

IN THE SUPREME COURT OF THE STATE OF NEVADA

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,
AGODA INTERNATIONAL USA
LLC, HOTEL TONIGHT INC, HOTEL
TONIGHT LLC,

Petitioners,

v.

EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF
CLARK and the Honorable MARK R.
DENTON,

Respondents,

and

STATE OF NEVADA EX REL. MARK
FIERRO and SIG ROGICH,

Real Parties in Interest.

Supreme Court Case No.

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Elizabeth A. Brown

District Case No. A-20-81411-13
Dept No. 13

Clerk of Supreme Court

**PETITION FOR WRIT OF MANDAMUS OR,
IN THE ALTERNATIVE, PROHIBITION**

Petitioners' Appendix – Volume II

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| Affidavit of Service – Agoda International USA, LLC; Booking.com USA, Inc.; Expedia Global, LLC; Expedia Inc.; Hotels.com LP; Hotwire, Inc.; Orbitz Worldwide, LLC; Travelocity, Inc.; Travelscape, LLC | January 20, 2021 | I PA 021-029 |
| Answer by Agoda International USA LLC to Complaint (Original) | June 30, 2021 | I PA 067-080 |
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| Answer by Hotel Tonight, Inc., Hotel Tonight, LLC to Complaint (Original) | June 30, 2021 | I PA 095-111 |
| Answer by Orbitz Worldwide, LLC, Orbitz, LLC, Orbitz, Inc., Travelscape LLC, Travelocity, Inc., Cheap Tickets, Inc., Expedia, Inc., Expedia Global, LLC, Hotels.com, LP, Hotwire, Inc., and TravelNow.com, Inc. to Complaint (Original) | June 30, 2021 | I PA 112-135 |
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CERTIFICATE OF SERVICE

I hereby certify that this **Petitioners' Appendix – Volume II** was filed electronically with the Nevada Supreme Court on August 2, 2022. Participants in this case who are registered with Eflex will be served by the Eflex system and other parties, listed below, who are not registered with the Eflex will be served with a sealed copy of the foregoing via regular U.S. Mail.

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

STATE OF NEVADA, EX REL.
Mark Fierro and Sig Rogich,

Plaintiffs,

v.

ORBITZ WORLDWIDE, LLC et al.,

Defendants.

Case No.: A-20-814111-B

Dept. No.: XIII

HEARING DATE: March 28, 2022

HEARING TIME: 9:00 AM

**DEFENDANTS' REPLY BRIEF IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT**

1 Defendants respectfully submit this reply brief in further support of their Motion for
2 Summary Judgment pursuant to NRS 357.080(3)(b), commonly referred to as the “government
3 action bar.”

4 INTRODUCTION AND SUMMARY

5 The Parties agree that Defendants’ motion for summary judgment under the Nevada False
6 Claims Act’s (“NFCA”) “government action bar” presents the Court with a pure question of law
7 and that the material facts are undisputed. And while Relators attempt to obfuscate and complicate
8 the relevant legal issues, they are simple and straightforward.

9 The government action bar makes clear that a *qui tam* relator may not maintain an NFCA
10 action if it is based on the same allegations or transactions as a civil action in which the State or
11 political subdivision of the State is a party. Specifically, the statute states:

12 An action may not be maintained by a private plaintiff pursuant to
13 this chapter . . . [i]f the action is based on ***allegations or transactions***
14 that are the subject of a civil action or an administrative proceeding
for a monetary penalty to which ***the State or political subdivision*** is
already a party.

15 NRS 357.080(3)(b) (emphasis added).

16 As set forth in Defendants’ motion papers, each government action bar element is satisfied
17 in this case. Relators are attempting to maintain their *qui tam* suit as private plaintiffs despite the
18 fact that Clark County, a political subdivision, simultaneously is pursuing a civil action—for
19 recovery of tax obligations allegedly imposed by Clark County—that completely overlaps with the
20 allegations or transactions at issue in this action. Indeed, Relators—represented here by the same
21 counsel who are representing Clark County in the separate civil action—expressly have represented
22 to this Court that the Clark County Action involves exactly the same allegations as this Qui Tam
23 Action.¹ Based on these facts and under the plain meaning of the NFCA, Defendants are entitled
24 to judgment as a matter of law.

25
26 ¹ See Plaintiffs’ Opposition to Defendants’ Motion for Bifurcated Discovery , July 14, 2021, at 2-
27 3 (“On May 14, 2021, Clark County, Nevada filed ***a new lawsuit*** [the Clark County Action] ***against***
28 ***the same Defendants*** as named in the [Qui Tam Action] ***based upon the same failure to pay***
transient lodging taxes to various Nevada governmental authorities as is the subject of the [Qui
Tam Action].”) (emphasis added).

1 In their response, Relators improperly stray far afield from the express statutory text,
2 attempting not only to manufacture government action bar elements that do not exist but also to
3 alter the test for its application. Relators erroneously contend that: (1) the government action bar
4 requires both actions to be brought by or on behalf of the *same* political subdivision, and (2) the
5 government action bar does not apply because the legal theories and relief sought in the Clark
6 County Action differ from those in the Qui Tam Action. Both arguments are without merit and
7 easily refuted by the actual text of the statute.

8 First, Relators’ argument that the government action bar only applies where the *same*
9 political subdivision is a party in parallel lawsuits runs squarely counter to the plain statutory
10 language. There is no such requirement in the statute, which does not say the “same” or limit
11 application to “*the* political subdivision,” and Relators cannot amend it now to suit their personal
12 interests.

13 Lacking any support in the statutory language, Relators brazenly contend that the
14 Legislature could not have intended the government action bar to mean what it says. Instead,
15 Relators hypothesize that allowing the government action bar to apply here would mean that a suit
16 “by any county in Nevada that is not a party in a pending qui tam action would bar maintenance of
17 a false claims act qui tam case that was filed on behalf of the State and/or any other county.” Opp.
18 at 8. According to Relators, that would be an “illogical and irrational outcome.” *Id.*

19 Relators’ narrative, however, never could occur because they fail to mention the critical fact
20 that the government action bar only applies to *qui tam* actions brought by private citizens on behalf
21 of the government. The bar does not apply to actions brought *directly* by the State. Thus, an action
22 by a county in Nevada could never prevent the State from *directly* pursuing both NFCA and civil
23 claims based on the same subject matter—it would prevent only suits by private citizens.

24 Indeed, Relators’ own policy argument shows precisely why their interpretation is
25 misguided. The government action bar serves the interests of the government by ensuring that a
26 governmental entity—which can be held accountable by the electorate—decides when and how to
27 pursue claims on behalf of the government and what litigation strategy to employ, rather than
28 ceding that authority to self-interested *qui tam* private plaintiffs who are accountable to no one and

1 who pursue claims for personal gain.²

2 Moreover, Relators' hypothetical need not distract the Court as it has no bearing here. In
3 *this* case, there is complete overlap in the governmental interests, as both suits are against the same
4 defendants and arise from the exact same allegations or transactions—namely, the supposed
5 obligation of Defendants to remit taxes in accordance with Clark County's ordinance. As stated in
6 Defendants' Motion and not disputed by Relators, to the extent this tax applies at all to the
7 Defendants, Defendants owe no direct obligation to the State. Rather, any applicable tax would be
8 paid directly to Clark County as the taxing authority, which would then distribute any remitted
9 taxes among the relevant jurisdictions, including the State. Mot. at 10. As of necessity, therefore,
10 the liability to Clark County and the State—if any—arises out of the very same transaction and the
11 alleged nonpayment of taxes to Clark County in the first instance (*i.e.*, the “allegations or
12 transactions” are it issue in both actions are identical). Thus, notwithstanding application of the
13 government action bar here, if Clark County were to recover the full amount of the tax it is claiming
14 is owed in the separate civil action, the State would receive its portion from Clark County and
15 therefore would be made whole (without having to share any of those proceeds with Relators)
16 through that action.

17 Second, Relators argue that the government action bar does not apply because the Clark
18 County Action involves legal theories and relief that are different from the Qui Tam Action. Opp.
19 at 12-13 (chart comparing the “Claims for Relief” and the “Relief Requested” in the two actions).
20 This argument also is unfounded and belied by the statutory language on its face. The statute only
21 requires that the “allegations or transactions” at issue in the Qui Tam Action are the “subject” of

22 ² The Nevada Supreme Court has stressed the importance and logic of ensuring that government
23 entities make important policy decisions in certain areas, particularly on tax questions. In a *qui tam*
24 case involving reverse false claims allegations arising out of supposed tax obligations, the Supreme
25 Court noted “that, while private plaintiffs may properly bring false claims actions based on tax
26 deficiencies in some circumstances, state law entrusts the primary responsibility for making factual
27 evaluations under, and legal interpretations of, the revenue statutes to the expertise of Nevada's
28 Department of Taxation. Accordingly, the Attorney General's assertion that an FCA action
implicates issues that are better left, initially, to the tax department's expertise constitutes a good
faith basis for dismissal.” *Int'l Game Tech., Inc. v. Second Judicial Dist. Ct.*, 122 Nev. 132, 138,
127 P.3d 1088, 1093 (2006) (approving Attorney General's dismissal of NFCA *qui tam* action
alleging defendant had intentionally failed to charge, collect, or remit taxes due on revenues
received from the licensing of gaming software on poker machines sold in Nevada).

1 the “allegations or transactions” in the Clark County Action. NRS 357.080(3)(b). Nowhere in
2 Relators’ Opposition do they dispute Defendants’ showing that the allegations or transactions are
3 the same in each. Mot. at 4-5 (chart comparing allegations in the two complaints). Nor could they
4 do so in light of their express admissions to the contrary. *See Opp.* at 12-13.

5 The Motion before the Court is a simple one. The Parties agree that there are no disputed
6 material facts and that this Motion presents a pure question of law. The relevant statutory language
7 of the government action bar consists of only one sentence and the text is clear, simple, and applies
8 here. Accordingly, the Court should grant Defendants’ motion for summary judgment and dismiss
9 this case.

10 **MEMORANDUM OF POINTS AND AUTHORITIES**

11 **I. There Are No Disputed Material Facts**

12 The parties are in agreement that there are no material facts in dispute that would preclude
13 summary judgment as to the application of the government action bar. Defendants’ Motion set
14 forth numerous material facts—with citations to supporting evidence—establishing the predicate
15 for dismissal pursuant to NRS 357.080(b)(3). Mot. at 2-6.³ And while Relators spend three pages
16 setting forth the summary judgment standard, *Opp.* at 3-5, they nevertheless agree that there are no
17 disputed factual issues. *Opp.* at 2 (“There are no factual disputes as the parties all acknowledge
18 that both Complaints were filed, and no disagreement exists as to the express factual allegations
19 made therein.”).

20 **II. Each Element of the Government Action Bar Is Satisfied**

21 The government action bar has four elements:

- 22 (1) the NFCA cause of action must be brought under the *qui tam*
23 provisions (*i.e.*, by a private party as opposed to the government);
- 24 (2) the “allegations or transactions” in the *qui tam* action must be the
subject of a separate civil or administrative action;
- 25 (3) the state of Nevada or “political subdivision” of Nevada must be a

26
27 ³ In their Opposition, Relators do not dispute any such facts and merely presented three “relevant
28 and undisputed facts” that are subsumed in Defendants’ “undisputed facts” and noncontroversial in
any event. *Opp.* at 2-3 (identifying the date the Qui Tam Action was filed, the Court’s order on
Defendants’ Motion to Dismiss, and the date the Clark County Complaint was filed).

1 party to the separate civil action; and

2 (4) the relators must be “maintaining” the *qui tam* action
3 notwithstanding the separate civil action.

4 See NRS 357.080(3)(b). These elements—and the facts supporting their application here—are
5 clearly laid out in Defendants’ Motion, and Relators do not dispute that they are satisfied in this
6 case.

7 **III. Relators’ “Policy” Arguments Are Unfounded**

8 Departing from the plain text of the actual government action bar statutory provision,
9 Relators resort to pure policy arguments to suggest that the government action bar contains an
10 additional element, found nowhere in the statutory text. According to Relators, the bar applies only
11 where the *qui tam* action and the civil action are brought by or on behalf of the *same* political
12 subdivision. This argument has no basis in the statutory language and should be rejected out of
13 hand.⁴

14 Relators’ only argument in support of their reading of the government action bar is that the
15 relevant statutory language should be other than what is actually on the books. Specifically,
16 Relators claim that the statutory language, which applies to actions where “the State or political
17 subdivision is already a party,” should be read as “the State or [*the*] political subdivision,” and
18 would thus presumably refer to the *same* political subdivision on whose behalf a *qui tam* action is
19 brought. This argument is without merit.

20 First and foremost, that is not the statutory language. While Relators clearly would like the
21 statute to say “*the* political subdivision” and go so far as to quote the statutory language as such in
22 their brief, Opp. at 10, that is not what the statute says. If the Legislature wanted to refer to a
23 specific political subdivision by inserting the word “the,” it would have done so. Indeed, earlier in
24 the same section, the Legislature did just that. When referring to a plaintiff’s ability to sue under
25 the *qui tam* provisions, the statute expressly states that “[t]he action must be brought in the name

26 ⁴ *Int’l Game Tech.*, 127 P.3d at 1102 (“When interpreting a statute, a court should consider multiple
27 legislative provisions as a whole. The language of a statute should be given its plain meaning
28 unless, in doing so, the spirit of the act is violated. Thus, generally, a court may not look past the
language of a facially clear statute to determine the legislature’s intent.”).

1 of the State or *the* political subdivision, or both.” NRS 357.080(1) (emphasis added). The absence
2 of the word “the” in the government action bar provision means that the Legislature did not intend
3 to refer to a particular political subdivision, and Relators cannot simply re-write the statute to
4 include terms they prefer.⁵ See *Tarango v. State Indus. Ins. Sys.*, 117 Nev. 444, 25 P.3d 175, 180-
5 81 (Nev. 2001) (explaining “[w]hen the language of a statute is plain, its intention must be deduced
6 from such language, and the court has no right to go beyond it” and “conclud[ing] that [based on
7 the statutory language] the intent of the legislature is clear and should be given its ordinary
8 meaning”) (quotations and citations omitted).

9 Second, Relators argue that applying the plain meaning of the government action bar text
10 would “lead to entirely illogical and irrational outcomes.” Opp. at 8. To support this theory,
11 Relators posit the hypothetical of an NFCA action brought by Nevada for taxes owed to the State
12 being pretermitted under the government action bar by an action brought by Storey County for
13 unpaid taxes owed to Storey County. *Id.* But this “parade of horrors” depicted by Relators is
14 fiction.

15 To begin, as noted above, the Court need not speculate about some non-existent cause of
16 action raised by Storey County or any other political subdivision. Indeed, the scenario could not
17 arise because the government action bar applies where the underlying allegations or transactions
18 are the same. The subject of the Qui Tam Action and the Clark County Action is the alleged
19
20

21 ⁵ Relators point to the fact that the Legislature included the term “a” before “political subdivision”
22 in a different section of the NFCA regarding a different doctrine, the public disclosure bar, as
23 support for their position. See NRS 357.100 (referencing “a criminal, civil or administrative
24 hearing to which the State, a political subdivision, or an agent of the State or a political subdivision
25 is a party.”). The fact that the Legislature chose to use the word “a” when listing multiple entities
26 in an entirely different context has no bearing on the clear language of the government action bar
27 text. And in any event, it cannot support Relators’ attempt to literally re-write the statute to add in
28 the word “the” when it simply is not there—particularly when the Legislature actually used the
exact phraseology = Relators would like to add in the very same statutory provision when it actually
intended to refer to a specific political subdivision. *Robert E. v. Justice Court of Reno Twp.*, 99
Nev. 443, 445, 664 P.2d 957, 959 (1983) (“When presented with a question of statutory
interpretation, the intent of the legislature is the controlling factor and if the statute under
consideration is clear on its fact, courts cannot go beyond the statute in determining legislative
intent.”).

1 nonpayment of transient lodging taxes imposed by *the Clark County Code*.⁶ And, as the State does
2 not have its own transient lodging taxes and can only recover such taxes through those imposed by
3 counties—here Clark County—the allegations or transactions in the two cases are identical. In
4 contrast, Storey County would have no cause of action based on this alleged conduct. The complete
5 overlap between the allegations or transactions at issue here is precisely what the government action
6 bar addresses, and it precludes the hypothetical Relators advance.

7 In any event, Relators’ “policy” argument also is misguided because they ignore a key fact.
8 The government action bar applies only to actions by *qui tam* relators—private plaintiffs suing on
9 behalf of the State as opposed to a suit brought directly by the State itself. NRS 357.080(3) (“An
10 action may not be maintained by a *private plaintiff* pursuant to this chapter . . .”) (emphasis added).
11 Thus, if Nevada or any other authorized political subdivision wanted to pursue an NFCA cause of
12 action against a defendant for unpaid taxes or anything else, a separate civil action by Storey County
13 (or any other county) based on the same subject matter as the NFCA cause of action would not fall
14 within the ambit of the government action bar. The bar simply does not apply to an affirmative
15 NFCA action by the State (or a political subdivision if so designated by the Attorney General
16 pursuant to NRS 357.070(2)). So, Relators’ scenario, where Nevada FCA claims are preempted by
17 a County suit, would never occur because the bar only prevents private plaintiffs in *qui tam* suits
18 from proceeding andnot the State itself.⁷

19 Relators also argue that it would be incongruous to afford the Attorney General the right to
20 intervene in and control a *qui tam* action at any time while simultaneously allowing any non-party
21 political subdivision to cause the termination of the *qui tam* action by filing a separate suit based

22 ⁶ The only county tax ordinance referenced in the Qui Tam Action complaint is Clark County Code
23 § 4.08. *See* Complaint, ¶¶ 36, 40, 51; *see also id.* at ¶ 35 (this is a “civil action arising from actions
occurring within the County of Clark, State of Nevada”).

24 ⁷ Defendants do not concede, however, that the State actually has standing to pursue tax recovery
25 of even the State’s portion of the taxes Clark County is statutorily designated to administer and
26 collect. The NFCA liability provision at issue in the Qui Tam Action requires that a defendant
27 knowingly avoid an “obligation” to pay money or property to the State or a political subdivision.
28 NRS 357.040(g). The fact that the taxes in question are collected in the first instance by Clark
County gives rise to a separate legal question as to whether the State of Nevada itself has standing
to sue under the NFCA since the obligation to pay, if any, is owed to Clark County. Defendants
would address this flaw, if necessary, in future proceedings in this matter.

1 on the same subject matter. Opp. at 9. But again, Relators misread the statute.⁸ It is precisely
2 **because** the Attorney General maintains rights in a non-intervened *qui tam* action that the
3 government action bar makes perfect sense. The government action bar—by its terms—applies
4 only where a private plaintiff is maintaining the action. Thus, if the State—which monitors
5 declined *qui tam* cases (as evidenced by the Attorney General’s letter to this Court regarding
6 application of the public disclosure bar)—deems it necessary to protect its interests given a separate
7 civil action brought by a political subdivision based on the same allegations or transactions, it has
8 the means to do so.⁹ The Legislature vested this power where it should be, in the hands of
9 government officials rather than private plaintiffs who are accountable to no one.

10 Finally, Relators overlook the fundamental logic of the Legislature’s decision to enact the
11 government action bar. The Legislature wanted to ensure that the government—not a private
12 plaintiff with purely mercenary interests—controls the manner and means by which the government
13 pursues claims. That makes perfect sense because the government—whether state or political
14 subdivision—is accountable to the people of Nevada and is sworn to act in the public interest. Since
15 the claim belongs to the government, the Legislature affords the government the discretion to
16 pursue claims in the forum and manner it deems appropriate. Here, Clark County—a political
17 subdivision with responsibility to administer and collect the tax, including that portion forwarded

18 ⁸ Relators’ reference to NRS 357.080(2) and the definition of “person,” Opp. at 7, likewise have
19 no relevance to this Motion. Subsection (2) is a separate and distinct “bar” to certain *qui tam* actions
20 and is commonly referred to as the “first-to-file” bar. That bar would apply for instance, to prevent
21 a second *qui tam* action being filed by private plaintiffs based on the facts underlying a previously
22 filed *qui tam* action. No such circumstance is present here, and Relators’ contention that
23 Defendants somehow are relying on the “first-to-file” bar under NRS 357.080(2) as a basis for
24 summary judgment, Opp. at 8, is incorrect.

25 ⁹ Relators’ repeated references in their Opposition to the “public disclosure bar” are off-target.
26 The NFCA’s public disclosure bar applies where the private parties have commenced a *qui tam*
27 action based on allegations or transactions that were disclosed publicly prior to suit. NRS 357.100.
28 While Defendants submit that the public disclosure bar applies to the Qui Tam Action, they have
not yet filed a summary judgment motion based on that separate provision. While both the
government action bar and the public disclosure bar serve the public interest in preventing parasitic
and opportunistic suits by *qui tam* relators, they are distinct and separate defenses found in different
statutory provisions. See, e.g., *People ex rel. Lindblom v. Sears Brands, LLC*, 2018 IL App. (1st)
171468 at ¶ 7 (applying the Illinois False Claims Act government action bar: “The government
action bar prohibits *qui tam* actions that are parasitic in that they duplicate the State’s civil suits or
administrative proceedings without giving the government any useful return, other than the
potential for additional monetary recovery.”).

1 to the State—with full knowledge of this Qui Tam Action, has elected to pursue the same
2 allegations or transactions in a separate civil action. The government action bar offers Clark County
3 the freedom to make that election and to thereby control the manner and means by which any claim
4 against Defendants is pursued.¹⁰

5 **IV. Relators’ Focus on the Relief Sought Is a Red Herring**

6 Relators next argue that the government action bar does not apply because the Qui Tam
7 Action is brought on behalf of the State, whereas the Clark County Action is brought by Clark
8 County, and because the relief sought in each action is different. Opp. at 10-13. Again, Relators’
9 argument fails for the simple reason that the statutory language contains no such requirement. The
10 statute only requires that the “subject” of the two actions be based on the same “allegations or
11 transactions.” NRS 357.080(b)(3).

12 Relators do not dispute that the allegations or transactions underlying both actions are the
13 same, and indeed have admitted as much in prior court filings. *See* Plaintiffs’ Opp. to Def’s Mot.
14 for Bifurcated Discovery, July 14, 2021, at 2-3 (describing Clark County Action as “based upon
15 the same failure to pay transient lodging taxes to various Nevada governmental authorities as is the
16 subject of the [Qui Tam Action].”); Opp. at 1-2 (“The qui tam action alleges, among other things,
17 that Defendants failed to remit the transient lodging tax on the full amount of rent charged to guests
18 that is due and owing to the State of Nevada pursuant to Clark County Code 4.08, *et seq.* and
19 Nevada Revised Statute 244A, 244.335, *et seq.*”). And the Clark County Complaint itself—written
20 by Relators’ counsel—expressly describes the underlying conduct in that case (the non-payment of
21 taxes on individual web-based bookings) as “transactions.” Mot. Exh. 1 at ¶ 3.

22 In advancing their argument, Relators offer a comparison chart with Rows labeled
23 “Defendants,” “Claims for Relief,” and “Relief Requested” and observe that while Defendants are

24 ¹⁰ That decision is consistent with the Nevada Supreme Court’s views that allegations of non-
25 compliance with revenue collection statutes where there is an underlying question of whether taxes
26 are owed in the first instance are not appropriate for resolution via an NFCA complaint. *Int’l Game*
27 *Tech.*, 127 P.3d at 1106 (“Thus a claim that cannot be resolved without evaluating the facts of a
28 particular case under the revenue statutes – for example, when there exists a legitimate dispute on
whether the taxes are actually owed under Title 32 – does not fall within the FCA’s definition of
fraudulent acts or its purpose to expose instances in which a person ‘lies’ to the government, and it
not properly resolved by the courts in the first instance.”).

1 the same in each case, the causes of action and relief requested are different, with the Qui Tam
2 Action seeking recovery for Nevada and the Clark County Action seeking recovery for Clark
3 County. Opp. at 12-13. But none of these factors is relevant to the government action bar. The
4 government action bar, by its express terms, focuses not on the causes of action and relief sought,
5 but on the underlying conduct—the “allegations or transactions” that are the “subject” of each.
6 NRS 357.080(b)(3). The side-by-side chart embedded in Defendants’ Motion makes that exact
7 comparison, showing the often-verbatim identity between the allegations or transactions at issue in
8 both cases. Mot. at 4-5. Indeed, both are focused solely on activity in Clark County and the
9 supposed nonpayment of taxes allegedly due for the facilitation of transient hotel lodging in Clark
10 County. The precise same tax statutes will be analyzed in both cases to determine whether or not
11 any such taxes to Clark County, a portion of which would then be forwarded to the State of Nevada.

12 As such, none of the differences that Relators point to between the Clark County Action
13 and this action has any relevance to the government action bar, and Relators have not (and cannot)
14 dispute that the only relevant facts—the allegations and transactions in both actions—are indeed
15 the same. Accordingly, the government action bar has been satisfied and requires the dismissal of
16 this lawsuit.

17 CONCLUSION

18 For all the foregoing reasons, Defendants request the Court grant the Motion for Summary
19 Judgment and dismiss this action with prejudice pursuant to the NFCA’s government action bar.

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1 Dated: March 21, 2022

2 Respectfully submitted,

3 BALLARD SPAHR LLP

4 By: /s/ Joel E. Tasca

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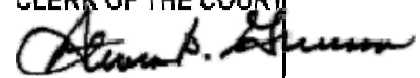
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1 **RTRAN**

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5 DISTRICT COURT
6 CLARK COUNTY, NEVADA

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8 STATE OF NEVADA, EX REL,
9 MARK FIERRO,

10 Plaintiff,

11 vs.

12 ORBITZ WORLDWIDE, et al,

13 Defendants.

CASE#: A-20-814111-B

DEPT. VIII

14 BEFORE THE HONORABLE LINDA M. BELL, CHIEF DISTRICT COURT
15 JUDGE

16 MONDAY, MARCH 28, 2022

17 **RECORDER'S TRANSCRIPT OF HEARING**
18 **DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

19 **APPEARANCES:**

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21 For the Defendants:
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23 Inc., Agoda International USA, LLC,
24 Travelweb, LLC, Booking Holdings,
25 Inc., Hotwire, Inc., Hotels.com, LP,
Expedia Global, LLC, Expedia, Inc.,
Cheap Tickets, Inc., Travelocity, Inc.,
Travelscape, LLC, Orbitz, Inc.,

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5 Expedia, Inc., Cheap Tickets, Inc.,
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Orbitz, Inc., Orbitz, LLC, Orbitz
Worldwide, LLC)

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RECORDED BY: KIMBERLY ESTALA, COURT RECORDER

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Las Vegas, Nevada, Monday, March 28, 2022

[Case called at 9:55 a.m.]

THE COURT: Good morning.

MR. TASCA: Good morning, Your Honor.

MR. GENTILE: Good morning, Your Honor.

MR. CRISTALLI: Good morning, Your Honor.

