

**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; TRAVEL  
WEB LLC; TRAVELNOW.COM  
INC.; AGODA INTERNATIONAL  
USA LLC; HOTEL TONIGHT INC.;  
AND HOTEL TONIGHT LLC,

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT  
COURT OF THE STATE OF  
NEVADA, IN AND FOR THE  
COUNTY OF CLARK; AND THE  
HONORABLE MARK R. DENTON,  
DISTRICT JUDGE,

Respondents,

and

THE STATE OF NEVADA; MARK  
FIERRO; AND SIG ROGICH,

Real Parties in Interest.

Supreme Court Case No.: 85111  
Electronically Filed  
Sep 29 2022 11:34 a.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

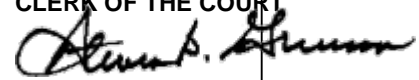
**REAL PARTIES IN INTEREST'S APPENDIX TO THEIR ANSWER TO  
PETITIONERS' WRIT OF MANDAMUS OR PROHIBITION**

Date	Document	Exhibit	Bates No.
4.24.2020	Original Complaint	1	RAPP_000001-000011
6.2.2021	Order Granting in Part and Denying in Part Defendants' Motion to Dismiss	2	RAPP_000012-000016

5.14.2021	Clark County v. Orbitz Worldwide, LLC, et al. – Complaint – Case No. A-21-834681-C	3	RAPP_000017-000032
2.24.2022	Petitioners’ Motion for Summary Judgment	4	RAPP_000033-000067
3.10.2022	Respondents’ Response to Petitioners Motion for Summary Judgment	5	RAPP_000068-000089
3.21.2022	Petitioners Reply to Response to Motion Summary Judgment	6	RAPP_000090-000102
4.5.2022	Respondents’ Motion for Leave to Amend Complaint	7	RAPP_000103-000122
4.29.2022	Order Denying Motion for Summary Judgement	8	RAPP_000123-000129
5.7.2022	Stipulation and Order to Withdrawal of Respondents’ Opposition to Relators’ Motion for Leave to Amend	9	RAPP_000130-000137
5.13.2022	Petitioners Motion for Reconsideration of Courts’ April 29, 2022 Order	10	RAPP_000138-000151
5.16.2022	First Amended Complaint	11	RAPP_000152-000160
7.12.2022	Order Denying Motion for Reconsideration	12	RAPP_000161-000168
3.28.2022	Transcript of Hearing on Petitioners’ Motion for Summary Judgment	13	RAPP_000169-000190
3.31.1999	Minutes of the Senate Committee on Government Affairs Seventieth Session	14	RAPP_000191-000196

**EXHIBIT 1**

**EXHIBIT 1**



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

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and Sig Rogich*

**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  
28

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 24<sup>th</sup> day of April, 2020.

17 **CLARK HILL PLLC**

18 */s/ Michael Cristalli*

19 \_\_\_\_\_  
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**EXHIBIT 2**

**EXHIBIT 2**

*Heather S. Smith*

CLERK OF THE COURT

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Hotwire, Inc., Travelnow.com, Inc.,  
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LLC, Travelweb LLC, Agoda  
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*Attorneys for Defendants Hotel Tonight,  
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**EIGHTH JUDICIAL DISTRICT COURT**

**CLARK COUNTY, NEVADA**

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

Plaintiffs,

v.

ORBITZ WORLDWIDE, LLC, et al.,

Defendants.

Case No.: A-20-814111-B

Dept. No.: XIII

Hearing Date: May 17, 2021

Hearing Time: 9:00 a.m.

**ORDER GRANTING IN PART AND DENYING IN PART  
DEFENDANTS' MOTION TO DISMISS**

RAPP\_000012

On March 5, 2021, Defendants filed a motion to dismiss the Relators' complaint with prejudice. On May 3, 2021, the Relators filed their opposition to the motion, and on May 10, 2021, Defendants filed their reply in support of the motion. On May 17, 2021, the Court heard oral argument on the motion. Douglas W. Baruch, Esq., appeared on behalf of all moving Defendants with Maria A. Gall, Esq. as their Nevada counsel<sup>1</sup>; Dominic Gentile, Esq. appeared on behalf of the Relators. Based on the foregoing papers and argument, as well as all other filings in this matter, the Court GRANTS the motion in part and DENIES the motion in part as follows:

1. The Relators asserted six claims for relief in their Complaint, styled as Counts One through Six.

2. As to Counts Two through Six, Relators conceded the Motion. Accordingly, and for good cause shown, Defendants' Motion is GRANTED as to Counts Two through Six and they are dismissed with prejudice.

3. The Court DENIES, without prejudice, the Motion as to Count One, which constitutes the Relators' claim under the Nevada False Claims Act ("NFCA"). The Court finds that whether the Relators are "original sources" for purposes of the NFCA public disclosure bar involves questions of fact that are not ripe for resolution on a motion to dismiss.

4. The Court will be scheduling a Rule 16 conference in this matter and anticipates discussing at that conference whether to bifurcate and/or phase discovery in this matter so that discovery proceeds first on the question of whether the Relators are proper Relators to bring claims under the NFCA.

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<sup>1</sup> Also present as counsel on behalf of certain Defendants were Tiffany J. deGruy, Esq. K. Laney Gifford, Esq. and Catherine Battin, Esq.

1 IT IS SO ORDERED.

2  
3 ~~Dated this \_\_\_\_ day of \_\_\_\_, 2021.~~ **Dated this 2nd day of June, 2021**

4 

5  
6 **THE HONORABLE MARK R. DENTON**  
**DISTRICT COURT JUDGE**

**888 8EA 6AF5 5196**  
**Mark R. Denton**  
**District Court Judge**

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9  
10 Submitted by the following after providing  
11 opposing counsel an opportunity to review and  
comment:

12 BALLARD SPAHR LLP

13 By: /s/ Maria A. Gall

14 Joel E. Tasca, Esq.

Nevada Bar No. 14124

Maria A. Gall, Esq.

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17 *Attorneys for Defendants Orbitz Worldwide, et al.*  
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1 **CSERV**

2  
3 DISTRICT COURT  
CLARK COUNTY, NEVADA

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

CASE NO: A-20-814111-B

7 vs.

DEPT. NO. Department 13

8  
9 Orbitz Worldwide, LLC,  
Defendant(s)

10  
11 **AUTOMATED CERTIFICATE OF SERVICE**

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

15 Service Date: 6/2/2021

16 Las Vegas Docket	LVDocket@ballardspahr.com
17 Puoy Premsrirut	puoy@brownlawlv.com
18 Marilyn Millam	mmillam@ag.nv.gov
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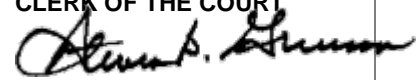
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**EXHIBIT 3**

**EXHIBIT 3**



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

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Attorneys for Plaintiffs

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

CLARK COUNTY, NEVADA,

Plaintiffs,

Case No.:

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:

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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 “taxes 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.

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 rather than on the \$200 retail rate charged to the consumer. The hotel submits the tax on 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.

///

**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.

1           29.     This civil action arises from actions occurring within County of Clark, State of  
2 Nevada, involving an amount in controversy in excess of the sum of Fifteen Thousand Dollars  
3 (\$15,000.00), exclusive of costs and interest, thereby giving this Court jurisdiction over this  
4 matter.

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

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

### 10                               **FACTUAL ALLEGATIONS**

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

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

19           34.     The "Rent" upon which the Combined Transient Lodging Tax is imposed is  
20 defined as "the amount charged for a sleeping room/space in a transient lodging establishment,  
21 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.

1                                   **SECOND CLAIM FOR RELIEF**

2                                   **(Violation of CLARK COUNTY Ordinances)**

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

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

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

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

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

17                                   **THIRD CLAIM FOR RELIEF**

18                                   **(Conversion)**

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

21                   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.

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.

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

4           64.     As a direct and proximate result of Defendants' conduct, Plaintiff has suffered,  
5 and will continue to suffer monetary damages in excess of in excess of fifteen thousand dollars  
6 (\$15,000.00) subject to proof at trial.

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

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

#### 12                               **FOURTH CLAIM FOR RELIEF**

##### 13                               **(Breach of Fiduciary Duty)**

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

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

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

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

26           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

1 **FIFTH CLAIM FOR RELIEF**

2 **(Constructive Trust)**

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

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

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

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

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

16 **SIXTH CLAIM FOR RELIEF**

17 **(Consumer Fraud/Violation Of Nrs 598**

18 **Deceptive Trade Practices Act)**

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

21 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.

95. 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

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

1. That a judgment be entered in favor of Plaintiff CLARK COUNTY;
2. That the Court issue a Declaratory Judgment consistent with the matters set forth herein;
3. For compensatory damages in an amount in excess of Fifteen Thousand Dollars subject to proof at trial;
4. For punitive damages in an amount subject to proof at trial;
5. For imposition of a constructive trust;
6. For costs of suit and reasonable attorney's fees; and,
7. For such additional or alternative relief as this Court deems appropriate under the circumstances.

Respectfully Submitted this 14th day of May, 2020.

**CLARK HILL PLLC**

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**EXHIBIT 4**

**EXHIBIT 4**

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**EIGHTH JUDICIAL DISTRICT COURT**

**CLARK COUNTY, NEVADA**

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

Plaintiffs,

v.

ORBITZ WORLDWIDE, LLC et al.,

Defendants.

Case No.: A-20-814111-B

Dept. No.: XIII

**HEARING REQUESTED**

**DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

RAPP\_000033

1 Defendants<sup>1</sup> respectfully move this Court to enter summary judgment in their favor and  
2 dismiss this action with prejudice pursuant to NRS 357.080(3)(b), commonly referred to as the  
3 “government action bar.”

