amount of taxes calculated on basis of negotiated discounted room rates, involved fact question that could not be resolved on motion to dismiss city's action against companies to recover underpaid taxes of hotel lodging. Ohio R.C. § 5739.02(E).

[5] Antitrust and Trade Regulation 141
29Tk141 Most Cited Cases
Transactions.
City was not "individual," for purposes of Ohio Consumer Sales Practices Act (OCSPA), and thus could not bring action against online travel companies under OCSPA to recover underpaid taxes on hotel lodging. Ohio R.C. §§ 1345.01(A), 1345.09(B).

[6] Trusts 91
390k91 Most Cited Cases
Under Ohio law, constructive trust may be imposed even though property was acquired without fraud or was acquired in good faith.

[7] Trusts 91
390k91 Most Cited Cases
Under Ohio law, constructive trust subjects person holding legal title to equitable duty to convey it to another on ground that he would be unjustly enriched if he were permitted to retain it.

[8] Federal Civil Procedure 1831
170Ak1831 Most Cited Cases
Issue of whether online travel companies collected transient and excise taxes based on hotel room rates actually paid by their customers, but remitted to city amount of taxes calculated on basis of negotiated discounted room rates, involved fact question that could not be resolved on motion to dismiss city's action to impose constructive trust on taxes paid to

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companies but not remitted to state.

[9] Trusts 62
390k62 Most Cited Cases
Under Ohio law, "resulting trust" is one that court of equity declares to exist where legal estate in property is transferred or acquired by one under facts and circumstances that indicate that beneficial interest is not intended to be enjoyed by holder of legal title.

[10] Trusts 69
390k69 Most Cited Cases
Under Ohio law, any resulting trust imposed on excess funds allegedly collected by online travel companies from their customers for city transient and excise taxes would be created in favor of customers, not in favor of city.

[11] Trusts 86
390k86 Most Cited Cases
Under Ohio law, resulting trust arises in favor of one who transfers property under circumstances that raise rebuttable inference that transferor intended to transfer to another bare legal title without giving transferee beneficial interest in property.

[12] Trover and Conversion 4
389k4 Most Cited Cases

[12] Trover and Conversion 7
389k7 Most Cited Cases
Under Ohio law, "conversion" is wrongful exercise of dominion over property in exclusion of owner's right, or withholding it from his possession under claim inconsistent with his rights.

[13] Trover and Conversion 1
389k1 Most Cited Cases
To establish claim of conversion under Ohio law, plaintiff must show: (1) plaintiff's ownership or right to possession of property at time of conversion; (2) defendant's conversion by wrongful act or disposition of plaintiff's property rights; and (3) damages.

[14] Trover and Conversion 2
389k2 Most Cited Cases
Under Ohio law, plaintiff may claim conversion of money where defendant is obligated to pay specifically identifiable funds to plaintiff.

[15] Trover and Conversion 9(3.1)
389k9(3.1) Most Cited Cases
Under Ohio law, demand and refusal in conversion action are usually required to prove conversion of property otherwise lawfully held.

[16] Trover and Conversion 9(5)
389k9(5) Most Cited Cases
Under Ohio law, online travel companies did not lawfully hold excess city transient and excise taxes they had collected from their customers, and thus city was not required to make demand on companies for return of taxes before asserting conversion claim against companies.

***857** Alicia Wolph Roshong, Fostoria, OH, George L. Kentris, Kentris, Brown, Powell & Balega, Findlay, OH, John T. Murray, Murray & Murray, Sandusky, OH, for Plaintiff.

Michael R. Gladman, Todd S. Swatsler, Jones Day, Columbus, OH, John A. Biek, Elizabeth Herrington, Paul E. Chronis, McDermott Will & Emery, Chicago, IL, Tammy Geiger Lavalette, Steven R. Smith, Connelly, Jackson & Collier, Toledo, OH, Darrel J. Hieber, Skadden, Arps, Slate, Meagher & Flom, Los Angeles, CA, Karen L. Valihura, Michael A. Barlow, Skadden, Arps, Slate, Meagher & Flom, Wilmington, DE, John Pernick, Bingham, McCutchen, San Francisco, CA, for Defendants.

MEMORANDUM OPINION

KATZ, District Judge.

This is a putative class action brought against a number of online travel companies by the City of Findlay, Ohio, ("the City"), alleging that Defendants underpaid taxes on hotel lodging. (Doc. No. 1-2, Ex. A). The case is before the Court on Defendants' Motion to Dismiss the City's entire complaint under Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim upon which relief can be granted. (Doc. No. 39-1). Also before the Court is Plaintiff's Motion to Strike Defendants' Memorandum Addressing Plaintiff's Supplemental Authority. (Doc. No. 59-1). That motion is denied. As Defendants point out, this Court has indeed permitted such responses in the past. In any event, the Court herein decides the matters before it without reference to the cited authority, so the point is moot. For the reasons set forth below, the Court grants in part and denies in part Defendants' Motion to Dismiss.

I. BACKGROUND

In its complaint, the City raises five causes of action and requests the Court to certify its claims as a class action on behalf of "all Ohio cities, counties, and

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townships who have enacted uniform transient taxes and/or an excise tax on lodging by a hotel." (Doc. No. 1-2, Ex. A, ¶ 30). The City claims each Defendant's failure to remit guest occupancy taxes: (I) Violates the City's transient guest tax ordinance and similar ordinances enacted by the Class; (II) Violates the Ohio Consumer Sales Practices Act ("OCSPA"); (III) Constitutes conversion of funds that belong to the City and the Class; (IV) Warrants imposition of a constructive trust; and (V) Warrants a declaration that Defendants violated the OCSPA. *Id.* ¶¶ 35-53.

The City brings its claims based on these factual allegations:

> Defendants contract with hotels for rooms at negotiated discounted room rates. The hotels indicate what the total tax obligation is on rooms sold in the area where the hotel is located--bed taxes and sales taxes. Defendants then mark up their inventory of rooms and sell the rooms to the general public, who actually occupy the rooms. Defendants charge and collect taxes from occupants ***858** based on the marked up room rates, but only remit to Plaintiff Class members the tax amounts based on the lower, negotiated room rates. Each Defendant then retains the difference.

Id. ¶ 25. The City alleges Defendants charge their customers an itemized "taxes and services" fee based on the marked-up price, therefore leading the public to believe that "Defendants remit the correct amount of sales tax and bed tax to the appropriate taxing authorities." *Id.* ¶ 28.

II. ARGUMENTS AND ANALYSIS

In deciding a Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(6), the function of the Court is to test the legal sufficiency of the complaint. In scrutinizing the complaint, the Court is required to accept the allegations stated in the complaint as true, *Hishon v. King & Spalding,* 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984), while viewing the complaint in a light most favorable to the plaintiff, *Scheuer v. Rhodes,* 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974); *Westlake v. Lucas,* 537 F.2d 857, 858 (6th Cir.1976). The Court is without authority to dismiss a complaint "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957); *See generally* 2 James Wm. Moore et al., Moore's Federal Practice § 12.34[1] (3d ed.2006).

A. Claim that Defendants Failed to Remit Transient Guest Taxes:

The City complains that "Defendants have failed to collect and remit to Plaintiff and the Class the [taxes] due and owing to them pursuant to Chapter 195 of the Codified Ordinances of the City of Findlay and similar ordinances." (Doc. No. 1-2, Ex. A, ¶ 37).

Defendants argue "[t]he City's factual allegations fail to establish that [Defendants] are 'vendors' subject to the Findlay occupancy tax's collection and remittance obligations, and that failure requires dismissal of the Complaint in its entirety." (Doc. No. 39-1, p. 3). The City's ordinance states: " 'Vendor' means the person who is the owner or operator of the hotel and who furnishes the lodging." Findlay, Ohio, Codified Ordinances § 195.03(d), *available at* http://www.conwaygreene.com/Findlay (click "Start Here"; in pop-up window, click on folder icon next to "Findlay, Ohio"; the cited section appears in "Part One--Administrative Code") (hereinafter "Findlay Ord."). Defendants assert they cannot be "vendors" because they are neither owners nor operators of hotels and because they do not furnish lodging to transient guests. (Doc. No. 39-1, pp. 4-6).

In response, the City argues the purpose and intent of its transient guest tax would be frustrated if Defendants are not considered vendors. (Doc. No. 44, pp. 3-6, 10, 22). The purpose of the tax, it argues, is to generate revenue by levying a three percent excise tax on the amount paid by transient guests for lodging--not three percent of the discounted room rate. *Id.* at 6.

1. Defendants Are Not "Vendors" Under the City's Ordinance:

[1] The Court concludes the City's transient guest tax ordinance, enacted in 1979 and never amended, does not impose a direct tax obligation on Defendants. The ordinance states:

> The transient guest tax ... shall be paid by the transient guest to the *vendor,* and each *vendor* shall collect from the transient guest the full and exact amount of the tax payable on each taxable lodging. The tax required to be collected under this chapter shall be ***859** deemed to be held in trust by the *vendor* until paid to the [City Auditor] ...

Findlay Ord. § 195.06. (emphasis added). Under this ordinance, a "vendor" must be one "who is the owner or operator of [a] hotel...." Findlay Ord. § 195.03(d).

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The City's complaint does not allege that Defendants are either owners or operators of any hotels, but instead alleges that "Defendants, each of them, are on-line sellers, and/or on-line resellers of hotel rooms to the general public." (Doc. 1-2, Ex. A, ¶ 22). The plain definition of "vendor" in the City's ordinance is too narrow to reach Defendants, who are not alleged to own or operate any hotels.

Because the Court finds a necessary and unambiguous clause defining "vendor" excludes Defendants, there is no reason to construe the language of the City's ordinance in light of its purpose and intent. *See, e.g., Hudson v. Reno,* 130 F.3d 1193, 1199 (6th Cir.1997) ("[I]f the words of the statute are unambiguous, the judicial inquiry is at an end, and the plain meaning of the text must be enforced ....") (citing *United States v. Ron Pair Enters.,* 489 U.S. 235, 241, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989)). The first necessary clause defining "vendor"--"owner or operator of [a] hotel"--is sufficiently clear and unambiguous. Because this clause is unambiguous and the City alleges no facts to show Defendants meet this requirement, there is no need to consider whether "vendor's" second necessary clause--"furnishes the lodging"--is ambiguous.

The City argues additional reasons why Defendants should be considered "vendors." It relies on a clause in the definition section of its ordinance: "For the purposes of this chapter, the following definitions shall apply unless *the context clearly indicates or requires a different meaning."* Findlay Ord. § 195.03 (emphasis added); (Doc. No. 44, p. 12). Upon this base, the City builds its argument: "In view of the Ohio Revised Code's definition of vendor and the common law determinations regarding who is or is not a vendor, the City's ordinance is broad enough to include [Defendants'] activities...." (Doc. No. 44, p. 12). For three reasons, the Court cannot conclude that the definition of "vendor" in the City's ordinance requires this application or interpretation.

First, case law rejects the idea that the exception clause in the City's definition section warrants altering the meaning of a specifically-defined term in light of common law determinations. *See Crane Plastics, Inc. v. City of Columbus,* No. 90AP-956, 1991 WL 10922, at *5, 1991 Ohio App. LEXIS 404, at *11 (Jan. 31, 1991). In *Crane,* a city's tax ordinance contained an exception clause essentially identical the City's. *Id.* The primary issue on appeal was whether the tax statute required references to common law principles in order to construe the meaning of terms at the heart of the dispute. *Id.* 1991 WL 10922, at *5, 1991 Ohio App. LEXIS 404, at *8-9. The Court answered in the negative, holding that the terms already had "specific definitions as set forth in the [city's] tax ... code." *Id.* 1991 WL 10922, at *5, 1991 Ohio App. LEXIS 404, at *11. The court also reasoned, "[h]ad it been intended that traditional common law concepts ... be utilized in defining the [terms] for tax purposes ... such a definition could have easily been made a part of the city tax code." *Id.* Similarly, here, "vendor" has a "specific definition" already set forth in the City's ordinance. There is no need now to broaden its meaning through the strained approach urged by the City. In addition, the City initially could have defined "vendor" broadly if it intended to impose a hotel tax obligation on organizations that were not "owners and operators of [a] hotel"--especially when such a definition "could have easily been made a part of the [City's] tax" ordinance, *id.*

***860** Second, because the City, when enacting its ordinance, decided not to adopt the published definition of "vendor" in the Ohio Revised Code (as it did with its "hotel" and "transient guest" definitions), and chose instead to define "vendor" more narrowly, it cannot now demand reliance on the Ohio Revised Code's definition of "vendor" instead of its own.

[2] Finally, even if the exception clause in the City's definition section created an ambiguity regarding whether Defendants are "vendors," the Ohio Supreme Court maintains that when it "find[s] statutes defining subjects of taxation to be ambiguous, [it] resolve[s] the ambiguity in favor of the taxpayer." *Zalud Oldsmobile v. Limbach,* 68 Ohio St.3d 516, 628 N.E.2d 1382, 1385 (1994). The "tax will be construed strictly against the taxing authority." *B.F. Goodrich Co. v. Peck,* 161 Ohio St. 202, 118 N.E.2d 525, 527 (1954) (quoting *McNally v. Evatt,* 146 Ohio St. 443, 66 N.E.2d 633, 636 (1946)). For the reasons above, Defendants cannot be considered "vendors" under Findlay Ord. Chapter 195.

2. Defendants Have a Duty to Remit Collected Taxes

Although Defendants have no direct taxable duty under the City's ordinance, the Court finds the City has presented a viable legal theory under which it could be granted relief. The City relies on *Barker*

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Furnace Co. v. Lindley, No. 6813, 1981 WL 2815, at *3, 1981 Ohio App. LEXIS 13603, at *6-7 (June 2, 1981). (Doc. No. 44, p. 7). *Barker* holds that a "party's error in making [an] improper [tax] collection is no justification for avoiding assessment for non-remission, a duty which exists concommitant [sic] to the authority under which the collection is made." *Barker*, 1981 WL 2815, at *4, 1981 Ohio App.LEXIS 13603, at *10.

In *Barker*, the taxpayer was a contractor who purchased equipment that it used in its construction contracts and also sold at retail without installation. *Id.* 1981 WL 2815, at *2, 1981 Ohio App.LEXIS 13603, at *2. The taxpayer charged sales tax on both types of transactions and the sales tax charges were labeled as such on the construction contracts. *Id.* 1981 WL 2815, at **2, 4, 1981 Ohio App.LEXIS 13603, at *2, 9. However, the taxpayer calculated taxes on its construction contract prices in such a way that it received from its customers an amount of sales tax in excess of the amount which it paid to the State. *Id.* 1981 WL 2815, at *2, 1981 Ohio App.LEXIS 13603, at *3. The Tax Commissioner assessed the taxpayer for non-remission of these funds. *Id.* The taxpayer argued it should not have to remit the funds because its contract transactions were nontaxable under the applicable tax statute. *Id.* 1981 WL 2815, at *5-6, 1981 Ohio App.LEXIS 13603, at *7-8. The tax commissioner conceded the contract transactions were nontaxable, but argued that "in such a situation[,] the party charging and collecting the tax (which has no legal existence) under the apparent authority of state law, may not thereafter keep the amount collected for the reason that the collection was erroneous." *Id.* 1981 WL 2815, at *4, 1981 Ohio App.LEXIS 13603, at *8. The *Barker* court agreed, justifying its holding by the "express legislative policy" of Ohio Rev.Code § 5739.01(H). *Id.* 1981 WL 2815, at *4, 1981 Ohio App.LEXIS 13603, at *7-8. That section, now § 5739.02(E), states in pertinent part:

> The tax collected by the vendor from the consumer under this chapter is not part of the price, but is a tax collection for the benefit of the state, and of counties levying an additional sales tax ... and of transit authorities.... [N]o *person* other than the state or such a county or transit authority shall derive any benefit ***861** from the collection or payment of the tax levied....

