

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.

Case No. 85111

District Case No. A-20-814111-B

Dept No. 13

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Aug 03 2022 11:46 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

**Motion by Petitioners to Extend District Court's Stay of Proceedings
Pending Petition for Writ of Mandamus or Prohibition**

Petitioners seek an extension of the district court’s 21-day stay of all district court proceedings pending their petition for a writ of mandamus or prohibition. The petition seeks this Court’s review of an important, discrete, and case-dispositive legal issue of first impression under the Nevada False Claims Act (“NFCA”). The legal issue is separate and distinct from the merits of the underlying case.

Under the NFCA’s “government action bar,” NRS 357.080(3)(b), a *qui tam* action by a private plaintiff “may not be maintained” if it is based on allegations or transactions that are the subject of a separate civil suit to which the government is a party. The district court made a clear and express factual finding that this *qui tam* action is based on allegations or transactions that are the subject of a separate civil suit brought by Clark County. Nevertheless, the court held that the government action bar does not apply because the government’s civil suit was filed before this *qui tam* action. This interpretation is legally erroneous because the NFCA contains no such sequencing requirement. Thus, Petitioners seek reversal of the district court’s order denying Petitioners’ dispositive motion under the NFCA’s government action bar.

All relevant factors militate in favor of extending the district court’s stay. First, every day that this action proceeds defeats the object of the writ petition, which is to enforce the Nevada legislature’s express command that a *qui tam* action pursued by private parties under the NFCA yield to a separate civil action brought by the

government based on the same allegations or transactions. Second, if the stay is denied, Petitioners—17 companies alleged to have engaged in misconduct in Clark County and elsewhere—will suffer irreparable injury because the existence of this action (brought by two media relations professionals) is subjecting Petitioners to ongoing reputational harm and a risk of inconsistent judgments. Third, no serious injury would result from a stay. The government—on whose behalf this *qui tam* case is brought—knew about the alleged conduct underlying this action for over a decade before Relators commenced this suit; the minimal delay engendered by a stay pending the writ petition pales in comparison to that period of inaction. Fourth, Petitioners are likely to prevail on the merits of their petition because the government action bar unquestionably applies here and the district court’s refusal to apply the bar resulted from an erroneous interpretation of the NFCA’s plain language.

Memorandum of Points and Authorities

I. BACKGROUND

A. The *Qui Tam* Action and the Clark County Action

Mark Fierro and Sig Rogich (Relators) commenced this NFCA *qui tam* action in the Eighth Judicial District Court on April 24, 2020 (the “Qui Tam Action”). (Ex. 1 at 1.) They allege that the Petitioners violated the NFCA by knowingly avoiding an obligation to “remit the transient lodging tax on the full amount of rent charged to guests that is [allegedly] due” under Clark County Code 4.08, *et seq.* and NRS

244A, 244.335, *et seq.* (*Id.* at 7, ¶ 46.) Relators have since amended their complaint to seek recovery for alleged underpayment of lodging tax due to other Nevada counties, but the Amended Complaint continues to include—as its primary claim—the same allegations of avoidance of Clark County taxes. (Ex. 2 at 6-7.)

On May 14, 2021, Clark County—represented by the same counsel representing Relators here—sued Petitioners for, again, allegedly failing under Clark County Code 4.08, *et seq.* and NRS 244A, 244.335, *et seq.* to remit transient lodging taxes on the full amount of rent charged to guests (the “Clark County Action”). (Ex. 3 at 5 (citing Ex. 1 to Defendants’ Motion for Summary Judgment).) The key allegations in the Clark County Action are either verbatim or substantively identical to those in the Qui Tam Action. (*Id.* at 6-7.) Petitioners removed the Clark County Action to federal court, where it remains pending. *See Clark County, Nevada v. Orbitz Worldwide, LLC, et al.*, No. 2:21-CV-1328 JCM (VCF) (D. Nev.).

B. THE CHALLENGED ORDER

Prior to discovery on the merits, Petitioners moved for summary judgment under the NFCA’s government action bar. (Ex. 3.) The district court expressly found that “The Clark County Action is based on the same underlying allegations or transactions that are the subject of Relators’ qui tam action.” (Ex. 4 at 2, ¶ 2.) Nevertheless, the court denied the motion based on its *sua sponte* legal conclusion that “because the Clark County Action was filed after this action was commenced,

Clark County is ‘not already a party’ to the Clark County Action for purposes of [the government action bar].” (*Id.* at 3, ¶ 5.)

Petitioners moved for reconsideration or, in the alternative, a stay pending these writ proceedings. (Ex. 5.) The district court denied the motion for reconsideration¹ but issued a 21-day stay and directed Petitioners to seek a further stay from this Court. (Ex. 6 at 2.) Petitioners’ writ petition and this motion followed.

II. PETITIONERS HAVE SATISFIED THEIR OBLIGATIONS UNDER NRAP 8(A)

When a party seeks a stay of trial court proceedings from the Supreme Court, the motion shall state that the district court either denied the stay motion or failed to afford the relief requested. NRAP 8(a)(2)(A)(ii). The motion shall include any reasons given by the district court for its refusal to grant the requested relief. *Id.*

Here, Petitioners moved the district court for a stay pending these writ proceedings. (Ex. 5 at 2.) The district court granted a 21-day stay, apparently based on Petitioners’ representation that they intended to file a petition for writ relief in 21 days, but it did not explain why it declined to issue a longer stay. (Ex. 6 at 2.)

¹ The summary judgment motion was heard and decided by Chief Judge Linda Bell because she was covering respondent Judge Denton’s calendar while he presided over a separate trial. Judge Denton heard Petitioners’ motion for reconsideration, but he did not supplant or supplement the reasoning in Judge Bell’s order.

III. LEGAL STANDARD

Nevada courts consider the following factors in deciding whether to stay proceedings pending a writ to the Nevada Supreme Court:

1. whether the object of the writ petition will be defeated if the stay is denied;
2. whether petitioner will suffer irreparable or serious injury if the stay is denied;
3. whether respondent/real party in interest will suffer irreparable or serious injury if the stay is granted; and
4. whether petitioner is likely to prevail on the merits in the petition.

NRAP 8(c). None of the factors is weighted heavier than any other, but “if one or two factors are especially strong, they may counterbalance other weak factors.” *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 251, 89 P.3d 36, 38 (2004). Here, all factors strongly weigh in favor of extending the district court’s stay.

A. The Object Of The Petition Will Be Defeated Unless the Stay Is Extended

The object of the writ petition is to enforce the Nevada legislature’s directive that a *qui tam* action by private party plaintiffs on behalf of the government “may not be maintained” when the government separately is pursuing the same underlying conduct in a civil action. NRS 357.080(3)(b). Therefore, the very purpose of the government action bar is being undermined every day that the Qui Tam Action is litigated notwithstanding the pendency of the Clark County Action.

B. Petitioners Will Suffer Irreparable Injury Unless the Stay Is Extended

Irreparable or serious harm remains part of the stay analysis, but it “will not generally play a significant role in the decision whether to issue a stay.” *Mikohn Gaming Corp. v. McCrea*, 120 Nev. at 253, 89 P.3d at 39. Litigation costs and delay are not irreparable harm, *id.*, but reputational harm and the risk of inconsistent judgments may be, *see Chateau Vegas Wine, Inc. v. So. Wine & Spirits of Am., Inc.*, 127 Nev. 818, 829, 265 P.3d 680, 687 (2011); *Foltz v. Columbia Cas. Co.*, 2016 U.S. Dist. LEXIS 109626, at *7 (W.D. Okla. Aug. 18, 2016).

Here, the district court concluded that Petitioners made the requisite showing for a 21-day stay, but by allowing Relators to act beyond their statutory authority, the district court is exposing Petitioners to irreparable harm. Relators—who are Nevada-based media relations professionals—are subjecting Petitioners to ongoing reputational harm. For example, just days ago, the Las Vegas Review-Journal—undoubtedly urged by Relators—published a one-sided news article about the recent denial of Petitioners’ motion for reconsideration in the district court, which included statements by Relators’ counsel that cast Petitioners in an unflattering light.² Further, by refusing to apply the government action bar, the district court is exposing Petitioners to the risk that the Clark County Action results in a judgment inconsistent

² Jeff German, *Lawsuit claiming travel firms cost Nevada millions in taxes clears path forward*, L.V. REVIEW-JOURNAL, July 20, 2022, <https://www.reviewjournal.com/business/lawsuit-claiming-travel-firms-cost-nevada-millions-in-taxes-clears-path-to-trial-2610347/>

with any judgment issued in the Qui Tam Action.

C. No Irreparable or Serious Injury Will Occur If the Stay is Extended

A delay in pursuing discovery and litigation “does not constitute irreparable harm.” *Mikohn Gaming Corp.* 120 Nev. at 253, 89 P.3d at 39. That is especially so in this case. Petitioners demonstrated in the district court that the government has been aware of the alleged underlying conduct in this case for over 12 years, and yet this suit was not brought until 2020. (Ex. 5 at 12.) Even after Relators commenced the Qui Tam Action, the Attorney General declined to intervene in it following the statutorily required investigation. NRS 357.070(1) (“the Attorney General shall investigate diligently any alleged liability pursuant to this chapter”).

Moreover, the government—represented by the same lawyers as in this case—is actively pursuing its rights in the Clark County Action even while this action is stayed. Thus, this factor weighs in favor of extending the stay because no injury will befall the government from a modest delay for a few additional months while this Court considers Petitioners’ case-dispositive petition.

D. Petitioners Are Likely To Prevail On The Merits Of Their Petition

Finally, Petitioners are likely to prevail on the merits of their position on the government action bar. The government action bar provides:

An action may not be maintained by a private plaintiff pursuant to this chapter . . . [i]f the action is based on allegations or transactions 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.

NRS 357.080(3)(b). Here, the only government action bar element that the district court found lacking was that Clark County was not “already a party” to the Clark County Action. The district court reasoned that to give effect to the term “already,” the separate civil action by the government must be brought *prior to* a *qui tam* action, and here, the Clark County Action was not brought until *after* the Qui Tam Action. (Ex. 4 at 2-3.)