#### 4 **INTRODUCTION AND SUMMARY**

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

16 The government action bar states:

17 An action may not be maintained by a private plaintiff pursuant to  
18 this chapter . . . [i]f the action is based on allegations or transactions  
19 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.

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

---

23 <sup>1</sup> “Defendants” as used herein refers to Orbitz Worldwide, LLC, Orbitz, LLC, Orbitz, Inc.,  
24 Travelscape LLC, Travelocity, Inc., Cheap Tickets, Inc., Expedia, Inc. Expedia Global, LLC,  
25 Hotels.Com, LP, Hotwire, Inc., Travelnow.com, Inc. (together, “Expedia Defendants”), Booking  
26 Holdings, Inc., Priceline.com LLC, Agoda International USA LLC, Hotel Tonight Inc., and Hotel  
27 Tonight LLC. On April 1, 2014, priceline.com LLC assumed the former operations of  
28 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.

Defendants<sup>1</sup> 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;

---

<sup>1</sup> “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).<sup>2</sup>

#### **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

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<sup>2</sup> 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).<sup>3</sup> 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.

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25 <sup>3</sup> 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.<sup>4</sup> 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.").

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27 <sup>4</sup> 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,<sup>5</sup> sent a letter to the Court, purporting to state an “objection” to “public disclosure bar”  
9 dismissal under NRS 357.100.<sup>6</sup> 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

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

27 <sup>6</sup> 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).<sup>7</sup> 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

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26 <sup>7</sup> 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 (7<sup>th</sup> 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.

13  
14 [Signature On Following Page]  
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1 Dated: February 24, 2022

2 Respectfully submitted,

3 BALLARD SPAHR LLP

4 By: /s/ Maria A. Gall

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6 Nevada Bar No. 14124  
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12 -and-

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19 *Orbitz, LLC, Orbitz, Inc., Travelscape LLC,*  
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*

1                                    **DECLARATION OF MARIA A. GALL, ESQ.**

2            I, Maria A. Gall, Esq., declare as follows:

3            1.        I am a partner of and attorney with the law firm of Ballard Spahr LLP, counsel of  
4 record for Defendants. I reside in Clark County, Nevada, am over 21 years of age, and consider  
5 myself competent to provide testimony in legal proceedings. I provide this declaration in support  
6 of Defendants' Motion for Summary Judgment.

7            2.        Attached as Exhibit 1 to the Motion for Summary Judgment is a true and correct  
8 copy of the complaint in what is referred to as the Clark County Action. I obtained a copy of the  
9 complaint by locating the Clark County Action in the CM/ECF filing system for the U.S. District  
10 Court for the District of Nevada and downloading the same from the civil docket, where it is filed  
11 as ECF No. 1-1.

12           I declare under penalty of perjury that the same foregoing is true and correct.

13           Dated: February 24, 2022

14           /s/ Maria A. Gall (signed in Clark County, Nevada)

**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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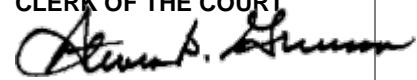
*Attorney for Remark Holdings Inc.*

/s/ Adam Crawford  
An employee of BALLARD SPAHR LLP

# EXHIBIT 1

# EXHIBIT 1

Electronically Filed  
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Attorneys for Plaintiffs

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  
place of business in Norwalk, Connecticut. Defendant Booking Holdings Inc. has at all times  
7 relevant to this litigation conducted business in this state.

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

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

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

17          20. Defendant Agoda International USA LLC is a Delaware limited liability company  
with its principal place of business in New York, New York. Defendant Agoda International  
18 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.

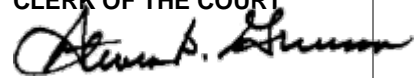
WHEREFORE, Plaintiff CLARK COUNTY requests that judgment be entered as follows:

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

/s/ Michael V. Cristalli, Esq.  
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DOMINIC P. GENTILE, ESQ. (NSBN 1923)  
MICHAEL V. CRISTALLI, ESQ. (NSBN 6266)  
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**EXHIBIT 5**

**EXHIBIT 5**



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9 Attorneys for Plaintiffs

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

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

13 Plaintiffs,

14 vs.

15 ORBITZ WORLDWIDE, LLC., et al.

16 Defendants.

Case No.: A-20-814111-B

Dept. No.: 13

**PLAINTIFFS' RESPONSE TO  
DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT**

17 Plaintiffs by and through their counsel of record, of the law firm Clark Hill, PLLC, hereby  
18 responds to Defendants' Motion for Summary Judgment.

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

22 **MEMORANDUM OF POINTS AND AUTHORITIES**

23 **I.**

24 **INTRODUCTION**

25 Plaintiffs/Relators herein have filed a qui tam action on behalf of and in the name of the  
26 State of Nevada pursuant to the Nevada False Claims Act, NRS 357.010 et seq. The qui tam action  
27 alleges, among other things, that Defendants failed to remit the transient lodging tax on the full  
28

1 amount of rent charged to guests that is due and owing to the State of Nevada pursuant to Clark  
2 County Code 4.08, *et seq.* and Nevada Revised Statute 244A, 244.335, *et seq.*

3 Subsequent to the filing of the qui tam action on behalf of and in the name of the State of  
4 Nevada, Clark County filed a direct action against many of the same Defendants in the qui tam  
5 action which direct action seeks to collect damages for unpaid transient lodging taxes due to Clark  
6 County (the “Clark County Action”). Defendants maintain that the subsequent filing of the Clark  
7 County Action triggers application of the so-called government action bar set forth in NRS  
8 357.080(3)(b) and requires dismissal of the entire qui tam action.

9 While postured as a motion for summary judgment, the instant motion presents a pure  
10 question of law for the Court. The Court must decide, after reviewing the allegations of the two  
11 Complaints, whether NRS 357.080(3)(b) requires dismissal of the qui tam action. There are no  
12 factual disputes as the parties all acknowledge that both Complaints were filed, and no  
13 disagreement exists as to the express factual allegations made therein.

14 Defendants’ Motion must be denied because NRS 357.080(3)(b) is simply not implicated  
15 by the filing of the Clark County Action. Defendants’ arguments fail because they rest upon the  
16 false premise that the filing of a direct action by any county that is not named as a party plaintiff  
17 in the qui tam action necessarily requires the dismissal of a qui tam action brought on behalf of  
18 and in the name of the State of Nevada or any other political subdivision thereof if the allegations  
19 of the direct action and the qui tam action are related in any way.

## 20 II.

### 21 **STATEMENT OF RELEVANT AND UNDISPUTED FACTS**

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

27  
28  

---

<sup>1</sup> The Order is attached hereto as Exhibit A. Plaintiffs ask the Court to take judicial notice of its own docket  
and this Order in considering the instant Motion for Summary Judgment.

3. On May 14, 2021, Clark County filed a direct action against many of the same Defendants that are subject to the Complaint in this matter (the “Clark County Action”).<sup>2</sup>

### III.

## LEGAL ARGUMENT

### A. Legal Standards for Summary Judgment

All facts and inferences drawn must be viewed in the light most favorable to the responding party when determining whether a genuine issue of material fact exists for summary judgment purposes. *Poller v. CBS, Inc.*, 368 U.S. 464, 473 (1962). Nevada law is in accord. See *Sawyer v. Sugarless Shops, Inc.*, 792 P.2d 14 (Nev. 1990); *Hidden Wells Ranch, Inc., v. Strip Realty, Inc.*, 83 Nev. 143, 425 P.2d 599 (1967) (All of the non-movant's statements must be accepted as true and a district court may not pass on the credibility of the opposing affidavits or evidence. That function is reserved for the trial court). "Summary judgment is inappropriate if reasonable jurors, drawing all inferences in favor of the nonmoving party, could return a verdict in the nonmoving party's favor." *Diaz v. Eagle Produce Ltd. P'ship*, 521 F.3d 1201, 1207 (9th Cir. 2008) (citing *United States v. Shumway*, 199 F.3d 1093, 1103-04 (9th Cir. 1999)).

In determining summary judgment, a court applies a burden-shifting analysis. "When the party moving for summary judgment would bear the burden of proof at trial, it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial. In such a case, the moving party has the initial burden of establishing the absence of a genuine issue of fact on each issue material to its case." *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted). In contrast, when the nonmoving party bears the burden of proving the claim or defense, the moving party can meet its burden in two ways: (1) by presenting evidence to negate an

<sup>2</sup> The Complaint in the Clark County Action is attached as Exhibit 1 to the Defendants' Motion.

1 essential element of the nonmoving party's case; or (2) by demonstrating that the nonmoving  
2 party failed to make a showing sufficient to establish an element essential to that party's case  
3 on which that party will bear the burden of proof at trial. See *Celotex Corp. v. Catrett*, 477  
4 U.S. 317, 323-24 (1986). If the moving party fails to meet its initial burden, summary  
5 judgment must be denied and the court need not consider the nonmoving party's evidence.  
6 See *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159-60 (1970).