Ohio Rev.Code § 5739.02(E) (internal citations omitted) (emphasis added). The Court finds this legislative policy warrants applying *Barker*'s holding to the City's claims.

The Court, for two reasons, does not conclude *Barker*'s holding requires the taxpayer involved to be a "vendor." First, the Ohio Supreme Court, shortly after *Barker*, rejected the argument that a duty to remit erroneously-collected taxes applies only to "vendors:"

> While R.C. 5739.01(H) refers to vendors, we find these references acknowledge that vendors are charged with the duty to collect sales tax.... Of greater importance is the General Assembly's use of the word "person," when describing who shall not "derive any benefit from the collection or payment of such tax." The definition of person, pursuant to R.C. 5739.01(A), includes appellant.

Geiler Co. v. Lindley, 66 Ohio St.2d 514, 423 N.E.2d 134, 136 (1981) (footnote omitted). Here, Defendants also meet the definition of person in Ohio Rev.Code § 5739.01(A), since they are "partnerships," "corporations," or "combinations of individuals of any form." Ohio Rev.Code § 5739.01(A). Second, Barker itself states the taxpayer there was not a "vendor." *Barker*, 1981 WL 2815, at *4, 1981 Ohio App.LEXIS 13603, at *8-9 ("The taxable event in the instant case was installation of the equipment for which Barker is classified as a consumer ...."); *id.* 1981 WL 2815, at *4, 1981 Ohio App.LEXIS 13603, at *6 ("[T]he contractor, rather than being a vendor, is the consumer and is directly responsible for the [use, as opposed to sales,] tax and its remittance ....").

[3][4] Here, the City alleges Defendants are collecting the correct tax amount required by the City's ordinance and denominating it as a sales and/or bed tax. *Barker* holds that even when a taxing statute fixes no liability, the collector is responsible for its payment to the proper taxing authority so long as the collection *purports* to be a collection of a tax. *Barker*, 1981 WL 2815, at *4, 1981 Ohio App.LEXIS 13603, at *8-9. Because Defendants here "undertook to charge and collect a sales tax on ... transactions with [their] customers, [they] ... assume[d] the responsibility for such collections and the duty to remit them to the [City]". *Id.*1981 WL 2815, at *4, 1981 Ohio App.LEXIS 13603, at *10. The City's allegations, if true, impose a duty on Defendants to remit the transient guest taxes they collected.

The City's complaint has overcome Defendants' motion to dismiss by presenting "allegations respecting all the material elements to sustain a recovery under some viable legal theory." *Mezibov v.*

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Allen, 411 F.3d 712, 716 (6th Cir.2005), *cert. denied*, --- U.S. ----, 126 S.Ct. 1911, 164 L.Ed.2d 663 (2006); *see also* 2 James Wm. Moore, et al., Moore's Federal Practice § 12.34 [1][b] ("[C]ourts will not dismiss for failure to state a claim merely because the complaint ... miscategorizes legal theories."). Defendants' Motion to Dismiss the transient guest tax claim in Count I of the City's complaint is denied.

B. Claim that Defendants Violated the Ohio Consumer Sales Practices Act:

The City complains that "Defendants engaged in deceptive, unlawful, unfair, and fraudulent business acts and practices," in violation of the OCSPA, Ohio Rev.Code Chapter 1345, by failing to remit taxes due and owing to the City and the Class. (Doc. No. 1-2, Ex. A, ¶ 39). The City, individually and on behalf of the Class, seeks a declaratory judgment that Defendants' business practices violated Chapter ***862** 1345 and that the City and Class are entitled to restitution and relief. *Id.* ¶ 41.

Defendants argue these claims should be dismissed because the City failed to plead the necessary elements of its individual and class-action OCSPA claims. (Doc. No. 39-1, pp. 8-14).

The OCSPA prohibits suppliers from committing unfair, deceptive, and unconscionable acts or practices in connection with a consumer transaction. Ohio Rev.Code §§ 1345.02-.03. A consumer transaction "means a sale, lease, assignment, award by chance, or other transfer or an item of goods, a service, a franchise, or an intangible, to an *individual* for purposes that are primarily personal, family, or household...." *Id.* § 1345.01(A) (emphasis added). A consumer is a "person who engages in a consumer transaction with a supplier." *Id.* § 1345.01(D).

The OCSPA permits individual and class action claims. *See id.* § 1345.09. When a violation of an act prohibited by §§ 1345.02 or 1345.03 occurs, "the consumer may, in an individual action, rescind the transaction or recover his damages." *Id.* § 1345.09(A). Regarding OCSPA class actions, the Ohio Supreme Court recently stated that Ohio Rev.Code § 1345.09(B):

> [P]rovides that a consumer may qualify for class action status *only when* a supplier acted in the face of prior notice that its conduct was deceptive or unconscionable. The prior notice may be in the form of (1) a rule adopted by the Attorney General under R.C. 1345.05(B)(2) or (2) court decision made available for public inspection by the Attorney General under R.C. 1345.05(A)(3).

Marrone v. Philip Morris, 110 Ohio St.3d 5, 850 N.E.2d 31, 34 (2006) (emphasis added).

The City makes several concessions in its response to Defendants' Motion to Dismiss. First, the City concedes that it is not an "individual." (Doc. No. 44, p. 17) ("[T]he City of Findlay is not alleging that it is an individual. It is a government, which qualifies as a 'person' under the Act."). In addition, the City concedes that Defendants' failure "to remit taxes is not a transfer of goods or services for 'personal, family, or household' purposes." *Id.* at 19. Furthermore, the City concedes the consumer transaction "at the heart of this matter" is the purchase of the hotel rooms by transient guests from Defendants. *Id.* at 19, 22.

[5] The City argues it has standing to bring its OCSPA claims for three reasons. First, it argues § 1345.09 does not limit who can bring a claim to "individuals," but "states simply that a 'consumer has a cause of action and is entitled to relief....' " (Doc. No. 44, p. 17). The City's concession that it is a "person" but not an "individual" prevents its statutory classification as a "consumer" because the OCSPA "requires that a consumer be an 'individual,' " and "[t]he term 'individual' has been interpreted to mean a natural person." *Watkins & Son Pet Supplies v. Iams Co.*, 107 F.Supp.2d 883, 893 (S.D.Ohio 1999) (citing *Toledo Metro Fed. Credit Union v. Ted Papenhagen Oldsmobile, Inc.*, 56 Ohio App.2d 218, 381 N.E.2d 1337, 1339 (1978)); *see also Ferron & Assocs., LPA v. U.S. Four, Inc.*, No. 05AP-659, 2005 WL 3550760, at *9, 2005 Ohio App. LEXIS 6280, at *11-13 (Dec. 29, 2005) (collecting cases). Because the City is not a natural person, it may not assert an OSCPA claim.

The City next argues that although the consumer transactions in this case were between the transient guests and the Defendants, the City, "as a beneficiary of the consumer transaction," (Doc. No. 44, p. 22), "was engaged in this consumer transaction, in that the remittance of the tax dollars collected from the hotel occupants ***863** occurred after the transaction between the [Defendants] and the occupants," *id.* at 17. Although "[c]ourts have interpreted the OCSPA to apply to the collection of debts associated with consumer transactions," *Delawder v. Platinum Fin. Servs. Corp.*, No. C-1-04-680, 2004 WL 3680160, 2005 U.S. Dist. LEXIS 40139, at *26 (S.D.Ohio

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Mar.1, 2005), *appeal dismissed,* 2006 U.S.App. LEXIS 15478 (6th Cir. June 19, 2006), the City's argument that collecting taxes involves it in the consumer transaction here is irrelevant because the Court concludes an OCSPA claim must be brought by a natural person.

Finally, the City argues that even if it is not a consumer, courts in other jurisdictions "have held that non-consumers may bring suit under consumer protection statutes." (Doc. No. 44, p. 18). The City relies solely on *John Labatt Ltd. v. Molson Breweries,* 853 F.Supp. 965, 970 (E.D.Mich.1994), which holds that non-consumers who have a significant stake in the events have a right of action under the Michigan Consumer Protection Act ("MCPA"). However, *Labatt'* s holding is not without criticism. *See Watkins,* 107 F.Supp.2d at 892-93. Moreover, the "issue in *Labatt* was limited to whether a business competitor had standing to sue under the MCPA." *Robertson v. State Fire & Cas. Co.,* 890 F.Supp. 671, 678 (E.D.Mich.1995). *Labatt* "has no obvious application" here, *id.,* since the City is bringing suit as a government entity and not as a business competitor.

In addition, the City cannot bring an OCSPA class action claim because the two prerequisites set forth in Ohio Rev.Code § 1345.09(B) have not been alleged. *See Johnson v. Microsoft Corp.,* 155 Ohio App.3d 626, 802 N.E.2d 712, 720 (2003), *aff'd on other grounds,* 106 Ohio St.3d 278, 834 N.E.2d 791 (2005). Defendants' Motion to Dismiss the City's OCSPA claims is granted. Accordingly, Defendants' Motion to Dismiss the City's claim seeking a declaratory judgment that Defendants violated the OSCPA is also granted.

C. Claim seeking Imposition of Constructive Trust:

The City claims Defendants are holding collected tax funds as "constructive trustee for the benefit of the Plaintiff and the Class," and requests this Court to order Defendants to give it and the Class possession of these monies. (Doc. No. 1-2, Ex. A, ¶ 49). It argues alternatively that the doctrine of resulting trusts is applicable here. (Doc. No. 44, p. 10).

The City alleges Defendants are "unjustly enriched" by retaining a "significant portion" of the tax funds collected to which Defendants are not entitled. *Id.* at 9. It further alleges that the guests did not intend for the Defendants to reap any benefit from the tax monies collected and argues these guests are legally obligated to pay the tax as it is "deemed a debt owed by the transient guest to the City [under] Findlay Ord. § 195.14." *Id.* at 10.

1. Constructive Trust:

[6] The Ohio Supreme Court has defined a constructive trust as:

> [A] trust by operation of law which arises contrary to intention and in invitum, against one who ... by any form of unconscionable conduct, artifice, concealment, or questionable means, or who in any way against equity and good conscience, either has obtained or holds the legal right to property which he ought not, in equity and good conscience, hold and enjoy.

Ferguson v. Owens, 9 Ohio St.3d 223, 459 N.E.2d 1293, 1295 (1984) (per curiam) (quoting 76 Am.Jur.2d *Trusts* § 221, (1975)) (initial alteration in *Ferguson*). A constructive trust may be imposed even though property "was acquired without ***864** fraud," *id.,* or acquired "in good faith," *In re Guardianship of Bucholtz,* 97CA0079, 1998 WL 214597, 1998 Ohio App. LEXIS 1908, at *4 (Apr. 24, 1998).

[7] A constructive trust subjects the person holding legal title "to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it." *Gabel v. Richley,* 101 Ohio App.3d 356, 655 N.E.2d 773, 778 (1995) (internal quotation omitted). "Unjust enrichment occurs when one person has and retains money or benefits which in justice and equity *belong to another." Bucholtz,* 1998 WL 214597, at *2, 1998 Ohio App. LEXIS 1908, at *4 (emphasis added). At least one Ohio court has expressly held that a constructive trust claim also requires the plaintiff to demonstrate that a Defendant "possess[es] funds which *rightfully belong* to [the plaintiff]." *Union Sav. Bank v. White Family Cos.,* No. 21137, 2006 WL 1453123, at *2, 2006 Ohio App. LEXIS 2467, at * 15-16 (May 19, 2006) (emphasis added).

[8] The Court finds the City has alleged facts to survive dismissal of its constructive trust claim. Here, assuming the City's allegations are true, equity requires imposition of a constructive trust to prevent unjust enrichment. The City has alleged facts under a viable legal theory to show that it and the Class are rightfully entitled to the transient guest taxes

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collected and retained by Defendants and thus Defendants cannot hold these funds in equity and good conscience.

2. Resulting Trust:

[9] The City's resulting trust theory, however, is in error. A resulting trust is "one which the court of equity declares to exist where the legal estate in property is transferred or acquired by one under facts and circumstances which indicate that the beneficial interest is not intended to be enjoyed by the holder of the legal title." *First Nat'l Bank of Cincinnati v. Tenney,* 165 Ohio St. 513, 138 N.E.2d 15, 17 (1956) (internal quotation omitted).

[10][11] Any resulting trust imposed here would be created in favor of the purchasing hotel guests; not in favor of the City and the Class. "A resulting trust arises *in favor of one who transfers property* under circumstances that raise a rebuttable inference that the *transferor* intended to transfer to another bare legal title without giving the transferee a beneficial interest in the property...." *Bell v. Straight, Inc.,* 707 F.Supp. 325, 329 (S.D.Ohio 1989) (emphasis added) (citing *Croston v. Croston,* 18 Ohio App.2d 159, 247 N.E.2d 765, 769 (1969)). Here, it is the hotel guest, not the City, who "transfers" the tax payment retained by Defendants.

The Court denies Defendants' Motion to Dismiss the City's constructive trust claim.

D. Conversion Claim:

In its conversion claim, the City alleges that "Plaintiff and the Class, were, and are, the sole rightful owners of the taxes due and owing to them under Ohio Rev.Code §§ 5739.08 and 5739.09;" that at all times alleged these monies "were in the possession and under the control of Defendants;" and that "Defendants have taken these monies for their own use and benefit, thereby permanently depriving Plaintiff and the Class of the use and benefit thereof." (Doc. No. 1-2, Ex. A, ¶¶ 43-45). As a result, the City and Class allege suffering and seek punitive damages and "damage in an amount to be determined according to proof at the time of trial." *Id.* ¶ 46.

[12][13][14] "Conversion is the wrongful exercise of dominion over property in exclusion of the right of the owner, or withholding it from his possession under a claim inconsistent with his rights." ***865***Young v. City of Sandusky,* No. 3:03CV7490, 2005 WL 1491219, at *5, 2005 U.S. Dist. LEXIS 12258, at *27 (N.D. Ohio June 23, 2005) (internal citation omitted); *see also Balt. & Ohio R.R. v. O'Donnell,* 49 Ohio St. 489, 32 N.E. 476, 478 (Ohio 1892). To establish a claim of conversion, a plaintiff "must establish three elements: (1) plaintiff's ownership or right to possession of the property at the time of conversion; (2) defendant's conversion by a wrongful act or disposition of plaintiff's property rights; and (3) damages." *Young,* 2005 WL 1491219, at *5, 2005 U.S. Dist. LEXIS 12258, at * 28. A plaintiff may claim conversion of money where the defendant is obligated to pay specifically identifiable funds to the plaintiff. *See Davis v. Flexman,* 109 F.Supp.2d 776, 808 and n. 30 (S.D.Ohio 1999) (plaintiff could recover under a conversion theory monies defendant received for her work but failed to pay to her per their agreement); *Wiltberger v. Davis,* 110 Ohio App.3d 46, 673 N.E.2d 628, 634 (1996) (noting the trial court had explained that "an action for the conversion of money is not recognized 'except where the money is specifically identifiable,' " and calling a conversion claim based on the failure to pay specific commissions owed to the plaintiff not "wholly unwarranted" given the state of existing authority).