As discussed in detail in the writ petition, the district court’s reasoning cannot be reconciled with the NFCA’s express language, which blocks Relators from “*maintain[ing]*” a *qui tam* action while a qualifying government action is pending. NRS 357.080(3)(b) (emphasis added). If the Nevada legislature intended the bar to apply only when a government action is brought *before* a *qui tam* action, it would have used language such as: “A private plaintiff may not *bring* an action under this Chapter” while a government action is pending.

The Nevada legislature generally modeled the NFCA after the federal False Claims Act (“FCA”), *Int’l Game Tech., Inc. v. Second Jud. Dist. Ct.*, 122 Nev. 132, 154 (2006), but it departed from the federal language to foreclose the interpretation adopted by the district court here. The federal FCA prohibits a private plaintiff from “bring[ing]”—*i.e.*, commencing—a *qui tam* suit when a government action is

pending. *See* 31 U.S.C. § 3730(e)(3). But rather than use the term “bring” from the federal FCA, the NFCA’s government action bar prohibits a private action from being “maintained” while a government action is pending. The Nevada legislature’s decision not to adopt the term “bring” from the federal FCA must be construed as purposeful. *Int’l Game Tech., Inc.*, 122 Nev. at 154. As this Court has explained in the context of the NFCA, “the presumption that the legislature, in enacting a state statute similar to a federal statute, intended to adopt the federal courts’ construction of that statute, *is rebutted when the state statute clearly reflects a contrary legislative intent.*” *Id.* (emphasis added) (internal quotations and footnotes omitted).

Moreover, the Nevada legislature knew how to use the phrase “bring an action” in the NFCA because it did so numerous times in other parts of the statute.³ For this reason as well, it must be presumed that the Nevada legislature’s decision to use the word “maintained,” instead of “brought,” was purposeful, and that “maintained” was intended to have a different meaning. *See Aerogrow Int’l, Inc. v. Eighth Jud. Dist. Ct. of Nev.*, 137 Nev. Adv. Op. 76, 499 P.3d 1193, 1199 (2021) (“a

³ *See, e.g.*, NRS 357.080(1) (authorizing a private party to “**bring** an action”) (emphasis added); NRS 357.080(2) (“If a private plaintiff **brings** an action pursuant to this chapter, no person other than the Attorney General . . . may intervene or **bring** a related action pursuant to his chapter . . .”) (emphasis added); *see also* NRS 357.026(2) (using the term “**bringing** an action” when defining an “original source”) (emphasis added); NRS 357.070(1), (2) (authorizing the Attorney General to “**bring** a civil action”) (emphasis added).

statute’s use of two different terms evinces the legislature’s intent that different meanings apply to the two terms”) (citation omitted).

Viewed in this context, the language in the NFCA’s government action bar that the government must be “already a party” to the separate civil action merely clarifies that the government must ***actually be joined*** to the action, and not just a potential intervenor. The district court apparently concluded that this interpretation would violate the canon of statutory interpretation against surplusage, but ***clarifying*** language does not violate that canon. *Farmers Ins. Exchange v. Super. Ct.*, 137 Cal. App. 4th 842, 858 (2006) (“A statute may clarify and emphasize a point notwithstanding the rule against surplusage”).

In sum, the applicability of NFCA’s government action bar does not depend on the ***sequence*** of the two suits but merely the ***existence*** of the two suits. Therefore, the government action bar applies here, and the fourth NRAP 8(c) factor, like all others, weighs in favor of extending the district court’s stay.

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IV. CONCLUSION

Accordingly, the Court should extend the district court's stay of the district court proceedings pending this Court's decision on Petitioners' writ petition.

Dated: August 3, 2022.

Respectfully submitted,

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By: /s/ Joel E. Tasca

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CERTIFICATE OF SERVICE

I hereby certify that this **Motion by Petitioners to Extend District Court's Stay of Proceedings Pending Petition for Writ of Mandamus or Prohibition** was filed electronically with the Nevada Supreme Court on August 3, 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.

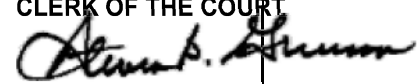
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Exhibit 1



CASE NO: A-20-814111-C
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**EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA**

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

Plaintiffs,

vs.

CASE NO.
DEPT.

COMPLAINT

JURY TRIAL DEMAND

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

Defendants.

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, NRS
6 357.010 *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. in
22 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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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.

9. Defendant Orbitz, LLC is a Delaware limited liability company with its principal place of business in Chicago, Illinois. Defendant Orbitz, LLC has at all times relevant to this litigation conducted business in this state.

10. Defendant Orbitz, Inc. is a Delaware corporation with its principal place of business in Chicago, Illinois. Defendant Orbitz, Inc. has at all times relevant to this litigation conducted business in this state.

11. Defendant Travelscape, LLC is a Nevada limited liability company (“Travelocity”) with its principal place of business in Las Vegas, Nevada. Defendant Travelscape, LLC has at all times relevant to this litigation conducted business in this state.

12. Defendant Travelocity, Inc. is a Nevada corporation with its principal place of business in Las Vegas, Nevada. Defendant Travelocity, Inc. has at all times relevant to this litigation conducted business in this state.

13. Defendant Cheap Tickets, Inc. is a Delaware corporation with its principal place of business in Honolulu, Hawaii. Defendant Cheap Tickets, Inc. has at all times relevant to this litigation conducted business in this state.

14. Defendant Expedia, Inc. is a Washington corporation with its principal place of

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

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

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

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

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

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

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

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

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

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

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

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

9 26. Defendant Tripadvisor LLC is a Delaware limited liability company with its
10 principal place of business in Needham, Massachusetts. Defendant Tripadvisor LLC has at all
11 times relevant to this litigation conducted business in this state.

12 27. Defendant Tripadvisor Inc. is a Delaware corporation with its principal place of
13 business in Needham, Massachusetts. Defendant Tripadvisor LLC has at all times relevant to this
14 litigation conducted business in this state.

15 28. Defendant Trip.com, Inc. is a Delaware corporation with its principal place of
16 business in Shanghai, China. Defendant Trip.com, Inc. has at all times relevant to this litigation
17 conducted business in this state.

18 29. Defendant Remark Holdings, Inc. is a Delaware corporation with its principal
19 place of business in Las Vegas, Nevada. Defendant Remark Holdings, Inc. has at all times
20 relevant to this litigation conducted business in this state.

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

24 31. At all times relevant, Defendants transacted business in the State of Nevada and in
25 the County of Clark by, among other activities, contracting to purchase hotel rooms from hotels,
26 advertising such hotel rooms to customers, and selling/booking such hotel rooms to the general
27 public.

1 32. This Court has jurisdiction over Plaintiffs' claims as they involve claims arising
2 exclusively under Nevada statutes.

3 33. Venue is proper because injuries to Plaintiffs occurred in Clark County, Nevada
4 and because Defendants committed unlawful acts and conducted their unlawful practices in
5 Clark County, Nevada.

6 34. That the true names and capacities, whether individual, corporate, associates, co-
7 partnership, or otherwise of Defendants DOES 1 through 100 and ROE Corporations 1 through
8 100, are unknown to Plaintiffs who therefore sues said defendants by such fictitious names.
9 Plaintiffs are informed and believe and thereon allege that each of the defendants designated as
10 DOES 1 through 100 and ROE Corporations 1 through 100 are responsible in some manner for
11 the events and happenings referred to in this action and proximately caused damages to Plaintiffs
12 as herein alleged.

13 35. That this civil action arising from actions occurring within County of Clark, State
14 of Nevada, involving an amount in controversy in excess of the sum of \$15,000.00, exclusive of
15 costs and interests, thereby giving this Court jurisdiction over this matter.

16 **FACTUAL ALLEGATIONS**

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

20 37. The combined transient lodging tax is calculated as a percentage of gross rental
21 receipts and ranges between 10.5% and 13.38%.

22 38. Rent is the amount charged for a sleeping room/space in a transient lodging
23 establishment.

24 39. The transient lodging tax may be collected from the paying transient guests and
25 may be shown as an addition to the rent charged.

26 40. Upon information and belief, recipients of the tax collected within unincorporated
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Clark County include the Las Vegas Convention and Visitors Authority, the Clark County School District, local transportation districts, the Nevada Department of Tourism, the state of Nevada general fund, the State Supplemental School Fund, and the Clark County General Fund.

41. Defendants are operators of transient lodging establishments and/or managing agents that exercise judgment and discretion in performing the functions of an operator.

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

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

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

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

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

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

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

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

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

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

4 51. Defendants knowingly and improperly avoided and/or decreased their obligation
5 to pay money to the State by failing to remit the transient lodging tax on the full amount of rent
6 charged to guests that is due and owing to the State of Nevada pursuant to Clark County Code
7 4.08, *et seq.* and Nevada Revised Statute 244A, 244.335, *et seq.*

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

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

12 54. As a direct and proximate result of the aforementioned actions of Defendants, the
13 State of Nevada has been deprived of substantial tax revenues to which the State of Nevada is
14 otherwise entitled. Defendants are liable to the State of Nevada for three times the amount of
15 damages sustained by the State of Nevada in the form of unpaid transient lodging tax, for the
16 costs of bringing this action, and for a civil penalty of not less than \$5,500 or more than \$11,000
17 for each act constituting a violation.

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

19 **COUNT TWO**
20 **CONVERSION**

21 56. Plaintiffs re-allege and incorporate the allegations set forth above as though fully
22 alleged herein.

23 57. At all times relevant, Plaintiffs on behalf of the State of Nevada have been
24 entitled to and have had the right to the immediate possession of personal property, the taxes due
25 and owing.

26 58. At all times relevant, the monies due and owing were in the possession of one or
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1 more Defendants who wrongfully exercised dominion and control over the monies owing to
2 Plaintiffs on behalf of the State of Nevada, thereby depriving Plaintiffs the use and the benefit
3 thereof.

4 59. As a direct and proximate result of Defendants' conduct, Plaintiffs have suffered,
5 and will continue to suffer injury including damage in an amount to be determined according to
6 proof at the time of trial.