8         If the moving party satisfies its initial burden, the burden then shifts to the opposing  
9 party to establish that a genuine issue of material fact exists. See *Matsushita Elec. Indus. Co.*  
10 *v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual  
11 dispute, the opposing party need not establish a material issue of fact conclusively in its favor.  
12 It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve  
13 the parties' differing versions of the truth at trial." *T.W. Elec. Serv., Inc. v. Pac. Elec.*  
14 *Contractors Ass'n*, 809 F.2d 626, 631 (9th Cir. 1987). The nonmoving party cannot avoid  
15 summary judgment by relying solely on conclusory allegations that are unsupported by  
16 factual data. See *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Rather, the nonmoving  
17 party must go beyond the assertions and allegations of the pleadings and set forth specific  
18 facts by producing competent evidence that shows a genuine issue for trial. See *Celotex*  
19 *Corp.*, 477 U.S. at 324. At summary judgment, a court's function is not to weigh the evidence  
20 and determine the truth but to determine whether there is a genuine issue for trial. See  
21 *Anderson*, 477 U.S. at 249. The evidence of the nonmovant is "to be believed, and all  
22 justifiable inferences are to be drawn in his favor." *Id.* at 255. The Court has the obligation  
23 to view the evidence in a light most favorable to the non-moving party and to draw favorable  
24 inferences therefrom for the non-moving party. *Doud v. Las Vegas Hilton Corporation*, 109  
25 Nev. 1096, 864 P.2d 796 (1993).

1 After drawing inferences favorable to the respondent, summary judgment will be  
2 granted only if all reasonable inferences defeat the respondent's claims. See *Washoe Medical*  
3 *Center v. Churchill County*, 836 P.2d 624, 626 (Nev. 1992); *Nehls v. Leonard*, 97 Nev. 325,  
4 630 P.2d 258 (1981); *Stone v. Mission Bay Mtg. Co.*, 99 Nev. 802, 672 P.2d 629 (1983);  
5 *Shepard v. Harrison*, 100 Nev. 178, 678 P.2d 670 (1984) (all of the non-movant's factual  
6 statements must be accepted as true and summary judgment is foreclosed when there is the  
7 slightest doubt as to the operative facts). Similarly, the Court is not entitled to view the  
8 evidence in favor of the moving party. *Charles v. J. Steven Lemons & Associates*, 104  
9 Nev. 388, 760, P.2d 118 (1988). The "reasonable" inferences drawn need not be the most  
10 likely, but merely rational or reasonable ones and the possibility that inferences other  
11 than those favorable to the nonmoving party could be drawn does not entitle the moving  
12 party to summary judgment. *Mendocino Environmental Center v. Mendocino County*,  
13 192 F.3d 1283, 1293 (9th Cir. 1999).

14  
15  
16 Finally, "[I]n Nevada, issues of negligence and proximate cause are considered  
17 issues of fact and not of law, and thus they are left for the jury to resolve." *Nehls v.*  
18 *Leonard*, 97 Nev. 325, 630 P.2d 258, 260 (1981). See also *Merluzzi v. Larson*, 96 Nev.  
19 409, 610 P.2d 739 (1980); *Drummond v. Mid-West Growers*, 91 Nev. 698, 542 P.2d 198  
20 (1975).

## 21 **B. Defendants Misconstrue the Government Action Bar**

22  
23 In the instant Motion, the Defendants have attempted to dissect and interpret different  
24 subsections of NRS 357.080 as if they are stand-alone provisions that are unrelated to the other  
25 paragraphs and subparagraphs set forth in that statutory provision. Thus, Defendants cite and  
26 analyze NRS 357.080(3)(b) without reference to NRS 357.080(1) and/or NRS 357.080(2).  
27 However, the interpretation and meaning of the government action bar set forth in NRS  
28 357.080(3)(b) can only be understood with reference to those sections.

1 In its entirety, NRS 357.080 provides as follows:

2 **NRS 357.080 Action by private plaintiff; venue of actions.**

3 1. Except as otherwise provided in this section and NRS 357.100, a  
4 private plaintiff may bring an action pursuant to this chapter for a violation  
5 of NRS 357.040 on his or her own account and that of the State or a political  
6 subdivision, or both the State and a political subdivision. The action must  
7 be brought in the name of the State or the political subdivision, or both.  
8 After such an action is commenced, it may be dismissed only with written  
9 consent of the court and the Attorney General. The court and the Attorney  
10 General shall take into account the public purposes of this chapter and the  
11 best interests of the parties in dismissing the action or consenting to the  
12 dismissal, as applicable, and provide the reasons for dismissing the action  
13 or consenting to the dismissal, as applicable.

14 2. If a private plaintiff brings an action pursuant to this chapter, no  
15 person other than the Attorney General or the Attorney General's designee  
16 may intervene or bring a related action pursuant to this chapter based on the  
17 facts underlying the first action.

18 3. An action may not be maintained by a private plaintiff pursuant to  
19 this chapter:

20 (a) Against a member of the Legislature or the Judiciary, an elected  
21 officer of the Executive Department of the State Government, or a member  
22 of the governing body of a political subdivision, if the action is based upon  
23 evidence or information known to the State or political subdivision at the  
24 time the action was brought.

25 (b) If the action is based upon allegations or transactions that are the  
26 subject of a civil action or an administrative proceeding for a monetary  
27 penalty to which the State or political subdivision is already a party.

28 4. A complaint filed pursuant to this section must be placed under seal  
and so remain for at least 60 days or until the Attorney General or a designee  
of the Attorney General pursuant to NRS 357.070 has elected whether to  
intervene. No service may be made upon the defendant until so ordered by  
the court.

5. On the date the private plaintiff files a complaint, he or she shall  
send a copy of the complaint to the Attorney General by mail with return  
receipt requested. The private plaintiff shall send with each copy of the  
complaint a written disclosure of substantially all material evidence and  
information he or she possesses. If a district attorney or city attorney has  
accepted a designation from the Attorney General pursuant to NRS  
357.070, the Attorney General shall forward a copy of the complaint to the  
district attorney or city attorney, as applicable.

6. An action pursuant to this chapter may be brought in any judicial  
district in this State in which the defendant can be found, resides, transacts  
business or in which any of the alleged fraudulent activities occurred.

27 In the clearest of terms, NRS 357.080(1) allows private plaintiffs (i.e. Relators Rogich and  
28 Fierro) to "bring an action" on account of and on behalf of (i) the State of Nevada; (ii) a political

1 subdivision of the State of Nevada; or (iii) both the State of Nevada and a political subdivision of  
2 the State of Nevada. If the Relators bring the action on behalf of the State of Nevada, the statute  
3 expressly requires that the action be brought “in the name of the State.” Id. Likewise, if the  
4 Relators bring an action on behalf of a political subdivision of the State, the statute expressly  
5 requires that the action be brought “in the name of the ... political subdivision.” Id. If the Relators  
6 bring an action on behalf of both the State of Nevada and a political subdivision of the State, the  
7 statute expressly requires that the action be brought “in the name of ... both.” Id.

8 In this particular matter, Relators filed their action on behalf of and in the name of the State  
9 of Nevada. [See Complaint]. They did not jointly file on behalf of or in the name of any political  
10 subdivision of the State of Nevada. [Id.]. Having filed their action on behalf of and in the name  
11 of the State of Nevada, it “may be dismissed only with written consent of the court and the Attorney  
12 General.” [NRS 357.080(1)].

13 Once the action was filed, “no person other than the Attorney General or the Attorney  
14 General’s designee may intervene or bring a related action pursuant to this chapter based on the  
15 facts underlying the first action.” [NRS 357.080(2)]. NRS Chapter 357 does not set forth a special  
16 definition of “person” to be applied in connection with the interpretation of the statute. As such,  
17 the general definition of “person” as set forth in NRS 0.039 is applicable which sets forth the  
18 following:

19 **NRS 0.039 “Person” defined.** Except as otherwise expressly  
20 provided in a particular statute or required by the context, “person” means  
21 a natural person, any form of business or social organization and any other  
22 nongovernmental legal entity including, but not limited to, a corporation,  
23 partnership, association, trust or unincorporated organization. The term  
24 does not include a government, governmental agency or political  
25 subdivision of a government.

26 Inasmuch as neither Clark County nor any other political subdivision of the State of Nevada is a  
27 “person” as defined in NRS Chapter 357, the prohibition against a “person” bringing “a related  
28 action pursuant to this chapter based upon the facts underlying” this action is not applicable to  
actions brought by Clark County or any other political subdivision of the State of Nevada.<sup>3</sup>

---

<sup>3</sup> California has a substantially identical provision. Cal. Gov’t Code § 12652(c)(10)  
provides that “(w)hen a person brings an action under this subdivision, no other person may

1 Since a political subdivision of the State that is already a party to a qui tam action is not  
2 barred from bringing a direct action by NRS 357.080(3), the so-called government action bar set  
3 forth in NRS 357.080(3) addresses what should happen in the event such a political subdivision  
4 subsequently filed a related direct action on its own behalf. Not surprisingly, if a qui tam action  
5 was filed on behalf of and in the name of a County (i.e. a political subdivision) and that County  
6 subsequently chose to file a direct action “based on the facts underlying” the qui tam action, the  
7 government action bar defers prosecution of that case to the County in the subsequently filed direct  
8 action rather than to the private persons acting on behalf of that County in the qui tam action.  
9

10 Defendants herein are misreading the provisions of NRS 357.080(2) in advancing the  
11 proposition that any direct action brought by any county in Nevada that is not a party in a pending  
12 qui tam action would bar maintenance of a false claims act qui tam case that was filed on behalf  
13 of the State and/or any other county. Such a construction of the statute leads to entirely illogical  
14 and irrational outcomes. For instance, under Defendants’ interpretation, if a qui tam action was  
15 filed on behalf of and in the name of the State of Nevada for tax receipts owed to the State, a direct  
16 action by Storey County to collect unpaid taxes owed only to Storey County would require  
17 dismissal of the qui tam action filed in the name of the State of Nevada. Likewise, a qui tam filed  
18 in the name of Clark County for unpaid taxes owed to Clark County would need to be dismissed  
19 by the subsequent filing of a direct action by Storey County seeking collection of taxes owed to  
20 Storey County. Such an interpretation would essentially grant the power to cause the dismissal of  
21 every false claims act qui tam action to each and every political subdivision of the state even  
22  
23  
24  
25

26 bring a related action based on the facts underlying the pending action.” In *Rothschild v. Tyco*  
27 *Internat. (US), Inc.*, 83 Cal.App.4th 488, 499, 99 Cal.Rptr.2d 721, 728 (2000), in interpreting §  
28 12652(c)(10), the court held as follows: “we conclude that the bar on ‘related actions’ under  
section 12652(c)(10) applies only to subsequent qui tam actions filed under the False Claims  
Act.”