MR. GENTILE: Your Honor on behalf of the Plaintiff, Dominic Gentile, state bar number 1923, the law firm of Clark Hill.

And with me is Michael Cristalli, who's --

MR. CRISTALLI: 6266, Your Honor.

MR. GENTILE: Figures it had three 6's in it.

MR. CRISTALLI: With a little break in between.

MR. TASCA: Good morning, Your Honor, Joel Tasca from the law firm of Ballard Spahr, representing the Defendants. Bar number's 14124.

THE COURT: And just to disclose, I've known Mr. Gentile, Mr. Cristalli for years. I believe, Ms. Scow [phonetic] worked on the same [indiscernible]. I just -- I know people on both sides of this, which I think makes it even in terms of [indiscernible].

All right, so this is Orbitz's Motion for Judgment.

MR. TASCA: Correct, Your Honor. And I neglected to introduce my colleague, who's on the screen there.

THE COURT: Oh.

MR. TASCA: Doug Baruch from Morgan Lewis, who

1 represents the Expedia Defendants along with me.

2 MR. BARUCH: Good morning, Your Honor.

3 MR. TASCA: So I understand Your Honor is new to this case.
4 And just by way of background, this is a qui tam action, a False Claims
5 Act.

6 THE COURT: I got it, counsel. I read --

7 MR. TASCA: Okay.

8 THE COURT: -- all of it.

9 MR. TASCA: Got it, got it. Well, Your Honor, let me just get
10 to it. And before I do, I want to just make a couple of preliminary points.

11 The first one is that both sides agree that there are no facts in
12 dispute on this motion. It is ripe for decision.

13 THE COURT: Right.

14 MR. TASCA: And so, there's no need for further proceedings
15 or further discovery.

16 The second thing I wanted to note is that this motion gives the
17 Court the opportunity to get rid of the case that has now become
18 completely superfluous with respect to the alleged unpaid taxes that are
19 being sought.

20 THE COURT: So let me ask you a question. Is this the right
21 case to get rid of?

22 MR. TASCA: Well, it is, Your Honor, because the government
23 action bar applies here first of all.

24 And second of all, the Clark County action is an action that is
25 seeking a bigger bucket of unpaid -- alleged unpaid taxes. And so, if the

1 Clark County -- if Clark County succeeds in its action, its recovery will
2 subsume the amounts that the State is seeking in -- relators are seeking
3 on behalf of the State in this action.

4 THE COURT: So when we look at 57.0802, if a private
5 plaintiff brings an action pursuant to this chapter, right, and everybody
6 agrees this was the first case.

7 MR. TASCA: Correct.

8 THE COURT: Yes? Okay. No person other than the
9 Attorney General or the Attorney General's designee may intervene or
10 bring a related action pursuant to this chapter based on the facts
11 underlying the first action.

12 So is this the right case to dismiss?

13 MR. TASCA: I'm sorry, Your Honor. So I'm just not totally
14 sure I follow the point.

15 THE COURT: So the Attorney General did not bring the
16 federal action, right?

17 MR. TASCA: The Attorney General did not bring the federal
18 action, that's correct.

19 THE COURT: I mean, it appears to me that it bars somebody
20 bringing a second action when there's this -- when this case exists if it's
21 based on the facts of this case.

22 MR. TASCA: So I still don't quite follow how the Attorney
23 General -- why that matters exactly. If you go to the text of the
24 government action bar, which is the only --

25 THE COURT: Okay.

1 MR. TASCA: -- the only thing that's at issue in this case, it
2 can be broken out -- down into four basic elements. And these are, you
3 know, paraphrased but barely.

4 So these come right from the text. So, first, it's gotten the
5 private plaintiffs, who brought the False Claims Act. It's got to be a qui
6 tam action.

7 The allegations or transactions in qui tam action must be the
8 subject of a separate civil action.

9 The state or political subdivision must be a party to the
10 separate action. And the relators must be maintaining the qui tam action
11 despite the separate action.

12 So focusing on 357.080(3)(b), which is the -- a provision that
13 stands alone as the government action bar, those are the four elements.
14 And I am happy to go through those in detail, but those four elements
15 are met here.

16 THE COURT: When this was filed, right, the action was not
17 based upon allegations or transactions that were the subject of a civil
18 action.

19 So under your reading of this statute, this case could have
20 been filed three years ago on the eve of trial and a political subdivision
21 files a case somewhere else, and then, this case has to be dismissed.

22 MR. TASCA: That's the language of the statute, Your Honor.
23 And I'll point out that the legislature in this government action bar motion
24 made a deliberate decision to use the word maintain. The private
25 plaintiffs cannot maintain the action if a political subdivision has brought

1 an action.

2 And so, they could have easily used the word bring. We know
3 that they knew how to use the word bring from other parts of the statute.

4 THE COURT: Well, let's talk about the word already.

5 MR. TASCA: Sure.

6 THE COURT: Okay, because if the action is based upon
7 allegations or transactions that are the subject of a civil action or an
8 administrative proceeding for a monetary penalty to which the state or
9 political subdivision is already a party. Not just a party, but already a
10 party.

11 So, to me, that would mean there would have to be an action
12 already. That word has no meaning?

13 MR. TASCA: Well, that's not quite true, Your Honor.

14 THE COURT: So what does already mean then?

15 MR. TASCA: Sure. So already just means that the state or
16 political subdivision has to be a party at the time the government action
17 bar motion is brought.

18 It can't be waiting in the wings and preparing to intervene. It
19 actually has to be a party to the case.

20 And if Your Honor were correct in your interpretation that of
21 already --

22 THE COURT: So then what would be the difference if it said
23 to which the state or political subdivision is a party or if it said which the
24 state or political subdivision is already a party under the way that you're
25 interpreting that? I can't see a difference between those two.

1 MR. TASCA: In other words, your question is why it doesn't
2 say a instead of already?

3 THE COURT: Already has to mean something. It does say a,
4 It says is already a party.

5 MR. TASCA: Right.

6 THE COURT: So already has to have some meaning, right,
7 under the -- under statutory construction. There has to be meaning for
8 that word. The way you're interpreting this, it could be there or not be
9 there --

10 MR. TASCA: Well, I --

11 THE COURT: -- and mean the same thing?

12 MR. TASCA: Your Honor, I think that the already is simply to
13 clarify that because in these actions, we often have a political
14 subdivision or a state as like I said put it before, waiting in the wings and
15 getting ready to intervene but they may not have done so yet.

16 Already's just to clarify that they need to be a party at the time
17 of the government action or motion. The other point, Your Honor --

18 THE COURT: So, okay, but that doesn't answer my question.

19 MR. TASCA: Sure.

20 THE COURT: So how is that different than if it just said, which
21 the state or political subdivision is a party? How would it be different?

22 MR. TASCA: Well, I don't think it would be different, Your
23 Honor, but I think it's a matter of bringing clarity to the situation to
24 distinguish between a situation where a party is -- has not yet intervened
25 and the situation where the party has intervened.

1 And it's actually a party. It's already a party by the time the
2 government action, which was filed.

3 Can I make one further point on this that might be helpful,
4 Your Honor?

5 THE COURT: Yes.

6 MR. TASCA: So if Your Honor's interpretation that you're
7 suggesting were true, then the language of the statute would not say
8 maintain at the beginning of the government action bar. It would just say
9 bring.

10 But it doesn't just say bring. It talks about maintaining an
11 action. And so, it is contemplated under the word maintain that the
12 action that creates the bar may come after the original qui tam action
13 that is being brought.

14 And so, you know, I go back again to the fact that we've got a
15 federal False Claims Act statute that this statute was based on, but the
16 Nevada Legislature carefully adopted everything from that statute except
17 this word bring. And they chose to use the word maintain.

18 So that also has to have meaning. And I would suggest, Your
19 Honor, that that is the way this is intended to be interpreted.

20 We also know the state legislature knew how to say bring in
21 action because they did so in the same statutory section here earlier.

22 THE COURT: Okay.

23 MR. TASCA: Can I answer any other particular questions that
24 Your Honor might have or?

25 THE COURT: No.

1 MR. TASCA: Okay. Then I -- and it sounds like the, you
2 know, you've read everything of those four elements, the only elements
3 that have been disputed by the relators are the same allegations or
4 transactions element.

5 And I think that's an easy one. We -- both this action and the
6 Clark County action are based on alleged nonpayment of taxes for hotel
7 bookings that the Defendants facilitated through their online businesses.

8 THE COURT: Right.

9 MR. TASCA: It's identical. And we laid this out on pages 4
10 and 5 of our opening brief.

11 The counter to that that the relators come up with is to make a
12 bunch of comparisons of their own, but what they're comparing is the
13 relief requested, parties, the claims that were brought.

14 That's not the issue. The issue is transactions or allegations.
15 And on that point, there is no dispute even though relators, which we
16 pointed out in our brief earlier that they admitted that that was met.

17 And then, the final element, the only other element that's
18 contested by the relators is whether the political subdivision's a party to
19 the action that forms the basis for the bar.

20 And here, Clark County is a party to the relevant action.
21 That's clear. And Clark County unquestionably is a political subdivision
22 of the state.

23 Now what they have tried to do is read into the statute --

24 THE COURT: Well, they're not a party here.

25 MR. TASCA: They're not a party here, correct. And what the

1 relators have tried to do is read into a statute that would impose that kind
2 of requirement that it be the same political subdivision.

3 But there's simply nothing in the text of the statute that says it
4 needs to be the same political subdivision.

5 And again, just going back to canons of statutory
6 interpretation, if that's what the legislature meant, they might have used
7 the word the political subdivision.

8 They did not use that word. They used it in other parts of the
9 statute. In that same section of the statute, they said the political
10 subdivision. They didn't say that here. And so, you can't just read
11 words into a statute that simply don't exist.

12 There are also a number of odd sort of policy reasons, parade
13 of horrors that were cited by the relators in their brief. None of those
14 things would ever happen.

15 Storey County couldn't cut off this action. Storey County
16 wouldn't be collecting Clark County taxes. And so, you wouldn't have
17 the same transactions and allegations and things like that. So there
18 would be no fear of there being some sort of government action bar.

19 And the other point I would make on that is that the
20 government action bar only cuts off private plaintiffs, relators from
21 pursuing relief. It doesn't create some bar for the state itself to go ahead
22 for damages that appellant was entitled to.

23 So all of those elements, Your Honor, are met here. And like I
24 said, there are no facts in dispute.

25 And the -- you know, last thing I note is that the language of

1 the statute is mandatory, that if this in fact applies, then this action needs
2 to be dismissed. Thank you, Your Honor.

3 THE COURT: All right, thank you.

4 MR. GENTILE: I have five pages of notes and I think I'm
5 going to only going to need two.

6 THE COURT: I had a question for you before you get there.

7 MR. GENTILE: Sure.

8 THE COURT: So if there's a federal action with Clark County,
9 if they get 100 percent of the taxes, isn't this all covered? Isn't there 100
10 percent overlap between the two actions?

11 MR. GENTILE: Well, there's a couple of things that -- actually,
12 you kind of anticipated one of the things that I was going to point out.

13 We haven't had an early case conference. I mean, we have a
14 new one coming up. And it is clear by investigations that we have
15 conducted since the A.G. approved us going forward with this, that there
16 are other counties that have been damaged by this. And so, we will be
17 asking Judge Denton for an opportunity to amend the complaint at that
18 point in time.

19 But -- and again, to directly answer your question, there would
20 have to be something in the nature of a set off, but let's remember that
21 the case in the federal court is not brought under the Nevada False
22 Claims Act, which is a treble damage action.

23 And based upon our original experts, who now is no longer
24 available because he took a job with the Raiders, there's over a billion
25 dollars in damages in this case under the trebling, about 1.2 billion,

1 which is not going to happen in the federal case.

2 And with regard to the federal case, when we brought this
3 action originally, we sought some of the remedies. And then, obviously,
4 they were dismissed by Judge Denton because a private party relator
5 can't seek those remedies. A private party relator is limited to the
6 monetary damages remedies.

7 So your observation is absolutely appropriate here, but there
8 would be nothing really more than a set off. And in the real world, the
9 likelihood of both of these cases going to trial is not great, but they
10 could. They clearly could.

11 And I do not believe -- well, I don't want to get into what I
12 don't -- I don't want to get into that. I don't want to bring bad luck on
13 myself.

14 Have I answered your question?

15 THE COURT: Yes.

16 MR. GENTILE: Okay, now unfortunately, the Supreme Court
17 of Nevada governs what this Court can do, if it has decided something.

18 And in the case that was cited by my adversaries here and
19 also by us, International Gaming Technology versus 2nd Judicial District
20 Court of Nevada, 127 P.3d, 1088, I'm reading from 1094, one sentence.

21 Generally, a false claims action may not be maintained if
22 administrative or court proceedings involving the same underlying facts
23 and allegations were previously instigated, previously instigated, which
24 speaks directly to what already means in that statute.

25 It deals with sequence. What you observed at the threshold

1 today with regard to the ability of a political subdivision to come in three
2 hours into a piece of litigation and bring an action and cause that piece
3 of litigation to be dismissed clearly was not, number one, what
4 International Gaming Technology held.

5 But number two, wasn't part of what the legislature
6 anticipated. Let me show you how. Let me show you why.

7 If you look at NRS 357.150, which appears nowhere in the
8 pleadings, but it's clearly part of the statute, okay, it reads -- the title of it
9 is "Stay of Discovery by Private Plaintiff".

10 It reads the court may stay discovery by a private Plaintiff for
11 not more than 60 days if the Attorney General --

12 THE COURT: Mr. Gentile, this is not your Opposition?

13 MR. GENTILE: It is not, but it's still part of the statute. You
14 have to construe this statute so with all parts of the statute, you can't
15 take a piece of the statute.

16 THE COURT: Well, I know, but it's not particularly fair to the
17 other side, party to make a new argument right here that was not
18 included in the brief, right?

19 MR. GENTILE: It's a matter of statutory construction, Judge.
20 I don't think that that's a new argument.

21 THE COURT: Well, I think it is.

22 MR. GENTILE: Okay. All right, well, the point is, clearly, if
23 you look at the statute as a whole, all of it, it is clear that there are parts
24 of the statute that contemplated allowing a private plaintiff to go forward
25 and litigate a matter.

1 And if the -- and with another matter pending on the same tax.
2 And if that happens, the Attorney General could come in and ask for a
3 stay.

4 Now why would you ask for a stay if it's supposed to be
5 dismissed? It makes no sense. And so, clearly as a whole, the statute
6 does not anticipate that.

7 But I don't think it really need to go past 080(3)(b) itself
8 because of that word already and because of the International Gaming
9 Technology holding by our Supreme Court.

10 The other case, that is cited by my adversary in this matter,
11 and it's interesting that there was no case cited that's squarely on point
12 with regard to the sequence issue that's before this Court.

13 But in People Ex Rel. Lindblom versus Sears Brands, which is
14 an Illinois Appellate Court, at paragraph 26, the court there speaks about
15 what is the dispositive issue in that case.

16 And I'm reading from that decision. Because the department's
17 audit and the board's informal internal review of the proposed audit
18 adjustments were not an administrative civil money penalty proceeding,
19 that the State was already a party to, the government action bar is not
20 applicable to the relator's qui tam action.

21 So both of the cases that are cited in the moving papers of
22 Orbitz, et al, both of those cases recognize that it's a sequential
23 examination that you have to perform. Both of them do.

24 And the statute itself does. And getting back to International
25 Gaming, that holding, a false claim action may not be maintained if

1 administrative or court proceedings involving the same underlying facts
2 and allegations were previously instigated.

3 I think there's another consideration that the Court has to
4 make when you're trying to think in terms of what did the legislature
5 mean here. And that deals with the whole area of qui tam actions.

6 THE COURT: Well, I don't -- if the statute is [indiscernible]
7 until we don't get to legislative intent.

8 MR. GENTILE: No, no, I'm not talking about legislative intent.
9 I'm talking about the practical effect of qui tam actions. Qui tam actions
10 are private Attorney General actions. That's what they have been called
11 for the last 1,700 years.

12 And there -- they exist because they recognize that the
13 Attorney General -- prosecutorial offices in general have limited
14 resources.

15 If this Court were to hold that by Clark County coming into a
16 lawsuit after the qui tam was filed, three years later under your
17 hypothetical, it would cause the case to be dismissed. Under this
18 statute, that turns the whole system upside-down. Nobody will take one.
19 And so, I submit it.

20 THE COURT: Thank you.

21 And Mr. Tasca?

22 MR. TASCA: Your Honor, I find Mr. Gentile made a lot of new
23 arguments that we hadn't seen before and he was a little bit all over the
24 place, but I just want to point out that he did concede at the very
25 beginning that the same pot of unpaid taxes that are being sought in this

1 case are the subject of the Clark County action.

2 And so, the State will get its taxes if and when the Clark
3 County action proceeds and Clark County's able to recover.

4 But the point here is not so much the relief sought anyway. It
5 is the allegations or transactions. That is the sole focus of the
6 government action bar. And, again, I didn't hear Mr. Gentile say
7 anything about that fact, the fact that that's not met.

8 The only thing that's going to be additional here are sort of,
9 you know, these mercenary damages that would be obtained in a False
10 Claims Act, but there's no need for mercenary damages when the
11 county itself in the other case is going -- is pursuing the exact same
12 relief.

13 And so, those kind of damages are not warranted in a case
14 like this. That's part of the purpose of the government action bar. It's
15 better to have the government control its own case than to have private
16 plaintiffs accountable to no one pursuing the case.

17 And so --

18 THE COURT: But that isn't exactly, I mean, the statute gives
19 the Attorney General quite a bit of input and control, right? It's not just
20 people going wild and deciding to file lawsuits unchecked on behalf of
21 the state of Nevada. That could be quite interesting.

22 MR. TASCA: Well, it certainly does, Your Honor. I would
23 argue that that action supports my point. The fact that the A.G. has so
24 many powers in a False Claims Act, it means that if the A.G. wants to
25 step in at any time and take over, it's going to take over.

1 And so, you know, the private plaintiffs are only allowed to
2 proceed if governmental entities don't deem it appropriate in their
3 judgment to bring an action that is the subject of the False Claims Act.

4 And you see that in both the A.G. provisions of the False
5 Claims Act and the government action bar. It's from the same concept
6 that we see over and over. The government should be controlling.

7 And, Your Honor, with that, I just wanted to throw it to my
8 colleague, Mr. Baruch, to see if he has anything to add.

9 MR. BARUCH: If I may, Your Honor, very briefly, I just want to
10 respond to the point about the International Gaming case.

11 Yes, it's true that in that particular instance, and often as the
12 court has already -- the sequence is as it was in the [indiscernible] case
13 where the civil action filed first and the qui tam action was filed second.

14 So the court was addressing that and saying generally
15 speaking, that's what happens. You know, the government action bar
16 would apply.

17 And that certainly wasn't saying -- certainly didn't hold that the
18 government action bar would have also applied in the sequence where
19 there are qui tam actions filed first and the civil action is filed second.

20 In fact, as Mr. Tasca said the -- you know, the legislature was
21 very, very clear that both circuits, the action cannot be maintained
22 [indiscernible].

23 And Mr. Tasca is right that the -- Nevada borrowed the
24 language from the government action bar from the federal False Claims
25 Act, which does have the sequencing obligation in it.

1 And that's apparent from the language of the federal False
2 Claims Act, which speaks in terms of a private party bringing an action to
3 which the state or the government is already a party.

4 Nevada chose to alter that language materially by switching
5 the language from bring to maintain, thereby giving the government
6 more discretion than that's -- than as what is available under the federal
7 False Claims Act.

8 So the idea is that Nevada has allowed the government to
9 decide when and in what forum the -- its particular claims can be
10 pursued.

11 And once the government decides what that forum is, whether
12 it's before or after a qui tam action is filed, the qui tam action needs to
13 give away.

14 And that's what the language of the government action bar
15 says. So I wouldn't place any limiting interpretation on the International
16 Gaming case, because that was not this scenario.

17 And, yes, everyone would agree that generally speaking,
18 that's the situation and that's the circumstance in which the government
19 action bar most often applied -- arises, but that's not the situation here.

20 And certainly, the International Gaming case under the
21 Nevada Supreme Court was not limiting the application of the
22 government action bar to that sequencing priority.

23 THE COURT: So, in this case, one of the other things that's a
24 little -- I'm not quite sure what the word is, but one of my other concerns
25 in this case is the -- I appreciate that and, you know, it was the question I

1 asked Mr. Gentile, but that Nevada is a lot broader than just Clark
2 County, right?

3 So it doesn't necessarily make sense that we would dismiss
4 the broader case that was filed first, leaving the narrower case filed
5 second.

6 MR. TASCA: Can I speak to that, Your Honor?

7 THE COURT: Yes.

8 MR. TASCA: It -- it's actually the opposite. The only tax that's
9 being pursued in this case is the Clark County tax.

10 And, specifically, it's only the state of Nevada's portion of that
11 Clark County tax that it would ultimately receive that's being sought.

12 The broader case is actually the Clark County suit that's in
13 federal court, because that's seeking the entire Clark County alleged
14 unpaid tax it's owed.

15 THE COURT: Right. Anything else you want?

16 MR. TASCA: No, Your Honor, thank you.

17 THE COURT: Okay.

18 MR. GENTILE: No, Your Honor, thank you.

19 THE COURT: All right. Okay, so I'm going to divide the
20 motion for summary judgment based on [indiscernible]. I had it right
21 here and then it went somewhere else.

22 I do think that the significant meaning to that word already in
23 the statute, that it contemplates first in time, not the State is
24 already -- that the State is a party to an action that exists at the time of
25 the filing of the second qui tam action.

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So on that basis, I am going to deny the motion.

MR. TASCA: Thank you.

THE COURT: Mr. Gentile, if you will prepare the order?

MR. TASCA: We shall, thank you.

MR. GENTILE: Thank you, Your Honor.

[Proceedings concluded at 10:28 a.m.]

* * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.



Chris Hwang
Transcriber



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DISTRICT COURT
CLARK COUNTY, NEVADA

11 STATE OF NEVADA Ex. Rel. Mark Fierro
12 and Sig Rogich,

13 Plaintiffs,

14 vs.

15 ORBITZ WORLDWIDE, LLC., et al.

16 Defendants.

Case No.: A-20-814111-B

Dept. No.: 13

**RELATORS' MOTION FOR LEAVE TO
AMEND COMPLAINT**

(Hearing Requested)

17 Plaintiffs by and through their counsel of record, of the law firm Clark Hill, PLLC, hereby
18 respectfully moves this Court for an Order Granting Relators' Motion for Leave to Amend
19 Complaint.

20 This Motion is based upon and supported by the following Memorandum of Points and
21 Authorities, the pleadings and papers on file and any exhibits attached hereto, and any argument
22 that the Court may allow at the time of hearing.

23 **MEMORANDUM OF POINTS AND AUTHORITIES**

24 **I.**

25 **INTRODUCTION**

26 NRS Chapters 244 and 244A set forth the mandatory obligation of counties within the State
27 of Nevada to adopt ordinances compelling the collection and remittance of transient lodging taxes
28

1 within their respective jurisdictions. This action involves Relators' claim that Defendants, web-
2 based hotel booking companies, have knowingly engaged in a common practice/scheme to avoid
3 payment of Nevada's Combined Transient Lodging Tax as required by Nevada law. The action has
4 been filed as a qui tam action for and on behalf of the State of Nevada to collect the unpaid taxes
5 due the State.

6 To date, the litigation has been confined to procedural motion practice and limited
7 discovery related to the procedural issues raised regarding prior publication and original source.
8 Additionally, Defendants have unsuccessfully sought summary judgment pursuant to the
9 government action bar set forth in NRS 357.080(3)(b). The case is now poised to advance to
10 discovery upon the merits of Relators' claims.

11 However, during the procedural motion practice, it became evident that Defendants interpret
12 Relators' Complaint as dealing solely with claims that Defendants owe transient lodging taxes
13 pursuant to Clark County Ordinances to the exclusion of other transient lodging tax ordinances
14 mandatorily adopted by the board of commissioners for counties other than Clark County.
15 Conversely, Relators believe that Defendants' common practice/scheme to avoid payment of
16 Nevada's Combined Transient Lodging Tax as required by Nevada law extends to county
17 ordinances statewide. Relators intend to seek recovery of transient lodging taxes due to the State of
18 Nevada emanating from any county which has adopted an ordinance imposing upon Defendants
19 the duty to collect and remit the transient lodging taxes. To date, Relators have identified Clark
20 County, Washoe County, Lyon County, Nye County and Douglas County as counties that have
21 adopted such ordinances.

22 To clarify the scope of the instant litigation and to protect any judgment obtained by Relators
23 against Defendants that includes unpaid transient lodging taxes from Washoe County, Lyon
24 County, Nye County, Douglas County and/or any other county that has adopted an ordinance
25 imposing the duty to collect and remit transient lodging taxes on Defendants from future challenge
26 that the Complaint failed to adequately plead a claim for relief or provide adequate notice of claim
27 in compliance with NRCP 8(a)(2), Relators seek permission from the Court to file the [Proposed]
28 First Amended Complaint attached hereto as Exhibit 1. The principal change from the Original

1 Complaint on file herein is the clear and express inclusion of unpaid transient lodging taxes in
2 Washoe County, Lyon County, Nye County, Douglas County and/or any other county that has
3 adopted an ordinance imposing the duty to collect and remit transient lodging taxes on Defendants.
4 Based upon the prior Order of the Court dismissing the Second through sixth claims of the Original
5 Complaint, the [Proposed] First Amended Complaint also eliminates such causes of action and
6 asserts a single claim under the Nevada False Claims Act.

7 There is no delay, bad faith or dilatory motive involved in the filing of this motion nor would
8 granting the motion unduly prejudice the Defendants.

9 II.

10 LEGAL ARGUMENT

11 A. LEGAL STANDARD

12 NRCP 15(a) provides as follows:

13 (a) Amendments Before Trial.

14 (1) *Amending as a Matter of Course.* A party may amend its pleading once
15 as a matter of course within:

16 (A) 21 days after serving it, or

17 (B) if the pleading is one to which a responsive pleading is required, 21
18 days after service of a responsive pleading or 21 days after service of a motion
19 under Rule 12(b), (e), or (f), whichever is earlier.

20 (2) *Other Amendments.* In all other cases, a party may amend its pleading only with
21 the opposing party's written consent or the court's leave. The court should freely give leave
22 when justice so requires.

23 (3) *Time to Respond.* Unless the court orders otherwise, any required response to an
24 amended pleading must be made within the time remaining to respond to the original
25 pleading or within 14 days after service of the amended pleading, whichever is later.

26 NRCP 15(a) clearly provides that leave to amend shall be freely given when justice so
27 requires. The Supreme Court of Nevada has affirmed this principle in multiple cases. *See, e.g.,*
28 *Kantor v. Kantor*, 116 Nev. 886, 891, 8 P.3d 825, 828 (2000) (“After a responsive pleading is filed,
a party may amend his or her pleading only by leave of court or by written consent of the adverse
party; and leave shall be freely given when justice so requires”); *Adamson v. Bowker*, 85 Nev. 115,
121, 450 P.2d 796, 800 (1969) (“Rule 15(a) declares that leave to amend shall be freely given when
justice so requires; this mandate is to be heeded”). It is an abuse of discretion and inconsistent with

1 the Nevada Rules of Civil Procedure to deny a motion for leave to amend without a reasonable
2 justification. *See Adamson*, 85 Nev. at 120, 450 P.2d at 800.

