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Attorneys for Plaintiffs Mark Fierro

and Sig Rogich

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CASE NO: A-20-814111-C Department 14

## EIGHTH JUDICIAL DISTRICT COURT

### **CLARK COUNTY, NEVADA**

STATE OF NEVADA Ex. Rel. Mark Fierro and Sig Rogich, CASE NO. DEPT.

Plaintiffs, COMPLAINT

vs. JURY TRIAL DEMAND

Defendants.

ORBITZ WORLDWIDE, LLC; ORBITZ, LLC; ORBITZ, INC.; TRAVELSCAPE, LLC; TRAVELOCITY, INC.; CHEAP TICKETS, INC., EXPEDIA INC., EXPEDIA GLOBAL, LLC; HOTELS.COM LP; HOTWIRE INC.; BOOKING HOLDINGS INC.; PRICELINE.COM LLC; TRAVELWEB LLC; TRAVELNOW.COM INC.; BOOKING.COM USA INC., AGODA INTERNATIONAL USA LLC; HOTEL TONIGHT, INC.; HOTEL TONIGHT, LLC; TRIPADVISOR LLC; TRIPADVISOR INC.; TRIP.COM, INC.; REMARK HOLDINGS, INC.; DOES I through XXX, inclusive and ROE BUSINESS ENTITIES I through XXX, inclusive,

COMES NOW the State of Nevada ex rel. Mark Fierro and Sigmund ("Sig") Rogich, on

behalf of real parties in interest, the counties of Nevada, by and through counsel Michael

ClarkHill\J3633\401629\223770954.v1-4/24/20

Case Number: A-20-814111-C

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Cristalli, Esq. and Dominic P. Gentile, Esq., of Clark Hill PLC, and hereby complains of Defendants as follows:

### **NATURE OF THE ACTION**

- 1. This action is brought in the public interest for and on behalf of the State of Nevada, ex rel. Mark Fierro and Sigmund Rogich pursuant to the Nevada False Claims Act, NRS 357.010 et seg.
- 2. NRS 357.080(1) authorizes private persons to bring civil actions on behalf of themselves and on behalf of the State of Nevada. They are qui tam Plaintiffs also known as Plaintiff-Relators.
- 3. This lawsuit is to recover damages and injunctive relief from Defendants, webbased hotel booking companies, who have knowingly engaged in a common practice/scheme to avoid payment of Nevada's Combined Transient Lodging Tax as required by Nevada law.
- 4. Defendants contract with hotels for the right to purchase rooms at discounted or "wholesale" prices. Defendants then sell the rooms to the public through their internet sites or toll-free numbers at marked-up, "retail" prices, plus certain "tax recovery and fees." Defendants charge the customers' credit cards for the entire amount, which includes the retail price of the room and amounts sufficient to pay occupancy taxes on the retail price of the rooms. The hotels in turn invoice Defendants for the rooms at the discounted price and the applicable occupancy tax rate on the discounted rate.
- 5. For example, an online travel company such as Travelocity, Inc. obtains a room from a hotel at a previously negotiated wholesale price of, for instance \$150. Travelocity, Inc. in turn sells that same hotel room to an occupant over the internet for \$200. Because Travelocity, Inc. controls the occupancy of the hotel room, the amount due to the city by law in this example is the applicable percentage of \$200, or AMOUNT. Travelocity, Inc., however, remits the transient occupancy tax based on the lower wholesale price of \$150, thus creating a loss of AMOUNT to the state for that sale alone.

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#### THE PARTIES AND JURISDICTION

- 6. Plaintiff Mark Fierro is an individual resident of Clark County, Nevada who is entitled to bring this action on his own account and on behalf of the State of Nevada pursuant to NRS 357.080.
- 7. Plaintiff Sigmund Rogich is an individual resident of Clark County, Nevada who is entitled to bring this action on his own account and on behalf of the State of Nevada pursuant to NRS 357.080.
- 8. Defendant Orbitz Worldwide, LLC is a Delaware limited liability company with its principal place of business in Chicago, Illinois. Defendant Orbitz Worldwide, LLC has at all times relevant to this litigation conducted business in this state.
- 9. Defendant Orbitz, LLC is a Delaware limited liability company with its principal place of business in Chicago, Illinois. Defendant Orbitz, LLC has at all times relevant to this litigation conducted business in this state.
- 10. Defendant Orbitz, Inc. is a Delaware corporation with its principal place of business in Chicago, Illinois. Defendant Orbitz, Inc. has at all times relevant to this litigation conducted business in this state.
- 11. Defendant Travelscape, LLC is a Nevada limited liability company