[15][16] In Ohio, "[a] demand and refusal in a conversion action are usually required to prove the conversion of property otherwise *lawfully* held." *Ohio Tel. Equip. & Sales, Inc. v. Hadler Realty Co.,* 24 Ohio App.3d 91, 493 N.E.2d 289, 292 (1985) (emphasis added). " '[T]he sole object of a demand [in a conversion action is] to turn an otherwise lawful possession into an unlawful one, by reason of a refusal to comply with it, and thus to supply evidence of a conversion.' " *Fid. & Deposit Co. v. Farmers & Citizens Bank,* 72 Ohio App. 432, 52 N.E.2d 549, 550 (Ohio Ct.App.1943) (quoting *Pease v. Smith,* 61 N.Y. 477, 481 (N.Y.1875)). Here, the City in its conversion claim is not required to allege demand and refusal because Defendants do not lawfully hold the tax funds they have collected.

The City--in asserting its right to possession of tax funds collected by Defendants, Defendants' continual retention of these funds, and damages--has alleged all essential elements of a conversion claim. Defendants' Motion to Dismiss the City's conversion claim is denied.

III. CONCLUSION

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(Cite as: 441 F.Supp.2d 855)

For the foregoing reasons, Defendants' Motion to Dismiss (Doc. No. 39) is granted as to Count II (OCSPA claims) and Count V (declaration on OCSPA claims) of the City's complaint, and is denied as to Count I (violation of transient guest tax ordinances), Count III (conversion), and Count IV (imposition of a constructive trust). The Plaintiff's Motion to Strike (Doc. No. 59) is denied.

IT IS SO ORDERED.

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

City of Rome, Georgia;
Hart County, Georgia;
City of Cartersville,
Georgia;

Plaintiffs,

v.

CIVIL ACTION FILE
NO. 4:05-CV-249-HLM

Hotels.com, LP; 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); Lowestfare.com Incorporated; Maupintour Holdings, LLC; Orbitz, Inc.; Orbitz, LLC; priceline.com Incorporated; Site59.com, LLC; Travelocity.com, Inc.; Travelocity.com, L.P.; Travelweb LLC; TravelNow.com, Inc.; OneTravel, Inc. (d/b/a onetravel.com); and DOES 1 through 1000, Inclusive,

Defendants.

ORDER

This is a class action brought against a number of online travel companies by Plaintiffs alleging that Defendants underpaid Georgia local option sales taxes and county or municipal hotel excise taxes. This case is before the Court on Defendants' Motion to Dismiss and Oral Argument Request

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[23, 71], and on Plaintiffs' First, Second, and Third Motions to Add Parties and Notice of Designation of Additional Proposed Class Representatives [42, 55, 57].

I. Background

A. Factual Background

1. The Parties

Plaintiff City of Rome, Georgia, is a municipal corporation organized under the laws of the State of Georgia and is the county seat of Floyd County, Georgia. (Compl. ¶ 1.) Plaintiff Hart County, Georgia, was created in 1853 from part of Elbert County, Georgia, and Franklin County, Georgia. (Id. ¶ 2.) Plaintiff City of Cartersville, Georgia, is a municipal corporation organized under the laws of the State of Georgia and is the county seat of Bartow County, Georgia. (Id. ¶ 3.)

Defendant Hotels.com, LP is a Delaware limited partnership with its principal place of business in Dallas, Texas. (Compl. ¶ 4.) Defendant Hotels.com GP, LLC is a Texas corporation with its principal place of business in Dallas, Texas. (Id. ¶ 5.) Defendant Hotwire, Inc. is a Delaware corporation with its principal place of business in San Francisco, California. (Id. ¶ 6.) Defendant Cheap Tickets, Inc. is a Delaware corporation with its principal place of

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business in Honolulu, Hawaii. (Id. ¶ 7.) Defendant Cendant Travel Distribution Services Group Inc. is a Delaware corporation with its principal place of business in Parsippany, New Jersey. (Id. ¶ 8.) Defendant Expedia, Inc. is a Washington corporation with its principal place of business in Bellevue, Washington. (Id. ¶ 9.) Defendant Internetwork Publishing Corporation (d/b/a Lodging.com) is a Florida Corporation with its principal place of business in Boca Raton, Florida. (Id. ¶ 10.) Defendant Lowestfare.com Incorporated is a Delaware corporation with its principal place of business in Norwalk, Connecticut. (Id. ¶ 11.) Defendant Maupintour Holdings, LLC is a Nevada corporation with its principal place of business in Las Vegas, Nevada. (Id. ¶ 12.) Defendants Orbitz, Inc. and Orbitz, LLC are Delaware corporations with their principal places of business in Chicago, Illinois. (Id. ¶¶ 13-14.) Defendant priceline.com Incorporated is a Delaware corporation with its principal place of business in Norwalk Connecticut. (Id. ¶ 15.) Defendant Site59.com, LLC is a Delaware corporation with its principal place of business in New York, New York. (Id. ¶ 16.) Defendants Travelocity.com, Inc. and Travelocity.com, L.P. are Delaware corporations with their principal places of business in Texas. (Id. ¶¶ 17-18.) Defendant Travelweb LLC is a Delaware corporation with its principal place of business

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in Dallas, Texas. (Id. ¶ 19.) Defendant TravelNow.com, Inc. is a Delaware corporation with its principal place of business in Springfield, Missouri. (Id. ¶ 20.) Defendant OneTravel, Inc. is a Texas corporation with its principal place of business in East Greenville, Pennsylvania. (Id. ¶ 21.)

At the time Plaintiffs filed their Complaint, Plaintiffs did not know the true names and capacities of Defendants designated as DOES. (Compl. ¶ 22.)

2. Alleged Facts

Plaintiffs bring this lawsuit pursuant to 28 U.S.C.A. § 1332. (Compl. ¶¶ 24–25.) There is complete diversity between Plaintiffs and Defendants, and the amount in controversy exceeds $75,000, exclusive of interest and costs. (Id.)

Plaintiffs allege that Defendants failed to remit taxes due to Plaintiffs and other political subdivisions of the State of Georgia. (Compl. ¶ 27.) Defendants are online sellers and/or resellers of hotel rooms to the general public, and Defendants failed to pay taxes due and owing to Plaintiffs and the appropriate governmental authorities on such transactions. (Id. ¶ 28.)

Plaintiffs' excise tax on rooms, lodging and accommodations requires Defendants to collect and remit taxes on behalf of county and municipal governing authorities. (Compl. ¶ 29.) Plaintiffs may impose excise taxes at rates

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between three and eight percent under O.C.G.A. § 48-13-51 et seq. (Id.) The amount of transient occupancy and/or excise tax is calculated as a percentage of the price each consumer occupant pays each Defendant operator for a hotel room. (Id.) That is the amount each Defendant is required to remit to Plaintiffs. (Id.)

Defendants are also required to charge the public and remit sales taxes to the appropriate governmental authorities on the hotel rooms they sell to the public. (Compl. ¶ 35.) Plaintiffs are entitled to a percentage of the sales tax owed based upon their local ordinances. (Id.)

Defendants are charging and collecting excise and sales taxes from consumers, but Defendants are not remitting all of those taxes to Plaintiffs and the appropriate governmental authorities. (Compl. ¶¶ 31-37.) Defendants contract with hotels for rooms at discounted room rates. (Id. ¶ 32.) Defendants then mark up their inventory of rooms and sell the rooms to members of the public, who actually occupy the rooms. (Id.) Defendants charge and collect excise and sales taxes from those occupants based on the marked up room rates, but Defendants only remit to Plaintiffs and the appropriate governmental authorities the excise and sales tax amounts, respectively, based on the lower, negotiated room rates. (Compl. ¶¶ 31-37.) Defendants then pocket the difference

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between the excise and sales taxes charged and the excise and sales taxes remitted, thus failing to remit the correct amount of taxes due and owed to Plaintiffs and the appropriate governmental authorities. (Id.)

Defendants' business practices include charging the general public a "taxes and services" fee on the sale of each hotel room. (Compl. ¶ 38.) The general public is led to believe Defendants are remitting the correct amount of excise and sales taxes to Plaintiffs. (Id.) Additionally, Defendants do not explain to the general public the amounts being paid for each specific tax and the amounts, if any, being paid separately as service fees. (Id. ¶ 39.) Defendants require that the hotels not reveal to the general public what Defendant paid for the hotel rooms. (Id.) Likewise, the hotels do not know what the general public paid Defendants for the hotel rooms. (Id.)

B. Procedural Background

On November 18, 2005, Plaintiffs filed the instant Complaint, alleging that Defendants: (1) violated Georgia's excise tax on rooms, lodgings, and accommodations by failing to properly identify, categorize, collect, and remit taxes, including those paid and actually collected; (2) violated Georgia's sales and use tax laws by failing to properly identify, categorize, collect, and remit taxes, including

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those paid and actually collected; (3) violated Georgia's Uniform Deceptive and Unfair Trade Practices Act by misrepresenting to consumers the taxes Defendants intended to pay and then by underpaying those taxes due Plaintiffs; (4) converted tax moneys due and owing to Plaintiffs by retaining those for Defendants' own use and benefit; and (5) unjustly enriched themselves by representing that the taxes were required by Plaintiffs, but not remitting those taxes to Plaintiffs.

On February 6, 2006, Defendants filed their Motion to Dismiss and Oral Argument Request. On March 3, 2006, Plaintiffs filed their Response. On March 22, 2006, Defendants filed their response, and, with the Court's permission, (Order of Apr. 20, 2006), on April 21, 2006, Plaintiffs filed their surreply.

On March 20, 2006, Plaintiffs filed their Motion to Add Parties and Notice of Designation of Additional Proposed Class Representatives ("First Motion to Add Parties"). Plaintiffs move to add the State of Georgia Revenue Commissioner, Bart Graham (the "Commissioner"), as an additional Plaintiff and necessary party with regard to Plaintiffs' sales and use tax claim. Additionally, in their First Motion to Add Parties, and in their April 5 and 11, 2006, Motions to Add Parties ("Second" and "Third Motions to Add Parties," respectively),

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Plaintiffs also request to add the following entities as Plaintiffs as to all claims: Fulton County, Georgia; City of Hartwell, Georgia; City of Rockmart, Georgia; City of Cedartown, Georgia; City of Dalton, Georgia; Gwinnett County, Georgia; the City of East Point, Georgia; City of Warner Robins, Georgia; Cobb County, Georgia; and DeKalb County, Georgia.

On April 3, 2006, the Commissioner filed his Motion to Intervene and his Response to Plaintiffs' [First] Motion to Add Parties. (Order of Apr. 14, 2006.) On April 6, 2006, Defendants filed their Response to Plaintiffs' Motion to Join the Georgia Revenue Commissioner. On April 14, 2006, the Court granted the Commissioner's Motion to Intervene and accepted the Commissioner's response opposing his joinder as filed on April 3, 2006. (Order of Apr. 14, 2006.) Also on April 14, 2006, Plaintiffs filed a brief supporting joinder of the Commissioner and suggesting that the Commissioner misunderstood Plaintiffs' Motion to Add Parties and the Commissioner's role in Plaintiffs' Motion. On April 17, 2006, the Court directed the Commissioner and Defendants to respond to Plaintiffs' brief. (Order of Apr. 17, 2006.) On April 20 and 26, 2006, the Commissioner and Defendants filed their responses, respectively. On April 28, 2006, Plaintiffs filed their reply to Defendants' surresponse.

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As of the date of this Order, the time period for Defendants to respond to Plaintiffs' Second and Third Motions to Add Parties has expired. Consequently, the above Motions are now ripe for resolution by the Court.

II. Defendants' Motion to Dismiss

A. Standard Governing Motions to Dismiss

A court may grant a motion to dismiss "'only when the movant demonstrates beyond doubt that the plaintiff can prove no facts in support of his claim which would entitle him to relief.'" Simmons v. Sonvika, 394 F.3d 1335, 1338 (11th Cir. 2004) (quoting Spain v. Brown & Williamson Tobacco Corp., 363 F.3d 1183, 1187 (11th Cir. 2004)) (internal quotation marks omitted). When considering a motion to dismiss, the Court must "accept the allegations in the complaint as true and construe them 'in the light most favorable to the plaintiffs.'" Id. (quoting Hill v. White, 321 F.3d 1334, 1335 (11th Cir. 2003) (per curiam)). However, "'[c]onclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent dismissal.'" Jackson v. BellSouth Telecomms., 372 F.3d 1250, 1262 (11th Cir. 2004) (quoting Oxford Asset Mgmt., Ltd. v. Jaharis, 297 F.3d 1182, 1188 (11th Cir. 2002)). With that standard in mind, the Court proceeds to address Defendants'

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Motion to Dismiss.

B. Excise Tax Claim

Plaintiffs allege that Defendants failed to collect and remit to Plaintiffs the excise tax amounts due Plaintiffs. Plaintiffs contend that Defendants failed to properly identify, categorize, and quantify the taxes actually due and/or being paid by occupants during hotel purchasing transactions in violation of Plaintiff City of Rome's ordinance and other similar provisions. Plaintiffs also contend that Defendants actually collect taxes on the total value of the transaction, but that Defendants are remitting a reduced amount of taxes based upon the wholesale rates Defendants pay for the hotel rooms.

Defendants argue that Plaintiffs' excise tax claims must fail absent allegations establishing that Defendants are "operators" subject to hotel excise taxes. Defendants contend that the statute authorizing counties and municipalities to levy and collect such excise taxes, as well as the various ordinances enacted by Plaintiffs, provides that such taxes shall only be imposed on persons or entities licensed by or required to pay a business or occupation tax to the governing authority for operating a hotel or similar facility. Defendants also contend that Plaintiffs do not allege that any of the Defendants: operates a hotel in Georgia, is licensed by

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or required to pay business or occupation taxes to Plaintiffs for operating a hotel, or maintains a place of business in Plaintiffs' jurisdictions.

The Parties' briefs focus on the question of whether Defendants are liable to Plaintiffs for the excise taxes at issue. The Court therefore also focuses on that issue. O.C.G.A. § 48-13-50, Excise Tax on Rooms, Lodgings, and Accommodations, authorizes each county and municipality in Georgia to levy excise taxes for the purposes of promoting, attracting, stimulating, and developing conventions and tourism in counties and municipalities. O.C.G.A. § 48-13-50 (2005). Under O.C.G.A. § 48-13-51, municipalities may levy and collect an excise tax upon the furnishing for value to the public of any room or rooms furnished by any person or legal entity licensed by, or required to pay business or occupation taxes to, the municipality for operating a hotel or similar facility. O.C.G.A. § 48-13-51(a)(1)(A). Every person or entity subject to a tax levied as provided above shall be liable for the tax at the applicable rate on the lodging charges actually collected or, "if the amount of taxes collected from the hotel or motel guest is in excess of the total amount that should have been collected, the total amount actually collected must be remitted." O.C.G.A. § 48-13-51(a)(1)(B)(i) (emphasis added).

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Additionally, the excise tax levied is also imposed upon every person or entity who is a hotel or motel guest and who received a room, lodging, or accommodation that is subject to the tax. O.C.G.A. § 48-13-51(a)(1)(B)(ii). "The person or entity collecting the tax from the hotel or motel guest shall remit the tax to the governing authority imposing the tax, and the tax remitted shall be a credit against the tax imposed by [O.C.G.A. § 48-13-51(a)(1)(B)(i)] on the person or entity providing the room, lodging, or accommodation." O.C.G.A. § 48-13-51(a)(1)(B)(ii) (emphasis added).