3 Moreover, where the parties are on notice of the facts giving rise to the claims, failure to
4 grant leave to amend may be an abuse of discretion. *Cohen v. Mirage Resorts, Inc.*, 119 Nev. 1,
5 23, 62 P.3d 720, 735 (2003). The Supreme Court determined in *Cohen* that the principle of
6 allowing a party to amend its pleading is so strong that it will even overcome a motion to dismiss
7 made pursuant to NRCP 12(b)(5). The Court reaffirmed that district courts should not dismiss a
8 complaint “unless it appears to a certainty that the plaintiff could prove no set of facts which would
9 entitle him or her to relief. Moreover, when a complaint can be amended to state a claim for relief,
10 leave to amend, rather than dismissal, is the preferred remedy.” *Id.* at 22, 62 P.3d at 734.

13 In determining whether it would be just to grant leave to amend, the Court must consider the
14 position of both parties and the effect that the request will have on them. 6 Wright Miller &
15 Kane, Federal Practice and Procedure: Civil 2d, § 1487. For that reason, the court should only
16 deny a request to amend when the moving party has demonstrated undue delay, bad faith or
17 dilatory motive or where the amendment would unduly prejudice the opposing party. *See Foman*
18 *v. Davis*, 371 U.S. 178 (1962). Equally, an amendment will be denied where it is futile. *Id.*

20 **B. The Court Should Permit Relators to Amend Their Complaint**

21 **1. The Relevant Additions and Deletions to the Proposed Amended Complaint**

22 The Original Complaint on file herein sets forth the gravamen of the case in paragraph 36 as
23 follows:
24

25 36. In Nevada, proprietors of transient lodging as well as their managing agents have
26 a duty to collect and remit tax to the State on rents charged to guests pursuant to
27 Clark County Code 4.08, *et seq.* and Nevada Revised Statute 244A, 244.335, *et*
28 *seq*

1 In their most recently denied Motion for Summary Judgment based upon the so-called
2 government action bar as set forth in NRS 357.080(3)(b), Defendants have argued that the Original
3 Complaint was limited to the collection and remittance of unpaid transient lodging taxes only for
4 transient lodging Defendants have sold or furnished in Clark County, Nevada due to the express
5 inclusion of allegations regarding the Clark County Code.
6

7 However, paragraph 36 of the Original Complaint includes allegations of the “duty to collect
8 and remit tax to the State on rents charged to guests pursuant to ... Nevada Revised Statute 244A,
9 244.335, et seq.” NRS 244.3352 and 244.33561 mandate that the board of county commissioners
10 **SHALL** impose transient lodging taxes in their counties. NRS 244.33565 further mandates that
11 “(e)ach board of county commissioners shall adopt an ordinance that defines the term “transient
12 lodging” for the purposes of all taxes imposed by the board on the rental of transient lodging.”
13

14 While the allegations in paragraph 36 of the Original Complaint certainly expressly identify
15 only the Clark County Code 4.08 et seq., a fair reading of the allegation is that it encompasses all
16 transient lodging taxes that may be due and owing to the State of Nevada pursuant to the mandated
17 ordinances of each county, not just Clark County. The inclusion of allegations of the Clark County
18 Ordinance was illustrative rather than exclusionary.
19

20 Notwithstanding the above and foregoing, Defendants arguments relative to their recently
21 denied Motion for Summary Judgment certainly evidence that the allegations of paragraph 36 of
22 the Original Complaint are susceptible of different interpretations. Thus, the proposed amendment
23 is intended to and does clarify that this action includes transient lodging taxes in all counties of the
24 State that have adopted a mandatory ordinance pursuant to NRS Chapter 244 which imposes upon
25 Defendants the duty to collect and remit the tax. The proposed amendment further expressly
26 identifies additional county ordinances that Relators maintain imposes this duty upon Defendants.
27
28

1 To provide further notice of Relators' claims pursuant to NRCP 8(a), Paragraph 32 of the
2 [Proposed] First Amended Complaint sets forth the following allegation in substitute for the
3 allegation contained in paragraph 36 of the Original Complaint:
4

5 32. In Nevada, proprietors and/or operators of transient lodging establishments as
6 well as their managing agents and persons otherwise engaged in the business of
7 furnishing and/or selling transient lodging to consumers have a duty to collect
8 and remit tax to various counties and the State of Nevada on rents charged to
9 guests pursuant to Clark County Code 4.08, *et seq.*, Washoe County Code
10 25.117 *et seq.*, Douglas County Code 3.14.010 *et seq.*, Lyon County Code,
Chapter 2, Section 4.02.01 *et seq.* and Nye County Code 3.16.010 *et seq.*, such
other county codes as have imposed the duty to collect and remit transient
lodging taxes upon the Defendants. and Nevada Revised Statute 244A, 244.335,
et seq.

11 The remaining additions to the [Proposed] Amended Complaint are made to conform other
12 paragraphs to the additions set forth in paragraph 32. For instance, paragraphs 38-41 of the
13 [Proposed] Amended Complaint identify specific county ordinances which impose the duty to
14 collect and remit transient lodging taxes upon Defendants as follows:

15 38. Pursuant to Washoe County Code 25.117 *et seq.*, Defendants are
16 operators of transient lodging establishments as "on-line discount booking
17 agencies" and/or as managing agents that exercise judgment and discretion
in performing the functions of an operator.

18 39. Pursuant to Douglas County Code 3.14.010 *et seq.*, Defendants are
19 "vendors" who are engaged in the business of furnishing lodging to
20 consumers. *See e.g. City and County of Denver v. Expedia, Inc.*, 405 P.3d
1128 (2017).

21 40. Pursuant to Lyon County Code, Chapter 2, Section 4.02.01 *et seq.*,
22 Defendants are persons "operating, conducting or engaging in a rental
business" of transient lodging within the county.

23 41. Pursuant to Nye County Code 3.16.010 *et seq.*, Defendants are all
24 "persons [engaged] in the business of providing [transient] lodging in the
25 County."
26

27 Paragraphs 51 and 54 of the [Proposed] Amended Complaint likewise add allegations which
28 expressly identify the jurisdictions of Washoe, Douglas, Lyon and Nye counties.

1 The [Proposed] First Amended Complaint deletes the second through sixth causes of
2 action set forth in the Original Complaint. The Court has previously dismissed those causes of
3 action and the deletion merely conforms the amended complaint to reflect rulings that have
4 already occurred in this litigation.
5

6 **2. The Motion to Amend Should Be Granted**

7 In filing this motion, Relators have not demonstrated undue delay, bad faith or dilatory
8 motive. This Court should remain mindful that Defendants initially requested that discovery in
9 this case be bifurcated such that Phase 1 of discovery was limited to resolving procedural issues
10 related to prior publication and/or original source. No discovery into the merits of the case has
11 been authorized or occurred.
12

13 While Phase 1 of discovery was ongoing, the Nevada Attorney General noticed the Court
14 that the Attorney General objected to the dismissal of the case pursuant to the prior
15 publication/original source rule set forth in NRS 357.100. Said notice was fatal to the
16 underlying basis for bifurcating discovery.
17

18 Notwithstanding that the case no longer could be dismissed pursuant to NRS 357.100,
19 Defendants sought dismissal via summary judgment pursuant to another procedural device: i.e.
20 the so-called government action bar set forth in NRS 357.080(3)(b). No discovery into the merits
21 of the action occurred while the Court considered Defendants' summary judgment motion.
22

23 During briefing and arguments on the government action bar, the question of the scope
24 of Relators' claims vis a vis unpaid transient room taxes in counties other than Clark County
25 became crystalized. As set forth above, the allegations in paragraph 36 of the Original
26 Complaint are susceptible of more than one interpretation. Relators maintain that said paragraph
27 36 contains a "a short and plain statement of the claim showing that the pleader is entitled to
28

1 relief” that encompasses ordinances in all counties of Nevada in compliance with NRCP 8(a)(2);
2 however, Relators would rather expressly eliminate any argument regarding this issue early in
3 the litigation and prior to the parties engaging in any discovery on the merits. Indeed, it could
4 be argued that the failure to seek amendment at this stage of the proceedings to clarify this matter
5 would constitute undue delay or dilatory motive if a motion to amend were filed only after
6 discovery on the merits had been ongoing for months.
7

8 Nor would amendment of the Complaint unduly prejudice the Defendants. Under both
9 the Original Complaint and the [Proposed] Amended Complaint, it is alleged that the business
10 model adopted by the Defendants deprives the State of Nevada of transient lodging taxes due
11 and owing pursuant to county ordinances applicable to transient lodging taxes. It is alleged that
12 the same business model is used in all counties in Nevada. Assuming Defendants’ stated
13 understanding that the Original Complaint encompasses only Clark County Ordinances, to be
14 sure, Defendants would have to defend their business model in light of county ordinances which
15 contain differing language as opposed to merely justifying their conduct under the Clark County
16 Code; however, that is not the type of prejudice that would justifying denial of the instant motion.
17
18

19 As to futility, it is unknown whether Defendants will raise the issue and Relators reserve
20 the right to respond to any such argument in their Reply. Given that Washoe County Code
21 makes the "Operator" of the transient lodging establishment liable for collection and remittance
22 of the transient lodging taxes and Section 25.1322 thereof defines “Operator” as including an
23 “on-line discount booking agency,” Relators fail to see how futility would be a legitimate
24 argument in opposition to the instant motion to amend.
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III.

CONCLUSION

For the above and foregoing reasons, the Motion to Amend should be granted.

Dated this 5th day of April 2022.

CLARK HILL PLLC

/s/ Mark S. Dzarnoski, Esq.

A. William Maupin, Esq. (NSBN 1315)

Dominic P. Gentile, Esq. (NSBN 1923)

Michael Cristalli, Esq. (NSBN 6266)

Bert Wuester, Esq (NSBN 5556)

Mark S. Dzarnoski, Esq. (NSBN 3398)

3800 Howard Hughes Parkway, Suite 500

Las Vegas, Nevada 89169

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of April 2022, I served a true and correct copy of the foregoing **RELATORS' MOTION TO AMEND COMPLAINT** via the Court's electronic filing system only, pursuant to the Nevada Electronic Filing and Conversion Rules, Administrative Order 14-2, to all parties currently on the electronic service list.

/s/ Tanya Bain
An Employee of Clark Hill, PLLC

EXHIBIT 1

EXHIBIT 1

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15 Attorneys for Plaintiffs

16 **EIGHTH JUDICIAL DISTRICT COURT**

17 **CLARK COUNTY, NEVADA**

18 STATE OF NEVADA Ex. Rel. Mark Fierro
19 and Sig Rogich,

20 Plaintiffs,

21 vs.

22 ORBITZ WORLDWIDE, LLC; ORBITZ,
23 LLC; ORBITZ, INC.; TRAVELSCAPE,
24 LLC; TRAVELOCITY, INC.; CHEAP
25 TICKETS, INC., EXPEDIA INC., EXPEDIA
26 GLOBAL, LLC; HOTELS.COM LP;
27 HOTWIRE INC.; BOOKING HOLDINGS
28 INC.; PRICELINE.COM LLC;
TRAVELWEB LLC; TRAVELNOW.COM
INC.; BOOKING.COM USA INC., AGODA
INTERNATIONAL USA LLC; HOTEL
TONIGHT, INC.; HOTEL TONIGHT, LLC;
DOES I through XXX, inclusive and ROE
BUSINESS ENTITIES I through XXX,
inclusive,

Defendants.

CASE NO.
DEPT.

**[PROPOSED] FIRST AMENDED
COMPLAINT**

JURY TRIAL DEMAND

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

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

3 **NATURE OF THE ACTION**

4 1. This action is brought in the public interest for and on behalf of the State of
5 Nevada, *ex rel.* Mark Fierro and Sigmund Rogich pursuant to the Nevada False Claims Act,
6 NRS 357.010 *et seq.*

7 2. NRS 357.080(1) authorizes private persons to bring civil actions on behalf of
8 themselves and on behalf of the State of Nevada. They are qui tam Plaintiffs also known as
9 Plaintiff-Relators.

10 3. This lawsuit is to recover damages and injunctive relief from Defendants, web-
11 based hotel booking companies, who have knowingly engaged in a common practice/scheme to
12 avoid payment of Nevada's Combined Transient Lodging Tax as required by Nevada law.

13 4. Defendants contract with hotels for the right to purchase rooms at discounted or
14 "wholesale" prices. Defendants then sell the rooms to the public through their internet sites or
15 toll-free numbers at marked-up, "retail" prices, plus certain "tax recovery and fees." Defendants
16 charge the customers' credit cards for the entire amount, which includes the retail price of the
17 room and amounts sufficient to pay occupancy taxes on the retail price of the rooms. The hotels
18 in turn invoice Defendants for the rooms at the discounted price and the applicable occupancy
19 tax rate on the discounted rate.

20 5. For example, an online travel company such as Travelocity, Inc. obtains a room
21 from a hotel at a previously negotiated wholesale price of, for instance \$150. Travelocity, Inc.
22 in turn sells that same hotel room to an occupant over the internet for \$200. Because Travelocity,
23 Inc. controls the occupancy of the hotel room, the amount due to the city by law in this example
24 is the applicable percentage of \$200, or AMOUNT. Travelocity, Inc., however, remits the
25 transient occupancy tax based on the lower wholesale price of \$150, thus creating a loss of
26 AMOUNT to the state for that sale alone.

27 ///

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.

1 14. Defendant Expedia, Inc. is a Washington corporation with its principal place of
2 business in Seattle, Washington. Defendant Expedia, Inc. has at all times relevant to this
3 litigation conducted business in this state.

4 15. Defendant Expedia Global, LLC is a Nevada limited liability company with its
5 principal place of business in Seattle, Washington. Defendant Expedia Global, LLC has at all
6 times relevant to this litigation conducted business in this state.

7 16. Defendant Hotels.com LP is a Texas limited partnership with its principal place
8 of business in Dallas, Texas. Defendant Hotels.com LP has at all times relevant to this litigation
9 conducted business in this state.

10 17. Defendant Hotwire Inc. is a Delaware corporation with its principal place of
11 business in San Francisco, California. Defendant Hotwire Inc. has at all times relevant to this
12 litigation conducted business in this state.

13 18. Defendant Booking Holdings Inc. is a Delaware corporation with its principal
14 place of business in Norwalk, Connecticut. Defendant Booking Holdings Inc. has at all times
15 relevant to this litigation conducted business in this state.

16 19. Defendant Priceline.com LLC is a Delaware limited liability company with its
17 principal place of business in Norwalk, Connecticut. Defendant Priceline.com LLC has at all
18 times relevant to this litigation conducted business in this state.

19 20. Defendant Travelweb LLC is a Delaware limited liability company with its
20 principal place of business in Norwalk, Connecticut. Defendant Travelweb LLC has at all times
21 relevant to this litigation conducted business in this state.

22 21. Defendant Travelnow.com Inc. is a Delaware corporation with its principal place
23 of business in Bellevue, Washington. Defendant Travelnow.com Inc. has at all times relevant to
24 this litigation conducted business in this state.

25 22. Defendant Booking.com (USA) Inc. is a Delaware corporation with its principal
26 place of business in New York, New York. Defendant Booking.com (USA) Inc. has at all times
27 relevant to this litigation conducted business in this state.
28

1 23. Defendant Agoda International USA LLC is a Delaware limited liability company
2 with its principal place of business in New York, New York. Defendant Agoda International
3 USA LLC has at all times relevant to this litigation conducted business in this state.

4 24. Defendant Hotel Tonight, Inc. is a Delaware corporation with its principal place
5 of business in San Francisco, California. Defendant Hotel Tonight, Inc. has at all times relevant
6 to this litigation conducted business in this state.

7 25. Defendant Hotel Tonight, LLC is a Delaware limited liability company with its
8 principal place of business in San Francisco, California. Defendant Hotel Tonight, LLC has at
9 all times relevant to this litigation conducted business in this state.

10 26. NRS 357.080(1) authorizes private persons to bring civil actions on behalf of
11 themselves and on behalf of the State of Nevada. They are qui tam Plaintiffs also known as
12 Plaintiff-Relators.

13 27. At all times relevant, Defendants transacted business in the State of Nevada and
14 in Clark County, Washoe County, Lyon County, Nye County and Douglas County by, among
15 other activities, contracting to purchase hotel rooms from hotels, advertising such hotel rooms
16 to customers, and selling/booking such hotel rooms to the general public.

17 28. This Court has jurisdiction over Plaintiffs' claims as they involve claims arising
18 exclusively under Nevada statutes.

19 29. Venue is proper because injuries to Plaintiffs occurred substantially in Clark
20 County, Nevada and because Defendants committed unlawful acts and conducted their unlawful
21 practices in, among other counties, Clark County, Nevada.

22 30. That the true names and capacities, whether individual, corporate, associates, co-
23 partnership, or otherwise of Defendants DOES 1 through 100 and ROE Corporations 1 through
24 100, are unknown to Plaintiffs who therefore sues said defendants by such fictitious names.
25 Plaintiffs are informed and believe and thereon allege that each of the defendants designated as
26 DOES 1 through 100 and ROE Corporations 1 through 100 are responsible in some manner for
27
28

1 the events and happenings referred to in this action and proximately caused damages to Plaintiffs
2 as herein alleged.

3 31. That this civil action arising from actions occurring within, among other places,
4 County of Clark, State of Nevada, involving an amount in controversy in excess of the sum of
5 \$15,000.00, exclusive of costs and interests, thereby giving this Court jurisdiction over this
6 matter.

7 **FACTUAL ALLEGATIONS**

8 32. In Nevada, proprietors and/or operators of transient lodging establishments as well
9 as their managing agents and persons otherwise engaged in the business of furnishing and/or
10 selling transient lodging to consumers have a duty to collect and remit tax to various counties
11 and the State of Nevada on rents charged to guests pursuant to Clark County Code 4.08, *et seq.*,
12 Washoe County Code 25.117 *et seq.*, Douglas County Code 3.14.010 *et seq.*, Lyon County
13 Code, Chapter 2, Section 4.02.01 *et seq.* and Nye County Code 3.16.010 *et seq.*, such other
14 county codes as have imposed the duty to collect and remit transient lodging taxes upon the
15 Defendants. and Nevada Revised Statute 244A, 244.335, *et seq.*

16 33. The combined transient lodging tax is calculated as a percentage of gross rental
17 receipts and ranges between 10.5% and 13.38%.

18 34. Rent is the amount charged for a sleeping room/space in a transient lodging
19 establishment.

20 35. The transient lodging tax may be collected from the paying transient guests and
21 may be shown as an addition to the rent charged.

22 36. Upon information and belief, recipients of the tax collected within unincorporated
23 Clark County include the Las Vegas Convention and Visitors Authority, the Clark County
24 School District, local transportation districts, the Nevada Department of Tourism, the state of
25 Nevada general fund, the State Supplemental School Fund, and the Clark County General Fund.
26 Upon information and belief, recipients of the tax collected within Washoe, Douglas, Lyon and
27 Nye counties include the Nevada Department of Tourism and the state of Nevada general fund.
28

1 37. Pursuant to Clark County Code 4.08, *et seq.*, Defendants are operators of transient
2 lodging establishments and/or managing agents that exercise judgment and discretion in
3 performing the functions of an operator.

4 38. Pursuant to Washoe County Code 25.117 *et seq.*, Defendants are operators of
5 transient lodging establishments as “on-line discount booking agencies” and/or as managing
6 agents that exercise judgment and discretion in performing the functions of an operator.

7 39. Pursuant to Douglas County Code 3.14.010 *et seq.*, Defendants are “vendors” who
8 are engaged in the business of furnishing lodging to consumers. *See e.g. City and County of*
9 *Denver v. Expedia, Inc.*, 405 P.3d 1128 (2017).

10 40. Pursuant to Lyon County Code, Chapter 2, Section 4.02.01 *et seq.*, Defendants are
11 persons “operating, conducting or engaging in a rental business” of transient lodging within the
12 county.
13

14 41. Pursuant to Nye County Code 3.16.010 *et seq.*, Defendants are all “persons
15 [engaged] in the business of providing [transient] lodging in the County.”
16

17 42. Defendants negotiate with hotels and/or hotel chains for rooms at discounted
18 room rates, then make their inventory of rooms available for rent to customers on web-based
19 search engines at marked-up retail prices.

20 43. Defendants charge customers and receive payment from customers on their
21 websites for the hotel accommodations selected by the customers.

22 44. Defendants set the cancellation policies for the customers’ chosen hotel
23 accommodations and determine customers’ requests to modify reservations.

24 45. Defendants confirm customers’ prepaid reservations for the right to occupy the
25 hotel rooms on the dates selected at the retail prices charged by Defendants.

26 46. Defendants remit taxes to the State based on the lower, discounted room rates that
27 Defendants negotiated with hotels. Defendants have failed to remit the transient lodging tax on
28 the full amount of rent charged to guests that is due and owing to the State of Nevada.

1 47. At all times relevant, Defendants had a duty to collect and remit the transient
2 lodging tax based on the retail price the Defendants charged their customers for use and
3 occupancy of hotel rooms.

4 **COUNT ONE**
5 **VIOLATION OF THE FALSE CLAIMS ACT**
6 **NRS 357.010, *et seq.***

7 48. Plaintiffs re-allege and incorporate the allegations set forth above as though fully
8 alleged herein.

9 49. Nevada's False Claims Act imposes liability on any person who knowingly
10 conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit
11 money or property to the State or a political subdivision. NRS 357.040(1)(g).

12 50. Defendants have made numerous agreements with hotels for discounted room
13 rates to make their inventory of hotel rooms available to customers on websites for rent at a
14 marked-up retail price.

15 51. Defendants knowingly and improperly avoided and/or decreased their obligation
16 to pay money to the State by failing to remit the transient lodging tax on the full amount of rent
17 charged to guests that is due and owing to the State of Nevada pursuant to Clark County Code
18 4.08, *et seq.*, Washoe County Code 25.117 *et seq.*, Douglas County Code 3.14.010 *et seq.*, Lyon
19 County Code, Chapter 2, Section 4.02.01 *et seq.*, Nye County Code 3.16.010 *et seq.*, such other
20 county codes as have imposed the duty to collect and remit transient lodging taxes upon the
21 Defendants and Nevada Revised Statute 244A, 244.335, *et seq.*

22 52. Defendants knowingly and intentionally failed to charge, collect and remit the
23 transient lodging tax on the retail price of the rent charged to customers.

24 53. Defendants have engaged in a practice to evade payment of substantial amounts
25 of taxes on rent charged to customers.

26 54. As a direct and proximate result of the aforementioned actions of Defendants, the
27 Counties of Clark, Washoe, Douglas, Lyon, Nye and such other counties as have imposed the
28 duty to collect and remit transient lodging taxes upon the Defendants as well as the State of

1 Nevada have been deprived of substantial tax revenues to which the counties and the State of
2 Nevada are otherwise entitled. Defendants are liable to the State of Nevada for three times the
3 amount of damages sustained by the State of Nevada in the form of unpaid transient lodging tax,
4 for the costs of bringing this action, and for a civil penalty of not less than \$5,500 or more than
5 \$11,000 for each act constituting a violation.

6 55. Plaintiffs are entitled to recovery pursuant to NRS 357.210.

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

9 1. That a judgment be entered in favor of Plaintiff State of Nevada ex rel. Mark Fierro
10 and Sigmund Rogich which awards Plaintiff damages in an amount equal to three times the
11 amount of all transient lodging taxes, penalties and interest that Defendants owe as a result of
12 Defendants' violations of NRS 357.040(1)(g), plus mandatory statutory penalties;

13 2. That the Court award Plaintiffs Mark Fierro and Sigmund Rogich on their own
14 behalf between 15 percent and 30 percent of the proceeds collected by the State of Nevada as a
15 result of this action;

16 3. For costs of suit and reasonable attorney's fees;

17 4. For such additional or alternative relief as this Court deems appropriate under the
18 circumstances.

19 Respectfully Submitted this ____ day of ____, 2022.

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

STATE OF NEVADA, EX REL.
Mark Fierro and Sig Rogich,

Plaintiffs,

v.

ORBITZ WORLDWIDE, LLC et al.,

Defendants.

Case No.: A-20-814111-B

Dept. No.: XIII

ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

BASED ON NRS 357.080(3)(b)

1
2 On February 24, 2022, Defendants filed a motion for summary judgment, asserting that the
3 government-action bar, NRS 357.080(3), barred this action from proceeding. Relators responded
4 to Defendants' motion on March 10, 2022, and Defendants filed a reply in support of summary
5 judgment on March 21, 2022. The Court heard argument from the parties on March 28, 2022. For
6 the reasons more fully set out below, the Court DENIES Defendants' motion for summary
7 judgment.

8 FINDINGS OF FACT

9 1. On April 24, 2020, Relators Fierro and Rogich filed this action under the *qui tam*
10 provisions of the Nevada False Claims Act, NRS 357.080(1), on behalf of the State of
11 Nevada, alleging that Defendants knowingly avoided an obligation to remit certain Clark
12 County combined transient lodging tax in connection with lodging transactions in Clark
13 County, Nevada.

14 2. On July 13, 2021, Clark County filed an action in this Court against several of the
15 Defendants in this action, which Defendants removed and is now pending in the United
16 States District Court, District of Nevada, Case No. 2:21-cv-01328-JCM-VCF (the "Clark
17 County Action"). The Clark County Action is based on the same underlying allegations or
18 transactions that are the subject of Relators' *qui tam* action.

19 3. On February 24, 2022, Defendants moved for summary judgment as to the sole
20 remaining count in the Complaint (Count One) based on the Nevada False Claims Act's
21 government-action bar. NRS 357.080(3).

22 CONCLUSIONS OF LAW

23 4. NRS 357.080(3)(b) provides as follows:

24 An action may not be maintained by a private plaintiff pursuant to
25 this chapter . . . [i]f the action is based on allegations or transactions
26 that are the subject of a civil action or an administrative proceeding
27 for a monetary penalty to which the State or political subdivision is
28 already a party.

1 5. The Court finds that because the Clark County Action was filed after this action was
2 commenced, Clark County is not "already a party" to the Clark County Action for purposes
3 of NRS 357.080(3).

4 6. Accordingly, NRS 357.080(3) does not apply, and Defendants' summary judgment
5 motion is denied.

6
7 IT IS SO ORDERED.

Dated this 28th day of April 2022



F26 D66 5106 E97C
Linda Marie Bell
District Court Judge

1 Submitted by the following after providing opposing
2 Counsel an opportunity to review and comment:

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1 **CSERV**

2
3 DISTRICT COURT
4 CLARK COUNTY, NEVADA

5
6 State of Nevada Ex Rel Mark
7 Fierro, Plaintiff(s)

CASE NO: A-20-814111-B

8 vs.