  ("Travelocity") with its principal place of business in Las Vegas, Nevada. Defendant

  Travelscape, LLC has at all times relevant to this litigation conducted business in this state.
- 12. Defendant Travelocity, Inc. is a Nevada corporation with its principal place of business in Las Vegas, Nevada. Defendant Travelocity, Inc. has at all times relevant to this litigation conducted business in this state.
- 13. Defendant Cheap Tickets, Inc. is a Delaware corporation with its principal place of business in Honolulu, Hawaii. Defendant Cheap Tickets, Inc. has at all times relevant to this litigation conducted business in this state.
  - 14. Defendant Expedia, Inc. is a Washington corporation with its principal place of

business in Seattle, Washington. Defendant Expedia, Inc. has at all times relevant to this litigation conducted business in this state.

- 15. Defendant Expedia Global, LLC is a Nevada limited liability company with its principal place of business in Seattle, Washington. Defendant Expedia Global, LLC has at all times relevant to this litigation conducted business in this state.
- 16. Defendant Hotels.com LP is a Texas limited partnership with its principal place of business in Dallas, Texas. Defendant Hotels.com LP has at all times relevant to this litigation conducted business in this state.
- 17. Defendant Hotwire Inc. is a Delaware corporation with its principal place of business in San Francisco, California. Defendant Hotwire Inc. has at all times relevant to this litigation conducted business in this state.
- 18. Defendant Booking Holdings Inc. is a Delaware corporation with its principal place of business in Norwalk, Connecticut. Defendant Booking Holdings Inc. has at all times relevant to this litigation conducted business in this state.
- 19. Defendant Priceline.com LLC is a Delaware limited liability company with its principal place of business in Norwalk, Connecticut. Defendant Priceline.com LLC has at all times relevant to this litigation conducted business in this state.
- 20. Defendant Travelweb LLC is a Delaware limited liability company with its principal place of business in Norwalk, Connecticut. Defendant Travelweb LLC has at all times relevant to this litigation conducted business in this state.
- 21. Defendant Travelnow.com Inc. is a Delaware corporation with its principal place of business in Bellevue, Washington. Defendant Travelnow.com Inc. has at all times relevant to this litigation conducted business in this state.
- 22. Defendant Booking.com (USA) Inc. is a Delaware corporation with its principal place of business in New York, New York. Defendant Booking.com (USA) Inc. has at all times relevant to this litigation conducted business in this state.
  - 23. Defendant Agoda International USA LLC is a Delaware limited liability company

with its principal place of business in New York, New York. Defendant Agoda International USA LLC has at all times relevant to this litigation conducted business in this state.

- 24. Defendant Hotel Tonight, Inc. is a Delaware corporation with its principal place of business in San Francisco, California. Defendant Hotel Tonight, Inc. has at all times relevant to this litigation conducted business in this state.
- 25. Defendant Hotel Tonight, LLC is a Delaware limited liability company with its principal place of business in San Francisco, California. Defendant Hotel Tonight, LLC has at all times relevant to this litigation conducted business in this state.
- 26. Defendant Tripadvisor LLC is a Delaware limited liability company with its principal place of business in Needham, Massachusetts. Defendant Tripadvisor LLC has at all times relevant to this litigation conducted business in this state.
- 27. Defendant Tripadvisor Inc. is a Delaware corporation with its principal place of business in Needham, Massachusetts. Defendant Tripadvisor LLC has at all times relevant to this litigation conducted business in this state.
- 28. Defendant Trip.com, Inc. is a Delaware corporation with its principal place of business in Shanghai, China. Defendant Trip.com, Inc. has at all times relevant to this litigation conducted business in this state.
- 29. Defendant Remark Holdings, Inc. is a Delaware corporation with its principal place of business in Las Vegas, Nevada. Defendant Remark Holdings, Inc. has at all times relevant to this litigation conducted business in this state.
- 30. NRS 357.080(1) authorizes private persons to bring civil actions on behalf of themselves and on behalf of the State of Nevada. They are qui tam Plaintiffs also known as Plaintiff-Relators.
- 31. At all times relevant, Defendants transacted business in the State of Nevada and in the County of Clark by, among other activities, contracting to purchase hotel rooms from hotels, advertising such hotel rooms to customers, and selling/booking such hotel rooms to the general public.