1 though the qui tam action was seeking to vindicate the rights and interests of other jurisdictions:  
2 i.e. the State and/or the named political subdivision.

3 The Nevada Supreme Court has recognized that the statutory scheme envisions an ongoing  
4 role of the Attorney General from the date of filing of the action through its completion. See *Int'l*  
5 *Game Tech., Inc. v. Second Jud. Dist. Ct. of Nevada*, 122 Nev. 132, 138–39, 127 P.3d 1088, 1093–  
6 94 (2006).

7  
8 When the qui tam plaintiff files an action, he or she must send a copy of the  
9 complaint and written disclosure of all material information to the Attorney  
10 General.<sup>7</sup> The complaint is then sealed until the Attorney General decides  
11 whether to intervene;<sup>8</sup> the defendants are not served until the complaint is  
12 unsealed.<sup>9</sup> If the Attorney General decides to intervene “and proceed with  
13 the action,” the private plaintiff must cede control of the litigation<sup>10</sup> but  
14 nevertheless remains a party to the action.<sup>11</sup> But if the Attorney General  
15 initially decides not to intervene, the private plaintiff may proceed alone,  
16 with the same rights as the Attorney General would have had.<sup>12</sup> The Attorney  
17 General may later intervene only upon timely application and “if the interest  
18 of the State ... in recovery of the money or property involved is not being  
19 adequately represented by the private plaintiff.”<sup>13</sup> The Attorney General also  
20 has authority to settle the action and “may move to dismiss the action for  
21 good cause.”<sup>14</sup> Generally, a false claims action may not be maintained if  
22 administrative or court proceedings involving the same underlying facts and  
23 allegations were previously instigated.<sup>15</sup>

24 *Int'l Game Tech., Inc. v. Second Jud. Dist. Ct. of Nevada*, 122 Nev. 132, 138–  
25 39, 127 P.3d 1088, 1093–94 (2006)

26 It would be entirely inconsistent with the statutory scheme to grant the Attorney General  
27 oversight of the qui tam action and the right to intervene at any time (a) “if the interest of the State  
28 ... in recovery of the money or property involved is not being adequately represented by the private  
plaintiff” [NRS 357.130(2)] or (b) to settle the action and/or “move to dismiss the action for good  
cause” [NRS 357.120(2), (3)] while at the same time giving a non-party political subdivision who  
is not a party to the qui tam case the ability to cause termination of the qui tam case.

Further, the Supreme Court’s decision in *Int'l Game Tech., Inc. v. Second Jud. Dist. Ct. of*  
*Nevada, supra.* supports Relators’ position as advanced herein. Therein, the Supreme Court stated:  
“Generally, a false claims action may not be maintained if administrative or court proceedings

1 involving the same underlying facts and allegations were previously instigated.” Id. at 1093–94.  
2 That language relates to the “public disclosure bar” set forth in NRS 357.100 which has been the  
3 subject of other motion practice in this case.

4 Unlike the situation presented herein, the “public disclosure bar” addresses civil actions  
5 brought prior to the filing of the qui tam action not after the filing of the qui tam action. NRS  
6 357.100 provides, in relevant part, as follows: “Unless the Attorney General objects, a court shall  
7 dismiss an action or a claim made pursuant to this chapter that is substantially based on the same  
8 allegations or transactions that have been disclosed publicly: 1. In a criminal, civil or  
9 administrative hearing to which the State, a political subdivision, or an agent of the State or a  
10 political subdivision is a party.” (emphasis added). Said Section makes clear that the previously  
11 brought civil action includes civil actions brought by “a political subdivision” without reference  
12 to whether the political subdivision is also a party to the qui tam action. Thus, any prior brought  
13 civil action by any political subdivision could invoke the public disclosure bar. This is not so with  
14 respect to subsequently filed actions by political subdivisions with respect to the government  
15 action bar.

16 NRS 357.080(3)(b) is applicable to civil actions to which “the State or political subdivision  
17 is already a party.” (emphasis added). “The political subdivision” in this section clearly relates to  
18 “the political subdivision” on whose behalf and in whose name the qui tam action is brought as set  
19 forth in NRS 357.080(1) and (2). Where the legislature wished to include actions brought by “any”  
20 or “all” political subdivisions within the ambit of the provisions of the False Claims Act, it  
21 expressly referred to “a political subdivision of the State.”

### 22 **C. The Government Action Bar of NRS 357.080(3)(b) Does Not Apply to this Case.**

23 Applying the above and foregoing principles to the case sub judice, Defendants’ Motion  
24 for Summary Judgement must be denied because the government action bar, as a matter of law,  
25  
26  
27  
28

1 does not apply to this case. The Clark County direct action is not a civil action to which “the State  
2 or political subdivision” is already a party within the meaning of NRS 357.080(3)(b) .

3 The instant action is brought on behalf of and in the name of the State of Nevada. Clark  
4 County is not a party to the instant matter. Plaintiffs are not advancing claims on behalf of Clark  
5 County. While the initial Complaint on file herein alleged six (6) claims for relief, following the  
6 Court’s ruling on Defendants’ Motion to Dismiss, only the first claim for relief survives.<sup>4</sup>

7  
8 Plaintiffs’ sole remaining claim for relief is for violation of the False Claims Act, NRS  
9 357.010 et seq. In paragraph 51, the Complaint states as follows:

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

14 Paragraph 54 of the Complaint alleges as follows:

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

20 The Clark County Complaint in the direct action<sup>5</sup> has one Plaintiff: i.e. Clark County. The  
21 State of Nevada is not a party thereto. It asserts no claim under the False Claims Act for or on  
22 behalf of either itself or the State of Nevada. Rather, Clark County alleges seven (7) statutory or  
23 common law claims directly against the Defendants as follows:

- 24 1. Declaratory Judgment;  
25 2. Violation of Clark County Ordinances;  
26 3. Conversion;  
27

28  
<sup>4</sup> See Order attached hereto as Exhibit A dismissing the second through the sixth claims set forth in the Complaint.

<sup>5</sup> Attached as Exhibit 1 to the Motion.

4. Breach of Fiduciary Duty;
5. Unjust Enrichment;
6. Constructive Trust; and,
7. Deceptive Trade Practices.

All relief sought is for or on behalf of Clark County as the Plaintiff. No remedy or relief is sought for the State of Nevada or any other political subdivision thereof.

The Chart below compares relevant aspects of the two cases:

	<b>This Action</b>	<b>Clark County Action</b>
<b>Plaintiff</b>	State of Nevada Ex. Rel. Mark Fierro and Sig Rogich	Clark County
<b>Date of Filing</b>	April 24, 2020	May 14, 2021
<b>Defendants</b>	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	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
<b>Claims for Relief</b>	False Claims Act (NRS 357.010 et seq.) for failing to remit the transient lodging tax on the full amount of rent charged to guests that is due and owing to the State of Nevada pursuant to Clark County Code 4.08, <i>et seq.</i> and Nevada Revised Statute	<ol style="list-style-type: none"> <li>1. Declaratory Judgment;</li> <li>2. Violation of Clark County Ordinances;</li> <li>3. Conversion;</li> <li>4. Breach of Fiduciary Duty;</li> <li>5. Unjust Enrichment;</li> <li>6. Constructive Trust; and,</li> <li>7. Deceptive Trade Practices</li> </ol>

	244A, 244.335, <i>et seq.</i> [Complaint at para. 51]	[Clark County Complaint, Exhibit 1 to Motion].
<b>Relief Requested</b>	Defendants are liable to the State of Nevada for three times the amount of damages sustained by the State of Nevada in the form of unpaid transient lodging tax, for the costs of bringing this action, and for a civil penalty of not less than \$5,500 or more than \$11,000 for each act constituting a violation. [Complaint at para. 54]	Defendants are liable to Clark County and Clark County is entitled to Declaratory Relief, compensatory damages, punitive damages, imposition of a constructive trust, attorneys fees and costs and other relief that the Court deems just and proper.

The above and foregoing establishes that Clark County is not a political subdivision of the State of Nevada that is a party to the instant qui tam action. The action is for, on behalf of and in the name of the State of Nevada and it seeks to vindicate the rights of the State of Nevada. As such, the Motion should be denied because the subsequently filed direct action of Clark County does not implicate the government action bar.

Further, while it is true that both actions arise in connection with Defendants' failure to pay transient lodging taxes to various government entities pursuant to various statutes and ordinances, the qui tam action seeks money due and owing to the State of Nevada while the Clark County Action seeks money due and owing to Clark County. The two actions allege different legal theories as to how and why Defendants are liable to the respective Plaintiffs and the Clark County Action does not allege any claim for relief under the False Claims Act. Quite simply, since the State of Nevada is pursuing its own claims pursuant to its own legal theories in the qui tam action and since those claims are not being and cannot be advanced by Clark County in its direct action, the current qui tam action cannot be said to be one based upon "allegations or transactions that are the subject of a civil action" being pursued by Clark County.