DEPT. NO. Department 13

9 Orbitz Worldwide, LLC,
10 Defendant(s)

11 **AUTOMATED CERTIFICATE OF SERVICE**

12
13 This automated certificate of service was generated by the Eighth Judicial District
14 Court. The foregoing Order was served via the court's electronic eFile system to all
recipients registered for e-Service on the above entitled case as listed below:

15 Service Date: 4/29/2022

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Attorneys for Defendants Hotel Tonight, Inc. and Hotel Tonight LLC

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

STATE OF NEVADA, EX REL.
Mark Fierro and Sig Rogich,

Plaintiffs,

v.

ORBITZ WORLDWIDE, LLC et al.,

Defendants.

Case No.: A-20-814111-B

Dept. No.: XIII

**NOTICE OF ENTRY OF ORDER DENYING DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT BASED ON NRS 357.080(3)(b)**

1 Please take notice that an Order Denying Defendants' Motion for Summary Judgment
2 Based on NRS 357.080(3)(b) was filed on April 29, 2022. A copy is attached hereto as Exhibit A.

3 Dated: April 29, 2022

4 Respectfully submitted,

5 BALLARD SPAHR LLP

6 By: /s/ Maria A. Gall

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9 Maria A. Gall, Esq.
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14 -and-

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24 *Inc., and Travelnow.com, Inc.*

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Hotel Tonight LLC

1 **CERTIFICATE OF SERVICE**

2 I certify that on April 29, 2022, I served the foregoing **NOTICE OF ENTRY OF**
3 **ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT BASED**
4 **ON NRS 357.080(3)(b)** on the following parties registered to receive service by filing the same
5 with the Court's e-filing system:

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11 *Rogich*

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15 *Attorney for Remark Holdings Inc.*

16 /s/ Adam Crawford
17 An Employee of Ballard Spahr LLP
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EXHIBIT A

EXHIBIT A

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STATE OF NEVADA, EX REL.
Mark Fierro and Sig Rogich,

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v.

ORBITZ WORLDWIDE, LLC et al.,

Defendants.

Case No.: A-20-814111-B

Dept. No.: XIII

ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

BASED ON NRS 357.080(3)(b)

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2 On February 24, 2022, Defendants filed a motion for summary judgment, asserting that the
3 government-action bar, NRS 357.080(3), barred this action from proceeding. Relators responded
4 to Defendants' motion on March 10, 2022, and Defendants filed a reply in support of summary
5 judgment on March 21, 2022. The Court heard argument from the parties on March 28, 2022. For
6 the reasons more fully set out below, the Court DENIES Defendants' motion for summary
7 judgment.

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10 provisions of the Nevada False Claims Act, NRS 357.080(1), on behalf of the State of
11 Nevada, alleging that Defendants knowingly avoided an obligation to remit certain Clark
12 County combined transient lodging tax in connection with lodging transactions in Clark
13 County, Nevada.

14 2. On July 13, 2021, Clark County filed an action in this Court against several of the
15 Defendants in this action, which Defendants removed and is now pending in the United
16 States District Court, District of Nevada, Case No. 2:21-cv-01328-JCM-VCF (the "Clark
17 County Action"). The Clark County Action is based on the same underlying allegations or
18 transactions that are the subject of Relators' *qui tam* action.

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20 remaining count in the Complaint (Count One) based on the Nevada False Claims Act's
21 government-action bar. NRS 357.080(3).

22 CONCLUSIONS OF LAW

23 4. NRS 357.080(3)(b) provides as follows:

24 An action may not be maintained by a private plaintiff pursuant to
25 this chapter . . . [i]f the action is based on allegations or transactions
26 that are the subject of a civil action or an administrative proceeding
27 for a monetary penalty to which the State or political subdivision is
28 already a party.

1 5. The Court finds that because the Clark County Action was filed after this action was
2 commenced, Clark County is not "already a party" to the Clark County Action for purposes
3 of NRS 357.080(3).

4 6. Accordingly, NRS 357.080(3) does not apply, and Defendants' summary judgment
5 motion is denied.

6
7 IT IS SO ORDERED.

Dated this 28th day of April 2022



F26 D66 5106 E97C
Linda Marie Bell
District Court Judge

1 Submitted by the following after providing opposing
2 Counsel an opportunity to review and comment:

3 BALLARD SPAHR LLP

4 By: /s/ Joel E. Tasca

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1 **CSERV**

2
3 DISTRICT COURT
4 CLARK COUNTY, NEVADA

5
6 State of Nevada Ex Rel Mark
7 Fierro, Plaintiff(s)

CASE NO: A-20-814111-B

8 vs.

DEPT. NO. Department 13

9 Orbitz Worldwide, LLC,
10 Defendant(s)

11 **AUTOMATED CERTIFICATE OF SERVICE**

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13 This automated certificate of service was generated by the Eighth Judicial District
14 Court. The foregoing Order was served via the court's electronic eFile system to all
recipients registered for e-Service on the above entitled case as listed below:

15 Service Date: 4/29/2022

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11 *Expedia Global, LLC, Hotels.com, LLP,*
and Hotwire Inc.

12 EIGHTH JUDICIAL DISTRICT COURT
13 CLARK COUNTY, NEVADA

14 STATE OF NEVADA, EX REL,
15 Mark Fierro and Sig Rogich,
16 Plaintiffs,

Case No.: A-20-814111-B
Dept. No.: XIII

17 v.

18 ORBITZ WORLDWIDE, LLC, et al.,
19 Defendants.

20 STIPULATION AND ORDER FOR WITHDRAWAL OF DEFENDANTS'
21 OPPOSITION TO RELATORS' MOTION FOR LEAVE TO AMEND

22 Whereas, on April 5, 2022, Relators filed a Motion for Leave to Amend
Complaint (the "Motion");

23 Whereas, on April 19, 2022, Defendants filed an opposition to the Motion;

24 Whereas, on May 2, 2022, Relators filed a reply brief in support of the Motion;

25 Whereas, the Court has scheduled the hearing on the Motion for May 9, 2022,
26 at 9:00 a.m.;

27 Whereas, Defendants have agreed to withdraw their opposition to the Motion
28

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on the following terms, it is hereby stipulated and agreed:

STIPULATION

1. Defendants withdraw their opposition to the Motion, but they reserve all rights to assert any and all objections and defenses to the amended complaint, including but not limited to any arguments asserted in their opposition to the Motion, at later stages of this action, including, but not limited to, on a motion to dismiss Relators' amended complaint; and

2. Defendants shall have until June 6, 2022, or 30 days from the filing of Relators' amended complaint, whichever is later, to answer, move, or otherwise respond to the amended complaint.

3. In view of this Stipulation, the parties respectfully request that the Court vacate the hearing on the Motion currently scheduled for May 9, 2022.

Dated: May 6, 2022

BALLARD SPAHR LLP

CLARK HILL PLLC

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Attorneys for Defendants

Attorneys for Plaintiffs

ORDER

There being no opposition to Relators' Motion for Leave to Amend Complaint (the "Motion"), the Court grants the Motion, and notes that Defendants reserve all rights to assert any and all objections and defenses to the amended complaint, including but not limited to any arguments asserted in their opposition to the Motion, at later stages of this action, including, but not limited to, on a motion to dismiss Relators' amended complaint. It is further ordered that Defendants shall have until June 6, 2022, or 30 days from the filing of Relators' amended complaint, whichever is later, to answer, move, or otherwise respond to the amended complaint. The hearing on the Motion is vacated.

IT IS SO ORDERED.

Given this 7th day of May, 2022

3FB E91 2612 DPOR
Mark R. Denton
District Court Judge

Submitted by:

BALLARD SPAHR LLP

By: /s/ Joel E. Tasca

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Carlton, Mary Kay (LV)

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Put my name on the signature line instead of Cristalli's and then you have my permission to affix my signature to the Stip.

Best Regards,

Mark Dzarnoski
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[External Message]

Hi Mark – Attached is the draft stip. Please let us have any comments, or your approval to /s/ for you. Thanks.

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3 DISTRICT COURT
4 CLARK COUNTY, NEVADA

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6 State of Nevada Ex Rel Mark
7 Fierro, Plaintiff(s)

CASE NO: A-20-814111-B

8 vs.

DEPT. NO. Department 13

9 Orbitz Worldwide, LLC,
10 Defendant(s)

11 **AUTOMATED CERTIFICATE OF SERVICE**

12
13 This automated certificate of service was generated by the Eighth Judicial District
14 Court. The foregoing Stipulation and Order was served via the court's electronic eFile system
to all recipients registered for e-Service on the above entitled case as listed below:

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

19 STATE OF NEVADA, EX REL.
20 *Mark Fierro and Sig Rogich,*

21 Plaintiffs,

22 v.

23 ORBITZ WORLDWIDE, LLC et al.,

24 Defendants.

Case No.: A-20-814111-B

Dept. No.: XVI

HEARING REQUESTED

**DEFENDANTS' MOTION FOR RECONSIDERATION
OR IN THE ALTERNATIVE TO STAY PROCEEDINGS**

1 Defendants respectfully move this Court to reconsider their Motion for Summary Judgment
2 pursuant to NRS 357.080(3)(b), commonly referred to as the “government action bar.” In the
3 alternative, Defendants move to stay this action pending a petition for writ of review to the Nevada
4 Supreme Court to address this threshold government action bar question.

5 **MEMORANDUM OF POINTS AND AUTHORITIES**

6 **I. Introduction and Background**

7 The allegations and transactions at issue in this *qui tam* action – namely Defendants’ alleged
8 non-payment of combined transient lodging taxes on hotel transactions they helped facilitate in
9 Clark County – are the subject of a separate civil action filed by Clark County and pending in
10 federal court. This circumstance triggers application of the Nevada False Claims Act’s (“NFCA”)
11 government action bar, which states:

12 An action may not be maintained by a private plaintiff . . . [i]f the
13 action is based upon allegations or transactions that are the subject
14 of a civil action . . . to which the State or political subdivision is
15 already a party.

16 NRS 357.080(3)(b). Relators cannot maintain their *qui tam* action given Clark County’s civil action
17 against Defendants based on the same allegations or transactions. Relators – who are proceeding
18 in an NFCA case on behalf of the government – must yield to Clark County’s lawsuit.

19 Accordingly, Defendants filed their Motion for Summary Judgment and sought dismissal
20 of this *qui tam* action on the basis of the government action bar. The matter came on for hearing
21 on March 28, 2022 before The Honorable Linda Bell, Chief District Court Judge, who was hearing
22 Judge Denton’s motions calendar that day. In an order signed on April 29, 2022 (“Order”), Judge
23 Bell denied the Motion for Summary Judgment. In the Order, the Court made the following factual
24 findings:

25 1. On April 24, 2020 Relators Fierro and Rogich filed this
26 action under the *qui tam* provisions of the Nevada False Claims Act,
27 NRS 357.080(1), on behalf of the State of Nevada, alleging that
28 Defendants knowingly avoided an obligation to remit certain Clark

1 County combined transient lodging tax in connection with lodging
2 transactions in Clark County, Nevada.

3 2. On July 13, 2021, Clark County filed an action in this Court
4 against several of the Defendants in this action . . . (“the Clark
5 County Action.”). ***The Clark County Action is based on the same***
6 ***underlying allegations or transaction that are the subject of***
7 ***Relators’ qui tam action.***

8 Order at 2 (emphasis added). However, the Court raised *sua sponte* and concluded as a matter of
9 law that the government action bar does not apply for one reason:

10 5. The Court finds that because the Clark County Action was
11 filed ***after*** this [*qui tam*] action was commenced, ***Clark County is***
12 ***not “already a party”*** to the Clark County Action for purposes of
13 NRS 357.080(3).

14 *Id.* at 3 (emphasis added).¹

15 The Court’s decision denying summary judgment rests entirely on its legal conclusion that
16 the term “already a party” means that the government action bar does not apply if the civil action
17 that would otherwise bar the *qui tam* action is filed after commencement of the *qui tam* action
18 because, under the Court’s reasoning, in that circumstance, the state or political subdivision “is not
19 already a party” at the time the *qui tam* action is commenced. Per the Court’s rationale, Defendants’
20 interpretation of the government action bar – namely that there is no temporal or sequential
21 limitation on its application – improperly would render the term “already” superfluous and mere
22 surplusage.

23 Defendants respectfully submit that the Court’s legal conclusion is clearly erroneous and,
24 on that basis, move for reconsideration. As explained below, the term “already” is not controlling
25 here. It is clarifying language that does not alter the meaning of the term “is a party” and cannot
26 be interpreted as creating a substantive statutory requirement, particularly where that requirement

27 ¹ As discussed below, this finding, and this motion for reconsideration, should not be affected by
28 Relators’ forthcoming amended complaint, which purports to add claims on behalf of additional
Nevada counties.

1 would run counter to the Legislature’s clear intent in enacting the statute.

2 In adopting the NFCA, while the Legislature roughly patterned its text on the federal False
3 Claims Act,² the Legislature purposefully and explicitly varied from the federal FCA government
4 action bar text in 31 U.S.C. § 3730(e)(3). In particular, whereas the federal FCA provision does
5 not allow a *qui tam* plaintiff to “bring” (*i.e.*, file or commence) an action, the Legislature replaced
6 that term, such that NFCA does not allow a *qui tam* plaintiff to “maintain” (*i.e.*, continue to pursue)
7 a *qui tam* action.

8 In so doing, the Legislature clearly and affirmatively avoided any temporal or sequential
9 precondition to application of the NFCA’s government action bar. In other words, by changing
10 “bring” to “maintain,” the Legislature did not limit the NFCA government action bar to those cases
11 where a *qui tam* action was brought or commenced *after* the separate action had been pending. The
12 Court’s reading of the statute is the exact opposite.

13 Under these circumstances, reconsideration is warranted. The plain text of the government
14 action bar makes clear that a *qui tam* relator may not maintain NFCA claims based on the same
15 allegations or transactions that the government is pursuing in a separate civil action. The
16 Legislature clearly, and logically, determined that in this scenario – regardless of the sequencing of
17 the suit filings – the government rather than a self-interested private party should pursue the
18 conduct.

19 Finally, in the event that the Court denies reconsideration or affirms its Order, Defendants
20 respectfully move for a stay of proceedings to enable Defendants to seek a writ of review from the
21 Nevada Supreme Court. Such review would be warranted because interpretation of this provision
22 of the NFCA’s government action bar is a matter of first impression. And, under the factors set
23 forth in the Nevada Rules, a stay is appropriate pending that review.

24
25
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28 ² See *Int’l Game Tech., Inc. v. Second Judicial Dist. Court*, 122 Nev. 132, 150 (2006) (“Nevada’s
FCA was expressly modeled after the federal FCA.”).

1 **II. Argument**

2 **1. Standard for Reconsideration**

3 Reconsideration is appropriate when “[s]ubstantially different evidence is subsequently
4 introduced or the decision is clearly erroneous.” *Masonry & Tile Contractors Ass’n v. Jolley, Urga*
5 *& Wirth, Ltd.*, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997). Whether reconsideration is improper
6 would be predicated on whether summary judgment was proper. *Id.*

7 Here, the Court’s denial of summary judgment on the grounds that Clark County was not
8 “already” a party to the separate civil suit when Relators commenced their *qui tam* suit is a clearly
9 erroneous interpretation of the government action bar and contrary to the plain meaning of the
10 statute. Having made the factual findings that the same allegations or transactions are the subject
11 of both the *qui tam* action and the Clark County Action, Order at 2, the only remaining inquiry is
12 whether Relators are “maintaining” their *qui tam* suit. There is no dispute that they are. This fact
13 triggers the government action bar, mandates dismissal of the *qui tam* action, and warrants
14 reconsideration of the Court’s order denying summary judgment.³

15 **2. Clarifying Language is not Subject to the Surplusage Canon**

16 The Court’s order hinges on its interpretation of the term “already” in the government action
17 bar. Order at 2. Implicitly referencing the canon against surplusage – which generally provides
18 that statutes should be construed to avoid rendering words and phrases superfluous – the Court
19 determined that the Legislature’s use of “already” means that the bar cannot apply where the
20 separate civil action was filed by the government after the *qui tam* action.

21 But the canon against surplusage does not apply here. The government action bar’s
22 application does not depend on the *sequence* of the two suits – the *qui tam* action and the separate
23 civil action – but merely the *existence* of the two suits. And the term “already” does not create any
24 such sequencing standard. There is no meaningful difference between whether an entity “is a party”
25 and whether an entity “already is a party.” The term “already” simply provides emphasis and clarity
26
27

28 ³ Reconsideration also is warranted given that the Court raised this interpretation *sua sponte*,
without the benefit of full briefing by the parties.

1 to the term “party.”⁴

2 The Supreme Court has observed that “instances of surplusage are not unknown” in
3 statutory text. *See, e.g., Arlington Cent. School Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 299
4 n.1 (2006). And, in circumstances where the purportedly superfluous language merely clarifies
5 other statutory provisions, the canon against surplusage yields because legislatures often use
6 language that adds little to the statute itself but instead clarifies the legislature’s intent. *See Pugliese*
7 *v. Pukka Dev., Inc.*, 550 F.3d 1299, 1303 (11th Cir. 2008) (*citing BP Am. Prod. Co. v. Burton*, 549
8 U.S. 84, 98 (2006)). Such clarifying and emphasizing language does not render the language
9 surplusage, *ApolloMedia Corp. v. Reno*, 19 F. Supp. 2d 1081, 1096 (N.D. Cal. 1998), and “the rule
10 against surplusage is not controlling.” *Farmers Ins. Exchange v. Superior Court*, 137 Cal. App.
11 4th 842, 858 (2006) (“A statute may clarify and emphasize a point notwithstanding the rule against
12 surplusage”); *In re Davenport*, 522 S.W.3d 452, 457 (Tex. 2017) (language is not surplusage
13 because it clarified an issue).

14 Notably, other provisions of Nevada law and the Nevada Rules of Civil Procedure
15 demonstrate that the Nevada Legislature often includes descriptors – akin to the “already”
16 descriptor in the government action bar – to provide additional clarity to those statutes and rules.
17 One example is found in Nevada’s joinder rule, where the legislature refers to “an **existing party**”
18 even though a party to an action is always an “existing” party. NRCP 19(a)(1)(B)(ii) (emphasis
19 added). Another example is found in Nevada’s intervention as a matter of right rule, which allows
20 non-party movants to intervene in an action “unless **existing parties** adequately represent that
21 interest.” NRCP 24(a)(2) (emphasis added).⁵

22 Since the only parties to an action prior to intervention are “existing” parties, the word is
23

24 ⁴ As Defendants observed in their Motion, the government “is already a party” to the Clark County
25 Action. Mot. for Summ. Judgment at 10. An alternative explanation for use of the descriptor
26 “already” would be to make clear that it is not enough that the government is a real party in interest
27 in the separate civil action, or that it could potentially intervene in the action as a party. Rather, the
28 phrase “already” would emphasize that the government has to be an actual party litigant in the
separate civil action.

⁵ *See also* NRS 218F.720, which sets forth the Legislature’s unconditional right to intervene and
granting that authority “whether or not the Legislature’s interests are adequately represented by
existing parties and whether or not the State . . . is an **existing party**”) (emphasis added).

1 descriptive and has no independent meaning. Just as every party to an action is an “existing” party
2 for purposes of the joinder and intervention rules, every party by definition is “already” a party to
3 an action for purposes of the government action bar. The terms “existing” and “already” merely
4 clarify and emphasize and, as such, the canon against surplusage does not come into play to ascribe
5 independent meaning to them. Therefore, the Court improperly construed additional meaning –
6 ascribing Legislative intent – to the term “already” that is not warranted.

7 **3. The Court’s Construction of the Term “Already” Cannot be Reconciled with**
8 **the Legislature’s Use of the Term “Maintain”**

9 The Court’s focus on the term “already” as indicating Legislative intent that the government
10 action bar only applies where the separate civil action is filed before the *qui tam* suit is incompatible
11 with the Legislature’s clear intent and the clear text of this provision. In particular, the Legislature
12 made clear that the bar serves to block relators from “maintain[ing]” a *qui tam* action in the face of
13 a qualifying government civil action arising from the same allegations or transactions. NRS
14 357.080(3)(b) (“An action may not be ***maintained*** by a private plaintiff . . .”). The Legislature’s
15 use of the word “maintain” is highly instructive – indeed controlling – here. That is because in
16 using this word, the Legislature affirmatively departed from the language used in the federal False
17 Claims Act (“FCA”), on which much of the NFCA is patterned. The Nevada Supreme Court
18 already has recognized the legal significance of this type of affirmative departure by the Legislature
19 from the federal FCA. In *International Game Technology*, the Supreme Court relied on the fact
20 that, unlike the federal FCA, the Legislature did not include in the NFCA a prohibition against
21 claims based on the avoidance of certain tax obligations:

22 Any ambiguity caused by the Legislature’s failure to mention taxes
23 in the [Nevada] FCA is easily resolved by applying basic principles
24 of statutory construction to ascertain the Legislature’s intent. ***This***
25 ***court presumes that the Legislature enacts a statute “with full***
26 ***knowledge of existing statutes related to the same subject.”*** Thus,
27 the presumption that the Legislature, in enacting a state statute
28 similar to a federal statute, intended to adopt the federal courts’

1 construction of that statute, *is rebutted when the state statute clearly*
2 *reflects a contrary legislative intent.*

3 122 Nev. at 154 (internal citations omitted) (emphasis added). This principle must be applied in
4 interpreting the NFCA’s government action bar, which affirmatively departed from the federal
5 FCA’s government action bar text.

6 Under the federal FCA, the government action bar prevents a relator from “*bring[ing]*” –
7 not “maintaining” – a *qui tam* suit where the government is already a party to a separate civil action.
8 31 U.S.C. § 3730(e)(3) (“In no event may a person *bring* an action . . . which is based upon
9 allegations or transactions which are the subject of a civil suit or an administrative civil monetary
10 penalty proceeding in which the Government is already a party.”) (emphasis added). Thus, under
11 the federal FCA, it is the case that the government action bar serves only to prevent a *qui tam* relator
12 from commencing suit – bringing an action – where the government has brought a separate civil
13 action. But, importantly, that sequencing comes from Congress’s use of the word “bring” – not the
14 use of the word “already.” Indeed, the term “already” in the federal FCA’s government action bar
15 is merely descriptive as well. Whether the government action bar applies does not change if the
16 government “is a party” versus if it “is already a party.”

17 However, when the Nevada Legislature enacted the NFCA, it affirmatively departed from
18 the language in the federal NFCA. Rather than merely blocking relators from *bringing* suit where
19 the government is party to a separate civil action, the Legislature used the much broader term
20 “*maintain*” for the NFCA’s government action bar – thus also encompassing circumstances where
21 the separate civil action is filed *after* the *qui tam* suit. This is the most straightforward and logical
22 explanation for this change. *See Int’l Game Tech., Inc.*, 122 Nev. at 154 (finding dispositive the
23 fact that “Nevada’s FCA, in stark contrast to the federal legislation after which it was modeled,”
24 did not preclude certain types of reverse false claims). The Court’s legal conclusion that the NFCA
25 government action bar does not apply if the *qui tam* suit is filed first does not account for – and
26 indeed cannot be reconciled with – the use of the word “maintain” in the same provision.

27 Nor is there any argument that the words “bring” and “maintain” are synonymous and that
28

1 the Legislature’s use of the word “maintain” has no legal import.⁶ To the contrary, the Legislature
2 clearly understood the difference between these terms as it used both “bring” and “maintain” in
3 different contexts within the same subsection of the NFCA that contains the government action bar.
4 *See, e.g.*, NRS 357.080(1) (authorizing a private party to “**bring** an action”) (emphasis added); NRS
5 357.080(2) (“If a private plaintiff **brings** an action pursuant to this chapter, no person other than
6 the Attorney General . . . may intervene or **bring** a related action pursuant to his chapter . . .”)
7 (emphasis added). *See also* NRS 357.026(2) (using the term “**bringing** an action” when defining
8 an “original source”) (emphasis added); NRS 357.070(1), (2) (authorizing the Attorney General to
9 “**bring** a civil action”) (emphasis added). On the other hand, the Legislature used the word
10 “**maintain**” only in NRS 357.080 and, in so doing, materially altered the language from the federal
11 FCA, even as it otherwise largely mirrored the FCA’s language, including leaving untouched the
12 phrase “already a party.”

13 As the Nevada Supreme Court has made clear, it is a well-established principle of statutory
14 construction that if the Legislature uses the same word throughout a statute, it is presumed to have
15 the same meaning throughout, whereas a material variation in a term indicates a variation in its
16 meaning. *See Aerogrow Int’l, Inc. v. Eighth Judicial Dist. of Nev.*, 137 Nev. Adv. Op. 76, 499 P.3d
17 1193, 1199 (2021) (“a statute’s use of two different terms evinces the legislature’s intent that
18 different meanings apply to the two terms”) (*citing Labastida v. State*, 115 Nev. 298, 302-03, 986
19 P.2d 4]43, 446 (1999); *see also* Norman Singer & Shambie Singer, *2B Sutherland Statutory*
20 *Construction* § 52:5 (7th ed. 2016) (“when a legislature models a statute after a uniform act, but
21 does not adopt particular language, courts conclude the omission was ‘deliberate,’ or
22 ‘intentional’”).

23 In construing the government action bar here, the Court must give meaning to the term
24 “maintain.” But the Court’s construction of the provision does not do so and, instead, would accord
25 that term the same meaning as “bring,” thereby defying clear Legislative intent to depart from the
26

27 ⁶ It is worth noting again that Relators did not directly contest this point in their Opposition,
28 notwithstanding that Defendants’ Motion for Summary Judgment included extensive discussion of
this very distinction between the words “bring” and “maintain.” *See* Def’s Mtn. for Sum. Judg. at
11:3 – 13:5.

1 federal False Claims Act language. Accordingly, the Court should reconsider its ruling and grant
2 summary judgment to Defendants.

3 **4. Relators' Amended Complaint Does Not Alter the Reconsideration Analysis**

4 On May 7, 2022, pursuant to a party stipulation, this Court granted Relators' Motion for
5 Leave to Amend their Complaint. The Amended Complaint purports to allege that Defendants
6 violated the NFCA by avoiding transient lodging taxes due to Nevada under other Nevada county
7 tax ordinances beyond Clark County. Defendants intend to file a Motion to Dismiss the Amended
8 Complaint on the grounds, among others, that the additional county allegations fail to state a claim.
9 Even if the Amended Complaint survives a Motion to Dismiss on pleading grounds, it still would
10 fail under the NFCA's government action bar. That is primarily because the foundation for all of
11 the claims – *i.e.*, regardless of which county – is that Defendants' obligation to pay any combined
12 transient lodging taxes arises from the Nevada Revised Statute 244A, 244.335, *et seq.* Amended
13 Complaint at ¶ 51 (citing these NRS provisions as authorizing the imposition of the affected county
14 taxes at issue). *See also* Relators' Motion for Leave to File Amended Complaint at 8 (Relators
15 contending: "Under both the Original Complaint and the [Proposed] Amended Complaint, it is
16 alleged that the business model adopted by the Defendants deprives the State of Nevada of transient
17 lodging taxes due and owing pursuant to county ordinances applicable to transient lodging taxes.
18 It is alleged that the same business model is used in all counties in Nevada."). That same foundation
19 already undergirds Relators' claim in the Clark County Action because there can be no Clark
20 County violation in the absence of the enabling act language found at Nevada Revised Statute
21 244A. Therefore, even with the Amended Complaint, the subject matter of the Clark County Action
22 remains the same as this *qui tam* action.