- 32. This Court has jurisdiction over Plaintiffs' claims as they involve claims arising exclusively under Nevada statutes.
- 33. Venue is proper because injuries to Plaintiffs occurred in Clark County, Nevada and because Defendants committed unlawful acts and conducted their unlawful practices in Clark County, Nevada.
- 34. That the true names and capacities, whether individual, corporate, associates, copartnership, or otherwise of Defendants DOES 1 through 100 and ROE Corporations 1 through 100, are unknown to Plaintiffs who therefore sues said defendants by such fictitious names. Plaintiffs are informed and believe and thereon allege that each of the defendants designated as DOES 1 through 100 and ROE Corporations 1 through 100 are responsible in some manner for the events and happenings referred to in this action and proximately caused damages to Plaintiffs as herein alleged.
- 35. That this civil action arising from actions occurring within County of Clark, State of Nevada, involving an amount in controversy in excess of the sum of \$15,000.00, exclusive of costs and interests, thereby giving this Court jurisdiction over this matter.

#### **FACTUAL ALLEGATIONS**

- 36. In Nevada, proprietors of transient lodging as well as their managing agents have a duty to collect and remit tax to the State on rents charged to guests pursuant to Clark County Code 4.08, *et seq.* and Nevada Revised Statute 244A, 244.335, *et seq.*
- 37. The combined transient lodging tax is calculated as a percentage of gross rental receipts and ranges between 10.5% and 13.38%.
- 38. Rent is the amount charged for a sleeping room/space in a transient lodging establishment.
- 39. The transient lodging tax may be collected from the paying transient guests and may be shown as an addition to the rent charged.
  - 40. Upon information and belief, recipients of the tax collected within unincorporated

Clark County include the Las Vegas Convention and Visitors Authority, the Clark County
School District, local transportation districts, the Nevada Department of Tourism, the state o
Nevada general fund, the State Supplemental School Fund, and the Clark County General Fund.

- 41. Defendants are operators of transient lodging establishments and/or managing agents that exercise judgment and discretion in performing the functions of an operator.
- 42. Defendants negotiate with hotels and/or hotel chains for rooms at discounted room rates, then make their inventory of rooms available for rent to customers on web-based search engines at marked-up retail prices.
- 43. Defendants charge customers and receive payment from customers on their websites for the hotel accommodations selected by the customers.
- 44. Defendants set the cancellation policies for the customers' chosen hotel accommodations and determine customers' requests to modify reservations.
- 45. Defendants confirm customers' prepaid reservations for the right to occupy the hotel rooms on the dates selected at the retail prices charged by Defendants.
- 46. Defendants remit taxes to the State based on the lower, discounted room rates that Defendants negotiated with hotels. Defendants have failed to remit the transient lodging tax on the full amount of rent charged to guests that is due and owing to the State of Nevada.
- 47. At all times relevant, Defendants had a duty to collect and remit the transient lodging tax based on the retail price the Defendants charged their customers for use and occupancy of hotel rooms.

### COUNT ONE VIOLATION OF THE FALSE CLAIMS ACT NRS 357.010, et seq.

- 48. Plaintiffs re-allege and incorporate the allegations set forth above as though fully alleged herein.
- 49. Nevada's False Claims Act imposes liability on any person who knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the State or a political subdivision. NRS 357.040(1)(g).

- 50. Defendants have made numerous agreements with hotels for discounted room rates to make their inventory of hotel rooms available to customers on websites for rent at a marked-up retail price.
- 51. Defendants knowingly and improperly avoided and/or decreased their obligation to pay money to the State by failing to remit the transient lodging tax on the full amount of rent charged to guests that is due and owing to the State of Nevada pursuant to Clark County Code 4.08, *et seq.* and Nevada Revised Statute 244A, 244.335, *et seq.*
- 52. Defendants knowingly and intentionally failed to charge, collect and remit the transient lodging tax on the retail price of the rent charged to customers.
- 53. Defendants have engaged in a practice to evade payment of substantial amounts of taxes on rent charged to customers.
- 54. As a direct and proximate result of the aforementioned actions of Defendants, the State of Nevada has been deprived of substantial tax revenues to which the State of Nevada is otherwise entitled. Defendants are liable to the State of Nevada for three times the amount of damages sustained by the State of Nevada in the form of unpaid transient lodging tax, for the costs of bringing this action, and for a civil penalty of not less than \$5,500 or more than \$11,000 for each act constituting a violation.
  - 55. Plaintiffs are entitled to recovery pursuant to NRS 357.210.