7 60. In converting these monies, Defendants acted wantonly, willfully, and in knowing
8 disregard of the rights of Plaintiffs. Accordingly, an award of punitive damages is appropriate.
9 Plaintiff re-alleges and incorporates the allegations set forth above as though fully
10 alleged herein.

11 **COUNT THREE**
12 **UNJUST ENRICHMENT**

13 61. Plaintiffs re-allege and incorporate the allegations set forth above as though fully
14 alleged herein.

15 62. Defendants have obtained a benefit that in equity and good conscience they
16 should not have obtained or possessed because the benefits rightfully belonged to Plaintiffs.

17 63. Defendants are liable to Plaintiffs under the doctrine of unjust enrichment for full
18 amount of taxes collected, plus interest and penalties.

19 **COUNT FOUR**
20 **CONSTRUCTIVE TRUST**

21 64. Plaintiffs re-allege and incorporate the allegations set forth above as though fully
22 alleged herein.

23 65. At all times relevant, Plaintiffs' monies were in possession and under the control
24 of Defendants. Defendants have taken this property for their own use and benefit, thereby
25 depriving Plaintiffs of the use and benefit thereof. Plaintiffs have been damaged by their failure
26 to receive the monies.

27 66. The retention of monies by Defendants would be inequitable.
28

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

5 **COUNT FIVE**
6 **CONSUMER FRAUD/VIOLATION OF NRS 598**
7 **DECEPTIVE TRADE PRACTICES ACT**

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

10 69. NRS 41.600(2) defines "consumer fraud" as "(e) a deceptive trade practice as
11 defined in NRS 598.0915 to 598.0925, inclusive."

12 70. Defendants, as previously alleged, performed acts and omitted performing acts,
13 which constitute an unfair trade practice under one or more provisions of NRS 598.0903, *et seq.*,
14 including but not limited to NRS 598.0915(13), (14), and (15).

15 71. Plaintiff was damaged as previously alleged as a direct and proximate result of
16 Defendants' violations of said statutes.

17 **COUNT SIX**
18 **DECLARATORY RELIEF**

19 72. Plaintiff re-alleges and incorporates the allegations set forth above as though fully
20 alleged herein.

21 73. A dispute has arisen between Plaintiffs and Defendants that is ripe for
22 adjudication concerning the interpretation of Nevada's combined transient lodging tax, the False
23 Claims Act, and the Deceptive Trade Practices Act.

24 74. As a result of Defendants' actions, Plaintiffs have been damaged in an amount in
25 excess of AMOUNT to be determined at the time of trial.

26 75. As a result of Defendants' actions, it has become necessary to retain an attorney
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1 to prosecute the claims herein; therefore, Plaintiffs are entitled to recover all expenses incurred in
2 this action, including without limitation, all costs and attorney's fees together with interest
3 thereon.

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

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

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

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

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

16 Respectfully Submitted this 24th day of April, 2020.

17 **CLARK HILL PLLC**

18 */s/ Michael Cristalli*

19 **MICHAEL CRISTALLI, ESQ.**

20 Nevada Bar No. 6266

21 **DOMINIC P. GENTILE, ESQ.**

22 Nevada Bar No. 1923

23 **IVY P. HENSEL, ESQ.**

24 Nevada Bar No. 13502

25 **CLARK HILL PLC**

26 3800 Howard Hughes Parkway

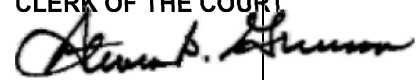
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28 Las Vegas, NV 89169

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Exhibit 2



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Attorneys for Plaintiffs

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.

27 ///

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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
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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 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 16th day of May, 2022.

20 **CLARK HILL PLLC**

21 /s/ Mark S. Dzarnoski, Esq.
22 A. William Maupin, Esq. (NSBN 1315)
23 Dominic P. Gentile, Esq. (NSBN 1923)
24 Michael Cristalli, Esq. (NSBN 6266)
25 Bert Wuester, Esq (NSBN 5556)
26 Mark S. Dzarnoski, Esq. (NSBN 3398)
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28 Las Vegas, Nevada 89169

Exhibit 3

MSJ

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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

HEARING REQUESTED

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants¹ respectfully move this Court to enter summary judgment in their favor and dismiss this action with prejudice pursuant to NRS 357.080(3)(b), commonly referred to as the “government action bar.”

INTRODUCTION AND SUMMARY

The Complaint in this case is fatally flawed on multiple threshold grounds. When Defendants filed their Motion to Dismiss on March 5, 2021, the threshold question was whether the action was subject to mandatory dismissal under the NRS 357.100—the Nevada False Claims Act’s (“NFCA”) “public disclosure bar.” On May 14, 2021, after that Motion to Dismiss had been fully briefed, another threshold ground for dismissal arose when Clark County, represented by the same lawyers who represent Relators in this case, filed a separate action arising out of the same allegations and transactions as the Complaint in this case. As a result of the Clark County lawsuit, this action became subject to dismissal under the NFCA’s “government action bar,” which prohibits a relator from maintaining an NFCA action when another action based on the same allegations has been filed by the State or a political subdivision. NRS 357.080(3). Through this Motion, Defendants seek summary judgment under the government action bar.

The government action bar states:

An action may not be maintained by a private plaintiff pursuant to this chapter . . . [i]f the action is based on allegations or transactions 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.

NRS 357.080(3)(b). As supported by the Undisputed Material Facts below, every element of the government action bar is satisfied here. (1) this action (“the Qui Tam Action”) is brought by “private plaintiffs” – Relators Mark Fierro and Sigmund Rogich (“Relators”) under the NFCA;

¹ “Defendants” as used herein refers to Orbitz Worldwide, LLC, Orbitz, LLC, Orbitz, Inc., Travelscape LLC, Travelocity, Inc., Cheap Tickets, Inc., Expedia, Inc. Expedia Global, LLC, Hotels.Com, LP, Hotwire, Inc., Travelnow.com, Inc. (together, “Expedia Defendants”), Booking Holdings, Inc., Priceline.com LLC, Agoda International USA LLC, Hotel Tonight Inc., and Hotel Tonight LLC. On April 1, 2014, priceline.com LLC assumed the former operations of priceline.com Incorporated (n/k/a Booking Holdings Inc.) as they relate to the merchant model hotel business at issue in this proceeding. As stated in the Expedia Defendants’ Answer and Affirmative Defenses to the Complaint, Travelocity, Inc., Cheap Tickets, Inc., and Travelnow.com, Inc. are not existing legal entities and are improperly named as defendants in the Complaint. *See* Expedia Defendants’ Answer and Affirmative Defenses to Complaint, ¶¶ 12-13, 21.

Defendants¹ respectfully move this Court to enter summary judgment in their favor and dismiss this action with prejudice pursuant to NRS 357.080(3)(b), commonly referred to as the “government action bar.”

INTRODUCTION AND SUMMARY

The Complaint in this case is fatally flawed on multiple threshold grounds. When Defendants filed their Motion to Dismiss on March 5, 2021, the threshold question was whether the action was subject to mandatory dismissal under the NRS 357.100—the Nevada False Claims Act’s (“NFCA”) “public disclosure bar.” On May 14, 2021, after that Motion to Dismiss had been fully briefed, another threshold ground for dismissal arose when Clark County, represented by the same lawyers who represent Relators in this case, filed a separate action arising out of the same allegations and transactions as the Complaint in this case. As a result of the Clark County lawsuit, this action became subject to dismissal under the NFCA’s “government action bar,” which prohibits a relator from maintaining an NFCA action when another action based on the same allegations has been filed by the State or a political subdivision. NRS 357.080(3). Through this Motion, Defendants seek summary judgment under the government action bar.

The government action bar states:

An action may not be maintained by a private plaintiff pursuant to this chapter . . . [i]f the action is based on allegations or transactions 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.

NRS 357.080(3)(b). As supported by the Undisputed Material Facts below, every element of the government action bar is satisfied here. (1) this action (“the Qui Tam Action”) is brought by “private plaintiffs” – Relators Mark Fierro and Sigmund Rogich (“Relators”) under the NFCA;

¹ “Defendants” as used herein refers to Orbitz Worldwide, LLC, Orbitz, LLC, Orbitz, Inc., Travelscape LLC, Travelocity, Inc., Cheap Tickets, Inc., Expedia, Inc. Expedia Global, LLC, Hotels.Com, LP, Hotwire, Inc., Travelnow.com, Inc. (together, “Expedia Defendants”), Booking Holdings, Inc., Priceline.com LLC, Agoda International USA LLC, Hotel Tonight Inc., and Hotel Tonight LLC. On April 1, 2014, priceline.com LLC assumed the former operations of priceline.com Incorporated (n/k/a Booking Holdings Inc.) as they relate to the merchant model hotel business at issue in this proceeding. As stated in the Expedia Defendants’ Answer and Affirmative Defenses to the Complaint, Travelocity, Inc., Cheap Tickets, Inc., and Travelnow.com, Inc. are not existing legal entities and are improperly named as defendants in the Complaint. See Expedia Defendants’ Answer and Affirmative Defenses to Complaint, ¶¶ 12-13, 21.

(2) the “allegations or transactions” in the Qui Tam Action are the subject of a separate civil action commenced by Clark County on May 14, 2021 (“the Clark County Action”); (3) Clark County is a “political subdivision” within the meaning of the NFCA; and (4) notwithstanding the filing of the Clark County Action, Relators are “maintaining” the Qui Tam Action. On this factual record, and under the law, this action cannot proceed. Summary judgment should now be entered for Defendants.

MEMORANDUM OF POINTS AND AUTHORITIES

I. The Undisputed Material Facts

A. The Parties

1. Relators Fierro and Rogich

Relators Fierro and Rogich in the Qui Tam Action are proceeding as private parties under the *qui tam* provisions of the NFCA. *See* Complaint, ¶ 2 (“NRS 357.080(1) authorizes private persons to bring civil actions on behalf of themselves and on behalf of the State of Nevada.”).