23 And, even to the extent that the *qui tam* action includes additional allegations that are not
24 the subject of the Clark County Action, that would not prevent the government action bar from
25 applying to the claims arising from Clark County. In other words, the government action bar
26 continues to apply with respect to the primary claim in this action – avoidance of Clark County
27 taxes – regardless of the amendment and thus is ripe for adjudication and, for present purposes,
28

1 reconsideration.

2 **5. In the Alternative, Defendants Move to Stay This Action Pending Appeal to**
3 **the Nevada Supreme Court**

4 As set forth above, the viability of this *qui tam* action turns on the legal question of whether
5 the NFCA’s government action bar is limited to circumstances where the *qui tam* action is filed
6 after the separate civil action by the government. If the Court were to grant reconsideration and
7 hold that no such action sequencing is required, this *qui tam* action would be terminated and
8 dismissed. As the Court recognized, this is a novel question. The Nevada appellate courts have
9 not issued any opinions on this question and because – as described above – the federal FCA’s
10 government action bar uses different language, there is no federal FCA case that addresses this
11 circumstance. Accordingly, if the Court denies reconsideration and affirms its Order, Defendants
12 respectfully request, pursuant to Nev. R. App. P. 8(a)(1)(A), that the Court stay further proceedings
13 to enable Defendants to promptly seek a writ of review from the Nevada Supreme Court.

14 Under the Nevada Rules, “courts generally consider the following factors” in determining
15 whether to grant a stay pending appeal: “(1) whether the object of the appeal or writ petition will
16 be defeated if the stay or injunction is denied; (2) whether appellant/petitioner will suffer irreparable
17 or serious injury if the stay or injunction is denied; (3) whether the respondent/real party in interest
18 will suffer irreparable or serious injury if the stay or injunction is granted; and (4) whether the
19 appellant/petitioner is likely to prevail on the merits in the appeal or writ petition.” Nev. R. App.
20 P. 8(c). The Nevada Supreme Court has “not indicated that any one factor carries more weight than
21 others . . . [but] recognizes that if one or two factors are especially strong, they may counterbalance
22 other weak factors. *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 251 (Nev. 2004). Here, a
23 stay is warranted for multiple reasons.

24 First, the government action bar plainly states that a *qui tam* action may not be maintained
25 if the government action bar elements are met. The Legislature has made the determination that it
26 is in the government’s interests to have the *qui tam* action give way when the government separately
27 is pursuing the same underlying conduct in a civil action. That is the circumstance here. Every
28 day that the *qui tam* action proceeds defeats the very purpose of the government action bar. Second,

1 for similar reasons, Defendants will suffer substantial harm if this action proceeds in violation of
2 the government action bar. That harm includes the substantial costs of discovery and further
3 litigation, as well as the ongoing reputational harm of having Relators pursue fraud actions in the
4 name of the State. *See Mikohn Gaming Corp.*, 120 Nev. at 253 (“Although irreparable or serious
5 harm remains part of the stay analysis, this factor will not generally play a significant role in the
6 decision whether to issue a stay.”). Third, the real party in interest here, the State of Nevada, will
7 suffer no harm from the entry of a stay pending appeal. The Nevada Attorney General declined to
8 intervene in Relators’ *qui tam* action and, as Defendants have shown, the government has been
9 aware of the underlying conduct for over 12 years.⁷ Moreover, Clark County is using the same
10 lawyers as the relators to pursue a separate action based on the same conduct and, by definition, the
11 government is well-positioned to protect its interests. Finally, for all the reasons set forth above,
12 Defendants are likely to prevail on the merits of their appeal, as there is no exception to the
13 government action bar where the civil action post-dates the *qui tam* action.

14 Therefore, the Court should grant a stay of proceedings pending appeal if it does not
15 reconsider and reverse its Order.

16 CONCLUSION

17 For all the foregoing reasons, Defendants respectfully request the Court reconsider their
18 previously filed Motion for Summary Judgment and dismiss this action with prejudice pursuant to
19 the NFCA’s government action bar.

24 ⁷ The Relators’ Amended Complaint, which purports to add claims on behalf other Nevada
25 counties, does not alter the stay analysis. For starters, the validity of those new claims will be tested
26 in Defendants’ forthcoming motion to dismiss, including on the grounds that the threadbare
27 allegations with respect to the additional counties do not survive pleading muster. Moreover, the
28 new claims still arise out of the same allegations or transactions. This is evidenced by the fact that
(1) all county claims are predicated on supposed non-compliance with the Nevada enabling tax
provision that authorizes counties to collect certain transient lodging taxes, and (2) Relators could
not have sought to amend the complaint in this manner absent a recognition that the new allegations
arise out of the same conduct at issue in the original complaint.

1 Dated: May 13, 2022

2 Respectfully submitted,

3 BALLARD SPAHR LLP

4 By: /s/ Joel E. Tasca

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CERTIFICATE OF SERVICE

I certify that on May 13, 2022, I served the foregoing document on the following parties registered to receive service by filing the same with the Court's e-filing system:

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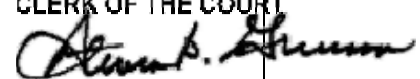
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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

STATE OF NEVADA Ex. Rel. Mark Fierro
and Sig Rogich,

Plaintiffs,

vs.

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;
DOES I through XXX, inclusive and ROE
BUSINESS ENTITIES I through XXX,
inclusive,

Defendants.

CASE NO. A-20-814111-B
DEPT. 13

FIRST AMENDED COMPLAINT

JURY TRIAL DEMAND

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

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

3 **NATURE OF THE ACTION**

4 1. This action is brought in the public interest for and on behalf of the State of
5 Nevada, *ex rel.* Mark Fierro and Sigmund Rogich pursuant to the Nevada False Claims Act,
6 NRS 357.010 *et seq.*

7 2. NRS 357.080(1) authorizes private persons to bring civil actions on behalf of
8 themselves and on behalf of the State of Nevada. They are qui tam Plaintiffs also known as
9 Plaintiff-Relators.

10 3. This lawsuit is to recover damages and injunctive relief from Defendants, web-
11 based hotel booking companies, who have knowingly engaged in a common practice/scheme to
12 avoid payment of Nevada's Combined Transient Lodging Tax as required by Nevada law.

13 4. Defendants contract with hotels for the right to purchase rooms at discounted or
14 "wholesale" prices. Defendants then sell the rooms to the public through their internet sites or
15 toll-free numbers at marked-up, "retail" prices, plus certain "tax recovery and fees." Defendants
16 charge the customers' credit cards for the entire amount, which includes the retail price of the
17 room and amounts sufficient to pay occupancy taxes on the retail price of the rooms. The hotels
18 in turn invoice Defendants for the rooms at the discounted price and the applicable occupancy
19 tax rate on the discounted rate.

20 5. For example, an online travel company such as Travelocity, Inc. obtains a room
21 from a hotel at a previously negotiated wholesale price of, for instance \$150. Travelocity, Inc.
22 in turn sells that same hotel room to an occupant over the internet for \$200. Because Travelocity,
23 Inc. controls the occupancy of the hotel room, the amount due to the city by law in this example
24 is the applicable percentage of \$200, or AMOUNT. Travelocity, Inc., however, remits the
25 transient occupancy tax based on the lower wholesale price of \$150, thus creating a loss of
26 AMOUNT to the state for that sale alone.

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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.

1 14. Defendant Expedia, Inc. is a Washington corporation with its principal place of
2 business in Seattle, Washington. Defendant Expedia, Inc. has at all times relevant to this
3 litigation conducted business in this state.

4 15. Defendant Expedia Global, LLC is a Nevada limited liability company with its
5 principal place of business in Seattle, Washington. Defendant Expedia Global, LLC has at all
6 times relevant to this litigation conducted business in this state.

7 16. Defendant Hotels.com LP is a Texas limited partnership with its principal place
8 of business in Dallas, Texas. Defendant Hotels.com LP has at all times relevant to this litigation
9 conducted business in this state.

10 17. Defendant Hotwire Inc. is a Delaware corporation with its principal place of
11 business in San Francisco, California. Defendant Hotwire Inc. has at all times relevant to this
12 litigation conducted business in this state.

13 18. Defendant Booking Holdings Inc. is a Delaware corporation with its principal
14 place of business in Norwalk, Connecticut. Defendant Booking Holdings Inc. has at all times
15 relevant to this litigation conducted business in this state.

16 19. Defendant Priceline.com LLC is a Delaware limited liability company with its
17 principal place of business in Norwalk, Connecticut. Defendant Priceline.com LLC has at all
18 times relevant to this litigation conducted business in this state.

19 20. Defendant Travelweb LLC is a Delaware limited liability company with its
20 principal place of business in Norwalk, Connecticut. Defendant Travelweb LLC has at all times
21 relevant to this litigation conducted business in this state.

22 21. Defendant Travelnow.com Inc. is a Delaware corporation with its principal place
23 of business in Bellevue, Washington. Defendant Travelnow.com Inc. has at all times relevant to
24 this litigation conducted business in this state.

25 22. Defendant Booking.com (USA) Inc. is a Delaware corporation with its principal
26 place of business in New York, New York. Defendant Booking.com (USA) Inc. has at all times
27 relevant to this litigation conducted business in this state.

1 23. Defendant Agoda International USA LLC is a Delaware limited liability company
2 with its principal place of business in New York, New York. Defendant Agoda International
3 USA LLC has at all times relevant to this litigation conducted business in this state.

4 24. Defendant Hotel Tonight, Inc. is a Delaware corporation with its principal place
5 of business in San Francisco, California. Defendant Hotel Tonight, Inc. has at all times relevant
6 to this litigation conducted business in this state.

7 25. Defendant Hotel Tonight, LLC is a Delaware limited liability company with its
8 principal place of business in San Francisco, California. Defendant Hotel Tonight, LLC has at
9 all times relevant to this litigation conducted business in this state.

10 26. NRS 357.080(1) authorizes private persons to bring civil actions on behalf of
11 themselves and on behalf of the State of Nevada. They are qui tam Plaintiffs also known as
12 Plaintiff-Relators.

13 27. At all times relevant, Defendants transacted business in the State of Nevada and
14 in Clark County, Washoe County, Lyon County, Nye County and Douglas County by, among
15 other activities, contracting to purchase hotel rooms from hotels, advertising such hotel rooms
16 to customers, and selling/booking such hotel rooms to the general public.

17 28. This Court has jurisdiction over Plaintiffs' claims as they involve claims arising
18 exclusively under Nevada statutes.

19 29. Venue is proper because injuries to Plaintiffs occurred substantially in Clark
20 County, Nevada and because Defendants committed unlawful acts and conducted their unlawful
21 practices in, among other counties, Clark County, Nevada.

22 30. That the true names and capacities, whether individual, corporate, associates, co-
23 partnership, or otherwise of Defendants DOES 1 through 100 and ROE Corporations 1 through
24 100, are unknown to Plaintiffs who therefore sues said defendants by such fictitious names.
25 Plaintiffs are informed and believe and thereon allege that each of the defendants designated as
26 DOES 1 through 100 and ROE Corporations 1 through 100 are responsible in some manner for
27
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1 the events and happenings referred to in this action and proximately caused damages to Plaintiffs
2 as herein alleged.

3 31. That this civil action arising from actions occurring within, among other places,
4 County of Clark, State of Nevada, involving an amount in controversy in excess of the sum of
5 \$15,000.00, exclusive of costs and interests, thereby giving this Court jurisdiction over this
6 matter.

7 **FACTUAL ALLEGATIONS**

8 32. In Nevada, proprietors and/or operators of transient lodging establishments as well
9 as their managing agents and persons otherwise engaged in the business of furnishing and/or
10 selling transient lodging to consumers have a duty to collect and remit tax to various counties
11 and the State of Nevada on rents charged to guests pursuant to Clark County Code 4.08, *et seq.*,
12 Washoe County Code 25.117 *et seq.*, Douglas County Code 3.14.010 *et seq.*, Lyon County
13 Code, Chapter 2, Section 4.02.01 *et seq.* and Nye County Code 3.16.010 *et seq.*, such other
14 county codes as have imposed the duty to collect and remit transient lodging taxes upon the
15 Defendants. and Nevada Revised Statute 244A, 244.335, *et seq.*

16 33. The combined transient lodging tax is calculated as a percentage of gross rental
17 receipts and ranges between 10.5% and 13.38%.

18 34. Rent is the amount charged for a sleeping room/space in a transient lodging
19 establishment.

20 35. The transient lodging tax may be collected from the paying transient guests and
21 may be shown as an addition to the rent charged.

22 36. Upon information and belief, recipients of the tax collected within unincorporated
23 Clark County include the Las Vegas Convention and Visitors Authority, the Clark County
24 School District, local transportation districts, the Nevada Department of Tourism, the state of
25 Nevada general fund, the State Supplemental School Fund, and the Clark County General Fund.
26 Upon information and belief, recipients of the tax collected within Washoe, Douglas, Lyon and
27 Nye counties include the Nevada Department of Tourism and the state of Nevada general fund.
28

1 37. Pursuant to Clark County Code 4.08, *et seq.*, Defendants are operators of transient
2 lodging establishments and/or managing agents that exercise judgment and discretion in
3 performing the functions of an operator.

4 38. Pursuant to Washoe County Code 25.117 *et seq.*, Defendants are operators of
5 transient lodging establishments as “on-line discount booking agencies” and/or as managing
6 agents that exercise judgment and discretion in performing the functions of an operator.

7 39. Pursuant to Douglas County Code 3.14.010 *et seq.*, Defendants are “vendors” who
8 are engaged in the business of furnishing lodging to consumers. *See e.g. City and County of*
9 *Denver v. Expedia, Inc.*, 405 P.3d 1128 (2017).
10

11 40. Pursuant to Lyon County Code, Chapter 2, Section 4.02.01 *et seq.*, Defendants are
12 persons “operating, conducting or engaging in a rental business” of transient lodging within the
13 county.

14 41. Pursuant to Nye County Code 3.16.010 *et seq.*, Defendants are all “persons
15 [engaged] in the business of providing [transient] lodging in the County.”
16

17 42. Defendants negotiate with hotels and/or hotel chains for rooms at discounted
18 room rates, then make their inventory of rooms available for rent to customers on web-based
19 search engines at marked-up retail prices.

20 43. Defendants charge customers and receive payment from customers on their
21 websites for the hotel accommodations selected by the customers.

22 44. Defendants set the cancellation policies for the customers’ chosen hotel
23 accommodations and determine customers’ requests to modify reservations.

24 45. Defendants confirm customers’ prepaid reservations for the right to occupy the
25 hotel rooms on the dates selected at the retail prices charged by Defendants.

26 46. Defendants remit taxes to the State based on the lower, discounted room rates that
27 Defendants negotiated with hotels. Defendants have failed to remit the transient lodging tax on
28 the full amount of rent charged to guests that is due and owing to the State of Nevada.

1 47. At all times relevant, Defendants had a duty to collect and remit the transient
2 lodging tax based on the retail price the Defendants charged their customers for use and
3 occupancy of hotel rooms.

4 **COUNT ONE**
5 **VIOLATION OF THE FALSE CLAIMS ACT**
6 **NRS 357.010, *et seq.***

7 48. Plaintiffs re-allege and incorporate the allegations set forth above as though fully
8 alleged herein.

9 49. Nevada's False Claims Act imposes liability on any person who knowingly
10 conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit
11 money or property to the State or a political subdivision. NRS 357.040(1)(g).

12 50. Defendants have made numerous agreements with hotels for discounted room
13 rates to make their inventory of hotel rooms available to customers on websites for rent at a
14 marked-up retail price.

15 51. Defendants knowingly and improperly avoided and/or decreased their obligation
16 to pay money to the State by failing to remit the transient lodging tax on the full amount of rent
17 charged to guests that is due and owing to the State of Nevada pursuant to Clark County Code
18 4.08, *et seq.*, Washoe County Code 25.117 *et seq.*, Douglas County Code 3.14.010 *et seq.*, Lyon
19 County Code, Chapter 2, Section 4.02.01 *et seq.*, Nye County Code 3.16.010 *et seq.*, such other
20 county codes as have imposed the duty to collect and remit transient lodging taxes upon the
21 Defendants and Nevada Revised Statute 244A, 244.335, *et seq.*

22 52. Defendants knowingly and intentionally failed to charge, collect and remit the
23 transient lodging tax on the retail price of the rent charged to customers.

24 53. Defendants have engaged in a practice to evade payment of substantial amounts
25 of taxes on rent charged to customers.

26 54. As a direct and proximate result of the aforementioned actions of Defendants, the
27 Counties of Clark, Washoe, Douglas, Lyon, Nye and such other counties as have imposed the
28 duty to collect and remit transient lodging taxes upon the Defendants as well as the State of

1 Nevada have been deprived of substantial tax revenues to which the counties and the State of
2 Nevada are otherwise entitled. Defendants are liable to the State of Nevada for three times the
3 amount of damages sustained by the State of Nevada in the form of unpaid transient lodging tax,
4 for the costs of bringing this action, and for a civil penalty of not less than \$5,500 or more than
5 \$11,000 for each act constituting a violation.

6 55. Plaintiffs are entitled to recovery pursuant to NRS 357.210.

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

9 1. That a judgment be entered in favor of Plaintiff State of Nevada ex rel. Mark Fierro
10 and Sigmund Rogich which awards Plaintiff damages in an amount equal to three times the
11 amount of all transient lodging taxes, penalties and interest that Defendants owe as a result of
12 Defendants' violations of NRS 357.040(1)(g), plus mandatory statutory penalties;

13 2. That the Court award Plaintiffs Mark Fierro and Sigmund Rogich on their own
14 behalf between 15 percent and 30 percent of the proceeds collected by the State of Nevada as a
15 result of this action;

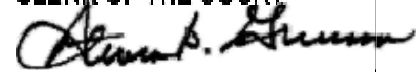
16 3. For costs of suit and reasonable attorney's fees;

17 4. For such additional or alternative relief as this Court deems appropriate under the
18 circumstances.

19 Respectfully Submitted this 16th day of May, 2022.

20 **CLARK HILL PLLC**

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DISTRICT COURT

CLARK COUNTY, NEVADA

STATE OF NEVADA Ex. Rel. Mark Fierro
and Sig Rogich,

Plaintiffs,

vs.

ORBITZ WORLDWIDE, LLC., et al.

Defendants.

Case No.: A-20-814111-B

Dept. No.: 13

**PLAINTIFFS' RESPONSE TO
DEFENDANTS' MOTION FOR
RECONSIDERATION OR IN THE
ALTERNATIVE TO STAY
PROCEEDINGS**

Plaintiffs by and through their counsel of record, of the law firm Clark Hill, PLLC, hereby responds to Defendants' Motion for Reconsideration or in the alternative to Stay Proceedings.

This Response is based upon and supported by the following Memorandum of Points and Authorities, the pleadings and papers on file and any exhibits attached hereto, and any argument that the Court may allow at the time of hearing.

MEMORANDUM OF POINTS AND AUTHORITIES

I.

STATEMENT OF RELEVANT AND UNDISPUTED FACTS

1. The Complaint in this matter was initially filed on April 24, 2020.
2. On June 2, 2021, the Court issued an Order Granting in part and Denying in part a Motion to Dismiss filed by Defendants. The Order dismissed, with prejudice, the second through the sixth claims for relief set forth in the Complaint, leaving Plaintiffs' sole surviving claim as one under the Nevada False Claims Act, NRS 357.010 et seq.

3. On May 14, 2021, Clark County filed a direct action against many of the same Defendants that are subject to the Complaint in this matter (the “Clark County Action”).¹
4. On February 24, 2022, Defendants filed a Motion for Summary Judgment on the sole remaining claim set forth in the original Complaint.
5. On March 10, 2022, Plaintiffs filed their Response to Motion for Summary Judgment which is incorporated herein by reference.
6. The Motion for Summary Judgment was DENIED by Order dated April 29, 2022.
7. On April 5, 2022, Plaintiffs filed Relators Motion for Leave to Amend Complaint.
8. While Defendants initially opposed the Motion for Leave to Amend, they ultimately withdrew their opposition and the Motion to Amend was granted pursuant to stipulation by Order dated May 7, 2022.
9. The instant Motion for Reconsideration of the Court’s April 29, 2022 Order was filed on May 13, 2022.
10. Plaintiffs filed the First Amended Complaint on May 16, 2022.

II.

LEGAL ARGUMENT

A. Legal Standards for Reconsideration

EDCR 2.24 addresses the rehearing of motions and sets forth as follows

Rule 2.24. Rehearing of motions.

(a) No motions once heard and disposed of may be renewed in the same cause, nor may the same matters therein embraced be reheard, unless by leave of the court granted upon motion therefor, after notice of such motion to the adverse parties.

(b) A party seeking reconsideration of a ruling of the court, other than any order that may be addressed by motion pursuant to NRCP 50(b), 52(b), 59 or 60, must file a motion for such relief within 14 days after service of written notice of the order or judgment unless the time is shortened or enlarged by order. A motion for rehearing or reconsideration must be served, noticed, filed and heard as is any other motion. A motion for reconsideration does not toll the period for filing a notice of appeal from a final order or judgment.

(c) If a motion for rehearing is granted, the court may make a final disposition of the cause without reargument or may reset it for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case.

¹ Defendants removed the case to federal court and it is styled Clark County, Nevada v. Orbitz Worldwide, LLC, et al., CASE NO.: 2:21-cv-01328-JCM-VCF (USDC, Nevada).

1 “Only in very rare instances in which new issues of fact or law are raised supporting a ruling
2 contrary to the ruling already reached should a motion for rehearing be granted.” *Moore v. City of*
3 *Las Vegas*, 92 Nev. 402, 405, 551 P.2d 244, 246 (1976). Additionally, a district court may consider
4 a **motion** for reconsideration concerning a previously decided issue if the decision was clearly
5 erroneous. *Masonry and Tile v. Jolley, Urga & Wirth*, 113 Nev. 737, 741, 941 P.2d 486, 489
6 (1997).
7

8 **B. The Motion For Reconsideration Is Moot Based Upon The Filing Of The First**
9 **Amended Complaint**

10 The Defendants’ Motion for Summary Judgment, filed on February 24, 2022, sought
11 summary judgment on the Plaintiffs’ first claim for relief as set forth in its original Complaint
12 based upon the government action bar. This Court denied the Motion on April 29, 2022.

13 Thereafter, pursuant to the Stipulation of the parties, on May 7, 2022, the Court issued an
14 Order granting Plaintiffs leave to file the First Amended Complaint in this matter. The instant
15 Motion was filed on May 13, 2022. Plaintiffs filed the First Amended Complaint on May 16,
16 2022.

17 While Plaintiffs believe the April 29, 2022, Order was correctly issued and that no grounds
18 for reconsideration thereof exists, whether the Order was correctly issued or incorrectly issued is
19 of no relevance to these proceedings going forward. The Order, right or wrong, related solely to
20 the allegations set forth in the original Complaint.

21 Since at least 1872 when the Nevada Supreme Court issued its decision in *McFadden v.*
22 *Ellsworth Mill and Mining Company*, 8 Nev. 57 (1872), it has been the consistent legal authority
23 in Nevada that an amended complaint generally supersedes the original complaint and renders it
24 nugatory. *See Randono v. Ballow*, 100 Nev. 142, 676 P.2d 807, 807 (1984); *See also, Associated*
25 *Aviation Underwriters, Inc. v. Vegas Jet, L.L.C.*, 106 F.Supp.2d 1051, 1054 (US District Court,
26 District of Nevada, 2000). (both cases citing to *McFadden*, *supra.*). Thus, Defendants are seeking
27 relief in the form of an order granting summary judgment as to a Complaint that is no longer
28

1 operative and has been entirely replaced by the First Amended Complaint.

2 Significantly, the argument and briefing submitted with respect to the Motion for Summary
3 Judgment focused intensely on whether the Clark County Action involved “the *same* allegations
4 and transactions that are the *subject* of this Qui Tam Action.” See Motion for Summary Judgment
5 at 10:9-10. As phrased by Defendants, “(t)he subject of the Qui Tam Action and the Clark County
6 Action is the alleged nonpayment of transient lodging taxes imposed by *the Clark County Code*.”
7 See Defendants’ Reply Brief in Support of Motion for Summary Judgment at 6:18-7:1. Footnote
8 6 contained in the Reply Brief further frames the argument as follows:
9

10 The only county tax ordinance referenced in the Qui Tam Action complaint
11 is Clark County Code § 4.08. *See* Complaint, ¶¶ 36, 40, 51; *see also id.* at ¶
12 35 (this is a “civil action arising from actions occurring within the County
13 of Clark, State of Nevada”).

14 Reply Brief at footnote 6.

15 Defendants’ argument was completely predicated upon their assertion that there was a
16 complete overlap between the transactions at issue in the Clark County Action and the instant case
17 because only transient lodging transactions in Clark County were at issue in both cases.
18 Defendants further argued that the government action bar was triggered precisely because the only
19 taxes allegedly due to the State in this action and Clark County in the Clark County Action arose
20 from the same transient lodging sales. See Reply Brief at 7:4-6: “The complete overlap between
21 the allegations or transactions at issue here is precisely what the government action bar addresses,
22 and it precludes the hypothetical Relators advance.”

23 During oral argument, when the Court observed that “(s)o it doesn’t necessarily make
24 sense that we would dismiss the broader case that was filed first [the instant matter], leaving
25 the narrower case filed second [the federal case]” [Transcript attached hereto as Exhibit 1 at
26 21:3-5], Defendants continued to stress that the critical fact supporting their argument was that
27 only taxes from transactions in Clark County were at issue in both cases.
28

1 MR. TASCA: It -- it's actually the opposite. The only tax that's
2 being pursued in this case is the Clark County tax.

3 And, specifically, it's only the state of Nevada's portion of that
4 Clark County tax that it would ultimately receive that's being sought.

5 The broader case is actually the Clark County suit that's in
6 federal court, because that's seeking the entire Clark County alleged unpaid
7 tax it's owed.