The Court finds that Plaintiffs have stated a claim for relief on the grounds that Defendants have failed to properly identify the taxes charged and paid by hotel guests and have not remitted moneys collected as taxes to Plaintiffs or the proper government authorities. Construing the allegations in Plaintiffs' Complaint as true, as the Court must, Defendants are collecting excise taxes from hotel guests that Defendants are not remitting to Plaintiffs. Regardless of whether Defendants operate hotels or are licensed by Plaintiffs to do so, Defendants are the entities actually collecting the excise taxes from the hotel guests and, pursuant to O.C.G.A. § 48-13-51(a)(1)(B)(i), those taxes actually collected must be

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remitted to Plaintiffs.[1]

Furthermore, according to Plaintiffs, the hotels do not know what amount Defendants charge guests for the booked hotel room and thus do not know the total amount of taxes Defendants charged and collected from those guests or the total amount of taxes due Plaintiffs. Likewise, the hotel guests do not have this information, because the hotel guests do not receive an itemized receipt showing the amount of taxes charged and collected by Defendants. Defendants therefore are the only ones who know the total amount of taxes charged and collected, and Defendants, acting on their own, are retaining a portion of the excise taxes that Defendants actually collect. The Court therefore finds that Plaintiffs have properly stated a claim against Defendants for failing to remit the taxes at issue.

The Court concludes that it does not appear beyond a doubt that Plaintiffs can prove no set of fact to support their excise tax claim which would entitle Plaintiffs to relief. The Court therefore declines to dismiss Plaintiffs' excise tax claim.

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[1] For the reasons discussed above, the Court finds it unnecessary to address whether Defendants are operators, furnishes, or providers of lodgings at this stage in the litigation.

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C. Sales and Use Tax Claim

Plaintiffs allege that, as express beneficiaries of the sales and use taxes, they have standing to raise Defendants' alleged liabilities for such taxes. Additionally, Plaintiffs move the Court to include the Commissioner in this action as an indispensable party; however, the Court addresses Plaintiffs' First, Second, and Third Motions to Add Parties infra Part III.

Defendants argue that Plaintiffs' local sales tax claims must be dismissed. Defendants contend that the entire case must be dismissed because the Commissioner does not consent to joining the lawsuit. Defendants also contend that Plaintiffs themselves have no separate or independent standing to collect local sales taxes.

Stated broadly, "[t]he focus of the standing inquiry is 'whether the plaintiff is the proper party to bring this suit.'" Bochese v. Town of Ponce Inlet, Fla., 405 F.3d 964, 980 (11th Cir. 2005) (quoting Raines v. Byrd, 521 U.S. 811, 818 (1997)). In contrast to the excise taxes and statutes discussed supra Part II.B., the Georgia General Assembly has not plainly and unmistakably authorized Plaintiffs to collect sales and use taxes. See Camden Tel. & Tel. Co. v. City of St. Marys, Ga., 247 Ga. 687, 688-89, 279 S.E.2d 200, 202 (1981) (recognizing that power to tax belongs to State and

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that such power must be conferred to municipalities in "plain and unmistakable terms" either directly in State constitution or by statute).

Counties and municipalities, such as Plaintiffs, are authorized to impose sales and use taxes. O.C.G.A. § 48-8-82. Pursuant to O.C.G.A. § 48-8-87, however, those taxes "shall be exclusively administered and collected by the [C]ommissioner for the use and benefit of each county . . . ." O.C.G.A. § 48-8-87 (emphasis added). O.C.G.A. §§ 48-8-95 and 48-8-113 further vest the Commissioner with the power and authority to promulgate rules and regulations necessary for the effective and efficient administration, enforcement, and collection of such taxes. O.C.G.A. §§ 48-8-95 and 48-8-113.

In sum, the above provisions of the Georgia Code clearly authorize and obligate the Commissioner, and no other entity, to collect sales and use taxes. See Cellular One, Inc. v. Emanuel County, 227 Ga. App. 197, 198-99, 489 S.E.2d 50, 52-53 (1998) ("[A]lthough Article 1 and the tax revenue rules and regulations provide a comprehensive scheme for the administration and collection of local taxes, these authorities provide no express right of action for counties to sue dealers who fail to properly remit the taxes.").

Considering the comprehensive administrative scheme provided by the above statutes, the Court finds that the

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Georgia General Assembly did not intend for cities and counties, such as Plaintiffs, to have an independent right of action against Defendants resulting from their alleged failure to remit sales and use taxes to the Commissioner. The Court declines to accept Plaintiffs' argument that, as the tax beneficiaries, they possess standing to bring a claim for unremitted sales and use taxes. The Court finds that the Commissioner, not Plaintiffs, is the proper plaintiff to bring an action regarding any such unremitted taxes. Consequently, the Court grants Defendants' Motion to Dismiss with regard to Plaintiffs' sales and use tax claim, set forth in Count II of Plaintiffs' Complaint.

D. **Other Claims**

Defendants do not directly oppose Plaintiffs' other claims, but instead argue that the Court should dismiss Plaintiffs' Complaint in its entirety. For the reasons discussed supra Parts II.B. and C., the Court finds that Plaintiffs have stated claims for conversion, and unjust enrichment, and have asserted claims under Georgia's Uniform Deceptive and Unfair Trade Practices Act. Consequently, the Court declines to dismiss those claims.

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III. Plaintiffs' Motions to Add Parties

Plaintiffs seek to add additional class representatives with regard to all of Plaintiffs' claims, and seek to add the Commissioner as a necessary party pursuant to Federal Rule of Civil Procedure 19(a) with regard to Plaintiffs' sales and use tax claims. Plaintiffs contend that Defendants also owe the proposed additional class representatives excise and sales and use tax. Plaintiffs also contend that the Commissioner has a fiduciary duty to collect sales tax on behalf of Georgia's cities and counties and therefore is a necessary party with respect to Plaintiffs' sales and use tax claims.

The Commissioner opposes Plaintiffs' Motion to join him as an involuntary party in this lawsuit. The Commissioner argues that only he may bring an action for the collection of state or local sales taxes, that this lawsuit may not be brought until the Department of Revenue has determined that a liability exists and issues an official assessment to Defendants, and that he has no obligation to permit Plaintiffs to use his name or title to collect such taxes. The Commissioner contends that this Court may not review his decision not to join this lawsuit and that, by joining this lawsuit, he would destroy the Court's diversity jurisdiction. Defendants adopt the Commissioner's arguments as to why he should not be joined.

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A. The Commissioner

Rule 19(a) provides for the joinder of necessary parties and permits a plaintiff, under certain circumstances, to require a person to join the plaintiff in his lawsuit. Fed. R. Civ. P. 19(a). Rule 19(a), however, "makes no provision for a plaintiff to require another person to maintain an action vested solely in such other person, even though its maintenance might result in benefit to the plaintiff." Coast v. Hunt Co., 195 F.2d 870, 872 (5th Cir. 1952).[2] Additionally, "the authorization in Rule 19(a) to join a party as an involuntary plaintiff can be invoked only when the party sought to be joined has a duty to allow plaintiff to use his name in the action." 7 Charles A. Wright, et al., Federal Practice and Procedure, § 1606 (3d ed. 2001).

Furthermore, Rule 19(a) requires that the joined party "not deprive the court of jurisdiction over the subject matter of the action . . . ." Fed. R. Civ. P. 19(a). Pursuant to 28 U.S.C.A. § 1332, a district court has original jurisdiction over all cases between citizens of different states when the amount in controversy exceeds $75,000. 28 U.S.C.A. § 1332(a).

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[2] Opinions of the Fifth Circuit issued prior to October 1, 1981, the date marking the creation of the Eleventh Circuit, are binding precedent on this Court. See Bonner v. City of Prichard, 661 F.2d 1206, 1209-11 (11th Cir. 1981) (en banc).

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It is well established that a state is not a citizen of a state for the purposes of such diversity jurisdiction, and that an "arm or alter ego of the State," likewise, is not a citizen for purposes of diversity jurisdiction. Moor v. County of Alameda, Cal., 411 U.S. 693, 717-18 (1973).

For the following reasons, the Court declines Plaintiffs' request to add the Commissioner as an involuntary, necessary party under Rule 19(a). First, for the reasons discussed supra Part II.C., Plaintiffs do not have an independent right of action against Defendants resulting from their alleged failure to remit sales and use taxes to the Commissioner. Rather, the Commissioner is the proper party to bring such a suit. Consequently, the Court finds that Plaintiffs cannot use Rule 19(a) to require the Commissioner to involuntarily maintain an action vested solely in the Commissioner, even though the claim at issue might benefit Plaintiffs.

Second, Plaintiffs have not convinced the Court that the Commissioner has a duty to allow Plaintiffs to use his name to pursue allegedly unremitted sales and use taxes. As discussed supra Part II.C., the General Assembly "exclusively" vested in the Commissioner the power to administer and collect the sales and use taxes at issue. See O.C.G.A. § 48-8-87. The Court understands Plaintiffs' desire to receive any unremitted sales and use taxes; however, Plaintiffs do not have the authority

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to sua sponte collect any such taxes. The Court emphasizes to Plaintiffs that the Commissioner states that he is not precluded from bringing such a suit in the appropriate forum, but, at this time, any such suit would be premature because the Department of Revenue has not determined that a liability exists and has not issued to Defendants an Official Assessment and Demand for Payment. (Comm'r's Resp. to Pls.' Mot. to Add Parties at 7 & n.2.)

Furthermore, if Plaintiffs believe that the Commissioner is not adequately carrying out his duties, then Plaintiffs' most appropriate recourse may be to petition Georgia's legislative and executive branches, rather than the federal courts. The Court therefore finds that there are no grounds for the Court to interfere with the Commissioner's duty to administer and collect the allegedly unremitted sales and use taxes or to authorize that this suit be maintained in the Commissioner's behalf by Plaintiffs.

Fourth, the Court finds that the Commissioner's addition to this lawsuit would deprive the Court of diversity jurisdiction. The Court adopts the opinion of the District Court for the Southern District of Georgia in Miles v. State of Georgia Department of Revenue, 797 F. Supp. 987, 988 (S.D. Ga. 1997), and finds that the Department of Revenue is an arm of the state and that the Department of Revenue and its

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Commissioner are protected by sovereign immunity pursuant to the Eleventh Amendment. Because the "Eleventh Amendment immunity analysis is applicable to determinations of citizenship for the purposes of diversity jurisdiction," Univ. of S. Ala. v. The Am. Tobacco Co., 168 F.3d 405, 412 (11th Cir. 1999), the Court also finds that the Department of Revenue, and the Commissioner in his official capacity, is an arm of the state of Georgia, not a citizen, for the purposes of diversity jurisdiction. Consequently, Plaintiffs have failed to establish subject matter jurisdiction to support their claim that the Commissioner, or the Plaintiffs in his stead, can bring an action in this Court for the allegedly unremitted sales and use taxes.

Consequently, the Court declines Plaintiffs' invitation to join the Commissioner as a necessary party under Rule 19(a). The Court therefore denies Plaintiffs' First Motion to Add Parties to the extent Plaintiffs request that the Commissioner be involuntarily joined as a Party to this lawsuit.

B. All Other Proposed Class Representatives

Plaintiffs have filed three Motions to Add Parties to this lawsuit, including: (1) a request to add Fulton County, Georgia; City of Hartwell, Georgia; City of Rockmart, Georgia; City of Cedartown, Georgia; City of Dalton, Georgia (Docket

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No. 42); (2) a request to add Gwinnett County, Georgia; the City of East Point, Georgia; City of Warner Robins, Georgia (Docket No. 55); and (3) a request to add Cobb County, Georgia; and DeKalb County, Georgia (Docket No. 57). Defendants do not oppose Plaintiffs' requests to add the above parties other to this lawsuit.

Federal Rule of Civil Procedure 21 provides that, "[p]arties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just." Fed. R. Civ. P. 21. At this time, Plaintiffs seek to add the above parties to this lawsuit, and those additions are unopposed by Defendants. With respect to the above parties, the Court knows of no reason why the addition of the above parties to this lawsuit would be unjust as to all of Plaintiffs' claims, except their sales and use tax claim for the reasons discussed supra Part II.C. The Court therefore finds that the addition of the above Parties to Plaintiffs' remaining claims is just.

Consequently, the Court grants in part Plaintiffs' First Second and Third Motions to Add Parties as to Counts I, III, IV, V, VI, and VII of Plaintiffs' Complaint, and denies Plaintiffs' Motions with regard to Plaintiffs' sales and use tax claim set forth in Count II.

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VI. Defendants' Oral Argument Request

"Motions will be decided by the court without oral hearing, unless a hearing is ordered by the court." N.D. Ga. R. 7.1(E). The Court determines that a hearing on the above issues is not required and therefore denies Defendants' Oral Argument Request.

VII. Conclusion

ACCORDINGLY, the Court **GRANTS IN PART AND DENIES IN PART** Plaintiffs' First Motion to Add Parties [42]. The Court **GRANTS** Plaintiffs' Motion as to Fulton County, City of Hartwell, City of Rockmart, City of Cedartown, and City of Dalton with regard to all of Plaintiffs' claims, except their sales and use tax claims, and **DENIES** Plaintiffs' Motion as to State Revenue Commissioner Bart Graham. The Court **GRANTS IN PART AND DENIES IN PART** Plaintiffs' Second and Third Motions to Add Parties [55, 57]. The Court **GRANTS** Plaintiffs' Second and Third Motions to Add Parties to Counts I, III, IV, V, VI, and VII of Plaintiffs' Complaint, and **DENIES** Plaintiffs' Motions with regard to Count II, Plaintiffs' sales and use tax claim. The Court **GRANTS IN PART AND DENIES IN PART** Defendants' Motion to Dismiss and Oral Argument Request [23, 71]. The Court **DISMISSES WITHOUT PREJUDICE** Plaintiffs' sales

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and use tax claim, and the Court **DENIES** Defendants' Motion as to Plaintiffs' excise tax claim and Defendants' Oral Argument Request.

IT IS SO ORDERED, this the 8th day of May, 2006.

UNITED STATES DISTRICT JUDGE

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West's Ann.Cal.Civ.Code § 2223

C

Effective: [See Text Amendments]

West's Annotated California Codes Currentness
Civil Code (Refs & Annos)
Division 3. Obligations (Refs & Annos)
Part 4. Obligations Arising from Particular Transactions (Refs & Annos)
Title 8. Involuntary Trusts (Refs & Annos)

§ 2223. Involuntary trustee

One who wrongfully detains a thing is an involuntary trustee thereof, for the benefit of the owner.

CREDIT(S)

(Added by Stats.1986, c. 820, § 8, eff. Sept. 15, 1986, operative July 1, 1987.)

LAW REVISION COMMISSION COMMENTS

Section 2223 continues former Section 2223 without change. See also Prob. Code § 15003 (constructive and resulting trusts unaffected by new Trust Law). [18 Cal. L.Rev.Comm. Reports 501 (1986)].

HISTORICAL AND STATUTORY NOTES

2007 Electronic Update

1986 Legislation

Former § 2223 was repealed by Stats.1986, c. 820, § 7, operative July 1, 1987. For disposition, see table preceding § 2215.

Derivation: Former § 2223, enacted 1872.

CROSS REFERENCES

Rights of trustees, involuntary trustee as lacking, see Civil Code § 2275.

Third persons as involuntary trustees, see Probate Code § 18100.

LAW REVIEW AND JOURNAL COMMENTARIES

Civil liability for attorneys to adverse parties when a settlement agreement is breached in California. David M. Lacy Kusters, 56 Hastings L.J. 1277 (2005).

Doctrine of constructive trust. (1927) 16 Cal.L.Rev. 19.

Express or constructive trust as result of creation of joint bank account. (1940) 29 Cal.L.Rev. 90.

Necessity for unjust enrichment in a constructive trust in California: Elliott v. Elliott. (1968) 19 Hastings L.J. 1268.

Observations on the state, etc., of the California Laws of Uses and Trusts. Orrin B. Evans (1955) 28 S.Cal.L.Rev.