Assuming arguendo that Clark County could be considered a party to the qui tam action

1 such that the government action bar has any relevance, so too would every other county in the  
2 State of Nevada. In its direct action, Clark County does not allege nor can it assert standing to  
3 proceed on behalf of either the State of Nevada or any other county in the State of Nevada for  
4 transient lodging taxes owed to them. If the Clark County direct action required the dismissal of  
5 the instant qui tam action as to the State of Nevada and all other counties, the impact of that would  
6 be that the State of Nevada and all other counties would similarly have to file their own direct  
7 actions to pursue their claims for unpaid taxes or walk away from their claims. Said outcome  
8 would entirely gut the purpose of the Nevada legislature in enacting the False Claims Act and  
9 authorizing qui tam actions.  
10

11         If there is any application of the government action bar to the instant matter, it should be  
12 limited to only barring the qui tam Relators from pursuing claims on behalf of Clark County. If  
13 the qui tam action is deemed to include claims of the State of Nevada and all political subdivisions  
14 thereof, the claims of the State and/or other counties being pursued by the Relators in the qui tam  
15 action should be allowed to continue regardless of whether the qui tam Relators can also prosecute  
16 the claims of Clark County.  
17

18         Plaintiffs certainly concede that Clark County is not entitled to collect duplicative damages  
19 in two separate proceedings. However, the State of Nevada is entitled to collect the portion of  
20 unpaid taxes it is entitled to which emanate from unpaid taxes for transient lodging transactions  
21 within Clark County and elsewhere in Nevada. That the State of Nevada has chosen to allow  
22 private qui tam Relators to pursue those claims should be left undisturbed.  
23

24         In the event Relators attempt, later in the litigation, to advance claims for or on behalf of  
25 Clark County which might subject Defendants to an award of duplicative damages, the Court can  
26 enter appropriate protective orders at that time.  
27  
28

1 IV.

2 CONCLUSION

3 For the above and foregoing reasons, the Defendants' Motion should be denied.

4 Dated this 10<sup>th</sup> day of March 2022.

5 CLARK HILL PLLC

6 /s/ Mark S. Dzarnoski, Esq.

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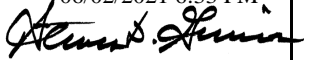
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# EXHIBIT A

  
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**EIGHTH JUDICIAL DISTRICT COURT**

**CLARK COUNTY, NEVADA**

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

Plaintiffs,

v.

ORBITZ WORLDWIDE, LLC, et al.,

Defendants.

Case No.: A-20-814111-B

Dept. No.: XIII

Hearing Date: May 17, 2021

Hearing Time: 9:00 a.m.

**ORDER GRANTING IN PART AND DENYING IN PART  
DEFENDANTS' MOTION TO DISMISS**

RAPP\_000085

On March 5, 2021, Defendants filed a motion to dismiss the Relators' complaint with prejudice. On May 3, 2021, the Relators filed their opposition to the motion, and on May 10, 2021, Defendants filed their reply in support of the motion. On May 17, 2021, the Court heard oral argument on the motion. Douglas W. Baruch, Esq., appeared on behalf of all moving Defendants with Maria A. Gall, Esq. as their Nevada counsel<sup>1</sup>; Dominic Gentile, Esq. appeared on behalf of the Relators. Based on the foregoing papers and argument, as well as all other filings in this matter, the Court GRANTS the motion in part and DENIES the motion in part as follows:

1. The Relators asserted six claims for relief in their Complaint, styled as Counts One through Six.

2. As to Counts Two through Six, Relators conceded the Motion. Accordingly, and for good cause shown, Defendants' Motion is GRANTED as to Counts Two through Six and they are dismissed with prejudice.

3. The Court DENIES, without prejudice, the Motion as to Count One, which constitutes the Relators' claim under the Nevada False Claims Act ("NFCA"). The Court finds that whether the Relators are "original sources" for purposes of the NFCA public disclosure bar involves questions of fact that are not ripe for resolution on a motion to dismiss.

4. The Court will be scheduling a Rule 16 conference in this matter and anticipates discussing at that conference whether to bifurcate and/or phase discovery in this matter so that discovery proceeds first on the question of whether the Relators are proper Relators to bring claims under the NFCA.

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<sup>1</sup> Also present as counsel on behalf of certain Defendants were Tiffany J. deGruy, Esq. K. Laney Gifford, Esq. and Catherine Battin, Esq.

1 IT IS SO ORDERED.

2  
3 ~~Dated this \_\_\_\_ day of \_\_\_\_, 2021.~~ **Dated this 2nd day of June, 2021**

4 

5  
6 **THE HONORABLE MARK R. DENTON**  
**DISTRICT COURT JUDGE**

7 **888 8EA 6AF5 5196**  
**Mark R. Denton**  
**District Court Judge**

8  
9  
10 Submitted by the following after providing  
11 opposing counsel an opportunity to review and  
comment:

12 BALLARD SPAHR LLP

13 By: /s/ Maria A. Gall

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17 *Attorneys for Defendants Orbitz Worldwide, et al.*  
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1 **CSERV**

2  
3 DISTRICT COURT  
CLARK COUNTY, NEVADA

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

CASE NO: A-20-814111-B

7 vs.

DEPT. NO. Department 13

8  
9 Orbitz Worldwide, LLC,  
Defendant(s)

10  
11 **AUTOMATED CERTIFICATE OF SERVICE**

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

15 Service Date: 6/2/2021

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RAPP\_000088

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**EXHIBIT 6**

**EXHIBIT 6**

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**EIGHTH JUDICIAL DISTRICT COURT**

**CLARK COUNTY, NEVADA**

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

Plaintiffs,

v.

ORBITZ WORLDWIDE, LLC et al.,

Defendants.

Case No.: A-20-814111-B

Dept. No.: XIII

**HEARING DATE: March 28, 2022**

**HEARING TIME: 9:00 AM**

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

RAPP\_000090

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

#### 4 INTRODUCTION AND SUMMARY

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

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

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

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

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

---

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

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

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

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

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

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

1 who pursue claims for personal gain.<sup>2</sup>

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

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

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

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

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

## 10 **MEMORANDUM OF POINTS AND AUTHORITIES**

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

12 The parties are in agreement that there are no material facts in dispute that would preclude  
13 summary judgment as to the application of the government action bar. Defendants’ Motion set  
14 forth numerous material facts—with citations to supporting evidence—establishing the predicate  
15 for dismissal pursuant to NRS 357.080(b)(3). Mot. at 2-6.<sup>3</sup> And while Relators spend three pages  
16 setting forth the summary judgment standard, Opp. at 3-5, they nevertheless agree that there are no  
17 disputed factual issues. Opp. at 2 (“There are no factual disputes as the parties all acknowledge  
18 that both Complaints were filed, and no disagreement exists as to the express factual allegations  
19 made therein.”).

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

21 The government action bar has four elements:

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

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

1 party to the separate civil action; and

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### 17 CONCLUSION

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

20 ///

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26 ///

27 ///

28 ///

1 Dated: March 21, 2022

2 Respectfully submitted,

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4 By: /s/ Joel E. Tasca

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1 **CERTIFICATE OF SERVICE**

2 I certify that on March 21, 2022, I served the foregoing REPLY MEMORANDUM IN  
3 SUPPORT OF MOTION FOR SUMMARY JUDGMENT on the following parties registered to  
4 receive service by filing the same with the Court's e-filing system:

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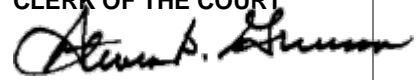
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**EXHIBIT 7**

**EXHIBIT 7**



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**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

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

Plaintiffs,

vs.

ORBITZ WORLDWIDE, LLC., et al.

Defendants.

Case No.: A-20-814111-B

Dept. No.: 13

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

**(Hearing Requested)**

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

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

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I.**

**INTRODUCTION**

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

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

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

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

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

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

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

## 9 II.

### 10 LEGAL ARGUMENT

#### 11 A. LEGAL STANDARD

12 NRCP 15(a) provides as follows:

##### 13 (a) Amendments Before Trial.

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

16 (A) 21 days after serving it, or

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

19 As to futility, it is unknown whether Defendants will raise the issue and Relators reserve  
20 the right to respond to any such argument in their Reply. Given that Washoe County Code  
21 makes the "Operator" of the transient lodging establishment liable for collection and remittance  
22 of the transient lodging taxes and Section 25.1322 thereof defines “Operator” as including an  
23 “on-line discount booking agency,” Relators fail to see how futility would be a legitimate  
24 argument in opposition to the instant motion to amend.  
25

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**III.**

**CONCLUSION**

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

Dated this 5<sup>th</sup> day of April 2022.

CLARK HILL PLLC

/s/ Mark S. Dzarnoski, Esq.

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Dominic P. Gentile, Esq. (NSBN 1923)

Michael Cristalli, Esq. (NSBN 6266)

Bert Wuester, Esq (NSBN 5556)

Mark S. Dzarnoski, Esq. (NSBN 3398)

3800 Howard Hughes Parkway, Suite 500

Las Vegas, Nevada 89169

## CERTIFICATE OF SERVICE

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

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

# EXHIBIT 1

# EXHIBIT 1

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14 ph.: (702) 862-8300; fax: (702) 862-8400  
15 Attorneys for Plaintiffs

**EIGHTH JUDICIAL DISTRICT COURT**

**CLARK COUNTY, NEVADA**

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

14 Plaintiffs,

15 vs.