8 Transcript at 21:8-14

9 Significantly, the First Amended Complaint clearly and expressly includes unpaid transient
10 room taxes from transactions occurring in the following counties: Washoe, Douglas, Lyon and
11 Nye.²

12 Defendants knowingly and improperly avoided and/or decreased their
13 obligation to pay money to the State by failing to remit the transient lodging
14 tax on the full amount of rent charged to guests that is due and owing to the
15 State of Nevada pursuant to Clark County Code 4.08, *et seq.*, Washoe
16 County Code 25.117 *et seq.*, Douglas County Code 3.14.010 *et seq.*, Lyon
17 County Code, Chapter 2, Section 4.02.01 *et seq.*, Nye County Code
18 3.16.010 *et seq.*, such other county codes as have imposed the duty to
19 collect and remit transient lodging taxes upon the Defendants and Nevada
20 Revised Statute 244A, 244.335, *et seq.*

21 First Amended Complaint at para. 51.

22 What is clear is that the Motion for Summary Judgment was briefed, argued and decided
23 based upon a belief that the Clark County Action involved the “same underlying allegations or
24 transactions that are the subject of Relators’ qui tam action” as set forth in the original Complaint.
25 As that original Complaint has been superseded by the First Amended Complaint which inarguably
26 contains allegations regarding different transient lodging transactions in multiple counties, this
27 Motion for Reconsideration is moot.

28 In discussing the First Amended Complaint, which had not been filed as of the date of

² Plaintiffs have not conceded that the original formulation of their Complaint did not include taxes due from Washoe, Douglas, Lyon, Nye and/or such other counties as have adopted codes that impose the duty to collect and remit transient lodging taxes upon the Defendants. Under liberal notice pleading standards, the original Complaint could have been interpreted as including such claims. However, this argument too has been mooted by the filing of the First Amended Complaint.

1 filing the instant Motion, Defendants are spinning faster than a child's top. After advancing the
2 position in their Motion for Summary Judgment that the government action bar applied precisely
3 because the Clark County Action and the instant action covered the same transient lodging
4 transactions only in Clark County such that there was a 100% overlap between the two cases,
5 Defendants now, inexplicably, assert that whether the same transactions are involved is
6 irrelevant. Rather, they now claim that the government action bar will apply to bar the First
7 Amended Complaint "primarily because the foundation for all of the claims – *i.e.*, regardless of
8 which county – is that Defendants' obligation to pay any combined transient lodging taxes arises
9 from the Nevada Revised Statute 244A, 244.335, *et seq.*" See Motion at 10:10-12. Thus, in
10 Defendants' presently advanced view, since county transient lodging tax ordinances are enabled
11 by Nevada Revised Statute 244A, 244.335, *et seq.* the government action bar applies even though
12 each county's ordinances may differ in language from another county's ordinance and even though
13 the tax liability owed to the State stems from different transactions in multiple counties.
14

15
16 If nothing else, the Defendants' current argument respecting the First Amended Complaint
17 demonstrates how the previous ruling related to the original Complaint is irrelevant to the
18 allegations contained in the First Amended Complaint.

19 **C. There Are Insufficient Grounds For Reconsideration**

20 As set forth hereinbefore, reconsideration of matters already decided by the Court are
21 disfavored. Only upon a showing that new issues of fact or law are being raised that could not
22 have been raised in the initial hearing or if the decision is clearly erroneous should reconsideration
23 be granted.

24 Defendants have not met these standards. Indeed, it appears as if Defendants are merely
25 submitting the same arguments as were fully briefed and argued previously to a different judge in
26 the hopes of getting a different decision.³
27
28

³ Judge Bell presided over the oral argument and rendered a decision on the Motion for Summary Judgment.

1 The Motion for Summary Judgment argued extensively about how the Clark County
2 Action and the instant matter involved, in Defendants' view, the identical, 100% overlapped
3 allegations and transactions. In addition to arguing against that proposition because the State was
4 pursuing taxes owed to the State in this action while the Clark County Action was pursuing taxes
5 owed to Clark County, Plaintiffs directly raised the issue of whether the Clark County Action was
6 a civil action to which the State or political subdivision was already a party. See Plaintiffs'
7 Response to Motion for Summary Judgment at 11:1-2 et seq.: "The Clark County direct action is
8 not a civil action to which "the State or political subdivision" is already a party within the meaning
9 of NRS 357.080(3)(b)".

10 The Transcript of Proceedings attached hereto as Exhibit 1 evidences that the Court and
11 Defendants' counsel spent considerable time discussing whether the State or political subdivision
12 was "already a party" to a civil action within the meaning of NRS 357.080(3)(b). See Transcript
13 at 7:16-10:25. The Court considered the arguments and the briefs and decided against Defendants.

14 In the instant Motion, Defendants do not claim that some new case has been decided that
15 the Court should consider. They present no caselaw that they couldn't have presented in their
16 moving papers or Reply Brief. To be sure, they are citing to caselaw that they did not cite
17 previously but only to try to bolster the same arguments that they presented to and were rejected
18 by the Court. Defendants have offered nothing to this Court that establishes that the previous
19 decision was "clearly erroneous."

20 **D. There Are No Grounds For Issuance Of A Stay**

21 While the application of the government action bar in circumstances like those posed by
22 the original Complaint may be a matter of first impression in the Nevada Supreme Court, the
23 proposition that an amended complaint supersedes the original complaint and renders it nugatory
24 has been ingrained in Nevada jurisprudence since at least 1872. Defendants fail to explain why
25 the Nevada Supreme Court would even bother to accept a Petition for Writ of Mandamus to decide
26 whether a Motion for Summary Judgment as to an original Complaint was wrongly denied when
27 the original Complaint has been superseded by an Amended Complaint rendering the original
28 Complaint nugatory and the decision irrelevant.

1 Further, Defendants have essentially abandoned the entire argument they advanced in their
2 Motion for Summary Judgment that the government action bar applied to the original Complaint
3 because the federal case and this matter involved a 100% overlap of transactions and allegations.
4 They now argue that the government action bar will apply to the First Amended Complaint
5 “primarily because the foundation for all of the claims – *i.e.*, regardless of which county – is that
6 Defendants’ obligation to pay any combined transient lodging taxes arises from the Nevada Revised
7 Statute 244A, 244.335, *et seq.*” regardless of the fact that the transactions are no longer the same.
8 Such a shift in legal positions indicates that Defendants are not likely to prevail on the merits of any
9 writ or appeal.

10 There is no procedural obstacle preventing Defendants from filing a Petition for an
11 appropriate writ. If the Nevada Supreme Court were to exercise its discretion and consider the
12 merits of any such filed Petition, Defendants would have another opportunity to seek a stay of these
13 proceedings. However, given the long-standing precedent that an amended complaint supersedes
14 the original complaint and renders it nugatory, this Court should not assume that the Nevada
15 Supreme Court will consider the matter and grant a stay prior to the time that Defendants have
16 even filed their requested appellate relief.

17 III.

18 CONCLUSION

19 For the above and foregoing reasons, the Motion should be denied in its entirety.

20 Dated this 27th day of May 2022.

21 CLARK HILL PLLC

22 /s/ Mark S. Dzarnoski, Esq.

23 A. William Maupin, Esq. (NSBN 1315)

24 Dominic P. Gentile, Esq. (NSBN 1923)

25 Michael Cristalli, Esq. (NSBN 6266)

26 Bert Wuester, Esq. (NSBN 5556)

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28 3800 Howard Hughes Parkway, Suite 500

Las Vegas, Nevada 89169

EXHIBIT 1

EXHIBIT 1



1 **RTRAN**

2
3
4
5 DISTRICT COURT
6 CLARK COUNTY, NEVADA

7
8 STATE OF NEVADA, EX REL,
9 MARK FIERRO,

10 Plaintiff,

11 vs.

12 ORBITZ WORLDWIDE, et al,

13 Defendants.

CASE#: A-20-814111-B

DEPT. VIII

14 BEFORE THE HONORABLE LINDA M. BELL, CHIEF DISTRICT COURT
15 JUDGE

16 MONDAY, MARCH 28, 2022

17 **RECORDER'S TRANSCRIPT OF HEARING**
18 **DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

19 **APPEARANCES:**

20 For the Plaintiff:

MICHAEL CRISTALLI, ESQ.
DOMINIC P. GENTILE, ESQ.

21 For the Defendants:
22 (Hotel Tonight, LLC, Hotel Tonight
23 Inc., Agoda International USA, LLC,
24 Travelweb, LLC, Booking Holdings,
25 Inc., Hotwire, Inc., Hotels.com, LP,
Expedia Global, LLC, Expedia, Inc.,
Cheap Tickets, Inc., Travelocity, Inc.,
Travelscape, LLC, Orbitz, Inc.,

JOEL E. TASCA, ESQ.

1 Orbitz, LLC, Orbitz Worldwide, LLC)

2 For the Defendants: DOUGLAS W. BARUCH, ESQ.
3 (Travelnow.com Inc., Hotwire, Inc., (via BlueJeans)
4 Hotels.com, LP, Expedia Global, LLC,
5 Expedia, Inc., Cheap Tickets, Inc.,
6 Travelocity, Inc., Travelscape, LLC,
Orbitz, Inc., Orbitz, LLC, Orbitz
Worldwide, LLC)

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RECORDED BY: KIMBERLY ESTALA, COURT RECORDER

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Motion, denied

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22

1 Las Vegas, Nevada, Monday, March 28, 2022

2
3 [Case called at 9:55 a.m.]

4 THE COURT: Good morning.

5 MR. TASCA: Good morning, Your Honor.

6 MR. GENTILE: Good morning, Your Honor.

7 MR. CRISTALLI: Good morning, Your Honor.

8 MR. GENTILE: Your Honor on behalf of the Plaintiff, Dominic
9 Gentile, state bar number 1923, the law firm of Clark Hill.

10 And with me is Michael Cristalli, who's --

11 MR. CRISTALLI: 6266, Your Honor.

12 MR. GENTILE: Figures it had three 6's in it.

13 MR. CRISTALLI: With a little break in between.

14 MR. TASCA: Good morning, Your Honor, Joel Tasca from the
15 law firm of Ballard Spahr, representing the Defendants. Bar number's
16 14124.

17 THE COURT: And just to disclose, I've known Mr. Gentile,
18 Mr. Cristalli for years. I believe, Ms. Scow [phonetic] worked on the
19 same [indiscernible]. I just -- I know people on both sides of this, which I
20 think makes it even in terms of [indiscernible].

21 All right, so this is Orbitz's Motion for Judgment.

22 MR. TASCA: Correct, Your Honor. And I neglected to
23 introduce my colleague, who's on the screen there.

24 THE COURT: Oh.

25 MR. TASCA: Doug Baruch from Morgan Lewis, who

1 represents the Expedia Defendants along with me.

2 MR. BARUCH: Good morning, Your Honor.

3 MR. TASCA: So I understand Your Honor is new to this case.
4 And just by way of background, this is a qui tam action, a False Claims
5 Act.

6 THE COURT: I got it, counsel. I read --

7 MR. TASCA: Okay.

8 THE COURT: -- all of it.

9 MR. TASCA: Got it, got it. Well, Your Honor, let me just get
10 to it. And before I do, I want to just make a couple of preliminary points.

11 The first one is that both sides agree that there are no facts in
12 dispute on this motion. It is ripe for decision.

13 THE COURT: Right.

14 MR. TASCA: And so, there's no need for further proceedings
15 or further discovery.

16 The second thing I wanted to note is that this motion gives the
17 Court the opportunity to get rid of the case that has now become
18 completely superfluous with respect to the alleged unpaid taxes that are
19 being sought.

20 THE COURT: So let me ask you a question. Is this the right
21 case to get rid of?

22 MR. TASCA: Well, it is, Your Honor, because the government
23 action bar applies here first of all.

24 And second of all, the Clark County action is an action that is
25 seeking a bigger bucket of unpaid -- alleged unpaid taxes. And so, if the

1 Clark County -- if Clark County succeeds in its action, its recovery will
2 subsume the amounts that the State is seeking in -- relators are seeking
3 on behalf of the State in this action.

4 THE COURT: So when we look at 57.0802, if a private
5 plaintiff brings an action pursuant to this chapter, right, and everybody
6 agrees this was the first case.

7 MR. TASCA: Correct.

8 THE COURT: Yes? Okay. No person other than the
9 Attorney General or the Attorney General's designee may intervene or
10 bring a related action pursuant to this chapter based on the facts
11 underlying the first action.

12 So is this the right case to dismiss?

13 MR. TASCA: I'm sorry, Your Honor. So I'm just not totally
14 sure I follow the point.

15 THE COURT: So the Attorney General did not bring the
16 federal action, right?

17 MR. TASCA: The Attorney General did not bring the federal
18 action, that's correct.

19 THE COURT: I mean, it appears to me that it bars somebody
20 bringing a second action when there's this -- when this case exists if it's
21 based on the facts of this case.

22 MR. TASCA: So I still don't quite follow how the Attorney
23 General -- why that matters exactly. If you go to the text of the
24 government action bar, which is the only --

25 THE COURT: Okay.

1 MR. TASCA: -- the only thing that's at issue in this case, it
2 can be broken out -- down into four basic elements. And these are, you
3 know, paraphrased but barely.

4 So these come right from the text. So, first, it's gotten the
5 private plaintiffs, who brought the False Claims Act. It's got to be a qui
6 tam action.

7 The allegations or transactions in qui tam action must be the
8 subject of a separate civil action.

9 The state or political subdivision must be a party to the
10 separate action. And the relators must be maintaining the qui tam action
11 despite the separate action.

12 So focusing on 357.080(3)(b), which is the -- a provision that
13 stands alone as the government action bar, those are the four elements.
14 And I am happy to go through those in detail, but those four elements
15 are met here.

16 THE COURT: When this was filed, right, the action was not
17 based upon allegations or transactions that were the subject of a civil
18 action.

19 So under your reading of this statute, this case could have
20 been filed three years ago on the eve of trial and a political subdivision
21 files a case somewhere else, and then, this case has to be dismissed.

22 MR. TASCA: That's the language of the statute, Your Honor.
23 And I'll point out that the legislature in this government action bar motion
24 made a deliberate decision to use the word maintain. The private
25 plaintiffs cannot maintain the action if a political subdivision has brought

1 an action.

2 And so, they could have easily used the word bring. We know
3 that they knew how to use the word bring from other parts of the statute.

4 THE COURT: Well, let's talk about the word already.

5 MR. TASCA: Sure.

6 THE COURT: Okay, because if the action is based upon
7 allegations or transactions that are the subject of a civil action or an
8 administrative proceeding for a monetary penalty to which the state or
9 political subdivision is already a party. Not just a party, but already a
10 party.

11 So, to me, that would mean there would have to be an action
12 already. That word has no meaning?

13 MR. TASCA: Well, that's not quite true, Your Honor.

14 THE COURT: So what does already mean then?

15 MR. TASCA: Sure. So already just means that the state or
16 political subdivision has to be a party at the time the government action
17 bar motion is brought.

18 It can't be waiting in the wings and preparing to intervene. It
19 actually has to be a party to the case.

20 And if Your Honor were correct in your interpretation that of
21 already --

22 THE COURT: So then what would be the difference if it said
23 to which the state or political subdivision is a party or if it said which the
24 state or political subdivision is already a party under the way that you're
25 interpreting that? I can't see a difference between those two.

1 MR. TASCA: In other words, your question is why it doesn't
2 say a instead of already?

3 THE COURT: Already has to mean something. It does say a,
4 It says is already a party.

5 MR. TASCA: Right.

6 THE COURT: So already has to have some meaning, right,
7 under the -- under statutory construction. There has to be meaning for
8 that word. The way you're interpreting this, it could be there or not be
9 there --

10 MR. TASCA: Well, I --

11 THE COURT: -- and mean the same thing?

12 MR. TASCA: Your Honor, I think that the already is simply to
13 clarify that because in these actions, we often have a political
14 subdivision or a state as like I said put it before, waiting in the wings and
15 getting ready to intervene but they may not have done so yet.

16 Already's just to clarify that they need to be a party at the time
17 of the government action or motion. The other point, Your Honor --

18 THE COURT: So, okay, but that doesn't answer my question.

19 MR. TASCA: Sure.

20 THE COURT: So how is that different than if it just said, which
21 the state or political subdivision is a party? How would it be different?

22 MR. TASCA: Well, I don't think it would be different, Your
23 Honor, but I think it's a matter of bringing clarity to the situation to
24 distinguish between a situation where a party is -- has not yet intervened
25 and the situation where the party has intervened.

1 And it's actually a party. It's already a party by the time the
2 government action, which was filed.

3 Can I make one further point on this that might be helpful,
4 Your Honor?

5 THE COURT: Yes.

6 MR. TASCA: So if Your Honor's interpretation that you're
7 suggesting were true, then the language of the statute would not say
8 maintain at the beginning of the government action bar. It would just say
9 bring.

10 But it doesn't just say bring. It talks about maintaining an
11 action. And so, it is contemplated under the word maintain that the
12 action that creates the bar may come after the original qui tam action
13 that is being brought.

14 And so, you know, I go back again to the fact that we've got a
15 federal False Claims Act statute that this statute was based on, but the
16 Nevada Legislature carefully adopted everything from that statute except
17 this word bring. And they chose to use the word maintain.

18 So that also has to have meaning. And I would suggest, Your
19 Honor, that that is the way this is intended to be interpreted.

20 We also know the state legislature knew how to say bring in
21 action because they did so in the same statutory section here earlier.

22 THE COURT: Okay.

23 MR. TASCA: Can I answer any other particular questions that
24 Your Honor might have or?

25 THE COURT: No.

1 MR. TASCA: Okay. Then I -- and it sounds like the, you
2 know, you've read everything of those four elements, the only elements
3 that have been disputed by the relators are the same allegations or
4 transactions element.

5 And I think that's an easy one. We -- both this action and the
6 Clark County action are based on alleged nonpayment of taxes for hotel
7 bookings that the Defendants facilitated through their online businesses.

8 THE COURT: Right.

9 MR. TASCA: It's identical. And we laid this out on pages 4
10 and 5 of our opening brief.

11 The counter to that that the relators come up with is to make a
12 bunch of comparisons of their own, but what they're comparing is the
13 relief requested, parties, the claims that were brought.

14 That's not the issue. The issue is transactions or allegations.
15 And on that point, there is no dispute even though relators, which we
16 pointed out in our brief earlier that they admitted that that was met.

17 And then, the final element, the only other element that's
18 contested by the relators is whether the political subdivision's a party to
19 the action that forms the basis for the bar.

20 And here, Clark County is a party to the relevant action.
21 That's clear. And Clark County unquestionably is a political subdivision
22 of the state.

23 Now what they have tried to do is read into the statute --

24 THE COURT: Well, they're not a party here.

25 MR. TASCA: They're not a party here, correct. And what the

1 relators have tried to do is read into a statute that would impose that kind
2 of requirement that it be the same political subdivision.

3 But there's simply nothing in the text of the statute that says it
4 needs to be the same political subdivision.

5 And again, just going back to canons of statutory
6 interpretation, if that's what the legislature meant, they might have used
7 the word the political subdivision.

8 They did not use that word. They used it in other parts of the
9 statute. In that same section of the statute, they said the political
10 subdivision. They didn't say that here. And so, you can't just read
11 words into a statute that simply don't exist.

12 There are also a number of odd sort of policy reasons, parade
13 of horrors that were cited by the relators in their brief. None of those
14 things would ever happen.

15 Storey County couldn't cut off this action. Storey County
16 wouldn't be collecting Clark County taxes. And so, you wouldn't have
17 the same transactions and allegations and things like that. So there
18 would be no fear of there being some sort of government action bar.

19 And the other point I would make on that is that the
20 government action bar only cuts off private plaintiffs, relators from
21 pursuing relief. It doesn't create some bar for the state itself to go ahead
22 for damages that appellant was entitled to.

23 So all of those elements, Your Honor, are met here. And like I
24 said, there are no facts in dispute.

25 And the -- you know, last thing I note is that the language of

1 the statute is mandatory, that if this in fact applies, then this action needs
2 to be dismissed. Thank you, Your Honor.

3 THE COURT: All right, thank you.

4 MR. GENTILE: I have five pages of notes and I think I'm
5 going to only going to need two.

6 THE COURT: I had a question for you before you get there.

7 MR. GENTILE: Sure.

8 THE COURT: So if there's a federal action with Clark County,
9 if they get 100 percent of the taxes, isn't this all covered? Isn't there 100
10 percent overlap between the two actions?

11 MR. GENTILE: Well, there's a couple of things that -- actually,
12 you kind of anticipated one of the things that I was going to point out.

13 We haven't had an early case conference. I mean, we have a
14 new one coming up. And it is clear by investigations that we have
15 conducted since the A.G. approved us going forward with this, that there
16 are other counties that have been damaged by this. And so, we will be
17 asking Judge Denton for an opportunity to amend the complaint at that
18 point in time.

19 But -- and again, to directly answer your question, there would
20 have to be something in the nature of a set off, but let's remember that
21 the case in the federal court is not brought under the Nevada False
22 Claims Act, which is a treble damage action.

23 And based upon our original experts, who now is no longer
24 available because he took a job with the Raiders, there's over a billion
25 dollars in damages in this case under the trebling, about 1.2 billion,

1 which is not going to happen in the federal case.

2 And with regard to the federal case, when we brought this
3 action originally, we sought some of the remedies. And then, obviously,
4 they were dismissed by Judge Denton because a private party relator
5 can't seek those remedies. A private party relator is limited to the
6 monetary damages remedies.

7 So your observation is absolutely appropriate here, but there
8 would be nothing really more than a set off. And in the real world, the
9 likelihood of both of these cases going to trial is not great, but they
10 could. They clearly could.

11 And I do not believe -- well, I don't want to get into what I
12 don't -- I don't want to get into that. I don't want to bring bad luck on
13 myself.

14 Have I answered your question?

15 THE COURT: Yes.

16 MR. GENTILE: Okay, now unfortunately, the Supreme Court
17 of Nevada governs what this Court can do, if it has decided something.

18 And in the case that was cited by my adversaries here and
19 also by us, International Gaming Technology versus 2nd Judicial District
20 Court of Nevada, 127 P.3d, 1088, I'm reading from 1094, one sentence.

21 Generally, a false claims action may not be maintained if
22 administrative or court proceedings involving the same underlying facts
23 and allegations were previously instigated, previously instigated, which
24 speaks directly to what already means in that statute.

25 It deals with sequence. What you observed at the threshold

1 today with regard to the ability of a political subdivision to come in three
2 hours into a piece of litigation and bring an action and cause that piece
3 of litigation to be dismissed clearly was not, number one, what
4 International Gaming Technology held.

5 But number two, wasn't part of what the legislature
6 anticipated. Let me show you how. Let me show you why.

7 If you look at NRS 357.150, which appears nowhere in the
8 pleadings, but it's clearly part of the statute, okay, it reads -- the title of it
9 is "Stay of Discovery by Private Plaintiff".

10 It reads the court may stay discovery by a private Plaintiff for
11 not more than 60 days if the Attorney General --

12 THE COURT: Mr. Gentile, this is not your Opposition?

13 MR. GENTILE: It is not, but it's still part of the statute. You
14 have to construe this statute so with all parts of the statute, you can't
15 take a piece of the statute.

16 THE COURT: Well, I know, but it's not particularly fair to the
17 other side, party to make a new argument right here that was not
18 included in the brief, right?

19 MR. GENTILE: It's a matter of statutory construction, Judge.
20 I don't think that that's a new argument.

21 THE COURT: Well, I think it is.

22 MR. GENTILE: Okay. All right, well, the point is, clearly, if
23 you look at the statute as a whole, all of it, it is clear that there are parts
24 of the statute that contemplated allowing a private plaintiff to go forward
25 and litigate a matter.

1 And if the -- and with another matter pending on the same tax.
2 And if that happens, the Attorney General could come in and ask for a
3 stay.

4 Now why would you ask for a stay if it's supposed to be
5 dismissed? It makes no sense. And so, clearly as a whole, the statute
6 does not anticipate that.

7 But I don't think it really need to go past 080(3)(b) itself
8 because of that word already and because of the International Gaming
9 Technology holding by our Supreme Court.

10 The other case, that is cited by my adversary in this matter,
11 and it's interesting that there was no case cited that's squarely on point
12 with regard to the sequence issue that's before this Court.

13 But in People Ex Rel. Lindblom versus Sears Brands, which is
14 an Illinois Appellate Court, at paragraph 26, the court there speaks about
15 what is the dispositive issue in that case.

16 And I'm reading from that decision. Because the department's
17 audit and the board's informal internal review of the proposed audit
18 adjustments were not an administrative civil money penalty proceeding,
19 that the State was already a party to, the government action bar is not
20 applicable to the relator's qui tam action.

21 So both of the cases that are cited in the moving papers of
22 Orbitz, et al, both of those cases recognize that it's a sequential
23 examination that you have to perform. Both of them do.

24 And the statute itself does. And getting back to International
25 Gaming, that holding, a false claim action may not be maintained if

1 administrative or court proceedings involving the same underlying facts
2 and allegations were previously instigated.

3 I think there's another consideration that the Court has to
4 make when you're trying to think in terms of what did the legislature
5 mean here. And that deals with the whole area of qui tam actions.

6 THE COURT: Well, I don't -- if the statute is [indiscernible]
7 until we don't get to legislative intent.

8 MR. GENTILE: No, no, I'm not talking about legislative intent.
9 I'm talking about the practical effect of qui tam actions. Qui tam actions
10 are private Attorney General actions. That's what they have been called
11 for the last 1,700 years.

12 And there -- they exist because they recognize that the
13 Attorney General -- prosecutorial offices in general have limited
14 resources.

15 If this Court were to hold that by Clark County coming into a
16 lawsuit after the qui tam was filed, three years later under your
17 hypothetical, it would cause the case to be dismissed. Under this
18 statute, that turns the whole system upside-down. Nobody will take one.
19 And so, I submit it.

20 THE COURT: Thank you.

21 And Mr. Tasca?

22 MR. TASCA: Your Honor, I find Mr. Gentile made a lot of new
23 arguments that we hadn't seen before and he was a little bit all over the
24 place, but I just want to point out that he did concede at the very
25 beginning that the same pot of unpaid taxes that are being sought in this

1 case are the subject of the Clark County action.

2 And so, the State will get its taxes if and when the Clark
3 County action proceeds and Clark County's able to recover.

4 But the point here is not so much the relief sought anyway. It
5 is the allegations or transactions. That is the sole focus of the
6 government action bar. And, again, I didn't hear Mr. Gentile say
7 anything about that fact, the fact that that's not met.

8 The only thing that's going to be additional here are sort of,
9 you know, these mercenary damages that would be obtained in a False
10 Claims Act, but there's no need for mercenary damages when the
11 county itself in the other case is going -- is pursuing the exact same
12 relief.

13 And so, those kind of damages are not warranted in a case
14 like this. That's part of the purpose of the government action bar. It's
15 better to have the government control its own case than to have private
16 plaintiffs accountable to no one pursuing the case.

17 And so --

18 THE COURT: But that isn't exactly, I mean, the statute gives
19 the Attorney General quite a bit of input and control, right? It's not just
20 people going wild and deciding to file lawsuits unchecked on behalf of
21 the state of Nevada. That could be quite interesting.

22 MR. TASCA: Well, it certainly does, Your Honor. I would
23 argue that that action supports my point. The fact that the A.G. has so
24 many powers in a False Claims Act, it means that if the A.G. wants to
25 step in at any time and take over, it's going to take over.