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West's Ann.Cal.Civ.Code § 2224

C

Effective: [See Text Amendments]

West's Annotated California Codes Currentness
Civil Code (Refs & Annos)
Division 3. Obligations (Refs & Annos)
Part 4. Obligations Arising from Particular Transactions (Refs & Annos)
Title 8. Involuntary Trusts (Refs & Annos)

§ 2224. Wrongful act

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.

CREDIT(S)

(Added by Stats.1986, c. 820, § 8, eff. Sept. 15, 1986, operative July 1, 1987.)

LAW REVISION COMMISSION COMMENTS

Section 2224 continues former Section 2224 without change. See also Prob. Code § 15003 (constructive and resulting trusts unaffected by new Trust Law). [18 Cal.L.Rev.Comm. Reports 501 (1986)].

HISTORICAL AND STATUTORY NOTES

2007 Electronic Update

1986 Legislation

Former § 2224 was repealed by Stats.1986, c. 820, § 7, operative July 1, 1987. For disposition, see table preceding Civil Code § 2215.

Derivation: Former § 2224, enacted 1872.

CROSS REFERENCES

Actual and constructive fraud defined under contract law, see Civil Code § § 1572, 1573.

Influence to obtain advantage from beneficiary, see Probate Code § 16004.

Rights of trustees, involuntary trustee as lacking, see Civil Code § 2275.

LAW REVIEW AND JOURNAL COMMENTARIES

Breach of oral agreement to divide realty purchased as giving rise to constructive trust. (1947) 22 Cal.St.B.J. 454.

Confidential relation between parties as basis for constructive trust. (1925) 13 Cal.L.Rev. 174, 176.

Constructive and resulting trusts distinguished. (1930) 19 Cal.L.Rev. 70.

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E. A consumer or user who willfully or intentionally fails, neglects or refuses to pay the full amount of tax levied by Section 1350 et seq. of this title or willfully or intentionally uses a sales tax permit or direct payment permit which is invalid, expired, revoked, canceled or otherwise limited to a specific line of business or willfully or intentionally issues a resale certificate to a vendor to evade the tax levied by Section 1350 et seq. of this title shall be subject to a penalty in the amount of Five Hundred Dollars ($500.00) per reporting period upon determination thereof, which shall be apportioned as provided for the apportionment of the tax.

F. Any sum or sums collected or accrued or required to be collected or accrued in Section 1350 et seq. of this title shall be deemed to be held in trust for the State of Oklahoma, and, as trustee, the collecting vendor or holder of a direct payment permit as provided for in Section 1364.1 of this title shall have a fiduciary duty to the State of Oklahoma in regards to such sums and shall be subject to the trust laws of this state.

CREDIT(S)

Laws 1981, c. 313, § 2, emerg. eff. June 29, 1981; Laws 1985, c. 127, § 1, eff. Jan. 1, 1986; Laws 1991, c. 159, § 2, emerg. eff. May 6, 1991; Laws 1993, c. 366, § 41, eff. Sept. 1, 1993; Laws 1996, c. 126, § 2, eff. Nov. 1, 1996; Laws 1996, c. 288, § 5, eff. Nov. 1, 1996; Laws 1997, c. 133, § 561, eff. July 1, 1999; Laws 2002, c. 460, § 39, eff. Nov. 1, 2002.

HISTORICAL AND STATUTORY NOTES

2007 Electronic Update

The 2002 amendment, in subsection C, substituted this title for Title 68 of the Oklahoma Statutes; in subsection F, in the first sentence, substituted this title for Title 68 of the Oklahoma Statutes, and deleted the second and third sentences, which prior thereto read:

"Any vendor who willfully or intentionally fails to remit the tax, after the tax levied by Section 1350 et seq. of this title was collected from the consumer or user, and appropriates the tax held in trust to his or her own use, or to the use of any person not entitled thereto, without authority of law, shall be guilty of the felony of embezzlement. Any holder of a direct payment permit who willfully or intentionally fails to remit the tax levied by Section 1350 et seq. of this title and appropriates the tax held in trust to his or her own use, or to the use of any person not entitled thereto, without authority of law, shall be guilty of the felony of embezzlement."

2001 Main Volume

The 1985 amendment, in subsection (C), substituted "Five Hundred Dollars ($500.00)" for "One Hundred Dollars ($100.00)" and substituted "One Thousand Dollars ($1,000.00)" for "Five Hundred Dollars ($500.00)" in the first sentence; inserted a new subsection (D); and redesignated former subsection (D) as subsection (E).

The 1991 amendment, in subsection (A), added the second paragraph; and in subsection (D), substituted "subject to a penalty in the amount of Five Hundred Dollars ($500.00) per reporting period upon determination thereof, which shall be apportioned as provided for the apportionment of the tax" for "deemed guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than Five Hundred Dollars ($500.00). Upon conviction of a second or subsequent offense the penalty shall be a fine of not more than One Thousand Dollars ($1,000.00) or imprisonment for not more than sixty (60) days or both such fine and imprisonment" following "shall be".

The 1993 amendment added the last two sentences in the first paragraph of subsection (A).

Section 1 of Laws 1996, c. 17, amending this section, was repealed by Laws 1996, c. 288, § 9.

Laws 1996, c. 126, § 2 changed the style of the subsection designators; inserted "Except as otherwise provided by subsection C of this section" throughout the section; inserted subsection C; redesignated former subsections (C) to (E) as subsections D to F; in subsection E, inserted "or direct payment permit"; in subsection F, in the first sentence

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EXHIBIT 5

Westlaw.

West's Ann.Cal.Rev. & T.Code § 7283.51

Effective: January 01, 2005

West's Annotated California Codes Currentness
Revenue and Taxation Code (Refs & Annos)
Division 2. Other Taxes (Refs & Annos)
Part 1.7. Additional Local Taxes (Refs & Annos)
Chapter 1. Occupancy Taxes (Refs & Annos)

➞§ 7283.51. Action to collect transient occupancy tax; limitation; exceptions

Notwithstanding any other provision of law, except in the case of fraud or the failure of a property owner to file a transient occupancy tax return, a city, county, or city and county may institute an action to collect unpaid transient occupancy taxes within four years of the date on which the transient occupancy taxes were required to be paid.

CREDIT(S)

(Added by Stats.2004, c. 936 (A.B.1916), § 3.)

HISTORICAL AND STATUTORY NOTES

2007 Electronic Update

2004 Legislation

Section 4 of Stats.2004, c. 936, provides:

"SEC. 4. It is the intent of the Legislature that this bill not be construed to make any changes to transient occupancy tax laws that apply to charter cities and charter counties."

West's Ann. Cal. Rev. & T. Code § 7283.51, **CA REV & TAX § 7283.51**

Current through Ch. 170 of 2007 Reg.Sess. urgency legislation

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END OF DOCUMENT

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110TH CONGRESS
1ST SESSION

S. 1726

To regulate certain State taxation of interstate commerce, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JUNE 28, 2007

Mr. SCHUMER (for himself and Mr. CRAPO) introduced the following bill; which was read twice and referred to the Committee on Finance

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A BILL

To regulate certain State taxation of interstate commerce, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Business Activity Tax Simplification Act of 2007".

SEC. 2. MODERNIZATION OF PUBLIC LAW 86–272.

(a) SOLICITATIONS WITH RESPECT TO SALES AND TRANSACTIONS OF OTHER THAN TANGIBLE PERSONAL PROPERTY.—Section 101 of the Act entitled "An Act relating to the power of the States to impose net income

taxes on income derived from interstate commerce, and authorizing studies by congressional committees of matters pertaining thereto", approved September 14, 1959 (15 U.S.C. 381 et seq.) is amended—

(1) in section (a), by striking "either, or both," and inserting "any one or more";

(2) in subsection (a)(1), by striking "by such person" and all that follows and inserting "(which are sent outside the State for approval or rejection) or customers by such person, or his representative, in such State for sales or transactions, which are—

"(A) in the case of tangible personal property, filled by shipment or delivery from a point outside the State; and

"(B) in the case of all other forms of property, services, and other transactions, fulfilled or distributed from a point outside the State;";

(3) in subsection (a)(2), by striking the period at the end and inserting a semicolon;

(4) in subsection (a), by adding at the end the following new paragraphs:

"(3) the furnishing of information to customers or affiliates in such State, or the coverage of events or other gathering of information in such State by such person, or his representative, which information

is used or disseminated from a point outside the State; and

"(4) those business activities directly related to such person's potential or actual purchase of goods or services within the State if the final decision to purchase is made outside the State.";

(5) by striking subsection (c) and inserting the following new subsection:

"(c) For purposes of subsection (a) of this section, a person shall not be considered to have engaged in business activities within a State during any taxable year merely—

"(1) by reason of sales or transactions in such State, the solicitation of orders for sales or transactions in such State, the furnishing of information to customers or affiliates in such State, or the coverage of events or other gathering of information in such State, on behalf of such person by one or more independent contractors;

"(2) by reason of the maintenance of an office in such State by one or more independent contractors whose activities on behalf of such person in such State consist solely of making sales or fulfilling transactions, soliciting order for sales or transactions, the furnishing of information to customers

or affiliates, or the coverage of events or other gathering of information; or

"(3) by reason of the furnishing of information to an independent contractor by such person ancillary to the solicitation of orders or transactions by the independent contractor on behalf of such person."; and

(6) in subsection (d)(1)—

(A) by inserting "or fulfilling transactions," after "selling"; and

(B) by striking "the sale of, tangible personal property" and inserting "a sale or transaction, furnishing information, or covering events, or otherwise gathering information".

(b) APPLICATION OF PROHIBITIONS TO OTHER BUSINESS ACTIVITY TAXES.—Title I of the Act entitled "An Act relating to the power of the States to impose net income taxes on income derived from interstate commerce, and authorizing studies by congressional committees of matters pertaining thereto", approved September 14, 1959 (15 U.S.C. 381 et seq.) is amended by adding at the end the following:

"SEC. 105. For taxable periods beginning on or after January 1, 2008, the prohibitions of section 101 that apply with respect to net income taxes shall also apply

with respect to each other business activity tax, as defined in section 3(g) of the Business Activity Tax Simplification Act of 2007. A State or political subdivision thereof may not assess or collect any tax which by reason of this section the State or political subdivision may not impose.".

(c) EFFECTIVE DATE.—The amendments made by this section shall apply with respect to the imposition, assessment, and collection of taxes for taxable periods beginning on or after January 1, 2008.

SEC. 3. MINIMUM JURISDICTIONAL STANDARD FOR STATE AND LOCAL NET INCOME TAXES AND OTHER BUSINESS ACTIVITY TAXES.

(a) IN GENERAL.—No taxing authority of a State shall have power to impose, assess, or collect a net income tax or other business activity tax on any person relating to such person's activities in interstate commerce unless such person has a physical presence in the State during the taxable period with respect to which the tax is imposed.

(b) REQUIREMENTS FOR PHYSICAL PRESENCE.—

(1) IN GENERAL.—For purposes of subsection (a), a person has a physical presence in a State only if such person's business activities in the State include any of the following during such person's taxable year:

(A) Being an individual physically in the State, or assigning one or more employees to be in the State.

(B) Using the services of an agent (excluding an employee) to establish or maintain the market in the State, if such agent does not perform business services in the State for any other person during such taxable year.

(C) The leasing or owning of tangible personal property or of real property in the State.

(2) DE MINIMIS PHYSICAL PRESENCE.—For purposes of this section, the term "physical presence" shall not include—

(A) presence in a State for less than 15 days in a taxable year (or a greater number of days if provided by State law); or

(B) presence in a State to conduct limited or transient business activity.

(c) TAXABLE PERIODS NOT CONSISTING OF A YEAR.—If the taxable period for which the tax is imposed is not a year, then any requirements expressed in days for establishing physical presence under this Act shall be adjusted pro rata accordingly.

(d) MINIMUM JURISDICTIONAL STANDARD.—This section provides for minimum jurisdictional standards and

shall not be construed to modify, affect, or supersede the authority of a State or any other provision of Federal law allowing persons to conduct greater activities without the imposition of tax jurisdiction.

(e) EXCEPTIONS.—

(1) DOMESTIC BUSINESS ENTITIES AND INDIVIDUALS DOMICILED IN, OR RESIDENTS OF, THE STATE.—Subsection (a) does not apply with respect to—

(A) a person (other than an individual) that is incorporated or formed under the laws of the State (or domiciled in the State) in which the tax is imposed; or

(B) an individual who is domiciled in, or a resident of, the State in which the tax is imposed.

(2) TAXATION OF PARTNERS AND SIMILAR PERSONS.—This section shall not be construed to modify or affect any State business activity tax liability of an owner or beneficiary of an entity that is a partnership, an S corporation (as defined in section 1361 of the Internal Revenue Code of 1986), a limited liability company (classified as a partnership for Federal income tax purposes), a trust, an estate, or

any other similar entity, if the entity has a physical presence in the State in which the tax is imposed.

(3) PRESERVATION OF AUTHORITY.—This section shall not be construed to modify, affect, or supersede the authority of a State to bring an enforcement action against a person or entity that may be engaged in an illegal activity, a sham transaction, or any perceived or actual abuse in its business activities if such enforcement action does not modify, affect, or supersede the operation of any provision of this section or of any other Federal law.

(f) RULE OF CONSTRUCTION.—This section shall not be construed to modify, affect, or supersede the operation of title I of the Act entitled "An Act relating to the power of the States to impose net income taxes on income derived from interstate commerce, and authorizing studies by congressional committees of matters pertaining thereto", approved September 14, 1959 (15 U.S.C. 381 et seq.).

(g) DEFINITIONS, ETC.—For purposes of this section:

(1) NET INCOME TAX.—The term "net income tax" has the meaning given that term for the purposes of the Act entitled "An Act relating to the power of the States to impose net income taxes on income derived from interstate commerce, and authorizing studies by congressional committees of

matters pertaining thereto", approved September 14, 1959 (15 U.S.C. 381 et seq.).

(2) OTHER BUSINESS ACTIVITY TAX.—

(A) IN GENERAL.—The term "other business activity tax" means any tax in the nature of a net income tax or tax measured by the amount of, or economic results of, business or related activity conducted in the State.

(B) EXCLUSION.—The term "other business activity tax" does not include a sales tax, a use tax, or a similar transaction tax, imposed on the sale or acquisition of goods or services, whether or not denominated a tax imposed on the privilege of doing business.

(3) PERSON.—The term "person" has the meaning given such term by section 1 of title 1 of the United States Code.

(4) STATE.—The term "State" means any of the several States, the District of Columbia, or any territory or possession of the United States, or any political subdivision of any of the foregoing.

(5) TANGIBLE PERSONAL PROPERTY.—For purposes of subsection (b)(1)(C), the leasing or owning of tangible personal property does not include the leasing or licensing of computer software.

(h) EFFECTIVE DATE.—This section shall apply with respect to taxable periods beginning on or after January 1, 2008.

○

Purpose: To protect consumer access to interstate travel booking services.

Insert at the appropriate place:

"(a) A State, or political subdivision of a State, may not levy or collect a tax or fee on amounts charged or retained for facilitating interstate booking of travel services, unless the tax or fee was finally assessed prior to enactment of this subsection. Provided, however, that this prohibition shall not apply to a generally applicable business and occupation tax imposed by a State and measured by gross receipts or gross proceeds."

STATE SALES + OCCUPANCY TAX COUNTERPROPOSAL

CONCEPTUAL DRAFT—FOR DISCUSSION ONLY

1. Definitions.—

(a) A "travel intermediary" is defined as an entity that acts independently of hotel operators, and who facilitates the reservation of hotel rooms without acquiring ownership or possessory interest in the hotel rooms. For purposes of this statute, travel intermediaries shall comply with the duties and obligations of hotel operators in the collection and remittance of tax as provided by [insert your state's statute/regulation].