16 ORBITZ WORLDWIDE, LLC; ORBITZ,  
17 LLC; ORBITZ, INC.; TRAVELSCAPE,  
18 LLC; TRAVELOCITY, INC.; CHEAP  
19 TICKETS, INC., EXPEDIA INC., EXPEDIA  
20 GLOBAL, LLC; HOTELS.COM LP;  
21 HOTWIRE INC.; BOOKING HOLDINGS  
22 INC.; PRICELINE.COM LLC;  
23 TRAVELWEB LLC; TRAVELNOW.COM  
24 INC.; BOOKING.COM USA INC., AGODA  
INTERNATIONAL USA LLC; HOTEL  
TONIGHT, INC.; HOTEL TONIGHT, LLC;  
DOES I through XXX, inclusive and ROE  
BUSINESS ENTITIES I through XXX,  
inclusive,

Defendants.

CASE NO.  
DEPT.

**[PROPOSED] FIRST AMENDED  
COMPLAINT**

**JURY TRIAL DEMAND**

25 COMES NOW the State of Nevada ex rel. Mark Fierro and Sigmund ("Sig") Rogich, on  
26 behalf of real parties in interest, the counties of Nevada, by and through counsel Michael  
27  
28

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  
27  
28

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

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

7 **FACTUAL ALLEGATIONS**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

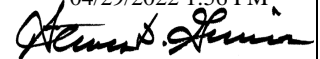
19 Respectfully Submitted this \_\_\_\_ day of \_\_\_\_, 2022.

20 **CLARK HILL PLLC**

21  
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**EXHIBIT 8**

**EXHIBIT 8**



CLERK OF THE COURT

**ORDER**

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**EIGHTH JUDICIAL DISTRICT COURT**

**CLARK COUNTY, NEVADA**

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

Plaintiffs,

v.

ORBITZ WORLDWIDE, LLC et al.,

Defendants.

Case No.: A-20-814111-B

Dept. No.: XIII

**ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

**BASED ON NRS 357.080(3)(b)**

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

### 8 FINDINGS OF FACT

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

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

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

### 22 CONCLUSIONS OF LAW

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

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

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

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

6  
7       IT IS SO ORDERED.

Dated this 29th day of April, 2022

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**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:

3 BALLARD SPAHR LLP

4 By: /s/ Joel E. Tasca

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Nevada Bar No. 14124

5 Maria A. Gall, Esq.

Nevada Bar No. 14200

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7 Las Vegas, Nevada 89135

8 *Attorneys for Defendants Orbitz Worldwide, et al.*

**CERTIFICATE OF SERVICE**

I certify that on April 26, 2022, I served the foregoing **ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** on the following parties registered to receive service by filing the same with the Court's e-filing system:

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*Attorney for Remark Holdings Inc.*

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

1 **CSERV**

2  
3 DISTRICT COURT  
4 CLARK COUNTY, NEVADA

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

CASE NO: A-20-814111-B

8 vs.

DEPT. NO. Department 13

9 Orbitz Worldwide, LLC,  
10 Defendant(s)

11 **AUTOMATED CERTIFICATE OF SERVICE**

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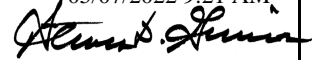
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RAPP\_000128

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EXHIBIT 9

EXHIBIT 9

  
CLERK OF THE COURT

1 **SAO**

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15 *Agoda International USA LLC, Hotel*  
16 *Tonight, Inc., Hotel Tonight LLC, Orbitz*  
17 *Worldwide, LLC, Orbitz, LLC, Orbitz,*  
18 *Inc., Travelscape, LLC, Travelocity, Inc.,*  
19 *Cheap Tickets, Inc., Expedia, Inc.,*  
20 *Expedia Global, LLC, Hotels.com, LLP,*  
21 *and Hotwire Inc.*

12 **EIGHTH JUDICIAL DISTRICT COURT**

13 **CLARK COUNTY, NEVADA**

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

16 Plaintiffs,

17 v.

18 ORBITZ WORLDWIDE, LLC, et al.,

19 Defendants.

Case No.: A-20-814111-B

Dept. No.: XIII

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

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

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

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

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

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

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RAPP\_000130

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

**STIPULATION**

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

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

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

Dated: May 6, 2022

BALLARD SPAHR LLP

CLARK HILL PLLC

By: /s/ Joel Tasca  
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By: /s/ Mark Dzarnoski  
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*Attorneys for Defendants*

*Attorneys for Plaintiffs*

**ORDER**

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

IT IS SO ORDERED.

Dated this 7th day of May, 2022



3FB E91 2612 DFD9  
Mark R. Denton  
District Court Judge

Submitted by:

BALLARD SPAHR LLP

By: /s/ Joel E. Tasca

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Worldwide, LLC, Orbitz, LLC, Orbitz,  
Inc., Travelscape, LLC, Travelocity, Inc.,  
Cheap Tickets, Inc., Expedia, Inc.,  
Expedia Global, LLC, Hotels.com, LLP,  
and Hotwire Inc.*

## Carlton, Mary Kay (LV)

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**From:** Tasca, Joel (LV)  
**Sent:** Friday, May 6, 2022 2:06 PM  
**To:** Carlton, Mary Kay (LV)  
**Subject:** FW: Stip and Order Re Motion for Leave to Amend.DOCX

Joel E. Tasca

**Ballard Spahr**  
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**⚠ EXTERNAL**

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

Best Regards,

**Mark Dzarnoski**  
Senior Counsel

**Clark Hill LLP**

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**Subject:** Stip and Order Re Motion for Leave to Amend.DOCX

**[External Message]**

---

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

**Joel E. Tasca**

**Ballard Spahr**  
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1 **CSERV**

2  
3 DISTRICT COURT  
CLARK COUNTY, NEVADA

4  
5  
6 State of Nevada Ex Rel Mark  
Fierro, Plaintiff(s)

CASE NO: A-20-814111-B

7 vs.

DEPT. NO. Department 13

8  
9 Orbitz Worldwide, LLC,  
Defendant(s)

10  
11 **AUTOMATED CERTIFICATE OF SERVICE**

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14 Court. The foregoing Stipulation and Order was served via the court's electronic eFile system  
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RAPP\_000136

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**EXHIBIT 10**

**EXHIBIT 10**

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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**

RAPP\_000138

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).<sup>1</sup>

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 <sup>1</sup> 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,<sup>2</sup> 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 <sup>2</sup> 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.<sup>3</sup>

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

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

21             But the canon against surplusage does not apply here. The government action bar’s  
22 application does not depend on the *sequence* of the two suits – the *qui tam* action and the separate  
23 civil action – but merely the *existence* of the two suits. And the term “already” does not create any  
24 such sequencing standard. There is no meaningful difference between whether an entity “is a party”  
25 and whether an entity “already is a party.” The term “already” simply provides emphasis and clarity  
26  
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28     <sup>3</sup> 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.”<sup>4</sup>

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).<sup>5</sup>

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

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24 <sup>4</sup> 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.

<sup>5</sup> *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.<sup>6</sup> 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

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27 <sup>6</sup> 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.<sup>7</sup> 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.

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25 <sup>7</sup> The Relators’ Amended Complaint, which purports to add claims on behalf other Nevada  
26 counties, does not alter the stay analysis. For starters, the validity of those new claims will be tested  
27 in Defendants’ forthcoming motion to dismiss, including on the grounds that the threadbare  
28 allegations with respect to the additional counties do not survive pleading muster. Moreover, the  
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

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**CERTIFICATE OF SERVICE**

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

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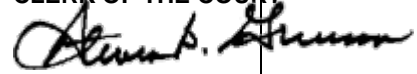
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**EXHIBIT 11**

**EXHIBIT 11**



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**EIGHTH JUDICIAL DISTRICT COURT**

**CLARK COUNTY, NEVADA**

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

Plaintiffs,

vs.

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

Defendants.

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

**FIRST AMENDED COMPLAINT**

**JURY TRIAL DEMAND**

COMES NOW the State of Nevada ex rel. Mark Fierro and Sigmund ("Sig") Rogich, on  
behalf of real parties in interest, the counties of Nevada, by and through counsel Michael

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

3 **NATURE OF THE ACTION**

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

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

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

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

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

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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.

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.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7 **FACTUAL ALLEGATIONS**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

19 Respectfully Submitted this 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)  
27 3800 Howard Hughes Parkway, Suite 500  
28 Las Vegas, Nevada 89169

**EXHIBIT 12**

**EXHIBIT 12**

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MARK S. DZARNOSKI, ESQ. (NSBN 3398)  
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**CLARK HILL PLLC**  
3800 Howard Hughes Parkway, Suite 500  
Las Vegas, Nevada 89169  
ph.: (702) 862-8300; fax: (702) 862-8400  
Attorneys for Plaintiffs

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

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

Relators,

vs.

ORBITZ WORLDWIDE, LLC., et al.

Defendants.

Case No.: A-20-814111-B

Dept. No.: 13

**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  
21 Las Vegas, Nevada 89169  
22 *Attorneys for Relators*  
Dated this 11<sup>th</sup> day of July, 2022.

23 Reviewed and Approved By:

24 BALLARD SPAHR LLP  
25 /s/ Joel E. Tasca  
Joel E. Tasca, Esq.  
26 Nevada Bar No. 14124  
1980 Festival Plaza Drive, Suite 900  
27 Las Vegas, Nevada 89135  
*Attorneys for Defendants Orbitz Worldwide, et al.*

28 Dated this 11th day of July, 2022.

**From:** Tasca, Joel <[TASCA@ballardspahr.com](mailto:TASCA@ballardspahr.com)>  
**Sent:** Tuesday, July 12, 2022 10:53 AM  
**To:** Dzarnoski, Mark <[mdzarnoski@ClarkHill.com](mailto:mdzarnoski@ClarkHill.com)>; 'douglas.baruch@morganlewis.com' <[douglas.baruch@morganlewis.com](mailto:douglas.baruch@morganlewis.com)>  
**Cc:** Bain, Tanya <[tbain@ClarkHill.com](mailto:tbain@ClarkHill.com)>; Gentile, Dominic <[dgentile@ClarkHill.com](mailto:dgentile@ClarkHill.com)>; Cristalli, Michael <[mcristalli@ClarkHill.com](mailto:mcristalli@ClarkHill.com)>  
**Subject:** RE: 2nd Request-- OTC - Proposed Order Reconsideration

[External Message]

---

You have my approval.