1 And so, you know, the private plaintiffs are only allowed to
2 proceed if governmental entities don't deem it appropriate in their
3 judgment to bring an action that is the subject of the False Claims Act.

4 And you see that in both the A.G. provisions of the False
5 Claims Act and the government action bar. It's from the same concept
6 that we see over and over. The government should be controlling.

7 And, Your Honor, with that, I just wanted to throw it to my
8 colleague, Mr. Baruch, to see if he has anything to add.

9 MR. BARUCH: If I may, Your Honor, very briefly, I just want to
10 respond to the point about the International Gaming case.

11 Yes, it's true that in that particular instance, and often as the
12 court has already -- the sequence is as it was in the [indiscernible] case
13 where the civil action filed first and the qui tam action was filed second.

14 So the court was addressing that and saying generally
15 speaking, that's what happens. You know, the government action bar
16 would apply.

17 And that certainly wasn't saying -- certainly didn't hold that the
18 government action bar would have also applied in the sequence where
19 there are qui tam actions filed first and the civil action is filed second.

20 In fact, as Mr. Tasca said the -- you know, the legislature was
21 very, very clear that both circuits, the action cannot be maintained
22 [indiscernible].

23 And Mr. Tasca is right that the -- Nevada borrowed the
24 language from the government action bar from the federal False Claims
25 Act, which does have the sequencing obligation in it.

1 And that's apparent from the language of the federal False
2 Claims Act, which speaks in terms of a private party bringing an action to
3 which the state or the government is already a party.

4 Nevada chose to alter that language materially by switching
5 the language from bring to maintain, thereby giving the government
6 more discretion than that's -- than as what is available under the federal
7 False Claims Act.

8 So the idea is that Nevada has allowed the government to
9 decide when and in what forum the -- its particular claims can be
10 pursued.

11 And once the government decides what that forum is, whether
12 it's before or after a qui tam action is filed, the qui tam action needs to
13 give away.

14 And that's what the language of the government action bar
15 says. So I wouldn't place any limiting interpretation on the International
16 Gaming case, because that was not this scenario.

17 And, yes, everyone would agree that generally speaking,
18 that's the situation and that's the circumstance in which the government
19 action bar most often applied -- arises, but that's not the situation here.

20 And certainly, the International Gaming case under the
21 Nevada Supreme Court was not limiting the application of the
22 government action bar to that sequencing priority.

23 THE COURT: So, in this case, one of the other things that's a
24 little -- I'm not quite sure what the word is, but one of my other concerns
25 in this case is the -- I appreciate that and, you know, it was the question I

1 asked Mr. Gentile, but that Nevada is a lot broader than just Clark
2 County, right?

3 So it doesn't necessarily make sense that we would dismiss
4 the broader case that was filed first, leaving the narrower case filed
5 second.

6 MR. TASCA: Can I speak to that, Your Honor?

7 THE COURT: Yes.

8 MR. TASCA: It -- it's actually the opposite. The only tax that's
9 being pursued in this case is the Clark County tax.

10 And, specifically, it's only the state of Nevada's portion of that
11 Clark County tax that it would ultimately receive that's being sought.

12 The broader case is actually the Clark County suit that's in
13 federal court, because that's seeking the entire Clark County alleged
14 unpaid tax it's owed.

15 THE COURT: Right. Anything else you want?

16 MR. TASCA: No, Your Honor, thank you.

17 THE COURT: Okay.

18 MR. GENTILE: No, Your Honor, thank you.

19 THE COURT: All right. Okay, so I'm going to divide the
20 motion for summary judgment based on [indiscernible]. I had it right
21 here and then it went somewhere else.

22 I do think that the significant meaning to that word already in
23 the statute, that it contemplates first in time, not the State is
24 already -- that the State is a party to an action that exists at the time of
25 the filing of the second qui tam action.

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So on that basis, I am going to deny the motion.

MR. TASCA: Thank you.

THE COURT: Mr. Gentile, if you will prepare the order?

MR. TASCA: We shall, thank you.

MR. GENTILE: Thank you, Your Honor.

[Proceedings concluded at 10:28 a.m.]

* * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.



Chris Hwang
Transcriber

RPLY

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

STATE OF NEVADA, EX REL.
Mark Fierro and Sig Rogich,

Plaintiffs,

v.

ORBITZ WORLDWIDE, LLC et al.,

Defendants.

Case No.: A-20-814111-B

Dept. No.: XIII

HEARING DATE: JUNE 13, 2022

HEARING TIME: 9:00 AM

**DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION FOR
RECONSIDERATION OR IN THE ALTERNATIVE TO STAY PROCEEDINGS**

1 Defendants respectfully submit this reply brief in support of their motion for reconsideration
2 of the Court’s denial of their Motion for Summary Judgment pursuant to the Nevada False Claims
3 Act (“NFCA”) government action bar, NRS 357.080(3)(b), and alternative motion to stay this
4 action pending a petition for writ of review to the Nevada Supreme Court to address this threshold
5 government action bar question.

6 **MEMORANDUM OF POINTS AND AUTHORITIES**

7 **I. Introduction and Background**

8 In Her Honor’s decision denying summary judgment as to the government action bar, Judge
9 Bell held that a legal conclusion that the term “already a party” effectively requires that the
10 government civil action that would otherwise bar a *qui tam* suit must have been filed prior to the
11 *qui tam* suit. See April 29, 2022 Order at ¶ 5 (“The Court finds that because the Clark County
12 Action was filed after this action was commenced, Clark County is not ‘already a party’ to the Clark
13 County Action for purposes of NRS 357.080(3).”). Applying that reasoning to the facts here, Judge
14 Bell found that the bar does not apply because the governmental suit – the Clark County Action
15 against Defendants – post-dates the commencement of this *qui tam* suit (the “Qui Tam Action”).
16 *Id.* at ¶ 6.

17 As set forth in the Motion for Reconsideration, Defendants respectfully submit that Judge
18 Bell’s legal conclusion on this point is clear error and that summary judgment should have been
19 granted in Defendants’ favor. The NFCA – unlike the federal FCA – does not contain the
20 sequencing requirement that Judge Bell read into the statute. Whereas the federal FCA’s
21 government action bar states that no person can “bring” – *i.e.*, commence or file – a *qui tam* action
22 that is the subject of a governmental civil suit, 31 U.S.C. § 3730(e)(3), the NFCA says that a *qui*
23 *tam* “action may not be maintained” in the face of such a governmental civil suit. NRS 357.080(3).
24 As detailed in Defendants’ Motion – and never addressed in Relators’ Opposition – the materially
25 different language employed by the Nevada legislature when enacting the NFCA’s government
26 action provision precludes the very “sequence” or timing requirement that Judge Bell grafted onto
27 the statute in her decision. Def. Mot. at 7-10. Since there was no dispute that all other elements of
28 the government action bar were satisfied, the only question should have been whether Relators

1 were *maintaining* their action after the government filed suit on the same subject matter per NRS
2 357.080(3). Relators clearly were, thereby establishing the basis for a grant of summary judgment.

3 In their Opposition, Relators raise two principal points: (1) they claim that the filing of the
4 Amended Complaint moots this Motion because the Summary Judgment Motion was aimed at the
5 original complaint, which has now been superseded; and (2) they assert that there are “insufficient
6 grounds for reconsideration” because there are no new issues of fact or law. As shown below,
7 neither point has merit. This Court has discretion to reconsider Judge Bell’s order notwithstanding
8 the Amended Complaint, which Relators have said time and again simply clarified and did not add
9 to the allegations in in their original complaint. And this motion is not about new facts or law. It
10 is about a clear error of law that warrants reconsideration.

11 Finally, Relators do not dispute that application of the government action bar is a threshold
12 question of law separate from the merits of the claims, nor do they dispute that this a novel issue
13 with no Nevada cases directly on point. As such, even if the motion for summary judgment ruling
14 is not reconsidered and reversed, a stay of proceedings is warranted to allow Defendants to file a
15 petition for a writ of review to the Nevada Supreme Court.

16 **II. Argument**

17 **1. This Motion Remains Ripe Notwithstanding the Amended Complaint**

18 Relators’ principal argument against reconsideration is that the filing of the Amended
19 Complaint after Judge Bell’s order denying summary judgment means that the summary judgment
20 order cannot be reconsidered. According to Relators, since the Court Order at issue pertains to the
21 original complaint, and that complaint is no longer operative, the Order is effectively unreviewable.
22 There is no such bright line rule, and the case law Relators point to does not hold otherwise. This
23 Court has discretion to reconsider any prior order in this action. And, even if Relators were correct
24 that the amendment requires Defendants to refile their motion post-amendment, that would not
25 obviate the need for this Court to address this same legal question. Defendants submit that this
26 Court can and should exercise its discretion to adjudicate this subject now.

27 Although an amended complaint generally supersedes all prior *complaints*, “[i]t is not true
28 that the prior *pleadings* are ineffective for all purposes.” *Las Vegas Network v. B. Shawcross &*

1 *Assocs.*, 80 Nev. 405, 407 (1964). The Court has discretion to consider a motion directed at the
2 original complaint, including if the amended complaint does not cure the original complaint's
3 deficiencies. *See, e.g., Chacon v. Babcock*, 640 F.2d 221 (9th Cir. 1981) (motion for summary
4 judgment); *Datastorm Techs. v. Excalibur Commc'ns*, 888 F. Supp. 112, 114 (N.D. Cal. 1995)
5 (motion to dismiss); *McCarthy v. Luong*, No. 1:16-cv-01172-LJO-BAM, 2016 U.S. Dist. LEXIS
6 161333, at *5 (E.D. Cal. Nov. 21, 2016) (motion to dismiss); *Kirk v. United States, IRS*, No. CV
7 96-1415-PHX-SMM, 1998 U.S. Dist. LEXIS 14005 (D. Ariz. Aug. 14, 1998) (motion for summary
8 judgment); *Fitzgerald v. Ariz.*, No. CIV. 96-2077-PHX-SMM, 1997 U.S. Dist. LEXIS 14876, at *3
9 (D. Ariz. July 9, 1997), *aff'd sub nom. Fitzgerald v. Ariz.*, 133 F.3d 926 (9th Cir. 1997) (motion to
10 dismiss).

11 This well-recognized judicial discretion is consistent with common sense and the general
12 interest in “secur[ing] the just, speedy, and inexpensive determination of every action and
13 proceeding.” *See* NRCP 1. Defendants “should not be required to file a new motion . . . simply
14 because an amended pleading was introduced while their motion was pending. . . . ***To hold***
15 ***otherwise would be to exalt form over substance.***” 6 Wright, Miller & Kane, Federal Practice and
16 Procedure § 1476 at 638 (2010 ed.) (emphasis added).

17 Indeed, it would contravene the spirit and purpose of the Nevada Rules of Civil Procedure
18 if a party could so easily defeat reconsideration of a threshold legal issue simply by filing an
19 amended complaint, particularly where the defect is of the type here that goes to the heart of
20 whether the “action” can be maintained at all. It also is worth noting here that when Relators sought
21 leave to file their Amended Complaint, they did so on the premise (albeit one that Defendants
22 challenged) that the amendment did not change their claims, but merely clarified the allegations
23 that already were in the original complaint.¹

24 Importantly, the government action bar – when it applies – stops an action in its tracks. A
25 *qui tam* action “may not be maintained” where it is based on allegations or transactions that the

26 ¹ Indeed, Relators still insist that their original complaint included conduct in Nevada counties
27 besides Clark County. *See e.g., Opp.* at 5 n.2 (“Plaintiffs have not conceded that the original
28 formulation of their Complaint did not include taxes due from Washoe, Douglas, Lyon, Nye and/or
such other counties Under liberal notice pleading standards, the original Complaint could
have been interpreted as including such claims.”).

1 government is pursuing for itself in a separate civil action. NRS 357.080(3). Thus, if the Court’s
2 interpretation of the bar was wrong as a legal matter, meaning that there is no requirement that the
3 civil action precede the *qui tam* suit, then this action had to be dismissed – as it could not be
4 maintained. And that dismissal necessarily would have happened before any amendment.

5 As such, the amended complaint does not obviate the need for the Court to address whether
6 Judge Bell’s legal determination was correct. The amended complaint continues to rely heavily on
7 the Clark County conduct that permeated their original complaint and therefore continues to overlap
8 with the Clark County Action. In their Opposition, Relators emphasize that Defendants argued that
9 there was **complete** overlap between the allegations or transactions at issue in the Clark County
10 Action and the Qui Tam Action. Opp. at 4. Of course, Defendants emphasized that point as it was
11 relevant and true. But the government action bar – on its face – is not limited to circumstances
12 where there is a complete overlap in the conduct at issue in both suits. The bar expressly states that
13 the *qui tam* action “may not be maintained” if it is based on allegations or transactions that are the
14 subject of a civil action. That was the case with the original complaint and it remains the case with
15 respect to the amended complaint. In addition, as detailed in Defendants’ Motion, the foundation
16 for all of Relators’ claims – *i.e.*, regardless of which county – is Nevada Revised Statute 244A,
17 244.335, *et seq.*, which Relators allege establishes Defendants’ supposed obligation to pay any
18 combined transient lodging taxes. Amended Complaint at ¶ 51 (citing these NRS provisions as
19 authorizing the imposition of the affected county taxes at issue); Def. Mot. at 10.

20 Accordingly, even if the amended complaint contains additional allegations that are not at
21 issue in the original complaint, the government action bar remains relevant and still applies. Under
22 these circumstances, the Court should address this question now, and Defendants submit that it
23 would be most efficient for the Court to do so in this context, rather than await a challenge to the
24 Amended Complaint that will be weeks away and will require briefing and consideration of
25 multiple other dismissal grounds as well.

26 **2. Reconsideration Is Appropriate**

27 Relators’ contention that Defendants have not met the standards for reconsideration is
28 without merit. As set forth in Defendants’ Motion, a reconsideration is proper when “[s]ubstantially

1 different evidence is subsequently introduced *or the decision is clearly erroneous.*” *Masonry &*
2 *Tile Contractors Ass’n v. Jolley, Urga & Wirth, Ltd.*, 113 Nev. 737, 741 (1997) (emphasis added).
3 Defendants have described why Judge Bell’s decision is clearly erroneous under the law. Ignoring
4 this, Relators argue that Defendants are making legal arguments that they could have and did
5 address in the summary judgment briefing. Opp. at 6. Even if that were true, and it is not,
6 Defendants are not trying to rehash arguments or present new facts or law. Reconsideration is
7 warranted here because Judge Bell’s denial of summary judgment was based on a clear error of
8 law, namely a legal conclusion that the government action bar simply does not apply unless the
9 government’s civil action is filed before the *qui tam* suit. Defendants submit that statutory
10 interpretation is erroneous, which is the type of challenge to an order that easily falls within the
11 ambit of reconsideration.

12 Moreover, Judge Bell’s interpretation of the statute largely was *sua sponte* at the hearing
13 itself. While Defendants’ summary judgment papers asserted that each element of the government
14 action bar had been established, the “sequencing” requirement that Judge Bell applied does not
15 appear on the face of the government action bar and thus was not a separate focus of Defendants’
16 briefing. See, e.g., Def. Mot. at 5, n.3. Nor was it part of Relators’ opposition to summary
17 judgment, wherein they expended most of their efforts on extraneous policy arguments for why the
18 bar should not apply to their claims. While there was brief argument on the sequencing point at the
19 summary judgment hearing when the Court mentioned it, the subject was not a focus of the parties’
20 briefing. Indeed, Defendants submit that the lack of briefing facilitated the Court’s mistaken
21 interpretation. Reconsideration is meant to address this precise circumstance, allowing the Court
22 to reassess its position where a party claims clear legal error.

23 Thus, Relators’ argument that “Defendants have offered nothing to this Court that
24 establishes that the previous decision was ‘clearly erroneous’” (Opp. at 7) is entirely without merit.
25 Defendants’ entire Motion, in fact, focuses on that very argument. And in support of that argument,
26 Defendants point to and discuss the language of the statute itself and principles of statutory
27 construction (and case law and legal commentary) demonstrating that the Court’s interpretation
28 was incorrect, and cite to the federal FCA and case law that show that the Nevada legislature

1 expressly deviated from the federal FCA – where the sequencing of actions applies – when it
2 enacted the NFCA’s government action bar and pointedly rendered sequencing irrelevant. *See* Def.
3 Mot. at 7-8.

4 What is most notable about Relators’ opposition is that they do not challenge any of the
5 Defendants’ legal analysis or authority. Indeed, they have no answer for the fact that the NFCA,
6 unlike the federal FCA, precludes a relator from “maintaining” an action that is based on allegations
7 that are the subject of a government civil suit, which is precisely what Relators are doing here,
8 regardless of when the civil suit was filed. They do not argue that “maintain” is synonymous with
9 “bring” in these circumstances, nor can they because, as Defendants have shown, the words have
10 distinct meanings and the Nevada legislature used the word “bring” elsewhere in the NFCA,
11 showing that it understood the difference. *See Aerogrow Int’l, Inc. v. Eighth Judicial Dist. of Nev.*,
12 137 Nev. Adv. Op. 76, 499 P.3d 1193, 1199 (2021) (“a statute’s use of two different terms evinces
13 the legislature’s intent that different meanings apply to the two terms”) (*citing Labastida v. State*,
14 115 Nev. 298, 302-03, 986 P.2d 443, 446 (1999); *see also* Norman Singer & Shambie Singer, *2B*
15 *Sutherland Statutory Construction* § 52:5 (7th ed. 2016) (“when a legislature models a statute after
16 a uniform act, but does not adopt particular language, courts conclude the omission was
17 ‘deliberate,’ or ‘intentional’”). As such, Relators have done nothing to counter Defendants’
18 substantial showing that the Court’s critical interpretation of the government action bar – finding
19 that it does not apply because the Clark County suit was filed after the *Qui Tam* Action (*see* April
20 29, 2022 Order at ¶ 5) – was clearly erroneous.

21 **3. If Reconsideration is Denied, the Court Should Stay the Proceedings Pending**
22 **Defendants’ Petition for Writ of Review**

23 As explained in the moving papers and herein, application of the government action bar is
24 a threshold question in this litigation. If it applies, dismissal of the *Qui Tam* Action is mandatory
25 under the NFCA, as Relators could not “maintain” their suit given the separate government civil
26 action. That outcome would not change, Defendants submit, even with the Amended Complaint,
27 which purports to plead claims on behalf of different counties beyond Clark County. Defendants
28 do not believe that the Amended Complaint properly asserts any new claims. But even if it did, the

1 government action bar would still require dismissal of the entire action because of the directly
2 overlapping Clark County claims. Accordingly, the application of the government action bar –
3 even if it was just as to the directly overlapping Clark County claims – would either terminate this
4 action or materially affect the scope of this suit going forward.

5 As such, if the Court were to deny reconsideration, this is the type of legal question that
6 would be ripe for review by the Supreme Court. For that reason, Defendants’ Motion contains the
7 alternative request, pursuant to NRAP 8(a)(1)(A), that the Court stay further proceedings to enable
8 Defendants to promptly seek a writ of review from the Nevada Supreme Court.

9 As explained in Defendants’ Motion, “courts generally consider the following factors” in
10 determining whether to grant a stay pending appeal: “(1) whether the object of the appeal or writ
11 petition will be defeated if the stay or injunction is denied; (2) whether appellant/petitioner will
12 suffer irreparable or serious injury if the stay or injunction is denied; (3) whether the
13 respondent/real party in interest will suffer irreparable or serious injury if the stay or injunction is
14 granted; and (4) whether the appellant/petitioner is likely to prevail on the merits in the appeal or
15 writ petition.” NRAP 8(c). And Defendants have explained why a stay is merited under these
16 factors.

17 In their Opposition, Relators concede that “there is no procedural obstacle preventing
18 Defendants from filing a Petition for an appropriate writ” (Opp. at 8), yet they say that this Court
19 should deny a stay and allow Defendants “another opportunity to seek a stay of these proceedings”
20 from the Supreme Court if a writ is granted. *Id.* But that approach is not efficient. Relators do not
21 deny that this is a threshold question separate and distinct from the merits of the action, and they
22 do not deny that resolution of this question in Defendants’ favor would either terminate the action
23 or materially limit its scope. Thus, the most efficient course would be for the Court to stay the
24 proceedings to enable Defendants to seek prompt review of the decision from the Supreme Court.

25 **CONCLUSION**

26 For all the foregoing reasons, Defendants respectfully request the Court reconsider their
27 previously filed Motion for Summary Judgment and dismiss this action with prejudice pursuant to
28 the NFCA’s government action bar.

1 Dated: June 6, 2022

2 Respectfully submitted,

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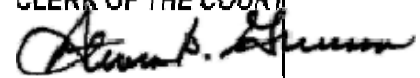
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1 TRAN

2 DISTRICT COURT
3 CLARK COUNTY, NEVADA

4
5 STATE OF NEVADA EX REL
6 MARK FIERRO,

7 Plaintiff(s),

8 vs.

9 ORBITZ WORLDWIDE, LLC,

10 Defendant(s).

Case No. A-20-814111-B

DEPT. XIII

11
12 BEFORE THE HONORABLE MARK R. DENTON,
13 DISTRICT COURT JUDGE

14
15 THURSDAY, JULY 7, 2022

16
17 ***TRANSCRIPT OF PROCEEDINGS RE:***
18 **DEFENDANTS' MOTION FOR RECONSIDERATION OR IN THE**
19 **ALTERNATIVE STAY OF PROCEEDINGS**

20
21
22 (Appearances on page 2.)

23
24
25 RECORDED BY: JENNIFER GEROLD, COURT RECORDER

1 APPEARANCES:

2 For the Plaintiff(s):

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MICHAEL V. CRISTALLI, ESQ.

4
5 For the Defendant(s):

DOUGLAS W. BARUCH, ESQ.
(Via BlueJeans)
JOEL E. TASCA, ESQ.
CATHERINE A. BATTIN, ESQ.

1 **LAS VEGAS, NEVADA, THURSDAY, JULY 7, 2022**

2 [Proceeding commenced at 9:39 a.m.]

3
4 THE COURT: Okay. Page 16, State of Nevada ex rel Mark
5 Fierro versus Orbitz Worldwide, LLC.

6 MR. TASCA: Good morning, Your Honor.

7 MR. GENTILE: Good morning, Your Honor.

8 MR. TASCA: Joel Tasca for the defendants. And I'm also
9 joined by my colleague, Doug Baruch, who's participating remotely
10 for the Expedia group of defendants.

11 THE COURT: All right.

12 MR. GENTILE: Your Honor, Dominic Gentile, State Bar
13 Number 1923, on behalf of the plaintiffs in the case. And with me is
14 Michael Cristalli, my partner, and Mark Fierro. And it's my
15 understanding that Mr. Rogich is on BlueJeans, but I don't know
16 that. He said he was having some difficulty. He's in the state of
17 Washington, so.

18 THE COURT: Okay.

19 MR. GENTILE: Said he was having difficulty accessing.
20 He may be on, he may not.

21 THE COURT: Okay. Very well. Do you want to go ahead
22 and proceed?

23 MR. GENTILE: Oh, yes. Please.

24 THE COURT: Okay. Very well.

25 It's Defendant's Motion for Reconsideration and in the

1 Alternative, to Stay Proceedings.

2 MR. TASCA: Thank you, Your Honor.

3 And as Your Honor points out, we are here on a
4 reconsideration of Judge Bell's decision, a decision she made in
5 Your Honor's stead a few months ago on Defendant's government
6 action to our motion.

7 And as Your Honor may recall from the briefing, the
8 government action bar is a bar that's expressly provided for by the
9 Nevada False Claims Act, and it would be case dispositive here.
10 And what it does is it bars a False Claims Act claim that's brought
11 by private plaintiff when there's a separate action that's brought by
12 the government that's based on the same transactions -- same
13 underlying allegations or transactions.

14 And here Judge Bell found that this case and the case
15 that's pending that Your Honor's probably familiar with by now, in
16 Federal Court by Clark County, are, in fact, based on the same
17 underlying allegations or transactions. But Judge Bell didn't apply
18 the bar and she didn't apply the bar for a very specific reason. She
19 got stuck with an aspect of the statutory language --

20 THE COURT: "Already"?

21 MR. TASCA: "Already." And just to remind Your Honor
22 of the specific line of the bar, it says:

23 An action may be -- may not be maintained by private
24 plaintiff if the action is based upon allegations or transactions
25 that are the subject of a civil action to which the state or political

1 subdivision is already a party.

2 And Judge Bell reasoned that the bar doesn't apply
3 because the Clark County action was filed after this action was filed,
4 and so Clark County was not already a party to that action at the
5 time this action was brought.

6 And her concern, and this is made clear in the oral
7 argument transcript, was that adopting Defendant's view of this
8 language would render the term "already" superfluous. And she
9 was concerned about the statutory canon of construction against
10 surplusage. And that was the basis for her decision.

11 We believe that Judge Bell's decision on that issue was
12 clearly erroneous, and that's why we're back here. And we're going
13 to talk about the term "already" a bit more in just a few minutes.
14 But I think it's important to note that the term "already," that was
15 already part of the federal template. That's part of the federal
16 government action bar that the Nevada legislature adopted. So
17 there's not a lot to glean about the Nevada legislature's intent
18 specifically from that word. It just came from the federal statute.

19 On the other hand, where you can very reliably glean
20 legislative intent is from what the Nevada legislature changed when
21 it adopted the federal government action bar language. And even
22 though the Nevada legislature adopted the federal language in all
23 substantive ways, verbatim, it made one change. And that change
24 is very important to the issue here today.

25 Instead of stating that the private party cannot bring an

1 action based on the same transactions or occurrences, the Nevada
2 version states the private party cannot maintain an action based on
3 the same transactions occurrences. And this change that the
4 Nevada legislature made to the federal language is very significant.
5 And we know that, based on what the Nevada Supreme Court said
6 in the International Game Technology case where the Court did
7 something -- Nevada Supreme Court did something very similar
8 with respect to another aspect of the Nevada False Claims Act and
9 said, look, when the Nevada legislature changes something in our --
10 Nevada's -- False Claims Act, from the federal statute, we got to
11 think that that was purposeful and that the Nevada legislature
12 meant something by that.

13 Another very telling indicator of legislative intent is the
14 fact that the Nevada legislature knew how the -- used the word
15 "bring," that was used in the federal language. It used "bring" a
16 number of times in other parts of Nevada False Claims Act, and we
17 cited those in our brief. But in the government action bar it chose
18 not to use that language.

19 So we've got two very -- and before I get to that point, I'll
20 just say that that's another issue that the Supreme Court has said
21 you have to think that the Nevada legislature means something
22 when they use different terms in different parts of the same statute.
23 So you have two very reliable indicators of the legislature's intent
24 here. You have, number one, a change from the federal template
25 that they used, and number two, you have the fact that they elected

1 not to use the word "bring," even though they used it in other parts
2 of the statute, and instead, they used the word "maintain."