2. Defendant OTCs

The named defendants in the Qui Tam Action include the Defendants listed in Footnote 1 herein. In the Clark County Action, the named defendants include each of the named Defendants listed in Footnote 1 herein. *See* Exhibit 1 (Clark County Complaint).²

B. The Qui Tam Action

Relators commenced this Qui Tam Action by filing a Complaint under seal in this Court on April 24, 2020. The Complaint contained six causes of action, including Count One, which purports to state a cause of action under the *qui tam* provisions of the Nevada False Claims Act (NRS 357.080(1)). *See* Complaint, ¶¶ 1, 2, 48-55 (Count One).

On September 29, 2020, after a statutorily required investigation, NRS 357.070 (the “Attorney General shall investigate diligently any alleged liability pursuant to this chapter.”), the Attorney General notified this Court that it was declining to intervene in Relators’ suit and asked that the Complaint be unsealed, NRS 357.110(2). *See* Order to Unseal Complaint, Dec. 23, 2020. This Court unsealed the Complaint, *id.*, and Relators thereafter served it on Defendants. The

² An authenticating declaration follows the memorandum of points and authorities.

1 allegations or transactions in the Complaint are based on the Defendant OTCs' alleged non-
2 payment of combined transient lodging taxes. According to the Complaint:

3 Defendants knowingly and improperly avoided and/or decreased their
4 obligation to pay money to the State by failing to remit the transient
5 lodging tax on the full amount of rent charged to guests that is due and
6 owing to the State of Nevada pursuant to Clark County Code 4.08, *et*
7 *seq.* and Nevada Revised Statute 244A, 244.335, *et seq.*

8 Qui Tam Action Complaint, ¶ 51.

9 Thus, the “transactions” underlying the alleged false claims in the Complaint are the
10 individual hotel transactions facilitated by the OTCs, and the “allegations” are that the OTCs have
11 not paid combined transient lodging taxes due on those transactions. As described below the
12 transactions at issue in the Qui Tam Action involve an alleged violation of the very same Clark
13 County Code tax provision as is at issue in the Clark County Action. As such, the tax statute that
14 must be judicially interpreted and applied to Defendants in both actions is the same.

15 On March 5, 2021, Defendants filed a motion to dismiss the Complaint on multiple grounds,
16 including that the allegations and transactions in the Complaint had been disclosed publicly prior
17 to suit, and that neither Relator qualified as an “original source” of the information. *See*
18 Defendants’ Motion to Dismiss (March 5, 2021).³ The Attorney General interposed no objection
19 or opposition to Defendants’ Motion to Dismiss, including the public disclosure grounds for
20 dismissal. After full briefing on the Motion, the Court scheduled oral argument for Monday, May
21 17, 2021.

22 **C. The Clark County Complaint**

23 On Friday, May 14, 2021, one business day before the Motion to Dismiss hearing in the
24 Qui Tam Action, Clark County filed the Clark County Action in this Court. *See* Exh. 1.

25 ³ Defendants filed their Motion to Dismiss more than two months before the Clark County Action
26 commenced. Defendants thus did not raise, and could not at that time have raised, the government
27 action bar as a ground for dismissal at that time. Relators filed their opposition to the Motion to
28 Dismiss on May 3, 2021, never mentioning the imminent filing of the Clark County Action. Defendants then filed a reply brief in support of their Motion to Dismiss on May 10, 2021, still unaware that Relators’ counsel was preparing to file the Clark County Action on behalf of Clark County. It was not until the eve of the hearing on the Motion to Dismiss that the Clark County Action was filed. Still, neither Relators nor their counsel mentioned the Clark County Action at the May 17, 2021 hearing, despite the same counsel pursuing both actions.

1 The attorneys for Clark County in the Clark County Action are the same attorneys who are
2 representing the Relators in the Qui Tam Action. *Id.*

3 The Clark County Complaint, on its face, arises from the same allegations and transactions
4 that are the subject of the Qui Tam Action. In fact, it appears that Clark County used the Complaint
5 in the Qui Tam Action as the template for drafting the Clark County Complaint.

6 As reflected in the chart below, several of the allegations in the Clark County Complaint
7 are either verbatim or substantively identical to those in the Qui Tam Complaint, including the
8 “Nature of the Action” sections.

<u>Qui Tam Action Complaint</u>	<u>Clark County Complaint</u>
3. This lawsuit is to recover damages and injunctive relief from Defendants, web-based hotel booking companies, who have knowingly engaged in a common practice/scheme to avoid payment of Nevada’s Combined Transient Lodging Tax as required by Nevada law.	1. This lawsuit is to recover damages and obtain other relief from Defendants, web-based hotel booking companies, who have knowingly engaged in a common practice/scheme to avoid payment of Nevada’s and CLARK COUNTY’s Combined Transient Lodging Tax as required by Nevada law.
4. Defendants contract with hotels for the right to purchase rooms at discounted or “wholesale” prices. Defendants then sell the rooms to the public through their internet sites or toll-free numbers at marked-up, “retail” prices, plus certain “tax recovery and fees.” Defendants charge the customers’ credit cards for the entire amount, which includes the retail price of the room and amounts sufficient to pay occupancy taxes on the retail price of the rooms. The hotels in turn invoice Defendants for the rooms at the discounted price and the applicable occupancy tax rate on the discounted rate.	2. Defendants contract with hotels for the right to purchase rooms at discounted or “wholesale” prices. Defendants then sell the rooms to the public through their internet sites or toll-free numbers at marked-up, “retail” prices, plus certain “tax recovery and fees.” On information and belief, Defendants charge the customers’ credit cards for the entire amount of the transaction, which includes the retail price of the room together with amounts sufficient to pay occupancy taxes on the retail price of the rooms, which taxes are lumped together in a single line item which includes unspecified and unitemized “fees.” The hotels in turn invoice Defendants for the rooms at the discounted wholesale price and the applicable occupancy tax rate on the discounted wholesale rate.

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<p>5. For example, an online travel company such as Travelocity, Inc. obtains a room from a hotel at a previously negotiated wholesale price of, for instance \$150. Travelocity, Inc. in turn sells that same hotel room to an occupant over the internet for \$200. Because Travelocity, Inc. controls the occupancy of the hotel room, the amount due to the city by law in this example is applicable percentage of \$200, or AMOUNT. Travelocity, Inc., however, remits the transient occupancy tax based on the lower wholesale price of \$150, thus creating a loss of AMOUNT to the state for that sale alone.</p>	<p>3. For example, an online travel company such as Travelocity, Inc. obtains a room from a hotel at a previously negotiated wholesale price of, for instance \$150. Travelocity, Inc. in turn sells that same hotel room to an occupant over the internet for \$200. In this example, Travelocity, Inc. remits to the hotel the discount wholesale amount (\$150) plus the occupancy tax calculated based upon the \$150 discounted wholesale rate to appropriate Nevada taxing authorities, including CLARK COUNTY. Travelocity retains the \$50 difference between the discounted wholesale rate (\$150) and the retail rate charged to consumers (\$200) plus any taxes and fees collected thereon. This business model deprives Nevada taxing authorities, including CLARK COUNTY, of taxes due them on the full value of the transaction whereby a consumer obtains transient lodging in a hotel.</p>
<p>36. In Nevada, proprietors of transient lodging as well as their managing agents have a duty to collect and remit tax to the State on rents charged to guests pursuant to Clark County Code 4.08, <i>et seq.</i> and Nevada Revised Statute 244A, 244.335, <i>et seq.</i></p>	<p>56. Clark County Ordinances 4.08 et seq. require Defendants to remit to CLARK COUNTY a Combined Transient Lodging Tax based upon the full amount of retail rent charged by Defendants to transient guests purchasing transient lodging from them pursuant to the business model set forth in paragraph 3 above.</p>
<p>37. The combined transient lodging tax is calculated as a percentage of gross rental receipts and ranges between 10% and 13.38%.</p>	<p>33. The combined transient lodging tax is calculated as a percentage of gross rental receipts and ranges between 10.5% and 13.38%.</p>
<p>40. Upon information and belief, recipients of the tax collected within unincorporated Clark County include the Las Vegas Convention and Visitors Authority, the Clark County School District, local transportation districts, the Nevada Department of Tourism, the state of Nevada general fund, the State Supplemental School Fund, and the Clark County General Fund.</p>	<p>47. Upon information and belief, ultimate recipients of the Combined Transient Lodging Tax collected within unincorporated Clark County include the Las Vegas Convention and Visitors Authority, the Clark County School District, local transportation districts, the Nevada Department of Tourism, the state of Nevada general fund, the State Supplemental School Fund, and the Clark County General Fund.</p>

1 See Qui Tam Action Compl. at ¶¶ 3, 4, 5, 36, 37, 40; compared with Exh. 1 at ¶¶ 12, 3, 56, 33, 47.

2 **D. Further Qui Tam Action Proceedings and Relators’ Admissions Concerning the**
3 **Subject of the Clark County Complaint**

4 Following a May 17, 2021 hearing in the Qui Tam Action, the Court entered an order
5 dismissing with prejudice Counts Two through Six of the Complaint, but allowing Count One, the
6 NFCA cause of action, to move forward. See June 2, 2021 Order Granting in Part and Denying in
7 Part Defendants’ Motion to Dismiss. Consequently, the Relators are proceeding with the Qui Tam
8 Action solely in their capacity as private plaintiffs under NRS 357.080.

9 On June 30, 2021, Defendants filed their Answer to the Complaint in the Qui Tam Action,
10 raising the government action bar as their Third Defense. See Defendants’ Answer at 18 (“Relators’
11 claims are barred by the “government action” bar of the Nevada False Claims Act, NRS
12 357.080(3)(b), because this action is based on allegations or transactions that are the subject of a
13 civil action for a monetary penalty to which a political subdivision of Nevada is a party.”).

14 Also, on June 30, 2021, Defendants filed a Motion for Bifurcated Discovery, seeking to
15 limit initial discovery to the threshold question of whether the Complaint is subject to dismissal
16 under the NFCA’s public disclosure bar, NRS 357.100.

17 In response to the bifurcation motion, Relators filed an opposition based in part on the Clark
18 County Action.⁴ In that opposition, in which they attached the Clark County Complaint and
19 referred repeatedly to it, Relators admitted to this Court that the Clark County Action and the Qui
20 Tam Action are based on the same allegations or transactions.