Joel E. Tasca

**Ballard Spahr**  
LLP

---

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**From:** Dzarnoski, Mark <[mdzarnoski@ClarkHill.com](mailto:mdzarnoski@ClarkHill.com)>  
**Sent:** Tuesday, July 12, 2022 10:52 AM  
**To:** Tasca, Joel (LV) <[TASCA@ballardspahr.com](mailto:TASCA@ballardspahr.com)>; Gall, Maria A. (LV) <[GallM@ballardspahr.com](mailto:GallM@ballardspahr.com)>; 'douglas.baruch@morganlewis.com' <[douglas.baruch@morganlewis.com](mailto:douglas.baruch@morganlewis.com)>  
**Cc:** Bain, Tanya <[tbain@ClarkHill.com](mailto:tbain@ClarkHill.com)>; Gentile, Dominic <[dgentile@ClarkHill.com](mailto:dgentile@ClarkHill.com)>; Cristalli, Michael <[mcristalli@ClarkHill.com](mailto: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**

3800 Howard Hughes Parkway, Ste 500, Las Vegas, NV 89169  
(702) 697-7506 (office) | (702) 778-9709 (fax)  
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**From:** Dzarnoski, Mark <[mdzarnoski@ClarkHill.com](mailto:mdzarnoski@ClarkHill.com)>

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

**To:** Tasca, Joel <[TASCA@ballardspahr.com](mailto:TASCA@ballardspahr.com)>; Gall, Maria A. <[GallM@ballardspahr.com](mailto:GallM@ballardspahr.com)>;

RAPP\_000163

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**Cc:** Bain, Tanya <[tbain@ClarkHill.com](mailto:tbain@ClarkHill.com)>; Gentile, Dominic <[dgentile@ClarkHill.com](mailto:dgentile@ClarkHill.com)>; Cristalli, Michael <[mcristalli@ClarkHill.com](mailto: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

**Clark Hill LLP**

3800 Howard Hughes Parkway, Ste 500, Las Vegas, NV 89169

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**From:** Tasca, Joel <[TASCA@ballardspahr.com](mailto:TASCA@ballardspahr.com)>

**Sent:** Monday, July 11, 2022 3:35 PM

**To:** Dzarnoski, Mark <[mdzarnoski@ClarkHill.com](mailto:mdzarnoski@ClarkHill.com)>; Gall, Maria A. <[GallM@ballardspahr.com](mailto:GallM@ballardspahr.com)>;

'douglas.baruch@morganlewis.com' <[douglas.baruch@morganlewis.com](mailto:douglas.baruch@morganlewis.com)>

**Cc:** Bain, Tanya <[tbain@ClarkHill.com](mailto:tbain@ClarkHill.com)>; Gentile, Dominic <[dgentile@ClarkHill.com](mailto:dgentile@ClarkHill.com)>; Cristalli, Michael <[mcristalli@ClarkHill.com](mailto:mcristalli@ClarkHill.com)>

**Subject:** RE: OTC - Proposed Order Reconsideration

**[External Message]**

---

Yes, you can submit it. Thanks.

**Joel E. Tasca**

**Ballard Spahr**  
LLP

---

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**From:** Dzarnoski, Mark <[mdzarnoski@ClarkHill.com](mailto:mdzarnoski@ClarkHill.com)>

**Sent:** Monday, July 11, 2022 3:17 PM

**To:** Tasca, Joel (LV) <[TASCA@ballardspahr.com](mailto:TASCA@ballardspahr.com)>; Gall, Maria A. (LV) <[GallM@ballardspahr.com](mailto:GallM@ballardspahr.com)>;

'douglas.baruch@morganlewis.com' <[douglas.baruch@morganlewis.com](mailto:douglas.baruch@morganlewis.com)>

**Cc:** Bain, Tanya <[tbain@ClarkHill.com](mailto:tbain@ClarkHill.com)>; Gentile, Dominic <[dgentile@ClarkHill.com](mailto:dgentile@ClarkHill.com)>; Cristalli, Michael

RAPP\_000164

<[mcristalli@ClarkHill.com](mailto:mcristalli@ClarkHill.com)>

**Subject:** RE: OTC - Proposed Order Reconsideration

**⚠ EXTERNAL**

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

**Mark Dzarnoski**

Senior Counsel

**Clark Hill LLP**

3800 Howard Hughes Parkway, Ste 500, Las Vegas, NV 89169

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**From:** Tasca, Joel <[TASCA@ballardspahr.com](mailto:TASCA@ballardspahr.com)>

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

**To:** Dzarnoski, Mark <[mdzarnoski@ClarkHill.com](mailto:mdzarnoski@ClarkHill.com)>; Gall, Maria A. <[GallM@ballardspahr.com](mailto:GallM@ballardspahr.com)>;

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**Cc:** Bain, Tanya <[tbain@ClarkHill.com](mailto:tbain@ClarkHill.com)>; Gentile, Dominic <[dgentile@ClarkHill.com](mailto:dgentile@ClarkHill.com)>; Cristalli, Michael <[mcristalli@ClarkHill.com](mailto: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**

**Ballard Spahr**  
LLP

---

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**From:** Dzarnoski, Mark <[mdzarnoski@ClarkHill.com](mailto:mdzarnoski@ClarkHill.com)>

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

**To:** Tasca, Joel (LV) <[TASCA@ballardspahr.com](mailto:TASCA@ballardspahr.com)>; Gall, Maria A. (LV) <[GallM@ballardspahr.com](mailto:GallM@ballardspahr.com)>;

'douglas.baruch@morganlewis.com' <[douglas.baruch@morganlewis.com](mailto:douglas.baruch@morganlewis.com)>

**Cc:** Bain, Tanya <[tbain@ClarkHill.com](mailto:tbain@ClarkHill.com)>; Gentile, Dominic <[dgentile@ClarkHill.com](mailto:dgentile@ClarkHill.com)>; Cristalli, Michael <[mcristalli@ClarkHill.com](mailto:mcristalli@ClarkHill.com)>

**Subject:** OTC - Proposed Order Reconsideration

**⚠ EXTERNAL**

RAPP\_000165

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**

Senior Counsel

**Clark Hill LLP**

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1 **CSERV**

2  
3 DISTRICT COURT  
4 CLARK COUNTY, NEVADA

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

CASE NO: A-20-814111-B

8 vs.

DEPT. NO. Department 13

9 Orbitz Worldwide, LLC,  
10 Defendant(s)

11 **AUTOMATED CERTIFICATE OF SERVICE**

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

15 Service Date: 7/12/2022

16 Todd Bice	tlb@pisanellibice.com
17 Las Vegas Docket	LVDocket@ballardspahr.com
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19 Marilyn Millam	mmillam@ag.nv.gov
20 David Pope	dpope@ag.nv.gov
21 Joel Tasca	tasca@ballardspahr.com
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23 James Pisanelli	lit@pisanellibice.com
24 Lindsay Stadlander	lindsay@brownlawlv.com
25 Jordan Smith	jts@pisanellibice.com

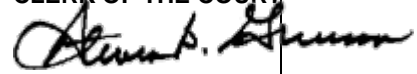
26  
27  
28

RAPP\_000167

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14	Aline Monestime	amonestime@mwe.com
15	Mark Dzarnoski	mdzarnoski@clarkhill.com
16	Kami DeSavio	kami@brownlawlv.com
17	Judy Estrada	jestrada@clarkhill.com
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**EXHIBIT 13**

**EXHIBIT 13**



RTRAN

DISTRICT COURT  
CLARK COUNTY, NEVADA

STATE OF NEVADA, EX REL,  
MARK FIERRO,

Plaintiff,

vs.

ORBITZ WORLDWIDE, et al,

Defendants.

CASE#: A-20-814111-B

DEPT. VIII

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

MONDAY, MARCH 28, 2022

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

APPEARANCES:

For the Plaintiff:

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

For the Defendants:

JOEL E. TASCA, ESQ.

(Hotel Tonight, LLC, Hotel Tonight  
Inc., Agoda International USA, LLC,  
Travelweb, LLC, Booking Holdings,  
Inc., Hotwire, Inc., Hotels.com, LP,  
Expedia Global, LLC, Expedia, Inc.,  
Cheap Tickets, Inc., Travelocity, Inc.,  
Travelscape, LLC, Orbitz, Inc.,

1 Orbitz, LLC, Orbitz Worldwide, LLC)

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

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RECORDED BY: KIMBERLY ESTALA, COURT RECORDER

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**INDEX**

Motion, denied

Page  
22

1  
2  
3  
4  
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7  
8  
9  
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11  
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Las Vegas, Nevada, Monday, March 28, 2022

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

THE COURT: Good morning.

MR. TASCA: Good morning, Your Honor.

MR. GENTILE: Good morning, Your Honor.

MR. CRISTALLI: Good morning, Your Honor.

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

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

MR. CRISTALLI: 6266, Your Honor.

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

MR. CRISTALLI: With a little break in between.

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

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

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

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

THE COURT: Oh.

MR. TASCA: Doug Baruch from Morgan Lewis, who

1 represents the Expedia Defendants along with me.