(b) A "hotel operator" is defined as a person or entity that operates a hotel, motel, inn, bed and breakfast, tourist camp, or other similar facility housing transients by:

(i) Owning a hotel or managing the day-to-day operations of the hotel, and

(ii) Physically furnishing hotel accommodations to the general public.

(c) A "facilitation fee" is defined as the charge for the service of facilitating hotel room reservations by a travel intermediary for any room, lodging, or accommodation furnished to transients by any hotel, inn, tourist court, tourist camp, tourist cabin, motel, or any similar facility in which rooms, lodgings or accommodations are furnished to transients. A facilitation fee shall not include any amount required to be paid by the travel intermediary to the hotel operator in furnishing accommodations.

(d) "Total rent" is defined as the total price a customer pays to use or occupy transient accommodations, including service charges or fees that are a condition of occupancy, except for mandatory fees imposed for the availability of communications services. Charges or fees paid by a customer to the person collecting the total rent as a condition of occupancy are included in the taxable rent even if the charges or fees are separately itemized on the customer's bill or are for items or services provided by a third party. Charges for items or services provided to occupants of transient accommodations which are not intrinsic to occupancy of the accommodation, which are provided only upon the election of the occupant, and which are separately itemized are not included in the taxable rent.

(e) The term "discount rate" as used in this section means the rate the registered owner or operator of the accommodation charges the travel intermediary for the room.

(f) The term "facilitation fee" means the difference between the total rent and the discounted rate.

2. Collection and Remittance of Tax

(a) A travel intermediary must register with the [state revenue agency] as a [dealer] for purposes of this [section].

(b) Travel intermediaries must remit to the owner or operator of any transient rental accommodations occupied by a customer of a travel intermediary the taxes due on the discount rate at the time of payment to the owner or operator. The travel intermediary must report and remit to the [state tax agency] the taxes due on the facilitation fee.

OPTIONAL LANGUAGE—IF APPLICABLE TO EXISTING STATE LAW

3. Clarification of Existing Law.

The purpose of this statute is to clarify existing law with respect to travel intermediaries.

4. Amnesty for registration and remittance of tax.

(a) The state shall provide an amnesty for unpaid taxes, penalties and interest imposed under [insert your state statute] on transient rentals if all of the following requirements are satisfied:

(i) The rentals subject to amnesty were made before (DATE);

(ii) The rental payments were collected by travel intermediaries who are not owners, operators or managers of the transient rental accommodations or their agents;

(iii) The travel intermediary who collected the rental payments registers with the [state revenue agency] to pay taxes on transient rentals on or before (DATE); and

(iv) The travel intermediary who collected the rental payments applies for amnesty within 3 months after (DATE) under the rules of the [state revenue agency].

(b) The amnesty is not available for taxes, penalties or interest that have been assessed if the assessment is final and has not been timely challenged, or for any taxes, penalties or interest that have been paid to the [state tax agency] unless the payment is the subject of an assessment that is not final or that has been timely challenged.

(c) The amnesty is not available for a tax billed to, or collected from, the consumer who pays for occupancy of the transient rental accommodation. The amnesty applies, however, to the amounts to the extent that the travel intermediary who collected the rental payments can document that the taxes were remitted to the owner or operator of the transient rental accommodation.

(d) The [state revenue agency] may adopt emergency rules under [insert state statute] to implement the amnesty. The rules may provide forms and procedures for applying for amnesty, for reporting and the rentals for which amnesty is sought, and for ensuring the applicant's ongoing commitment to registration, collection and remittance of the taxes imposed by state law on transient rentals. Notwithstanding any other law to the contrary, the emergency rules shall remain effective until six (6) months after the date of adoption of the rule or the date of final resolution of all amnesty applications filed under this section, whichever occurs later.

Model State Statute for Tax on Travel Intermediaries Facilitation Fees

DRAFT—FOR DISCUSSION PURPOSES ONLY

1. Definitions.—

(a) A "travel intermediary" is defined as an entity that acts independently of hotel operators, and who facilitates the reservation of hotel rooms without acquiring ownership or possessory interest in the hotel rooms.

(b) A "hotel operator" is defined as a person or entity that operates a hotel, motel, inn, bed and breakfast, tourist camp, or other similar facility housing transients by:

(i) Owning a hotel or managing the day-to-day operations of the hotel, and

(ii) Physically furnishing hotel accommodations to the general public.

(c) A "facilitation fee" is defined as the charge for the service of facilitating hotel room reservations by a travel intermediary for any room, lodging, or accommodation furnished to transients by any hotel, inn, tourist court, tourist camp, tourist cabin, motel, or any similar facility in which rooms, lodgings or accommodations are furnished to transients. A facilitation fee shall not include any amount required to be paid by the travel intermediary to the hotel operator in furnishing accommodations.

2. Imposition of Tax.—

(a) For purposes of this Act, a facilitation fee charged by a travel intermediary for the facilitation of reservations shall be sourced to the location indicated by an address for the purchaser of the services that is available from the business records of the travel intermediary.

(b) The gross receipts from the facilitation fees subject to tax shall be that portion of the total charge to any customer of the travel intermediary that is retained by the travel intermediary.

(c) The rate of tax shall be __% of the gross receipts from the facilitation fees.

(d) The travel intermediary shall not be required to separately state or otherwise disclose the facilitation fee, or the amount of tax imposed on the facilitation fee, on any customer invoice or customer receipt so long as it can provide such information from its books and records to the [state taxing authority].

(e) The travel intermediary shall not be required to disclose to its customer the amount paid by the travel intermediary to the hotel operator, including any taxes charged by the hotel operator. The travel intermediary shall represent to its customer that the charge by the travel intermediary includes taxes charged by the hotel operator.

(f) A local jurisdiction may impose a gross receipts tax at a rate of up to ___% of the facilitation fee, but may not impose any other taxes on the facilitation fee. Except as to rate, any local tax existing as of the date of adoption of this section, or enacted after the date of adoption of this section, shall correspond to the provisions of this section.

11/13/06

EXHIBIT 6

200208379L

August 22, 2002

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<**********>

Dear **********:

Thank you for your questions on Internet hotel reservation services. I have restated the hotel tax question below followed by my response. A sales tax specialist will respond to the remaining questions under separate cover.

You are planning to start a Web based online hotel reservation service. Hotel occupancy taxes will be applied to a guest's credit card at the time of reservation. You ask if your company or the hotel will pay taxes to the state.

Whether or not an Internet hotel reservation service company remits hotel occupancy taxes depends on whether the company is acting as an agent for guests or renting hotel rooms to guests. Agents have a contractual relationship to act on behalf of clients, in this case to obtain hotel accommodations. The role of an agent was described in Comptroller's Decision No. 32,105, "As for hotel rooms, these accommodations were not bought in a block by the Petitioner and then resold to the schools. The school purchased the hotel accommodations, using the Petitioner as their agent."

Agents may only reserve the number of rooms requested and room cancellation policies must be those of the hotel and not the agent. Agents pay hotels directly for their clients' rooms, including taxes, and the hotels are responsible for remitting the taxes. Differences in amounts paid hotels and charged clients are commissions and not subject to either hotel or sales taxes.

Hotel reservation service companies that rent hotel rooms to the public, however, are responsible for remitting taxes, but only on the difference between the taxes collected and the taxes paid the hotel. To rent hotel rooms, the companies must have a contractual right to control occupancy of the rooms prior to making them available to the public.

For example, an Internet company contracts for a block of rooms. Marked up rooms are then made available on the company's Web site where members of the public reserve rooms by paying with credit cards. The Internet company controls who occupies the rooms, sets cancellation polices, establishes attrition fees for no shows, and sets room prices. The company is required under Section 156.053, Tax Code, to collect and remit hotel taxes on the amount paid for the room (i.e., the difference paid hotels and collected from guests).

Because the Comptroller's office administers the 6% state hotel occupancy tax and local authorities (cities and counties) administer local hotel taxes, please contact the city and county where you reserve hotel rooms to determine local tax responsibilities.

200209424L

September 12, 2002

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<**********>

Dear **********:

Jerry Bobbitt requested I answer your question on Internet hotel reservation service companies and nexus for hotel occupancy taxes. I have restated the fact situation below followed by my response.

Your client is an out-of-state Internet company that contracts with hotel properties for volume room purchases and guarantees room availability to the public at discounted prices. Rooms are marked up and sold over the Internet. The company sets cancellation policies and requires customers to pay for rooms at the time of booking, after which the company pays the hotels. Business activities are performed outside Texas, either on the Internet or at call centers located outside Texas. You ask if your client has nexus.

The location of the rented rooms is a factor in determining nexus for hotel occupancy tax, not just where a company is located or where business activities are conducted. Your client, per the description, has a contractual right to control occupancy of hotel rooms located in Texas that it rents to the public. The company contracts for a block of rooms, sets room prices, sets cancellation policies, and controls who occupies the rooms.

The company, under Section 156.053 of the Tax Code, is required to collect for the state taxes on the price paid for rooms. Only the difference in taxes collected from guests and paid to hotels should be remitted to the state. Since the Comptroller only administers the 6% state hotel tax, your client will need to contact the cities and counties where the reserved rooms are located to determine local tax responsibilities.

You may obtain copies of statutes, rules, forms, and other tax information from the Comptroller's "Hotel Tax" Web page at http://window.state.tx.us/taxinfo/hotel/index.html.

Thank you for your inquiry. If you have further questions, please e-mail me at donald.dillard@cpa.state.tx.us or call me toll free at 1-800-531-5441, extension 6-6171.

Sincerely,

Donald S. Dillard
Tax Policy Division

200212648L

December 19, 2002

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Dear **********:

Thank you for your letter of December 12, 2002 on Internet hotel reservation services. I have restated the fact situation below followed by my response.

An out-of-state client provides Web-based online hotel reservation services to the public. The client contracts with hotels for a specified room rate rather than for a block of hotel rooms. The client is not guaranteed access to the rooms. Hotels maintain the right to change, on a daily basis, the rate the client pays and the number of rooms available. The client bears no inventory risk for rooms and only pays for rooms that are actually occupied by its customers or for rooms not cancelled in accordance with a hotel's cancellation policy. The client sets room prices for customers and has a separate cancellation policy from that of the hotel. You ask if your client is required to collect and remit hotel occupancy taxes on the amount charged to the customer upon making a room reservation.

Yes, your client is required to collect hotel occupancy tax on the price paid for rooms located in Texas. Only the difference between the tax collected and the tax paid the hotel should be remitted to the state.

Whether or not a hotel reservation service company collects and remits hotel occupancy tax, as stated in STAR document 200208379L, depends on whether the company is acting as an agent for guests in obtaining hotel accommodations or is acting as a hotel that rents rooms to guests. Agents may only reserve the number of rooms requested and room cancellation policies must be those of the hotel and not the agent.

Your client, per the description, is not merely an agent because they have set their own cancellation policy.

Please contact the cities and counties where the reserved rooms are located to determine local tax responsibilities. If I may be of further assistance, please call me toll free at 1-800-531-5441, extension 6-6171. You may also write me at the Tax Policy Division, Post Office Box 13528, Austin, Texas 78711-3528.

Sincerely,

Donald S. Dillard
Tax Policy Division

200310132L

October 7, 2003

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Dear **********:

Thank you for your question on Internet hotel reservation services. David Somerville forwarded your e-mail message to me for a reply.

The key factor to determine the tax responsibility of a hotel reservation service company is whether the company is acting as an agent for guests in obtaining hotel accommodations or is acting as a hotel that rents rooms to guests. Texas hotel tax law does not have a resale provision.

Agents may only reserve the number of rooms requested by clients and room cancellation policies must be those of the hotel and not the agent. Differences in amounts paid hotels and charged clients are commissions and not subject to either hotel or sales taxes.

Reservation service companies that have a contractual right to control occupancy of hotel rooms prior to making them available to the public, however, are responsible for paying taxes to the Comptroller, but only on the difference between the taxes collected and the taxes paid the hotel.

For example, a company contracts for a block of rooms. Rooms are marked up and sold over the Internet. The company requires customers to pay for rooms at the time of booking and has its own cancellation policy. The company controls who occupies the rooms, rents these rooms to the public and, therefore, is required under Texas Tax Code Section 156.053 to collect and remit hotel taxes on the amount paid for the room (i.e., the difference paid hotels and collected from guests).

Since local taxing authorities administer local hotel taxes, Internet hotel reservation services should contact the county and city where rooms are located to determine local hotel tax responsibilities.

Our policy on Internet hotel reservation services was addressed in the October 2002 issue of Tax Policy News and in letters that can be found on the Comptroller's State Tax Automated Research (STAR) system. Our Audit Division is aware of the policy.

Copies of STAR documents, statutes, and other tax information may be found on the Hotel Occupancy Tax Web page at http://window.state.tx.us/taxinfo/hotel/index.html

200507174L

July 6, 2005

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Dear **********:

Thank you for your questions on the taxes and rates applicable for short-term accommodation rentals, such as at hotels, apartments, and motels located in specific localities in Texas.

State and local hotel occupancy tax is due on short-term accommodation rentals, unless an exemption applies. The state hotel tax rate is 6% of the price paid for the room. Most municipalities and authorized counties may impose a tax of up to 7%. In addition, sports/community venue projects may impose a hotel tax of up to 2%, except Dallas County which may impose a hotel venue tax of up to 3%. There is no limit as to the number of venue projects the voters of a city or county may create. See Tax Code Sections 156.052, 351.003, and 352.003 and Local Government Code Section 334.254

Hotel tax may be separately stated or included in the room charge. A statement that tax is included in the room price is required. The law also requires that bills and receipts that include a venue project tax must list each applicable tax rate collected. See Local Government Code, Section 334.256.

Texas hotel tax law authorizes local taxing jurisdictions (cities and counties) to administer local hotel taxes, and not the Comptroller. I am unaware of any current list of local hotel occupancy tax rates in Texas. The only way I know to find a correct local rate is to contact the city and county where a hotel property is located.

An Internet hotel reservation service company that has a contractual right to control occupancy of a room prior to making it available to the public is responsible for paying taxes to the Comptroller, but only on the difference between the taxes collected and the taxes paid the hotel.

For example, a company contracts for a block of rooms. Rooms are marked up and sold over the Internet. The company requires customers to pay for rooms at the time of booking and has its own cancellation policy. The company controls who occupies the rooms, rents these rooms to the public and, therefore, is required under Texas Tax Code Section 156.053 to collect and remit hotel taxes on the

EXHIBIT 7

Pre-7/7/04 Amendments

City of Los Angeles Municipal Code

Chapter II - Licenses, Permits and Business Regulations

ARTICLE 1.7 – TRANSIENT OCCUPANCY TAX

1. **(Added by Ord. No. 127,757, Eff. 7/31/64, Operative 8/1/64.)**

Section

21.7.1 Title.

21.7.2 Definitions.

21.7.3 Tax Imposed.

21.7.4 Exemptions.

21.7.5 Operator's Duties.

21.7.6 Registration.

21.7.7 Reporting and Remitting.

21.7.8 Penalties and Interest.

21.7.9 Additional Powers and Duties of Director of Finance, Etc.

21.7.10 Assessment – Administrative Remedy.

21.7.11 Records.

21.7.12 Refunds.

21.7.13 Actions to Collect.

SEC. 21.7.1. TITLE.

This article shall be known as the Uniform Transient Occupancy Tax Ordinance of The City of Los Angeles.

SEC. 21.7.2. DEFINITIONS.