21 On May 14, 2021, Clark County, Nevada filed *a new lawsuit* (the
22 “Companion Action”) *against the same Defendants* as named in the
23 [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].

24 See Plaintiffs’ Opposition to Defendants’ Motion for Bifurcated Discovery, July 14, 2021, at 2-3
25 (emphasis added); see also Exh. 1 at ¶ 3 (describing the underlying conduct by Defendants—*i.e.*,
26 the non-payment of taxes on individual web-based bookings—as “transactions.”).

27 ⁴ The Attorney General did not oppose Defendants’ motion or otherwise tell the Court that it
28 objected to public disclosure bar discovery or its application in the Qui Tam Action.

1 On September 20, 2021, the Court granted Defendants’ Motion for Bifurcated Discovery,
2 ordering that the parties focus all discovery in “Phase One” on gathering facts relevant to
3 application of the public disclosure bar, *see* Sept. 20, 2021 Court Order at 2, and later extended the
4 Phase One discovery period to February 28, 2022. *See* Jan. 4, 2022 Court Order at 3 (extending
5 Phase One discovery period).

6 On January 14, 2022, the Attorney General, who had not opposed Defendants’ Motion to
7 Dismiss or the Court’s order directing Phase One discovery aimed at the public disclosure
8 question,⁵ sent a letter to the Court, purporting to state an “objection” to “public disclosure bar”
9 dismissal under NRS 357.100.⁶ The Attorney General offered no justification for not speaking to
10 this issue when the Motion to Dismiss was ripe or even when the Court ordered bifurcated
11 discovery. Further the Attorney General’s letter did not state any basis for an objection.

12 The Clark County Action remains pending in federal court following removal and the
13 federal court’s order denying remand. *Clark County, Nevada v. Orbitz Worldwide, LLC, et al.*, No.
14 2:21-CV-1328 JCM (D. Nev.).

15 **II. Legal Argument**

16 “Summary judgment is appropriate and shall be rendered forthwith when the pleadings and
17 other evidence on file demonstrates that no genuine issue of material fact [remains] and that and
18 the moving party is entitled to judgment as a matter of law.” *Wood v. Safeway, Inc.*, 121 Nev.
19 724, 729, 121 P.3d 1026, 1029 (2005) (internal quotations omitted) (brackets in original). A
20 genuine issue of material fact exists only where the evidence is such that a rational trier of fact
21 could return a verdict for the nonmoving party. *Id.* at 731, 121 P.2d at 1031; *see also Matsushita*
22 *Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (non-movant must come forward
23 with “specific facts showing that there is a *genuine issue for trial*” to avoid summary judgment)
24 (emphasis in original). Here, there is no genuine dispute with respect to the material facts set forth
25 above. Each fact supporting application of each element of the NFCA government action bar to

26 ⁵ The Attorney General is on the e-service list for this action and has been served with all filings.

27 ⁶ On February 9, 2022, without any notice to Defendants, Relators filed an ex parte application
28 seeking to terminate Phase One discovery and to shorten time for a hearing on that Motion. This
Court set that motion for hearing on March 3, 2022. *See* February 10, 2022 Order.

1 the Relators' claim is a matter of record that requires no further factual development.

2 **A. The NFCA's Government Action Bar**

3 The Nevada False Claims Act precludes *qui tam* actions in certain circumstances. The
4 government action bar is one such statutory impediment to *qui tam* actions. It provides:

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

9 NRS 357.080(3)(b).⁷ Under the plain language of the bar, a relator may not maintain a *qui tam*
10 action based on allegations or transactions that either the State or a political subdivision is pursuing
11 in a separate civil action. *See Int'l Game Tech., Inc. v. Second Judicial Dist. Ct.*, 127 P.3d 1088,
12 1094 (2006) (addressing circumstance where separate civil action preceded the false claims act case
13 and noting that “[g]enerally, a false claims action may not be maintained if administrative or court
14 proceedings involving the same underlying facts and allegations were previously instigated.”). *See,*
15 *e.g., People ex rel. Lindblom v. Sears Brands, LLC*, 2018 IL App. (1st) 171468 at ¶ 7 (applying the
16 Illinois False Claims Act government action bar: “The government action bar prohibits *qui tam*
17 actions that are parasitic in that they duplicate the State’s civil suits or administrative proceedings
18 without giving the government any useful return, other than the potential for additional monetary
19 recovery.”). Under the NFCA, if an action cannot be maintained, it must be dismissed. That is the
20 circumstance here. The government action bar applies and requires dismissal of the Qui Tam
21 Action.

22 Federal court decisions interpreting the federal False Claims Act’s government action bar
23 have treated it as jurisdictional. *See, e.g., United States ex rel. Batty v. Amerigroup Ill., Inc.*, 528
24 F. Supp. 2d 861, 876 (N.D. Il. 2007). While Defendants have not identified any Nevada decisions
25 on this issue, regardless of whether the bar is jurisdictional or not, the government action bar is ripe

26 ⁷ Under this provision, the same language—“An action may not be maintained by a private
27 plaintiff”—also applies if the action is “against a member of the Legislature or Judiciary, an
28 elected officer of the Executive Department of the State Government, or a member of the
governing body of a political subdivision” if circumstances exist “at the time the action was
brought.” NRS 357.080(3)(a).

1 for resolution now based on undisputed facts set forth herein and is dispositive of this entire case.

2 **B. Defendants Have Satisfied Each Element of the Government Action Bar**

3 The NFCA’s government action bar has four key elements:

- 4 (1) there must be a *qui tam* action under the NFCA,
5 (2) the “allegations or transactions” in the *qui tam* action must
6 be the subject of a separate civil action,
7 (3) the State or a political subdivision must be a party to the
8 separate civil action, and
9 (4) the relator must be “maintaining” the *qui tam* action despite
10 the separate civil action.

11 As shown below, each of these elements is met here.

12 **1. Relators are Proceeding as Private Plaintiffs Under the NFCA**

13 There is no dispute that Relators are proceeding as “private plaintiffs” under the NFCA.
14 See NRS 357.080(1) (“... a private party may bring an action pursuant to this chapter for a violation
15 of NRS 357.040 . . .”); Complaint, ¶ 2 (“NRS 357.080(1) authorizes private persons to bring civil
16 actions on behalf of themselves and on behalf of the State of Nevada.”). The NFCA provides that
17 a relator initiates suit, under seal, and the Attorney General then investigates and decides whether
18 to intervene in the action. See NRS 357.070(1). Here, the Attorney General notified the Court that
19 it was declining to intervene in this action and Relators elected to continue to pursue this action.
20 NRS 357.110(2) (“If the Attorney General . . . elects not to intervene, the private plaintiff may
21 proceed with the action.”). As such, Relators indisputably are proceeding with this action as
22 “private plaintiffs” within the meaning of the NFCA’s government action bar.

23 **2. Relators’ Qui Tam Action is Based on the Same Allegations or**
24 **Transactions That are the Subject of a Civil Action**

25 This element is readily satisfied as well. Both actions—the Qui Tam Action and the Clark
26 County Action—are based on the same underlying alleged conduct by Defendants—the supposed
27 non-payment of the Combined Transient Lodging Taxes for hotel bookings that Defendants
28 facilitate through their on-line business. Any taxes due, and allegations about non-payment or

1 avoidance of those taxes, therefore, arise out of the same transactions that are the foundation of
2 both cases.

3 In the chart in Section II above, Defendants illustrated these points through a side-by-side
4 comparison of key allegations in each of the complaints. In many cases, the language is identical,
5 and Clark County even characterizes each hotel facilitation as a “transaction.” *See* Exh. 1 at ¶ 36.
6 The comparison of the allegations in these complaints is dispositive proof that the allegations in the
7 Qui Tam Action also are the subject of the Clark County Action.

8 Nonetheless, to the extent any doubt remains, Relators admitted to this Court that Clark
9 County was proceeding against the *same* Defendants and based on the *same* allegations and
10 transactions that are the *subject* of this Qui Tam Action. *See* Plaintiffs’ Opposition to Defendants’
11 Motion for Bifurcated Discovery, May 14, 2020, at 2-3 (“On May 14, 2021, Clark County, Nevada
12 filed a new lawsuit . . . against the same Defendants as named in [this case] based upon the same
13 failure to pay transient lodging taxes to various Nevada governmental authorities as is the subject
14 of [this case].”).

15 Dismissal of this Qui Tam Action under these circumstances will not leave the government
16 without a remedy. If the underlying taxes are due and owing—an allegation that Defendants
17 strongly dispute—any such liability and relief will be determined by the federal court overseeing
18 that litigation. And it is precisely because of that separate action instituted by Clark County—the
19 taxing authority which would then distribute any remitted taxes among the relevant jurisdictions,
20 including the State—that the legislature precluded private parties such as Relators from maintaining
21 their separate suit arising out of the same allegations or transactions. *See* NRS 244.3354(1)(a),
22 (2)(a) (directing 3/8% to be deposited with State Treasurer for tourism fund); CCC 4.08.031(c)
23 (directing 3% to be deposited with State Treasurer for education fund).

24 **3. Clark County is a Party to the Civil Action**

25 The next element of the government action bar merely requires that either the “State or
26 political subdivision already is a party” to the separate civil action. NRS 357.080(3)(b). Clark
27 County clearly is already a party to the Clark County Action. Nor is there any doubt that Clark
28 County is a “political subdivision” within the meaning of the government action bar. *See* NRS

1 357.030 (“Political subdivision” defined. ‘Political subdivision’ means a county, city,
2 assessment district or any other local government as defined in NRS 354.474.”).

3 **4. Relators are Maintaining This Qui Tam Action Notwithstanding the**
4 **Clark County Civil Action**

5 The final element of the government action bar simply requires that Relators are seeking to
6 “maintain” an action “pursuant to this chapter”—*i.e.*, an action under the NFCA – notwithstanding
7 the separate civil action brought by the government. NRS 357.080(3)(b). That, too, is the case
8 here. Relators know about the Clark County Action—indeed they brought it to this Court’s
9 attention one business day after Relators’ own counsel filed it on behalf of Clark County. Yet,
10 Relators have continued to “maintain” their Qui Tam Action here.