# COUNT TWO CONVERSION

- 56. Plaintiffs re-allege and incorporate the allegations set forth above as though fully alleged herein.
- 57. At all times relevant, Plaintiffs on behalf of the State of Nevada have been entitled to and have had the right to the immediate possession of personal property, the taxes due and owing.
  - 58. At all times relevant, the monies due and owing were in the possession of one or

more Defendants who wrongfully exercised dominion and control over the monies owing to Plaintiffs on behalf of the State of Nevada, thereby depriving Plaintiffs the use and the benefit thereof.

- 59. As a direct and proximate result of Defendants' conduct, Plaintiffs have suffered, and will continue to suffer injury including damage in an amount to be determined according to proof at the time of trial.
- 60. In converting these monies, Defendants acted wantonly, willfully, and in knowing disregard of the rights of Plaintiffs. Accordingly, an award of punitive damages is appropriate. Plaintiff re-alleges and incorporates the allegations set forth above as though fully alleged herein.

# COUNT THREE UNJUST ENRICHMENT

- 61. Plaintiffs re-allege and incorporate the allegations set forth above as though fully alleged herein.
- 62. Defendants have obtained a benefit that in equity and good conscience they should not have obtained or possessed because the benefits rightfully belonged to Plaintiffs.
- 63. Defendants are liable to Plaintiffs under the doctrine of unjust enrichment for full amount of taxes collected, plus interest and penalties.

#### COUNT FOUR CONSTRUCTIVE TRUST

- 64. Plaintiffs re-allege and incorporate the allegations set forth above as though fully alleged herein.
- 65. At all times relevant, Plaintiffs' monies were in possession and under the control of Defendants. Defendants have taken this property for their own use and benefit, thereby depriving Plaintiffs of the use and benefit thereof. Plaintiffs have been damaged by their failure to receive the monies.
  - 66. The retention of monies by Defendants would be inequitable.

67. By virtue of Defendants' actions, Defendants hold these funds as constructive trustees for the benefits of the Plaintiffs. The existence and imposition of a constructive trust is essential to the effectuation of justice. The Plaintiffs request an order that Defendants be directed to give possession thereof to Plaintiffs.

#### COUNT FIVE CONSUMER FRAUD/VIOLATION OF NRS 598 DECEPTIVE TRADE PRACTICES ACT

- 68. Plaintiffs re-allege and incorporate the allegations set forth above as though fully alleged herein.
- 69. NRS 41.600(2) defines "consumer fraud" as "(e) a deceptive trade practice as defined in NRS 598.0915 to 598.0925, inclusive."
- 70. Defendants, as previously alleged, performed acts and omitted performing acts, which constitute an unfair trade practice under one or more provisions of NRS 598.0903, *et seq.*, including but not limited to NRS 598.0915(13), (14), and (15).
- 71. Plaintiff was damaged as previously alleged as a direct and proximate result of Defendants' violations of said statutes.

### COUNT SIX DECLARATORY RELIEF

- 72. Plaintiff re-alleges and incorporates the allegations set forth above as though fully alleged herein.
- 73. A dispute has arisen between Plaintiffs and Defendants that is ripe for adjudication concerning the interpretation of Nevada's combined transient lodging tax, the False Claims Act, and the Deceptive Trade Practices Act.
- 74. As a result of Defendants' actions, Plaintiffs have been damaged in an amount in excess of AMOUNT to be determined at the time of trial.
  - 75. As a result of Defendants' actions, it has become necessary to retain an attorney

to prosecute the claims herein; therefore, Plaintiffs are entitled to recover all expenses incurred in this action, including without limitation, all costs and attorney's fees together with interest thereon.

WHEREFORE, Plaintiff State of Nevada ex rel. Mark Fierro and Sigmund Rogich request that judgment be entered as follows:

- 1. That a judgment be entered in favor of Plaintiff State of Nevada ex rel. Mark Fierro and Sigmund Rogich which awards Plaintiff damages in an amount equal to three times the amount of all transient lodging taxes, penalties and interest that Defendants owe as a result of Defendants' violations of NRS 357.040(1)(g), plus mandatory statutory penalties;
- 2. That the Court award Plaintiffs Mark Fierro and Sigmund Rogich on their own behalf between 15 percent and 30 percent of the proceeds collected by the State of Nevada as a result of this action;
  - 3. For costs of suit and reasonable attorney's fees;
- 4. For such additional or alternative relief as this Court deems appropriate under the circumstances.

Respectfully Submitted this 24th day of April, 2020.

### CLARK HILL PLLC

/s/ Michael Cristalli

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