Except where the context otherwise requires, the definitions given in this section govern the construction of this article.

(a) **Person.** "**Person**" means any individual, firm, partnership, joint venture, association, social club, fraternal organization, joint stock company, corporation, estate, trust, business trust, receiver, trustee, syndicate or any other group or combination acting as a unit.

(b) **Hotel.** "**Hotel**" means any structure, or any portion of any structure, which is occupied or intended or designed for occupancy by transients for dwelling, lodging or sleeping purposes, and includes any hotel, inn, tourist home or house, motel, studio, hotel, bachelor hotel, lodging house, rooming house, apartment house, dormitory, public or private club, or other similar structure or portion thereof, and shall further include any trailer court, camp, park or lot where trailer spaces, or combinations of such spaces and trailers, including mobile homes, are occupied or intended or designed for occupancy by transients for dwelling, lodging or sleeping purposes.

(c) **Occupancy.** "**Occupancy**" means the use or possession, or the right to the use or possession of any room or rooms or space or portion thereof, in any hotel for dwelling, lodging or sleeping purposes. The use or possession or right to use or possess any room or any suite of connecting rooms as office space, banquet or private dining rooms, or exhibit, sample or display space shall not be considered "occupancy" within the meaning of this definition unless the person exercising occupancy uses or possesses, or has the right to use or possess all or any portion of such room or suite of rooms for dwelling, lodging or sleeping purposes.

(d) **Transient. (Amended by Ord. No. 164,961, Eff. 7/24/89, Oper. 8/1/89.)** "**Transient**" means:

1. Any person, other than an individual, who exercises occupancy or is entitled to occupancy by reason of concession, permit, right of access, license or other agreement, for any period of time, or

2. Any individual who personally exercises occupancy or is entitled to occupancy by reason of concession, permit, right of access, license or other agreement, for a period of 30 consecutive calendar days or less, counting portions of calendar days as full days. Any such individual so occupying space in a hotel shall be deemed to be a transient until the period of 30 days has expired unless there is an agreement in writing between the operator and the occupant providing for a longer period of occupancy.

Nothing in this definition or in this article shall be construed as prohibiting the operator of a hotel from refunding or making an allowance of credit to a person who has paid tax as required by this article where it is established that the person was not a "transient" as defined in this section or was exempt from the tax for any other reason, or had for any reason overpaid the tax.

(e) **Rent.** "**Rent**" means the consideration charged, whether or not received, for the occupancy of space in a hotel valued in money, whether to be received in money, goods, labor or otherwise, including all receipts, cash, credits and property and services of any kind or nature, without any deduction therefrom whatsoever. Nothing in this definition shall be construed to mean that rent is charged directly or indirectly for the occupancy of space in a hotel when that space is provided to the occupant as a compliment from the operator and where no consideration is charged to or received from any other person.

(f) **Operator.** "**Operator**" means the person who is proprietor of the hotel, whether in the capacity or owner, lessee, mortgagee in possession, licensee, or any other capacity. Where the operator performs his functions through a managing agent of any type or character other than an employee, the managing agent shall also be deemed an operator for the purposes of this article and shall have the same duties and liabilities as his principal. Compliance with the provisions of this article by either the principal or the managing agent shall however, be considered to be compliance by both.

*** Post-7-7-04 Amendments***

City of Los Angeles Municipal Code

Chapter II - Licenses, Permits, Business Regulations

ARTICLE 1.7
TRANSIENT OCCUPANCY TAX

(Added by Ord. No. 127,757, Eff. 7/31/64, Operative 8/1/64.)

Section

21.7.1 Title.

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SEC. 21.7.1. TITLE.

This article shall be known as the Uniform Transient Occupancy Tax Ordinance of The City of Los Angeles.

SEC. 21.7.2. DEFINITIONS.

Except where the context otherwise requires, the definitions given in this section govern the construction of this article.

(a) **Person.** "**Person**" means any individual, firm, partnership, joint venture, association, social club, fraternal organization, joint stock company, corporation, estate, trust, business trust, receiver, trustee, syndicate or any other group or combination acting as a unit.

(b) **Hotel.** "**Hotel**" means any structure, or any portion of any structure, which is occupied or intended or designed for occupancy by transients for dwelling, lodging or sleeping purposes, and includes any hotel, inn, tourist home or house, motel, studio, hotel, bachelor hotel, lodging house, rooming house, apartment house, dormitory, public or private club, or other similar structure or portion thereof, and shall further include any trailer court, camp, park or lot where trailer spaces, or combinations of such spaces and trailers, including mobile homes, are occupied or intended or designed for occupancy by transients for dwelling, lodging or sleeping purposes.

(c) **Occupancy.** "**Occupancy**" means the use or possession, or the right to the use or possession of any room or rooms or space or portion thereof, in any hotel for dwelling, lodging or sleeping purposes. The use or possession or right to use or possess any room or any suite of connecting rooms as office space, banquet or private dining rooms, or exhibit, sample or display space shall not be considered "occupancy" within the meaning of this definition unless the person exercising occupancy uses or possesses, or has the right to use or possess all or any portion of such room or suite of rooms for dwelling, lodging or sleeping purposes.

(d) **Transient. (Amended by Ord. No. 164,961, Eff. 7/24/89, Oper. 8/1/89.)** "**Transient**" means:

1. Any person, other than an individual, who exercises occupancy or is entitled to occupancy by reason of concession, permit, right of access, license or other agreement, for any period of time, or

2. Any individual who personally exercises occupancy or is entitled to occupancy by reason of concession, permit, right of access, license or other agreement, for a period of 30 consecutive calendar days or less, counting portions of calendar days as full days. Any such individual so occupying space in a hotel shall be deemed to be a transient until the period of 30 days has expired unless there is an agreement in writing between the operator and the occupant providing for a longer period of occupancy.

Nothing in this definition or in this article shall be construed as prohibiting the operator of a hotel from refunding or making an allowance of credit to a person who has paid tax as required by this article where it is established that the person was not a "transient" as defined in this section or was exempt from the tax for any other reason, or had for any reason overpaid the tax.

(e) **Rent.** "**Rent**" means the consideration charged, whether or not received, for the occupancy of space in a hotel valued in money, whether to be received in money, goods, labor or otherwise, including all receipts, cash, credits and property and services of any kind or nature, without any deduction therefrom whatsoever. Nothing in this definition shall be construed to mean that rent is charged directly or indirectly for the occupancy of space in a hotel when that space is provided to the occupant as a compliment from the operator and where no consideration is charged to or received from any other person.

(f) **Operator.** (**Amended by Ord. No. 176,005, Eff. 7/7/04.**) "**Operator**" means the person who is either the proprietor of the hotel or any other person who has the right to rent rooms within the hotel, whether in the capacity of owner, lessee, mortgagee in possession, licensee or any other capacity. The owner or proprietor who is primarily responsible for operation of the hotel shall be deemed to be the principal operator. If the principal operator performs or assigns its functions, in whole or in part, through a managing agent, a booking agent, a room seller or room reseller, or any other agent or contractee, including but not limited to on-line room sellers, on-line room resellers, and on-line travel agents, of any type or character other than an employee, those persons shall be deemed to be secondary operators.

A secondary operator shall be deemed an operator for purposes of this article and shall have the same duties and liabilities as the principal operator, including but not limited to the collection and remittance of the full amount of the tax owed under the provisions of this article to the City. A secondary operator may satisfy its obligations under the provisions of this article by submitting the full amount of tax due under this article, with credit for any taxes remitted to any other operator, either directly to the Director of Finance or through the principal operator. The principal operator may satisfy any potential liability it may have for taxes owed by a secondary operator by entering into a legally binding agreement with that secondary operator to remit the portion of the tax owed by the secondary operator directly to the City. Upon request, the principal operator shall provide the Director of Finance with copies of any such agreements.

Compliance with the provisions of this article by either the principal operator or the secondary operator shall be deemed compliance by both and no provision of this article shall be deemed to require the payment and/or remittance of any amount other than the full amount of the tax owed by the transient.

EXHIBIT 8

International Association of Convention & Visitor Bureaus (IACVB)
2025 M Street NW, Suite 500, Washington, DC 20036
www.iacvb.org • +1.202.296.7888

IACVB Special Report

2005 FORECAST FOR CVB & DESTINATION DECISION MAKING
January 2005
From the desk of ...
IACVB President & CEO, Michael D. Gehrisch
Today, more than ever, it is important to constantly monitor our environment for decision making purposes — we hope this report assists you.

CVBs are missing out on potentially millions of dollars in funding. The coffers of state, local and municipal governments are being drained each year through an obscure loophole in the occupancy or bed tax regulations. Internet companies such as Expedia.com, Hotels.com and others buy hotel room rates at wholesale rates and mark up the prices and sell the rooms to tourists. However, the Internet companies only pay taxes on the wholesale amount, claiming the markup is a service charge for selling the rooms online. Since CVBs and official destination marketing organizations are mainly funded through occupancy taxes levied on hotel guests, legitimate funds are being deferred from city and CVB coffers. IACVB will aggressively support legal action taken by municipal governments that the Internet companies should submit taxes based on the retail amount. IACVB President & CEO Michael Gehrisch agrees with many of the municipal tax officials that "It's not a tax on hotels; it is a tax on tourists. The entire amount of tax should be collected and used to promote the destination and the local infrastructure."

EXHIBIT 9

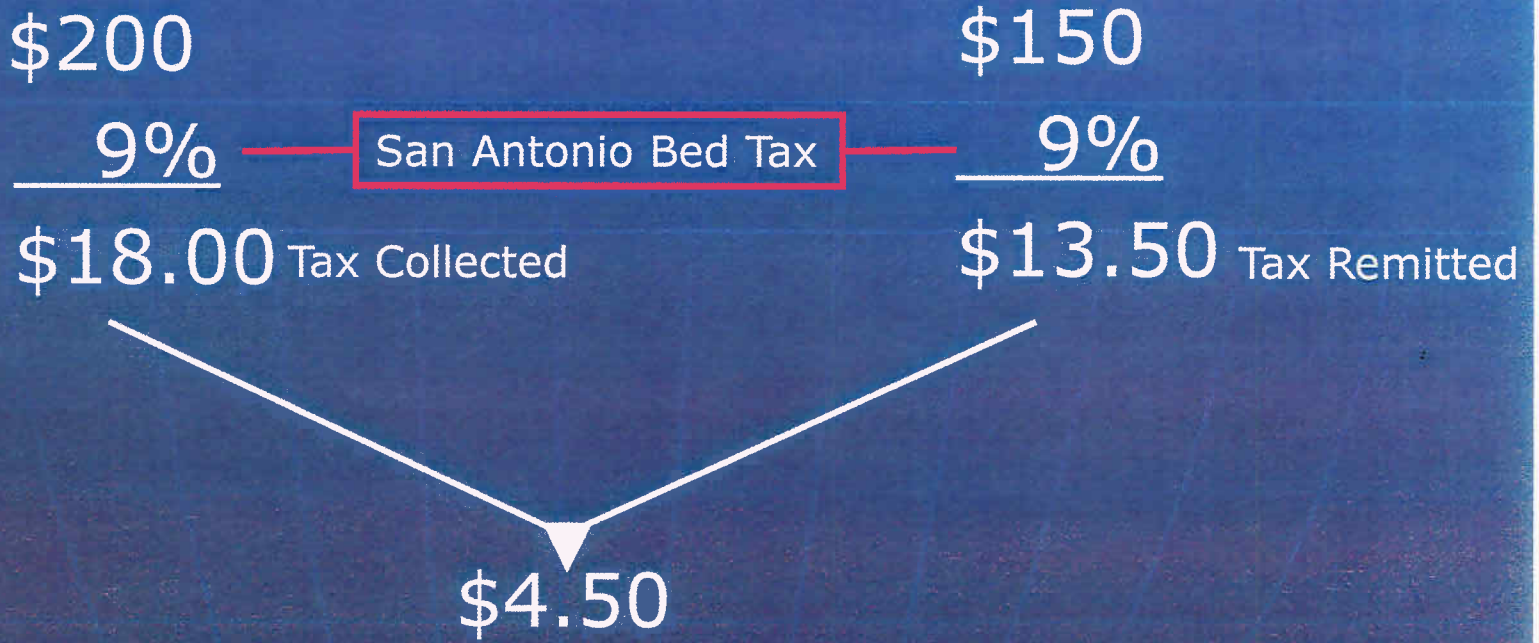
Online Transaction

Retail

Customer Pays OTC

Wholesale

OTC Pays Hotel



Expedia.com

My Iti

Start search over

Back to search results

Rate Details

Expedia Special Rate hotels require that your credit card be **charged for the full payment upon reservation**. Please carefully read the rules and restrictions for your selected hotel.

Need help booking your trip?



Call 1-800-551-2409

Summary	
Renaissance Nashville Hotel	
Check in:	10/29/07
Check out:	10/30/07
# of nights:	1
1 Adult	
10/29:	$289.00/night
Taxes/fees:	$57.09/night
Total:	**$346.09**

QUESTIONS?

- Can I use a credit card with a billing address outside the U.S.?
- Is it safe to buy online?
- Need help with this page?
- Other FAQs

1 Review the rate details

Room/unit type:**Deluxe room sleeps 4**

Guests: 1 adult

Room rate 10/29: $289.00 per night

Taxes & service fees: $57.09 per night Details

Total room cost: $346.09 Expedia Special Rate

I have a coupon. What's a coupon?

2 Review the hotel details

Mon Oct-29-2007 (1 night)

Renaissance Nashville Hotel

611 Commerce St
Nashville, TN 37203
USA

Check in: Mon Oct-29-2007
Check out: Tue Oct-30-2007

RENAISSANCE HOTELS & RESORTS

Hotel class: ☆☆☆☆☆ More lodging info

Room/unit type: Deluxe room

Unless specified otherwise, **rates are quoted in US dollars**.

The price shown above DOES NOT include any applicable hotel service fees, charges for optional incidentals (such as minibar snacks or telephone calls), or regulatory surcharges. The lodging will assess these fees, charges, and surcharges upon check-out.

Your room will be guaranteed for late arrival.

Award points and airline mileage may not be awarded when booking an Expedia Special Rate hotel.

3 Review the rules and restrictions

Property policies

- You must be at least 21 to check in to this hotel.
- Base rate is for 2 guests. See rules and details on guest charges and room capacity
- Your credit card is charged the total cost above at time of purchase. Prices and room availability are not guaranteed until full payment is received. See rules and details on pricing and payment
- Any changes to or cancellation of your reservation may result in fees from $25.00 up to the full cost of your stay. See rules and details on cancellation and

travelocity

Review and Continue

1 Review your selections

Hotel: 1 Room, 1 Night

Renaissance Nashville Hotel

Nashville Area: Downtown Nashville/Vanderbilt
611 COMMERCE ST
Nashville, TN 37203

Room 1: Renaissance Quality Guest Room (1 Adult)

Check in: **Mon, Oct 29, 2007**
Check out: **Tue, Oct 30, 2007**

2 Review the price

Some important information about your hotel.

What you should know:

- All Marriott Brand hotels in North America are now 100 percent smoke free. Guests are permitted to smoke in designated areas outside the building.

Room: Renaissance Quality Guest Room (1 Adult)
Nightly rates are based upon 1 person in the room.
1 Night:

Mon, Oct 29	$289.01
Sum of Nightly Rates:	$289.01
Taxes & Fees:	$48.73
Total for 1 Room:	**$337.74**

I have a Promotional Code: Apply

We will charge you $337.74 (US Dollars) when you complete this reservation.