11 With respect to this element, it is worth noting that the language of the NFCA differs
12 materially from the federal False Claims Act’s government action bar. While the federal False
13 Claims Act provides: “In no event may a person **bring** an action under subsection (b) which is
14 based upon allegations or transactions which are the subject of a civil suit or an administrative civil
15 money penalty proceeding in which the Government is already a party,” 31 U.S.C. § 3730(c)(3)
16 (emphasis added), the NFCA uses the term “maintain” as opposed to “bring.” Thus, whereas the
17 federal FCA government action bar operates to prevent a private party from “bring[ing] or
18 commencing an action based on the same matters that are the subject of separate civil suit to which
19 the Government is a party, the Nevada FCA prohibits a private party from “maintain[ing]” or
20 continuing to pursue an NFCA claim when the government has filed a separate civil suit based on
21 the same allegations or transactions.

22 The terms “bring” and “maintain” clearly have different meanings: “Bring an action” means
23 “[t]o sue; institute legal proceedings.” Black’s Law Dictionary (11th ed. 2019). “Maintain” means
24 “[t]o continue (something).” *Id.* Indeed, in *Madera v. State Indus. Ins. Sys.*, 114 Nev. 253 (1998),
25 the Nevada Supreme Court pointed favorably to an earlier—but substantively the same—definition
26 of “maintain” from Black’s Law Dictionary. In that case, the Supreme Court considered the
27 language of NRS 616D.030, which provides that “[n]o cause of action may be brought or
28 *maintained* against an insurer or third party administrator who violates any provision of [Nevada’s

1 industrial insurance statutes].” *Id.* (emphasis added.) After the Supreme Court recognized that the
2 fifth edition of Black’s had defined “maintain” as “to uphold, continue on foot, and keep from
3 collapse a suit already begun” and is “applied to actions already brought, but not yet reduced to
4 judgment,” the Court concluded that “Nevada law is in accord with the dictionary definition of
5 ‘maintain.’” *Id.* at 259.

6 Moreover, beyond the distinct defined meanings, the Nevada Legislature clearly understood
7 the difference between these terms. Not only did the Legislature depart from the “bring” language
8 in the FCA (even though the NFCA is patterned in large measure on the FCA), the Legislature
9 clearly understood the difference between these terms as it used both “bring” and “maintain” in
10 different contexts within the same subsection of the NFCA that contains the government action bar.

11 The Legislature used the term “bring” multiple times in this subsection of the NFCA. *See*
12 NRS 357.080(1) (“a private plaintiff may **bring** an action pursuant to this chapter for a violation
13 of NRS 357.040”) (emphasis added); NRS 357.080(2) (“If a private plaintiff **brings** an action
14 pursuant to this chapter, no person other than the Attorney General or the Attorney General’s
15 designee may intervene or **bring** a related action pursuant to this chapter based on the facts
16 underlying the first action.”) (emphasis added); NRS 357.070(1) (“the Attorney General shall
17 investigate diligently any alleged liability pursuant to this chapter and may **bring** a civil action
18 pursuant to this chapter”) (emphasis added); NRS 357.026 (“‘Original source’ means a person: (1)
19 Who has knowledge of information that is independent of and materially adds to the publicly
20 disclosed allegations or transactions and who voluntarily provides such information to the State or
21 political subdivision before **bringing** an action for a false claim based on the information”)
22 (emphasis added).

23 By contrast, the Legislature used the word “maintain” only one time in the NFCA, with
24 respect to the government action bar. As the Nevada Supreme Court itself has made clear, it is a
25 well-established principle of statutory construction that if the Legislature uses the same word
26 throughout a statute, it is presumed to have the same meaning throughout, whereas a material
27 variation in a term indicates a variation in its meaning. *See Aerogrow Int’l, Inc. v. Eighth Judicial*
28 *Dist. of Nev.*, 137 Nev. Adv. Op. 76, 499 P.3d 1193, 1199 (2021) (“a statute’s use of two different

1 terms evinces the legislature’s intent that different meanings apply to the two terms”) (citing
2 *Labastida v. State*, 115 Nev. 298, 302-03, 986 P.2d 443, 446 (1999); *see also* Norman Singer &
3 Shambie Singer, *2B Sutherland Statutory Construction* § 52:5 (7th ed. 2016) (“when a legislature
4 models a statute after a uniform act, but does not adopt particular language, courts conclude the
5 omission was ‘deliberate’ or ‘intentional’”).

6 Accordingly, based on a plain meaning of the statute, Relators are “maintaining” their Qui
7 Tam Action notwithstanding the Clark County Action. Therefore, this element of the government
8 action bar is satisfied.

9 CONCLUSION

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

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14 [Signature On Following Page]
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1 Dated: February 24, 2022

2 Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to N.R.C.P. 5(b), I certify that on February 24, 2022, I served a true and correct copy of the foregoing **DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** on the following by filing and serving the same with the Court's e-filing system:

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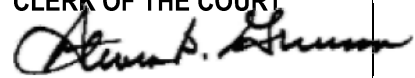
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EXHIBIT 1

EXHIBIT 1

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CASE NO: A-21-834681-C
Department 24

DISTRICT COURT

CLARK COUNTY, NEVADA

CLARK COUNTY, NEVADA,

Case No.:

Plaintiffs,

Dept. No.:

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.; AGODA
INTERNATIONAL USA LLC; HOTEL
TONIGHT, INC.; HOTEL TONIGHT,
LLC; DOES I through XXX, inclusive and
ROE BUSINESS ENTITIES I through
XXX, inclusive,

Defendants.

COMPLAINT

COMES NOW CLARK COUNTY, NEVADA ("CLARK COUNTY" or "Plaintiff"), by
and through their counsel of record of Clark Hill PLLC, and hereby complains of Defendants as
follows:

NATURE OF THE ACTION

1
2 1. This lawsuit is to recover damages and obtain other relief from Defendants, web-
3 based hotel booking companies, who have knowingly engaged in a common practice/scheme to
4 avoid payment of Nevada's and CLARK COUNTY's Combined Transient Lodging Tax as
5 required by Nevada law.

6 2. Defendants contract with hotels for the right to purchase rooms at discounted or
7 "wholesale" prices. Defendants then sell the rooms to the public through their internet sites or
8 toll-free numbers at marked-up, "retail" prices, plus certain "taxes and fees." On information and
9 belief, Defendants charge the customers' credit cards for the entire amount of the transaction,
10 which includes the retail price of the room together with amounts sufficient to pay occupancy
11 taxes on the retail price of the rooms which taxes are lumped together in a single line item which
12 includes unspecified and unitemized "fees." The hotels in turn invoice Defendants for the rooms
13 at the discounted wholesale price and the applicable occupancy tax rate on the discounted
14 wholesale rate.

15 3. For example, an online travel company such as Travelocity, Inc. obtains a room
16 from a hotel at a previously negotiated wholesale price of, for instance, \$150. Travelocity, Inc. in
17 turn sells that same hotel room to an occupant over the internet for \$200. In this example,
18 Travelocity, Inc. remits to the hotel the discount wholesale amount (\$150) plus the occupancy
19 tax calculated based upon the \$150 discounted wholesale rate rather than on the \$200 retail rate
20 charged to the consumer. The hotel submits the tax on the \$150 discounted wholesale rate to
21 appropriate Nevada taxing authorities, including CLARK COUNTY. Travelocity retains the \$50
difference between the discounted wholesale rate (\$150) and the retail rate charged to consumers
(\$200) plus any taxes and fees collected thereon. This business model deprives Nevada taxing
authorities, including CLARK COUNTY, of taxes due them on the full value of the transaction
whereby a consumer obtains transient lodging in a hotel.

///
///
///

THE PARTIES

4. Plaintiff CLARK COUNTY is an unincorporated county organized under the laws of the State of Nevada.

5. 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.

6. 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.

7. 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.

8. 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.

9. 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.

10. 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.

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

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

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

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

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

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

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

12 18. Defendant Travelnow.com Inc. is a Delaware corporation with its principal place
13 of business in Bellevue, Washington. Defendant Travelnow.com Inc. has at all times relevant to
14 this litigation conducted business in this state.

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

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

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

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

4 23. Defendant Tripadvisor LLC is a Delaware limited liability company with its
5 principal place of business in Needham, Massachusetts. Defendant Tripadvisor LLC has at all
6 times relevant to this litigation conducted business in this state.

7 24. Defendant Tripadvisor Inc. is a Delaware corporation with its principal place of
8 business in Needham, Massachusetts. Defendant Tripadvisor LLC has at all times relevant to this
9 litigation conducted business in this state.

10 25. Defendant Trip.com, Inc. is a Delaware corporation with its principal place of
11 business in Shanghai, China. Defendant Trip.com, Inc. has at all times relevant to this litigation
12 conducted business in this state.

13 26. Defendant Remark Holdings, Inc. is a Delaware corporation with its principal
14 place of business in Las Vegas, Nevada. Defendant Remark Holdings, Inc. has at all times
15 relevant to this litigation conducted business in this state.

16 27. The true names and capacities, whether individual, corporate, associates, co-
17 partnership, or otherwise of Defendants DOES 1 through 100 and ROE Corporations 1 through
18 100, are unknown to Plaintiffs who therefore sues said defendants by such fictitious names.
19 Plaintiffs are informed and believe and thereon allege that each of the defendants designated as
20 DOES 1 through 100 and ROE Corporations 1 through 100 are responsible in some manner for
21 the events and happenings referred to in this action and proximately caused damages to Plaintiffs
as herein alleged.

JURISDICTION AND VENUE

22 28. At all times relevant, Defendants transacted business in the State of Nevada and in
23 the County of Clark by, among other activities, contracting to purchase hotel rooms from hotels,
24 advertising such hotel rooms to customers, and selling/booking such hotel rooms to the general
25 public.

29. This civil action arises from actions occurring within County of Clark, State of Nevada, involving an amount in controversy in excess of the sum of Fifteen Thousand Dollars (\$15,000.00), exclusive of costs and interest, thereby giving this Court jurisdiction over this matter.