3 And what the Nevada Supreme Court has told us is that in
4 these circumstances, we have to presume that the Nevada
5 legislature meant something different by using the word
6 "maintain." Something broader than the word "bring." And what
7 "maintain" means is that the government action bar, it doesn't
8 depend on sequencing, like the federal government action bar does.
9 It depends only on the existence of two -- of the two actions at the
10 same time.

11 And, in essence, what the Nevada legislature's telling us
12 here is that if there's a government action out there, then, private
13 party, you can't maintain an action based on the same transactions
14 or occurrences, including one that you brought before the
15 government action bar was -- or before the government action itself
16 was filed.

17 So it doesn't depend on sequencing like the federal bar,
18 and that is evident by that -- the use of that word "maintain."

19 Now, against this decision by the Nevada legislature to
20 eschew the word "bring" and instead choose the word "maintain,"
21 which the Nevada Supreme Court says we have to presume means
22 something, we have the word "already." And we need to sort of
23 weigh -- determine whether the use of the word "already"
24 outweighs that very sort of powerful indicator of legislative intent
25 that we have by the use of the word "maintain" rather than "bring"

1 for the reasons I describe.

2 Now, "already" is not something, again, that the Nevada
3 legislature added that was in the federal template already. And the
4 "already" language, it's not -- Defendant's interpretation is not
5 defeated by the canon against surplusage, because it's simply
6 clarifying language. And we cited -- and it clarifies that the
7 government can't be sort of waiting in the wings in that other
8 action. It can't be a potential intervenor or a potential indispensable
9 party. It's got to actually be joined to the action before the
10 government action bar applies.

11 And, look, could you reach that same conclusion if the
12 statute just say "is" a party instead of "is already" a party? And
13 that's what Judge Bell was worried about. Sure, you could reach
14 that conclusion. But that doesn't mean that "already" needs to
15 mean something else. It's clarifying language.

16 And, again, we've cited cases in our brief that talk about
17 clarifying language does not get defeated just because there's -- the
18 canon out there, again, surplusage. And we see this clarifying
19 language, analogous clarifying language, in other parts of Nevada
20 law, and we've discussed this in our brief. We've got Nevada's
21 Joinder Rule, the legislature refers to an existing party. Even
22 though parties to an action is always an existing party, Nevada
23 legislature still said existing party.

24 The Intervention Rule is the same way. Nonparty
25 movants can intervene in an action unless existing parties

1 adequately represent the interest of the nonparties. Since the only
2 parties to an action are existing parties, "existing" doesn't really
3 have any independent meaning, but it was used anyway, because
4 it's a clarifying portion of the rule.

5 And it's the same thing here, just as every party to an
6 action is an existing party for purposes of the Joinder and
7 Intervention rules, every party, by definition, is already a party to an
8 action for purposes of the government action bar. But we still use
9 the words "existing" and "already" because they provide clarity.
10 They help make the distinction between someone who is actually
11 joined as a party and someone who's sort of waiting in the wings as
12 either a potential indispensable party or a potential intervenor.

13 And that's really what it comes down to, Your Honor. It's
14 a determination of whether meaning should be given to the word
15 "maintain," something the Nevada legislature specifically selected,
16 versus the term "already," which was already in there, not
17 specifically selected by the Nevada legislature, and, as I explained,
18 is simply in the nature of clarification.

19 Now, in their opposition to our Motion for
20 Reconsideration, they don't dispute any of this. None of what I just
21 said is argued against in their opposition. Instead, they, basically,
22 say we haven't met the standards for reconsideration. Well, that's
23 not true. Clearly erroneous is a standard for reconsideration and
24 that's what we're moving on. And they also spent a lot of time
25 talking about how the amended complaint trumps all of this and the

1 Court shouldn't -- and we feel we've addressed that sufficiently in
2 our reply brief, unless Your Honor has any questions about that
3 particular issue. But we don't think that the amended complaint
4 trumps this Court's ability to reconsider Judge Bell's decision on
5 the government action bar issue.

6 I do want to say one -- a couple of words about our
7 alternative request if Your Honor does not grant reconsideration.
8 We think we have a pretty good shot here of getting a writ granted
9 by the Nevada Supreme Court. We have -- it's a threshold issue
10 that we're dealing with here, it's separate from the merits, it's
11 potentially case dispositive, there's no other law on it, it's a novel
12 issue. So we actually think this is a really good issue to take up to
13 the Nevada Supreme Court if Your Honor does not go our way.
14 And so we would ask for a stay while we do that.

15 And, very briefly, Your Honor, because I think we
16 explained this well in our papers, but the standards for a stay I think
17 are met here. The object of the writ, which is, you know, getting the
18 government action bar to be invoked, would be defeated if there's
19 no stay here. This action would just keep trucking along while
20 there's a government action pending, which is exactly what the
21 government action bar is supposed to prevent.

22 Defendants would suffer injury, serious injury, if this
23 action continues. We think there are a lot of ways that this case can
24 be disposed of easily, as a matter of law. But if the relators get their
25 way, we think they're going to try to turn this into a big case,

1 they're going to take discovery from all the defendants, from third
2 parties. And if they kind of get their way and do that, obviously,
3 Defendants are going to incur a ton of costs defending this case.

4 On the other hand, the real party in interest here, the
5 State, they've known about this alleged misconduct for over a
6 decade; they didn't do anything about it. So the brief amount of
7 time that it would take to take up a writ pales in comparison to the
8 amount of time that the State of Nevada did nothing about this
9 issue until relators brought this case.

10 And then, you know --

11 THE COURT: I assume a stay would be sought -- I mean, a
12 writ would be sought promptly after any ruling denying this
13 motion, right?

14 MR. TASCA: Yes, Your Honor. We would --

15 THE COURT: A stay could also be sought in the Supreme
16 Court, right?

17 MR. TASCA: Yeah.

18 THE COURT: Based on that?

19 MR. TASCA: Yeah, yeah. If Your Honor were not to grant
20 it, we could seek it in the state Supreme Court. But we would
21 promptly file the writ. We could get the writ filed within three or
22 four weeks, if --

23 THE COURT: And I don't see anything on the calendar
24 that's upcoming on this, right? I mean, there's nothing taking place
25 in the near future in this case, right?

1 MR. TASCA: Yeah, well, again, we think that the amended
2 complaint, well, the amended complaint has been filed --

3 THE COURT: This is --

4 MR. TASCA: -- and we -- I think if the action continues on,
5 we would have to respond to it next week. And, you know, based
6 on that response, we -- the case could get dismissed based on
7 some of the arguments that we're making in there. But if it doesn't,
8 then discovery is likely to get started at some point. So -- but, yeah,
9 there's nothing immediately on the horizon other than the response
10 to our amended complaint.

11 THE COURT: All right. One question I have --

12 MR. TASCA: Sure.

13 THE COURT: -- in the conceptually here, is that it appears
14 to me that if an action has been filed, as this action has been, okay,
15 and it proceeds along and things take place, and the County isn't --
16 or the State, whatever, isn't pleased with what's taking place, what
17 you're saying, in effect, says that they can just go to another court
18 and -- right?

19 MR. TASCA: That's an option they have. And then the
20 government --

21 THE COURT: I see.

22 MR. TASCA: -- action bar wouldn't apply. They --

23 THE COURT: Just go down the road and -- in other words,
24 litigation takes place and then, well, this isn't going so well for us,
25 so let's file an action in Federal Court and say that it stops the one

1 in state court. That's basically --

2 MR. TASCA: Well, that's --

3 THE COURT: -- conceptually, in other words, that --

4 MR. TASCA: Conceptually, that is something that could
5 happen. I mean, the government has a lot of other options too. It
6 could intervene in the qui tam action instead of doing that. So --
7 but Your Honor's right, that's conceptually something that could
8 happen based on the statute.

9 THE COURT: Okay. All right. Thank you.

10 MR. TASCA: Thank you, Your Honor.

11 MR. GENTILE: Good morning, Your Honor.

12 THE COURT: Good morning.

13 MR. GENTILE: I can't resist this.

14 When I use a word, Humpty Dumpty said, in rather a
15 scornful tone, it means just what I choose it to mean, neither more
16 nor less.

17 The question is, said Alice, whether you can make words
18 mean so many different things.

19 The question is, said Humpty Dumpty, which is to be
20 master? That's all.

21 Judge Bell, at page 21 of the transcript that you have
22 before you of the argument that took place, stated quite simply:

23 I do think that the significant meaning to that word,
24 "already," in the statute, that it contemplates first in time.

25 "Already" bespeaks sequence, Judge. We argued all of

1 that in front of her, there's no need to reargue it here. Here, we
2 should be talking about whether this is an attempt at an appeal
3 from one district court judge to a judge of equal jurisdiction, which,
4 in my opinion, that's exactly what this is, or is it truly an effort for
5 reconsideration?

6 Now, for it to be an effort -- good-faith effort for
7 reconsideration, at least with regard to the purpose that they are
8 relying on, which is clearly erroneous, that Judge Bell's ruling was
9 clearly erroneous, it would seem to me that at the same time they
10 are saying that they think a writ will be granted because this is a
11 matter of first impression, I'm going to ask you how could it be
12 both? It can't be.

13 We have another case in the Supreme Court right now, it's
14 not one of your cases. And that was actually -- it is a contempt
15 case, my reply brief is due next week on it. And Judge Yeager,
16 reviewing a ruling of the justice court on a clearly erroneous
17 standard, said, I might have ruled differently, but there is no case
18 law. And so how could I say she was clearly erroneous? With
19 reference to the justice of the peace.

20 And so you have precisely that in front of you. It can't be
21 both. All right. So I suggest to you that it has to either be -- for it to
22 be clearly erroneous, the clearly erroneous standard is it's got to
23 be -- it's contrary to established precedent of which they're even
24 arguing there is none in Nevada, or it has to be a manifest abuse of
25 discretion, which clearly this was not. That being said, there's

1 nothing to do here but it dismiss this -- deny this motion.

2 In addition to that, however, as we bring out in our
3 opposition papers, there has subsequently been, in other words,
4 after Judge Bell ruled and before this was brought, there has been
5 an amended complaint filed. And as our reply -- excuse me, as our
6 opposition papers point out, the law on that is clear. And there
7 would be an abuse of discretion if you did not follow the law that's
8 been in place since 1872.

9 Now, we all know that one district court judge cannot
10 reverse another district court judge unless there's this abuse of --
11 this manifest abuse.

12 THE COURT: And I just want the record to reflect the fact
13 that Judge Bell was hearing the case because I was assigned to do
14 a trial at that time and she was conducting my motions calendar.

15 MR. GENTILE: I understand that.

16 THE COURT: Yeah. That's all.

17 MR. GENTILE: I understand that. But it certainly is akin to
18 a request like that. Okay.

19 The attorney general in this case, you know, he brought
20 up -- you brought up the question, and I tried to address it in front
21 of Judge Bell and she cut me off because it wasn't briefed. So since
22 you brought it up I'll talk about it. The attorney general -- qui tam
23 actions are, essentially, private attorney general lawsuits. That's
24 what they've been called since I was in law school, which was a
25 long time ago. And, you know, we all know, and especially now,

1 I'm told, I have it on information and belief, that there are a lot of
2 vacancies, there are a lot of jobs available at the attorney general's
3 office. There are -- they're looking for lawyers. Okay.

4 And one of the reasons for a qui tam action, the private
5 attorney general concept, is that sometimes private lawyers are just
6 better suited in certain kinds of things than an office such as the
7 district attorney or the AG. In this instance, earlier in this matter,
8 you received a letter from the attorney general. And that letter
9 basically put an end to one pursuit of getting this dismissed.

10 We are here as qui tam relators, but we are here for the
11 State of Nevada and for the counties of the state of Nevada, except
12 for Clark County now, because it's in a different locale. Okay.

13 So I submit to you that there is no reason for a stay in this
14 matter at all. It's unnecessary for them to file a writ. We don't have
15 any -- the discovery hasn't started. We haven't even had our
16 conference yet with the Court with regard to that plan. So, you
17 know, what's the hurry? We -- you don't need to enter a stay here.

18 If there is, in fact, the kind of merit that they're talking
19 about with regard to their writ, or their potential writ, then the
20 Supreme Court will embrace that. And if they embrace it, you can
21 bet that they'll enter a stay. But, you know, first things first.

22 So I would submit to you that the equities here are in
23 favor of the plaintiffs, because the beneficiaries here are the
24 taxpayers of the state of Nevada. And our education budget and
25 our health budget and our safety budget, law enforcement, and any

1 kind of a stay, anything that makes it take more time between now
2 and the ultimate resolution of this case on the merits affects those
3 people far more than the deep pocket defendants in this case. If we
4 are successful throughout and if this case has to go before a jury,
5 and if we obtain a judgment in our favor, and because of the basis
6 that the statute provides for trebling damages, there is over a billion
7 dollars involved in this case.

8 So I submit it to you, Judge. Unless you have a question.

9 THE COURT: I just wanted to make -- I'm looking at
10 minute of August 9, 2021. There was a mandatory Rule 16
11 conference that was conducted on that day. So there has been --
12 and this is a business court case and it appears that there was a
13 Rule 16 conference conducted.

14 MR. GENTILE: Well, there might have been a conference,
15 but the time for discovery I do not believe has commenced yet
16 because of these motions that have been pending.

17 THE COURT: Okay. All right. That's my understanding as
18 well. Okay. All right.

19 MR. GENTILE: Okay.

20 THE COURT: Thank you.

21 Counsel?

22 MR. TASCA: Very briefly, Your Honor.

23 One thing that I think is remarkable about the argument
24 you just heard is that they made no attempt whatsoever to
25 reconcile their position with the fact that the Nevada legislature

1 chose the use of the word "maintain" instead of "bring." I didn't
2 hear anything on that whatsoever. They have no explanation for it,
3 because Defendants are right on that issue.

4 Couple of other points very briefly, Your Honor. Clearly
5 erroneous, I mean, if there's no precedent out there, it can be based
6 on the statutory language itself. As we've argued throughout both
7 our summary judgment motion on the government action bar and
8 on this reconsideration motion, we think we're clearly right here
9 about the law, based on the change in statutory language and all
10 the other reasons that we discussed. And so we think that that --
11 Judge Bell's decision was clearly erroneous.

12 And then, finally, Your Honor, on the alternative relief that
13 we asked for, which is a stay pending a writ, there is going to be
14 activity in this case. We have a response to an amended complaint
15 due next week. We're going to be filing a motion. They are going
16 to file an opposition. We're going to file a reply. We're going to be
17 back down here on argument on that. Okay.

18 If we lose that, then we're into discovery at that point. So
19 the time to stop this case, to take a pause on this case, is now. The
20 writ, if we take it up and it gets granted and we prevail on that writ,
21 this case is over.

22 So the economies of -- the economies dictate that a stay
23 be imposed so we can take this writ up and see if this case is
24 actually going to go forward.

25 And with that, I just -- I don't know if my colleague,

1 Mr. Baruch, has anything to add.

2 MR. BARUCH: If I'm allowed to, I do have just one point
3 of observation here. I think what gets lost in this discussion is why
4 the Nevada legislature would have made this particular change.
5 You know, it makes sense for them to have done so. They wanted
6 to place control over how the government pursues these types of
7 claims in the hands of governmental officials.

8 So Clark County, there's no dispute, Clark County has
9 brought an action based on the same underlying allegations or
10 transactions. And the Nevada legislature, in changing the
11 government action bar from "bring" to "maintain," has said, in no
12 circumstances, where there is action by the government, whether
13 before or after, the government suit controls. That's the one that
14 gets to proceed. Government gets to choose. They're the real
15 party in interest in this case and they've chosen to pursue these
16 claims in a separate civil action. And that's tailor-made for the
17 government action bar as modified by Nevada legislature from the
18 Federal False Claims Act. And I don't think we can lose sight of
19 that.

20 THE COURT: All right. Thank you.

21 Again, I don't see anything -- my understanding is that if
22 you're going to be seeking a writ, you'll be doing so promptly.

23 MR. TASCA: We will, Your Honor. I think we can get the
24 writ filed within three to four weeks.

25 THE COURT: Okay. All right. Here's what I'm going to

1 do. I'm going to deny the Motion for Reconsideration. I'm not
2 persuaded that it has merit. I will grant a temporary stay, all right,
3 for 21 days, okay, which will be effective upon entry of the order
4 that -- on the motion on which I've just ruled. Okay. And you can
5 seek further stay in the Supreme Court when you pursue your writ.
6 Okay.

7 Under Rule 62, and I don't know that that's specifically
8 applicable to a writ petition. We're not talking about an appeal
9 here. But ordinarily, stays are first sought in the district court, and
10 if you can demonstrate to the Supreme Court that the stay is
11 temporary or was denied, you can then seek further stay in the
12 Supreme Court. Okay.

13 MR. GENTILE: Your Honor, you want us to submit the
14 order?

15 THE COURT: Yes, please submit the proposed order and
16 run it by opposing counsel. Okay?

17 MR. GENTILE: We'll do that today.

18 THE COURT: Okay. Thank you.

19 MR. TASCA: Thank you, Your Honor.

20 [Proceeding concluded at 10:09 a.m.]

21 ///

22 ATTEST: I do hereby certify that I have truly and correctly transcribed the
23 audio/video proceedings in the above-entitled case to the best of my
24 ability. Please note: Technical glitches in the BlueJeans audio/video
25 which resulted in distortion and/or audio cutting out completely were
experienced and are reflected in the transcript.

Shawna Ortega, CET*562

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DISTRICT COURT

CLARK COUNTY, NEVADA

STATE OF NEVADA Ex. Rel. Mark Fierro
and Sig Rogich,

Relators,

vs.

ORBITZ WORLDWIDE, LLC., et al.

Defendants.

Case No.: A-20-814111-B

Dept. No.: 13

**ORDER DENYING DEFENDANTS'
MOTION FOR RECONSIDERATION
AND GRANTING PARTIAL STAY**

On February 24, 2022, Defendants filed a motion for summary judgment, asserting that the government action bar, NRS 357.080.3(b), barred this action from proceeding. The Motion for Summary Judgment was DENIED by Order dated April 29, 2022. On May 13, 2022, Defendants' filed a Motion for Reconsideration of the Court's April 29, 2022 Order or, in the alternative, for a Stay of Proceedings.

The Motion for Reconsideration or Stay came on for hearing on July 7, 2022. Dominic P. Gentile Esq. and Michael V. Cristalli, Esq. appeared on behalf of Relators. Joel E. Tasca, Esq. and Douglas W. Baruch, Esq. appeared on behalf of Defendants. The Court heard argument from the parties. Additionally, the Court considered the moving papers, the Opposition/Response filed thereto and Defendants' Reply to Relators' Opposition/Response. Based thereon, the Court finds good cause to enter the following ORDER.

IT IS HEREBY ORDERED ADJUDGED AND DECREED that Defendants' Motion for Reconsideration is DENIED;

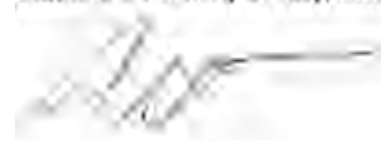
1 IT IS FURTHER ORDERED that Defendants' alternative Motion for Stay is GRANTED
2 IN PART, such that all proceedings are stayed for twenty-one (21) days to afford Defendants the
3 opportunity to seek relief from the Nevada Supreme Court. Said Stay commences upon filing a
4 Notice of Entry of this Order.

5 IT IS FURTHER ORDERED that, consistent with the above-ordered Stay, Defendants'
6 time for responding to the Amended Complaint, which is currently July 14, 2022, shall be extended
7 until 7 days after the expiration of the Stay.

8 IT IS FURTHER ORDERED that Defendants may seek a further Stay of these proceedings
9 (including, but not limited to, Defendants' obligation to respond to the Amended Complaint)
10 directly from the Nevada Supreme Court.

11 IT IS SO ORDERED.

Dated this 12th day of July, 2022



ABG
1EA 8B6 94F4 74B6
Mark R. Denton
District Court Judge

12
13
14
15
16 Submitted by the following after providing opposing
counsel an opportunity to review and comment:

17 CLARK HILL PLLC

18 /s/ Mark S. Dzarnoski

19 Mark S. Dzarnoski, Esq. (NSBN 3398)
20 3800 Howard Hughes Parkway, Suite 500
Las Vegas, Nevada 89169

21 *Attorneys for Relators*

Dated this 11th day of July, 2022.

22
23 Reviewed and Approved By:

24 BALLARD SPAHR LLP

25 /s/ Joel E. Tasca

26 Joel E. Tasca, Esq.
Nevada Bar No. 14124
1980 Festival Plaza Drive, Suite 900
Las Vegas, Nevada 89135

27 *Attorneys for Defendants Orbitz Worldwide, et al.*

28 Dated this 11th day of July, 2022.

From: Tasca, Joel <TASCA@ballardspahr.com>
Sent: Tuesday, July 12, 2022 10:53 AM
To: Dzarnoski, Mark <mdzarnoski@ClarkHill.com>; 'douglas.baruch@morganlewis.com' <douglas.baruch@morganlewis.com>
Cc: Bain, Tanya <tbain@ClarkHill.com>; Gentile, Dominic <dgentile@ClarkHill.com>; Cristalli, Michael <mcristalli@ClarkHill.com>
Subject: RE: 2nd Request-- OTC - Proposed Order Reconsideration

[External Message]

You have my approval.

Joel E. Tasca

Ballard Spahr

One Summerlin, 1980 Festival Plaza Drive, Suite 900
Las Vegas, NV 89135-2958
702.868.7511 DIRECT
702.471.7070 FAX

215.837.0925 MOBILE | tasca@ballardspahr.com
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Subject: 2nd Request-- RE: OTC - Proposed Order Reconsideration

⚠ EXTERNAL

Second Request: For our records, please send an email confirming your approval to affix your e-signature to the Order.

Mark Dzarnoski

Senior Counsel

Clark Hill LLP

3800 Howard Hughes Parkway, Ste 500, Las Vegas, NV 89169
(702) 697-7506 (office) | (702) 778-9709 (fax)
mdzarnoski@ClarkHill.com | www.clarkhill.com

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Attached please find the FINAL conformed Order for submission to chambers. For our records, please send an email confirming your approval to affix your e-signature to the Order.

Best Regards,

Mark Dzarnoski

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Your word changes are acceptable to me. Have you gotten a signoff from your group?

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Subject: OTC - Proposed Order Reconsideration

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Please see attached Proposed Order from today's hearing. Let me know if you have any requested edits or if I can affix your e-signature to the Order for submission to chambers.

Best Regards,

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1 **CSERV**

2
3 DISTRICT COURT
4 CLARK COUNTY, NEVADA

5
6 State of Nevada Ex Rel Mark
7 Fierro, Plaintiff(s)

CASE NO: A-20-814111-B

8 vs.

DEPT. NO. Department 13

9 Orbitz Worldwide, LLC,
10 Defendant(s)

11 **AUTOMATED CERTIFICATE OF SERVICE**

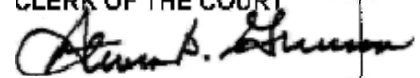
12
13 This automated certificate of service was generated by the Eighth Judicial District
14 Court. The foregoing Order was served via the court's electronic eFile system to all
recipients registered for e-Service on the above entitled case as listed below:

15 Service Date: 7/12/2022

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| 17 Las Vegas Docket | LVDocket@ballardspahr.com |
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| 19 Marilyn Millam | mmillam@ag.nv.gov |
| 20 David Pope | dpope@ag.nv.gov |
| 21 Joel Tasca | tasca@ballardspahr.com |
| 22 Maria Gall | gallm@ballardspahr.com |
| 23 James Pisanelli | lit@pisanellibice.com |
| 24 Lindsay Stadlander | lindsay@brownlawlv.com |
| 25 Jordan Smith | jts@pisanellibice.com |

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CLARK HILL PLLC
3800 Howard Hughes Parkway, Suite 500
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ph.: (702) 862-8300; fax: (702) 862-8400
Attorneys for Plaintiffs

DISTRICT COURT

CLARK COUNTY, NEVADA

STATE OF NEVADA Ex. Rel. Mark Fierro
and Sig Rogich,

Relators,

vs.

ORBITZ WORLDWIDE, LLC., et al.

Defendants.

Case No.: A-20-814111-B

Dept. No.: 13

**NOTICE OF ENTRY OF ORDER
DENYING DEFENDANTS' MOTION
FOR RECONSIDERATION AND
GRANTING PARTIAL STAY**

PLEASE TAKE NOTICE that on the 12th day of July, 2022 an Order Denying Defendants' Motion for Reconsideration and Granting Partial Stay was entered in the above-referenced matter. A copy of said Order is attached hereto and incorporated herein.

Dated this 13th day of July, 2022.

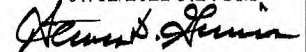
CLARK HILL PLLC

/s/ Mark S. Dzarnoski

Mark S. Dzarnoski, Esq. (NSBN 3398)
3800 Howard Hughes Parkway, Suite 500
Las Vegas, Nevada 89169
Attorneys for Relators

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/s/ Judy Estrada
An Employee of Clark Hill, PLLC


CLERK OF THE COURT

A. WILLIAM MAUPIN, ESQ. (NSBN 1315)
awmaupin@clarkhill.com
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Attorneys for Plaintiffs

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MOTION FOR RECONSIDERATION
AND GRANTING PARTIAL STAY**

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IT IS HEREBY ORDERED ADJUDGED AND DECREED that Defendants' Motion for Reconsideration is DENIED;

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2 IN PART, such that all proceedings are stayed for twenty-one (21) days to afford Defendants the
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4 Notice of Entry of this Order.

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10 directly from the Nevada Supreme Court.

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12 
13

14 ABG
15 1EA 8B6 94F4 74B6
16 Mark R. Denton
17 District Court Judge

18 Submitted by the following after providing opposing
19 counsel an opportunity to review and comment:

20 CLARK HILL PLLC

21 /s/ Mark S. Dzarnoski
22 Mark S. Dzarnoski, Esq. (NSBN 3398)
23 3800 Howard Hughes Parkway, Suite 500
24 Las Vegas, Nevada 89169
25 *Attorneys for Relators*
26 Dated this 11th day of July, 2022.

27 Reviewed and Approved By:

28 BALLARD SPAHR LLP
/s/ Joel E. Tasca
Joel E. Tasca, Esq.
Nevada Bar No. 14124
1980 Festival Plaza Drive, Suite 900
Las Vegas, Nevada 89135
Attorneys for Defendants Orbitz Worldwide, et al.

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Subject: RE: 2nd Request-- OTC - Proposed Order Reconsideration

[External Message]

You have my approval.

Joel E. Tasca

Ballard Spahr
LLP

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 **EXTERNAL**

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Mark Dzarnoski

Senior Counsel

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2 DISTRICT COURT
3 CLARK COUNTY, NEVADA

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6 State of Nevada Ex Rel Mark
Fierro, Plaintiff(s)

CASE NO: A-20-814111-B

7 vs.

DEPT. NO. Department 13

8
9 Orbitz Worldwide, LLC,
Defendant(s)

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17 Las Vegas Docket LVDocket@ballardspahr.com

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25 Jordan Smith jts@pisanellibice.com

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