3 Review the policies

Hotel Policies

- All GoodBuy hotel reservations are prepaid. Your credit card will be charged when you complete your reservation. View further details.
- Any incidental charges will be assessed directly to you by the hotel upon check-out. Examples: Parking, Phone Calls, Room Service.
- Any changes to or cancellation of your GoodBuy reservation may result in fees from $25.00 up to the full cost of your stay. View further details.
- No refunds for unused nights, including those resulting from delayed check-in or early check-out, will be given.
- Guests must be at least 18 to 21 years of age at time of check-in (depending on individual hotel policy) unless accompanied by a parent or guardian. View further details.

Room Policies

- Cancellations or changes occurring within 24 hours of 12:01 am (Central Time) on the day of check-in are subject to a cancellation penalty. This includes a 1 night room charge plus applicable fees and taxes.
- Cancellations or changes made after check-in are subject to a 100% charge.

priceline.com

About Your Hotel

Book Online or Call 1-866-PRICELINE



Renaissance Nashville
611 Commerce Street
Nashville , TN 37203
Hotel Rating: ★★★★
Check-In: Mon, Oct 29, 2007
Check-Out: Tue, Oct 30, 2007
Nights: 1 Night
Rooms: 1 Room

$289 /per room, per night
Total Price for 1 Night : $346

Hotel Details | View Map

Hotel Amenities: 24-hour room service, Accessible facilities, Adventure Science Center,... Hotel Details

Hotel Description: """""""The best of Nashville""""""" The elegant Renaissance Nashville Hotel is setting new standards for convention hotels. Located in the thriving business district of downtown Music City USA, the 673-r... Hotel Details

Select Your Room Type

The room type you select below will apply to all room reservations. Room rates below are based on double occupancy.

Identical room types shown may have different cancellation policies. Please review the Important Information section below.

◉	Deluxe Room, 1 King Or 2 Queen, 250Sqft/23Sqm, Living/Sitting Area, Wired Internet, For A Fee, Coffee/Tea Maker	$289.00 /per night

Currently Selected Room: Websaver - Full pre-payment required upon booking

Reservation Name (Age 21 or Older)

Please enter the name of the person who will be checking into the hotel. The person shown below must present a valid photo ID and credit card at check-in.

	First:	MI:	Last:
Room 1:			

Summary Of Charges

Room Cost (avg. per room, per night):	$289.00
Number of Rooms:	1
Number of Nights:	1
Subtotal:	$289.00
Taxes & Fees:	$57.30
Total Charges*:	**$346.30**

*Prices are in US dollars.

Important Information

lastminute.com

Home Last second deals Flights Hotels Vacations Activities Experiences Gift ideas Going out The boss is wa

Review Hotel Information: Step 1 of 2

PRINT THIS PAGE

1 Review Your Itinerary

RENAISSANCE NASHVILLE HOTEL
611 Commerce Street
Nashville, TN 37203 US

Check-in date: Monday, October 29, 2007
Check-out date: Tuesday, October 30, 2007
Nights: 1 **Rooms:** 1 **Adults:** 1 **Children:** 0
More Search Options Change Your Dates

2 Review Rate Details

Rate type:	us.lastminute.com Best Rate Guaranteed
Room type:	Renaissance Quality Guest Room
Nightly rate breakdown:	289.01 USD for Monday, October 29, 2007
Taxes and Fees :	57.36 USD
Total:	346.37 USD
Special offer code:	Update Total optional

3 Review Hotel Policy Information

- All Save Rate Hotels are prepaid at the time of booking to secure the discounted rate. Your credit card will be charged when you complete your reservation
  - The total charge includes all taxes and fees
  - Save Rate hotel reservations are guaranteed for late arrival
  - 346.37 USD charged to your credit card to secure this special rate. This amount includes room rate, tax recovery charges and applicable service fees and extra person charges, if any.
- Any incidental charges will be assessed directly to you by the hotel at the time of checkout. Examples of incidentals include: parking fees, telephone call, room service, mini-bar snacks and in-room movies.
- Changes to or cancellation of this reservation prior to 24 hours of arrival date will be charged a 25.00 USD fee. Changes to or cancellation of this reservation within 24 hours of arrival date will result in an additional charge per room of 1 night(s) room rate plus tax. No refunds for unused nights, including those resulting from delayed check-in or early check-out, will be given.
- Hotel rates are based on double occupancy unless otherwise noted. Charges for extra persons and / or children may apply and will be due directly to the hotel at the time of check-out.
- Loyalty program award points cannot be guaranteed when booking a Save Rate hotel.

lowestfare.com

Hertz Local Edition

Flights Hotels Cars Vacations Cruises Customer Support

My Hotel Reservations · Name Your Own Price ® · Hotel FAQ's

About Your Hotel



Renaissance Nashville
611 Commerce Street
Nashville , TN 37203
Hotel Rating: ★★★★
Check-In: Mon, Oct 29, 2007
Check-Out: Tue, Oct 30, 2007
Nights: 1 Night
Rooms: 1 Room

$289 /per room, per night

Total Price for 1 Night : $346

Hotel Details View Map

Hotel Amenities: 24-hour room service, Accessible facilities, Adventure Science Center,... Hotel Details

Hotel Description: """""""The best of Nashville""""""" The elegant Renaissance Nashville Hotel is setting new standards for convention hotels. Located in the thriving business district of downtown Music City USA, the 673-r... Hotel Details

Select Your Room Type

The room type you select below will apply to all room reservations. Room rates below are based on double occupancy.
Identical room types shown may have different cancellation policies. Please review the Important Information section below.

◉	Deluxe Room, 1 King Or 2 Queen, 250Sqft/23Sqm, Living/Sitting Area, Wired Internet, For A Fee, Coffee/Tea Maker	**$289.00** /per night

Currently Selected Room: Websaver - Full pre-payment required upon booking

Reservation Name (Age 21 or Older)

Please enter the name of the person who will be checking into the hotel. The person shown below must present a valid photo ID and credit card at check-in.

	First:	MI:	Last:
Room 1:			

Summary Of Charges

Room Cost (avg. per room, per night):	US$289.00
Number of Rooms:	1
Number of Nights:	1
Subtotal:	US$289.00

Taxes & Fees:	US$57.30
Total Charges:	**US$346.30**

Important Information

- **Rate Description:** Websaver - Full pre-payment required upon booking
- **Cancellation Policy:** Cancellations After 12:00PM Local Hotel Time/Day Of Arrival - No Refund. Cancellations Within 48 Hours Prior To 12:00PM Local Hotel Time/Day Of Arrival - First Night's Room, Tax And Fees Plus $25 Cancel Fee Per Room. Cancellations More Than 48 Hours Prior To 12:00PM Local Hotel Time/Day Of Arrival - $25 Cancel Fee Per Room.
- **Guarantee Policy:** Guarantee with valid credit card is required at booking.
- Your credit card is charged the total cost above at time of purchase. Prices and room availability are not guaranteed until full payment is received.
- All rooms are booked for double occupancy (i.e. 2 adults) and accommodations for more than two adults are not guaranteed.
- The reservation holder must present a valid photo ID and credit card at check-in. The credit card is required for any additional local occupancy taxes and incidental charges (phone calls, parking, resort fees, etc.). These charges are not included in the room rate.

Prev Next

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Partner

Steven D. Wolens

(214) 389-5347 | swolens@diamondmccarthy.com

Location:
Dallas, Texas

Education:
Stanford University, 1973
B.A., with distinction

Southern Methodist University
School of Law
(J.D. 1976)

Areas of Practice:
Complex litigation
Class actions
Toxic tort

Admitted to Practice:
Texas

Steven D. Wolens, a Partner at Diamond McCarthy, devotes his practice to complex class action and other litigation. Previously as a senior shareholder at Baron & Budd, P.C. for 20 years, Steve handled complex litigation involving toxic substances and class action. He has been the lead attorney in 3000-plus individual toxic tort cases in Illinois, Ohio, and 20 other states and a lead attorney representing the cities of Los Angeles, San Diego, and San Antonio in state and federal courts against online travel companies for non-payment of transient occupancy taxes.

From 1981 to 2005, he served as a member of the Texas House of Representatives. During his tenure, he authored landmark initiatives that became law including legislation governing partnerships and limited liability corporations, landmark ethics reforms, antitrust laws, and electric deregulation.

He was named six times as one of the "Ten Best Legislators" in the State by *Texas Monthly* magazine. "His intellectual purity - he cares about the principal, not politics - gives him near-absolute credibility on complex issues," the magazine wrote in its July 1993 issue; "Mesmerizing in debate, indefatigable in preparation, incisive in analysis, he is the House's most dreaded foe and most welcome ally." In 2003 through 2007, Steve was named to the Law & Politics Media, Inc. and *Texas Monthly* list of Texas Super Lawyers."

Education:

- Stanford University (B.A., with distinction, 1973)
- Southern Methodist University School of Law (J.D. 1976)

Bar and Court Admissions:

- Texas
- U.S. District Court for the Northern, Southern, and Western Districts of Texas.
- Martindale-Hubbell: highest achievement professional rating - AV Peer Review Rated

Texas Legislature:

- Elected 1980, representing the Dallas area (1981 - 2005)
- Chairman of the House Business and Commerce Committee (1987 - 1992) (Oversaw regulatory and licensing agencies, workers compensation)
- Chairman of the House State Affairs Committee (1997 - 2002)

(State Public Utility Commission, oversaw electricity and telephone regulation, state purchasing, ethics, abortion, gay marriage/adoption/rights, initiative and referendum, term limits)
- Chairman of the House Select Committee on Ethics (2003) (authored and passed complete revision of Texas ethics law)
- Significant Legislation:
- Author - HB 1606 (2003) - Omnibus Ethics Reform
- Sponsor - SB 7 (1999) - Texas Electric Deregulation
- Author - HJR 44 (1997) - Constitutional Amendment allowing home equity loans
- Sponsor - SB 5 (2001) - Texas Emissions Reduction Plan
- Authored & Sponsored - Texas Limited Partnership Act, SB 563 (1987); Limited Liability Corporations Act, HB 278 (1991) (became model for similar legislation in every state); Texas Revised Partnership Act, HB 273 (1993)

Awards and Honors:

- Ten Best Legislators (Texas Monthly; 2003, 1999, 1997, 1993, 1991, 1983)
- Texas Super Lawyers (Law & Politics Media, Inc. and Texas Monthly, 2003 - 2007)
- Outstanding Legislator of the 78th Texas Legislature (AARP Texas Chapter, 2003)
- Legislator of the Year (Texas Renewable Energy Industries Association, 2001)
- Legislator of the Year (National Retail Federation, 1999)
- Legislator of the Year (Texas Municipal League, 1999)
- Public Service Achievement Award (Common Cause; 1999, 1997, 1993, 1991)
- Legislative Crime Fighter of the Year (Greater Dallas Crime Commission, 1993 and 1991)
- Outstanding Legislator (Texas Business, 1983)

Notable Cases:

- *Kochan v. Owens-Corning Fiberglass Corp.*, 242 Ill.App.3d 781, 610 N.E.2d 683, 182 Ill. Dec. 814 (Ill. App. 1993) appeal denied, 152 Ill.2d 561, 622 N.E.2d 1200, 190 Ill. Dec. 891 (1993), cert denied, 5100 S.1177, 114 S.Ct. 1219, 127 L.E.2d. 565 (1994).

Personal:

- Steve was born in Dallas and grew up in Corsicana, where his family founded the K. Wolens department stores. During high school, he served as a page in the U.S. Congress and worked in the Washington office of Congressman Olin Teague. He is married to the immediate former Mayor of the City of Dallas Laura Miller. They have three children.



Partner

Gary Cruciani

(214) 389-5300 | gcruciani@diamondmccarthy.com

Location:
Dallas, Texas

Education:
University of Pittsburgh, 1982
B.A., Economics and Business Administration

University of Tennessee Law School, 1987
with High Honors

Areas of Practice:
Complex business litigation
Plaintiff class actions
Intellectual property and trade secrets
Breach of fiduciary duty and partnership disputes
Antitrust
Oil and gas

Admitted to Practice:
Texas, 1987

Gary has been practicing complex commercial litigation since 1987. Prior to joining Diamond McCarthy as a partner in 2007, Gary practiced at McKool Smith P.C. for fifteen years, where he was one of the founding members of that firm.
Gary has handled a wide variety of complex commercial matters involving numerous different industries and his practice areas include antitrust, oil and gas, tax disputes, intellectual property and trade secrets, construction disputes, breach of fiduciary duty and partnership disputes, and general contract cases. While Gary has extensive experience representing both sides of the docket, his primary emphasis has been representing plaintiffs, either in class actions or in contingent fee business litigation cases.

Gary has tried a number of cases to judgment in both state and federal court and has represented clients in various jurisdictions, including Texas, New York California, Colorado, New Mexico, Mississippi, and others. In addition he has briefed and argued appeals before both state and federal courts.

Cases in which Gary has acted as either lead or co-lead counsel include the following:

- Represented thousands of class members in federal court in a major antitrust lawsuit against Xerox in a case involving alleged monopolistic conduct in the high-volume copier market. The class was certified, and the case resulted in a settlement of $225 million in cash plus substantial non-monetary relief that the court valued as being worth additional hundreds of millions of dollars.

- Represented hundreds of royalty owners in federal court in a class action against Amoco and other oil companies for alleged underpayment of royalties in one of the world's largest carbon dioxide gas units. The class was certified, and the case settled for approximately $50 million in cash plus substantial additional non-monetary relief involving changes in Defendants' business practices.

- Represented a class of bondholders for the Dallas Cowboys in a suit against the Dallas Cowboys and Jerry Jones for alleged breach of the terms of the bond ordinance that had been used to fund the construction of Texas Stadium and for certain equitable relief. The class was certified, and the Defendants discontinued the practices that allegedly violated the ordinance and agreed to substantial additional equitable relief sought by the class members.

- Represented a small software company in a breach of contract and theft of trade secret case involving the security alarm industry, which resulted in a $14 million cash settlement as the jury was about to be selected.

- Secured a judgment in excess of $3 million following a two-week jury trial on behalf of Dr Pepper Bottling Company of Texas in a claim for breach of a franchise agreement against Del Monte Corporation.

- One of a team of lawyers who successfully defended a Dallas-based refining company that was sued for over $200 million in a lawsuit filed by another refining company over a proposed merger that failed to close. Following a several week trial in Delaware Chancery Court, the Court issued a 116-page ruling addressing seminal legal issues under Delaware law, which resulted in a finding that the plaintiff had repudiated the agreement and entered a take-nothing judgment in favor of Gary's client.

- Successfully defended one of the nation's largest private equity firms, Hicks, Muse, Tate & Furst, that was sued for $500 million as a result of a proposed merger that did not close due to an alleged material adverse change. Following Gary's argument of a summary judgment motion that resulted in the dismissal of the plaintiff's primary damages claims, the case settled on favorable terms for Gary's client.

- Represented a large Japanese financial institution in federal court in New York City in a case involving novel and significant legal issues relating to the commercial mortgage backed securities industry. Following a favorable Second Circuit opinion, the parties entered into a confidential settlement on terms that were extremely favorable to Gary's client.

Gary earned a double major in Economics and Business Administration from the University of Pittsburgh in 1982. He received his law degree from the University of Tennessee in 1987, where he graduated with High Honors, was a member of the Order of the Coif, and was an associate editor of the law review. He is a member of the State Bar of Texas and the Fifth Circuit Bar Association. He is admitted to practice before all of the federal courts in Texas, New Mexico, and Colorado as well as the Fifth and Tenth Circuit Courts of Appeal.

The attorney responsible for this website is William T. Reid, IV | Disclaimer
The lawyers resident in all offices, unless otherwise indicated, are not certified by the Texas Board of Legal Specialization