30. This Court further has jurisdiction over Plaintiffs' claims as they involve claims arising exclusively under Nevada statutes and CLARK COUNTY Ordinances.

31. Venue is proper because injuries to Plaintiffs occurred in Clark County, Nevada and because Defendants committed unlawful acts and conducted their unlawful practices in Clark County, Nevada.

FACTUAL ALLEGATIONS

32. In Nevada and in Clark County, a "Combined Transient Lodging Tax" is imposed in connection with the sale or rental of "Transient Lodging" in "Transient Lodging Establishments" to "any individual natural person who has or shall have the right of occupancy to any sleeping room/space in a transient lodging establishment for thirty consecutive days or less" pursuant to Clark County Code 4.08, *et seq.* and Nevada Revised Statute 244A, 244.335, *et seq.*

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

34. The "Rent" upon which the Combined Transient Lodging Tax is imposed is defined as "the amount charged for a sleeping room/space in a transient lodging establishment, valued in money, whether received in money or otherwise, and including the following, regardless of whether separately stated:

- (i) Charges that would normally be part of an all inclusive room rate, such as, but not limited to, payment processing fees, check-in fees, accommodation fees, facility fees, access fees, charges for additional guests, late check-out fees, and utility surcharges;
- (ii) Charges applicable to cleaning and readying such room/space for occupancy including, but not limited to, linen fees, cleaning fees, and non-refundable deposits;

(iii) Charges for rental of furnishings and appliances including, but not limited to, cribs, rollaways, refrigerators, televisions, microwaves, and in-room safes;

(iv) Room charges applicable to pets including, but not limited to, non-refundable pet cleaning fees/deposits;

(v) Charges associated with attrition, cancellation, late arrival, or failure to occupy a room, including, but not limited to, attrition fees, cancellation fees, late arrival fees, early departure fees, and no-show fees;

(vi) Reimbursements received for use of a sleeping room/space under incentive programs, such as, but not limited to, frequent guest programs or rewards programs;

(vii) The value of a sleeping room/space included as a component of a package, pursuant to Section 4.08.035;

(viii) ***Any charges for services, amenities, accommodations, or use, not otherwise specified above, that are mandatory in nature and charged in connection with rental of a sleeping/room space.***” See CLARK COUNTY Ordinance 4.08.005(22) (emphasis added).”.

35. The transient lodging tax “shall be collected from every operator in Clark County.” See Clark County Ordinance 4.08.010.

36. An “Operator” of a Transient Lodging Establishment is defined as “the person who is the proprietor of a transient lodging establishment, whether in the capacity of owner, lessee, sublessee, mortgagee, licensee, or any other capacity.” Additionally, when the operator/proprietor “performs his or her functions through a managing agent of any type or character other than an employee, the managing agent shall also be deemed an operator for the purposes of this chapter and shall have the same duties and liabilities as his or her principal.” See Clark County Ordinance 4.08.005(16).

37. With respect to Defendants’ sale and rental of transient lodging in a transient lodging establishment to transient guests pursuant to the business model set forth in paragraph 3 hereof, Defendants, and each of them, are “managing agents of any type or character” of the operator/proprietor and have the same duties and liabilities as the operator/proprietor in collecting and remitting the Combined Transient Lodging Tax to CLARK COUNTY.

38. With respect to the taxable transaction of selling and renting transient lodging in transient lodging establishments to transient guests, Defendants, and each of them, exercise

1 judgment and discretion in performing the functions of an operator in connection with, among
2 other things, advertising and marketing of the rooms to transient guests, the amount of rent and
3 other fees to be charged to the transient guests, refund and cancellation policies applicable to the
4 transaction and securing reservations and payment therefore from the transient guests. In fact,
5 from initiation of first contact with the transient guest through completion of the taxable
6 sale/rental transaction, the operator/proprietor is not engaged in the transaction with the transient
7 guest at all and all policies and procedures applied to the transaction are within the control and
8 discretion of Defendants.

9 39. The combined transient lodging tax imposed by Clark County Ordinances may be
10 collected from the paying transient guests and may be shown as an addition to the rent charged
11 by the transient lodging establishment. However, the operator and/or managing agent of the
12 operator is liable to CLARK COUNTY for the tax whether or not it is actually collected from the
13 paying transient guest. See Clark County Ordinance 4.08.010(c).

14 40. On information and belief, the Defendants charge and collect from transient
15 guests the Combined Transient Lodging Tax calculated as a percentage of the full retail price
16 Defendants charge transient guests for their rooms.

17 41. Regardless of whether Defendants actually charge and receive from transient
18 guests the full amount of the Combined Transient Lodging Tax calculated as a percentage of the
19 full retail price Defendants charge transient guests for their rooms, CLARK COUNTY is owed
20 the full amount of the Combined Transient Lodging Tax calculated as a percentage of the full
21 retail price Defendants charge transient guests for their rooms.

42. Operators/proprietors and Defendants, as managing agents therefore, are liable to
CLARK COUNTY for the full amount of the Combined Transient Lodging Tax calculated as a
percentage of the full retail price Defendants charge transient guests for their rooms, whether
paid for by transient guests or not.

43. Pursuant to the business model set forth in paragraph 3 hereof, Defendants have
been remitting to operators/proprietors only that portion of the Combined Transient Lodging Tax

1 which was calculated as a percentage of the discounted wholesale price Defendants pay to
2 operators/proprietors rather than the full retail price charged to transient guests and paid to
3 Defendants.

4 44. Pursuant to the business model set forth in paragraph 3 hereof,
5 operators/proprietors have remitted to CLARK COUNTY only that portion of the Combined
6 Transient Lodging Tax they have received from Defendants which was calculated as a
7 percentage of the discounted wholesale price Defendants pay to operators/proprietors.

8 45. Defendants directly remit no Combined Transient Lodging Tax to CLARK
9 COUNTY in connection with the sale or rental of transient lodging in transient lodging
10 establishments to transient guests.

11 46. As a result of the business model utilized by Defendants as set forth in paragraph
12 3 hereof, CLARK COUNTY has, for a period of time presently unknown to Plaintiff, been
13 deprived of receiving million of dollars in Combined Transient Lodging Taxes.

14 47. Upon information and belief, ultimate recipients of the Combined Transient
15 Lodging Tax collected within unincorporated Clark County include the Las Vegas Convention
16 and Visitors Authority, the Clark County School District, local transportation districts, the
17 Nevada Department of Tourism, the state of Nevada general fund, the State Supplemental School
18 Fund, and the Clark County General Fund.

19 **FIRST CLAIM FOR RELIEF**

20 **(Declaratory Judgment)**

21 48. Plaintiff repeats and realleges the allegations set forth in paragraphs 1-47 as if
fully set forth herein.

49. NRS 30.040(1) provides that “[a]ny person interested under a deed, written
contract or other writings constituting a contract, or whose rights, status or other legal relations
are affected by a statute, municipal ordinance, contract or franchise, may have determined any
question of construction or validity arising under the instrument, statute, ordinance, contract or
franchise and obtain a declaration of rights, status or other legal relations thereunder.

1 50. CLARK COUNTY maintains as follows:

- 2 a. Clark County Code 4.08, *et seq.* and Nevada Revised Statute 244A, 244.335,
3 *et seq.* establishes a Combined Transient Lodging Tax which requires the tax
4 be imposed and remitted based upon the full amount of retail rent charged by
5 Defendants to transient guests purchasing transient lodging from them
6 pursuant to the business model set forth in paragraph 3 hereof;
7 b. With respect to the taxable transaction of purchasing or renting transient
8 lodging from Defendants pursuant to the business model set forth in paragraph
9 3 hereof, Defendants are “managing agents of any type or character” of the
10 hotel operators within the meaning of relevant Ordinances; and,
11 c. With respect to the taxable transaction of purchasing or renting transient
12 lodging from Defendants pursuant to the business model set forth in paragraph
13 3 hereof, Defendants are liable for payment of the Combined Transient
14 Lodging Tax based upon the full amount of retail rent charged by Defendants
15 to transient guests to the same extent as operators.

16 51. CLARK COUNTY seeks a judicial declaration of its rights consistent with its
17 opposition as set forth in paragraph 50 hereof.

18 52. NRS 30.130 provides, in relevant part, that “all persons shall be made parties who
19 have or claim any interest which would be affected by the declaration, and no declaration shall
20 prejudice the rights of persons not parties to the proceeding.”

21 53. Defendants herein dispute the interpretation of Nevada statutes and ordinances as
 set forth in paragraph 50 hereof and are the subject of the relief requested herein. Thus, there is a
 justiciable controversy ripe for adjudication between the parties.

 54. As a result of the actions, practices and course of conduct of Defendants, Plaintiff
 has been compelled to retain the services of an attorney for the protection of its interests.

SECOND CLAIM FOR RELIEF

(Violation of CLARK COUNTY Ordinances)

55. Plaintiff repeats and realleges the allegations set forth in paragraphs 1-54 as if fully set forth herein.

56. Clark County Ordinances 4.08 et. seq. require Defendants to remit to CLARK COUNTY a Combined Transient Lodging Tax based upon the full amount of retail rent charged by Defendants to transient guests purchasing transient lodging from them pursuant to the business model set forth in paragraph 3 hereof.

57. Defendants have failed to remit the amount of Combined Transient Lodging Tax due to CLARK COUNTY on account of Defendants' sale or rental of transient lodging in transient lodging establishments to transient guests as more fully set forth hereinbefore.

58. As a direct and proximate result of Defendants' failure to remit the Combined Transient Lodging Tax to Plaintiff when due, Plaintiff has been damaged in an amount in excess of fifteen thousand dollars (\$15,000.00) subject to proof at trial.

59. As a result of the actions, practices and course of conduct of Defendants, Plaintiff has been compelled to retain the services of an attorney for the protection of its interests

THIRD CLAIM FOR RELIEF

(Conversion)

60. Plaintiff repeats and realleges the allegations set forth in paragraphs 1-59 as if fully set forth herein.

61. The Combined Transient Lodging Tax from the sale or rental of transient lodging by Defendants is due and payable to CLARK COUNTY on the first day of each month for transactions consummated in the preceding month. Clark County Ordinance 4.08.055.

62. As of, at least, the date the Combined Transient Lodging Tax is due and payable to CLARK COUNTY, Plaintiff has the right to the immediate possession of the money representing the taxes due and owing.

63. In failing to remit the Combined Transient Lodging Tax to CLARK COUNTY as required, Defendants wrongfully exercised dominion and control over the monies belonging to CLARK COUNTY thereby depriving Plaintiff of the use and the benefit thereof.

64. As a direct and proximate result of Defendants' conduct, Plaintiff has suffered, and will continue to suffer monetary damages in excess of in excess of fifteen thousand dollars (\$15,000.00) subject to proof at trial.

65. In converting these monies, Defendants acted wantonly, willfully, and in knowing disregard of the rights of Plaintiff. Accordingly, an award of punitive damages is appropriate in an amount subject to proof at trial.

66. As a result of the actions, practices and course of conduct of Defendants, Plaintiff has been compelled to retain the services of an attorney for the protection of its interests

FOURTH CLAIM FOR RELIEF

(Breach of Fiduciary Duty)

67. Plaintiff repeats and realleges the allegations set forth in paragraphs 1-66 as if fully set forth herein.

68. The Combined Transient Lodging Tax constitutes the money and property of CLARK COUNTY, at least, as of the time it becomes due and payable to CLARK COUNTY and/or, alternatively, when it is collected from Defendants' customers as part of the sales or rental transaction.

69. In that Defendants are holding the money and property belonging to CLARK COUNTY and have collected the tax due from its customers in the transient lodging transaction, Defendants stand in a fiduciary relationship with CLARK COUNTY as to the amount of taxes due and owing and/or collected from its customers.

70. Defendants owe CLARK COUNTY the duty to safeguard and remit as required the money and property of CLARK COUNTY that it is holding in its possession.

71. Defendants have breached the fiduciary duty it owes CLARK COUNTY by,

1 among other things, failing to safeguard, account for and/or remit the Combined Transient
2 Lodging Tax as and when due.

3 72. As a direct and proximate result of Defendants' conduct, Plaintiff has suffered,
4 and will continue to suffer monetary damages in excess of in excess of fifteen thousand dollars
5 (\$15,000.00) subject to proof at trial.

6 73. Defendants acted wantonly, willfully, and in knowing disregard of the rights of
7 Plaintiff. Accordingly, an award of punitive damages is appropriate in an amount subject to
8 proof at trial.

9 74. As a result of the actions, practices and course of conduct of Defendants, Plaintiff
10 has been compelled to retain the services of an attorney for the protection of its interests

11 **FIFTH CLAIM FOR RELIEF**
12 **(Unjust Enrichment)**

13 75. Plaintiff repeats and realleges the allegations set forth in paragraphs 1-74 as if
14 fully set forth herein.

15 76. In retaining and failing to remit the Combined Transient Lodging Tax as
16 described herein, Defendants have obtained a benefit that in equity and good conscience they
17 should not have obtained or possessed because the benefits rightfully belonged to Plaintiff.

18 77. Defendants are liable to Plaintiffs under the doctrine of unjust enrichment for full
19 amount of taxes collected, plus interest and penalties.

20 78. As a direct and proximate result of Defendants' conduct, Plaintiff has suffered,
21 and will continue to suffer monetary damages in excess of in excess of fifteen thousand dollars
(\$15,000.00) subject to proof at trial.

79. Defendants acted wantonly, willfully, and in knowing disregard of the rights of
Plaintiff. Accordingly, an award of punitive damages is appropriate in an amount subject to
proof at trial.

80. As a result of the actions, practices and course of conduct of Defendants, Plaintiff
has been compelled to retain the services of an attorney for the protection of its interests

FIFTH CLAIM FOR RELIEF

(Constructive Trust)

81. Plaintiff repeats and realleges the allegations set forth in paragraphs 1-80 as if fully set forth herein.

82. At all relevant times, Plaintiff's monies were in the possession and under the control of Defendants. Defendants have taken this property for their own use and benefit, thereby depriving Plaintiffs of the use and benefit thereof. Plaintiffs have been damaged by their failure to receive the monies.

83. The retention of monies by Defendants would be inequitable.

84. By virtue of Defendants' actions, Defendants hold these funds as constructive trustees for the benefit of CLARK COUNTY. The existence and imposition of a constructive trust is essential to the effectuation of justice. The Plaintiff requests an order that Defendants be directed to give possession thereof to Plaintiff.

85. As a result of the actions, practices and course of conduct of Defendants, Plaintiff has been compelled to retain the services of an attorney for the protection of its interests

SIXTH CLAIM FOR RELIEF

(Consumer Fraud/Violation Of Nrs 598

Deceptive Trade Practices Act)

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

87. The business model utilized by Defendants as set forth in paragraph 3 hereof combined with Defendants' method of invoicing customers is inherently deceptive and is intended to and does obscure the amount of "Rent" charged for transient lodging in Clark County, Nevada as well as the amount of taxes and other fees charged and collected by Defendants.

88. Knowing that taxable "Rent" for transient lodging means the full amount charged for a sleeping room/space in a transient lodging establishment" and expressly includes charges that are "mandatory in nature and charged in connection with rental of a sleeping/room space,"

1 Defendants nonetheless utilize a business model that falsely reports to CLARK COUNTY and
2 other governmental bodies collecting a Combined Transient Lodging Tax that the “Rent” is the
3 discounted wholesale amount charged to Defendants by the operator rather than the retail “Rent”
4 paid by transient guests.

5 89. On information and belief, Defendants standard practice is to invoice its retail
6 customers showing only two line items as follows: (1) Room rate and (2) Taxes and other fees.

7 90. In lumping taxes together in a single line item with taxes and other fees,
8 Defendants disguise from both government bodies, including CLARK COUNTY, and
9 Defendants’ customers the actual amount of room taxes the customer is paying for. Said practice
10 also disguises the amount and nature of the additional fees being charged.

11 91. NRS 41.600(2) defines “consumer fraud” as “(e) a deceptive trade practice as
12 defined in NRS 598.0915 to 598.0925, inclusive.”

13 92. Defendants, as previously alleged, performed acts and omitted performing acts,
14 which constitute an unfair trade practice under one or more provisions of NRS 598.0903, *et seq.*,
15 including but not limited to NRS 598.0915(13) and (15). More specifically, the business model
16 utilized by Defendants as set forth in paragraph 3 hereof combined with Defendants’ method of
17 invoicing customers constitutes (a) the making of misleading statements of fact concerning the
18 price of goods or services for sale or lease, or the reasons for, existence of or amounts of price
19 reductions” pursuant to NRS 598.0915(13) and/or (b) knowingly making any other false
20 representation in a transaction pursuant to NRS 598.0915(15).

21 93. As a direct and proximate result of Defendants’ conduct, Plaintiff has suffered,
and will continue to suffer monetary damages in excess of in excess of fifteen thousand dollars
(\$15,000.00) subject to proof at trial.

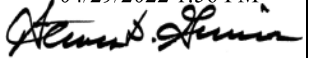
94. Defendants acted wantonly, willfully, and in knowing disregard of the rights of
Plaintiff. Accordingly, an award of punitive damages is appropriate in an amount subject to proof
at trial.

WHEREFORE, Plaintiff CLARK COUNTY requests that judgment be entered as follows:

- Respectfully Submitted this 14th day of May, 2020.

/s/ Michael V. Cristalli, Esq.
A. WILLIAM MAUPIN, ESQ. (NSBN 1315)
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Exhibit 4


CLERK OF THE COURT

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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

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.

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

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

IT IS SO ORDERED.

Dated this 29th day of April, 2022



**F29 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
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

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9 Orbitz Worldwide, LLC,
Defendant(s)

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11 **AUTOMATED CERTIFICATE OF SERVICE**

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Exhibit 5

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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.: 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.

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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

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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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12 -and-

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20 *Travelocity, Inc., Cheap Tickets, Inc., Expedia, Inc.,*
21 *Expedia Global, LLC, Hotels.Com, LP, Hotwire,*
22 *Inc., and Travelnow.com, Inc.*

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

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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/s/ M.K. Carlton
An Employee of Ballard Spahr LLP

Exhibit 6

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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

**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

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LLP

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Cc: Bain, Tanya <tbain@ClarkHill.com>; Gentile, Dominic <dgentile@ClarkHill.com>; Cristalli, Michael <mcristalli@ClarkHill.com>
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

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From: Dzarnoski, Mark <mdzarnoski@ClarkHill.com>

Sent: Monday, July 11, 2022 3:42 PM

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Cc: Bain, Tanya <tbain@ClarkHill.com>; Gentile, Dominic <dgentile@ClarkHill.com>; Cristalli, Michael <mcristalli@ClarkHill.com>

Subject: RE: OTC - Proposed Order Reconsideration

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

Senior Counsel

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From: Tasca, Joel <TASCA@ballardspahr.com>

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Subject: RE: OTC - Proposed Order Reconsideration

[External Message]

Yes, you can submit it. Thanks.

Joel E. Tasca

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Subject: RE: OTC - Proposed Order Reconsideration

⚠ EXTERNAL

Your word changes are acceptable to me. Have you gotten a signoff from your group?

Mark Dzarnoski

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From: Tasca, Joel <TASCA@ballardspahr.com>

Sent: Sunday, July 10, 2022 9:55 AM

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Cc: Bain, Tanya <tbain@ClarkHill.com>; Gentile, Dominic <dgentile@ClarkHill.com>; Cristalli, Michael <mcristalli@ClarkHill.com>

Subject: RE: OTC - Proposed Order Reconsideration

[External Message]

Mark – I'm still waiting for sign-off from certain members of our group, so this is subject to change, but I wanted to keep things moving. See attached redlines. Thanks.

Joel E. Tasca

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Sent: Thursday, July 7, 2022 11:09 AM

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Cc: Bain, Tanya <tbain@ClarkHill.com>; Gentile, Dominic <dgentile@ClarkHill.com>; Cristalli, Michael <mcristalli@ClarkHill.com>

Subject: OTC - Proposed Order Reconsideration

⚠ EXTERNAL

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,

Mark Dzarnoski

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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:

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