2 MR. BARUCH: Good morning, Your Honor.

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

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

7 MR. TASCA: Okay.

8 THE COURT: -- all of it.

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

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

13 THE COURT: Right.

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

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

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

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

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

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

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

7 MR. TASCA: Correct.

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

12 So is this the right case to dismiss?

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

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

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

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

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

25 THE COURT: Okay.

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

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

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

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

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

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

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

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

1 an action.

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

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

5 MR. TASCA: Sure.

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

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

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

14 THE COURT: So what does already mean then?

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

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

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

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

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

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

5 MR. TASCA: Right.

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

10 MR. TASCA: Well, I --

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

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

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

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

19 MR. TASCA: Sure.

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

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

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

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

5                   THE COURT: Yes.

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

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

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

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

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

22                  THE COURT: Okay.

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

25                  THE COURT: No.

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

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

8 THE COURT: Right.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3 THE COURT: All right, thank you.

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

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

7 MR. GENTILE: Sure.

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

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

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

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

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

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

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

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

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

14 Have I answered your question?

15 THE COURT: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

21 THE COURT: Well, I think it is.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

20 THE COURT: Thank you.

21 And Mr. Tasca?

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

1 case are the subject of the Clark County action.

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

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

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

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

17 And so --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7 THE COURT: Yes.

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

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

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

15 THE COURT: Right. Anything else you want?

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

17 THE COURT: Okay.

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

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

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

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

MR. TASCA: Thank you.

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

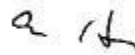
MR. TASCA: We shall, thank you.

MR. GENTILE: Thank you, Your Honor.

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

\* \* \* \* \*

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



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Chris Hwang  
Transcriber

**EXHIBIT 14**

**EXHIBIT 14**

**MINUTES OF THE  
SENATE COMMITTEE ON GOVERNMENT AFFAIRS**

**Seventieth Session  
March 31, 1999**

The Senate Committee on Government Affairs was called to order by Chairman Ann O'Connell, at 3:00 p.m., on Wednesday, March 31, 1999, in Room 2149 of the Legislative Building, Carson City, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file at the Research Library of the Legislative Counsel Bureau.

**COMMITTEE MEMBERS PRESENT:**

Senator Ann O'Connell, Chairman  
Senator William J. Raggio, Vice Chairman  
Senator William R. O'Donnell  
Senator Jon C. Porter  
Senator Joseph M. Neal, Jr.  
Senator Dina Titus  
Senator Terry Care

**GUEST LEGISLATORS PRESENT:**

Senator Mark A. James, Clark County Senatorial District No. 8

**STAFF MEMBERS PRESENT:**

Kim Marsh Guinasso, Committee Counsel  
Juliann Jenson, Committee Policy Analyst  
Amelie Welden, Committee Secretary

**OTHERS PRESENT:**

John P. Comeaux, Director, Department of Administration  
Carol A. Jackson, Director, Department of Employment, Training and Rehabilitation  
Robert E. Shriver, Executive Director, Division of Economic Development, Commission on Economic Development  
Andrea L. Reitan, Deputy Chief of Staff, Office of the Lieutenant Governor  
Madelyn Shipman, Lobbyist, Washoe County

Chairman O'Connell closed the hearing on S.B. 408 and opened the hearing on S.B. 418.

**SENATE BILL 418**: Provides civil penalty for submission of false claim to state or local government. (BDR 31-1474)

Senator Alice Costandina (Dina) Titus, Clark County Senatorial District No. 7, testified S.B. 418 would create a state false-claims act for Nevada. She explained false claims, or "qui tam," laws have existed for hundreds of years, dating back to the Middle Ages in England. She expressed qui tam provisions give private citizens the right and a financial incentive to assist law enforcement in identifying practices which attempt to defraud government. Senator Titus noted the Continental Congress enacted various qui tam provisions, and she pointed out Abraham Lincoln promoted enactment of the 1863 False Claims Act, which was essential in protecting the government from fraudulent suppliers of faulty war equipment during the Civil War. She continued this law was amended by the United States Congress in 1986 to strengthen incentives for citizens to uncover and fight fraud.

Senator Titus stated qui tam actions have returned over \$1.45 billion to the United States Treasury since those amendments were passed. She asserted in addition to the federal False Claims Act, five states – California, Texas, Tennessee, Illinois, and Florida – have enacted false-claims acts since 1986. She maintained those states have been satisfied with the outcomes of their false-claims acts and have experienced success in recovering taxpayer dollars for their governments. Senator Titus said about six more states are currently considering enactment of false-claims acts.

Senator Titus explained several types of false claims can be made against government. She elaborated government contractors can make false claims, as can medical providers. Senator Titus added individuals can wrongfully claim entitlements, such as subsidies or agricultural price supports. She concluded a fourth type of false claim involves underpayment of government through false appraisals in land swaps, under-reportings of royalties due, and so forth.

Senator Titus noted the Senate Committee on Government Affairs has heard testimony regarding the need for government to "live up to its end of the bargain" when it enters into contracts. She referred to the issue of prompt payment to contractors for public-works projects. She stated, "This is the other

side of that same coin," contending government needs to be protected from unscrupulous activities by contractors. Senator Titus emphasized S.B. 418 would protect taxpayer dollars by allowing the state to "go after" individuals or companies that attempt to defraud government with false claims. She expressed the state already "goes after" insurance fraud, Medicaid fraud, and workers' compensation fraud.

Senator Titus stated she supports an amendment to S.B. 418 which would be offered in later testimony. She distributed a copy of the proposed amendment (Exhibit G), along with a letter written by a Las Vegas attorney in support of S.B. 418 (Exhibit H), a Tenth Anniversary Report on the 1986 False Claims Act amendments (Exhibit I. Original is on file in the Research Library.), and an assessment of the economic impact of those amendments (Exhibit J. Original is on file in the Research Library.). Senator Titus explained the proposed amendment to S.B. 418 would narrow the bill so it would include only the attorney general, not city or county prosecutors.

Tim Terry, Senior Deputy Attorney General, Medicaid Fraud Control Unit, Office of the Attorney General, offered that office's support for S.B. 418. He reiterated the federal False Claims Act has been successful after the 1986 amendments, noting approximately \$355,000 was recovered pursuant to the act in 1986. He stated, "Up until 1998, including the 2-year period [19]97 and [19]98, that number had increased to over \$1 billion in recoveries under that act."

Mr. Terry suggested S.B. 418 would create an important incentive to combat fraud. He elaborated S.B. 418 would allow a "relator," or a "whistleblower," with knowledge of a fraudulent activity to file a qui tam action and then share in the recovery. Mr. Terry said the bill would also protect the "relator" from termination of employment due to the reporting of fraudulent activity. He noted law enforcement currently cannot offer those incentives, and he asserted many potential "relators" are presently afraid to assist with law-enforcement investigations on fraud because they fear they will lose their jobs.

Mr. Terry maintained he has consulted with the five states that currently have state false-claims laws. He indicated most civil false-claims actions are currently related to health care fraud, and he pointed out about 61 percent of federal false-claims activity is in that area. He added such claims are typically filed in federal court under the Federal False Claims act, with a "pendant" or

"attached" claim for the state false-claims activity. Mr. Terry expressed California currently has the most state false claims with about 30 active cases. He said that state has a person assigned to monitor the litigation of federal court and to participate in the discovery, or in the investigative work. He added the state shares in the recovery after the federal action is completed. Mr. Terry concluded S.B. 418 would not create the need for substantial resources at the state level, and thus, no fiscal note is attached to the bill. He suggested letting the program run for a couple of years to establish a history and a database which could be reviewed to determine whether additional resources are needed.

Mr. Terry presented proposed amendments to S.B. 418, pointing out the changes would really apply to only one issue. He expressed Senator Titus and representatives from Washoe and Clark counties decided counties should not have an obligation under the bill, and false-claims activity should be handled by the attorney general's office. Mr. Terry indicated S.B. 418, as drafted, defines the prosecuting authority as either the attorney general or the local district attorney's office. He explained the proposed amendments would delete references to county-level investigation and prosecution, thus focusing such procedures in the attorney general's office.

Senator Raggio questioned the necessity of S.B. 418. He asked for specific situations in which such legislation has been necessary.

Mr. Terry answered S.B. 418 is an attempt to "bolster" the available resources to combat fraud. He elaborated the bill would be a "privatization" of the fight against fraud because it would allow a private individual with no connection to government and with personal knowledge of fraudulent activity to file an action and to share in the government's recovery, if received. Mr. Terry asserted the bill would "open up new avenues of investigation or recovery on behalf of the state." He expressed the legislation has no "downside."

Senator Raggio reiterated his question regarding specific cases in Nevada that suggest a need for S.B. 418. Mr. Terry mentioned the attorney general's office has units designed specifically to prosecute and investigate allegations of Medicaid fraud, workers' compensation fraud, insurance fraud, telemarketing fraud, and securities fraud. He asserted current authority relates only to law enforcement, and he pointed out S.B. 418 would not be a criminal statute, but a civil statute allowing a monetary penalty to be assessed against those who make fraudulent claims.

Senator Raggio asked if enough false-claims activity occurs in Nevada to make S.B. 418 necessary. Mr. Terry responded federal recoveries have substantially increased as a result of amendments to the federal False Claims Act. He stated statistics prove that a high level of fraudulent activity occurs, and he asserted, "The government can't [cannot] get to it all." Mr. Terry continued the federal government has turned down over 1200 potential false-claims cases due to insufficient resources. He explained the "relators" and their attorneys can still prosecute those cases on their own. He noted the federal government has only intervened in about 340 false-claims cases since 1986.

Mr. Terry contended the attorney general's office regularly sees fraud in the areas it currently investigates. He emphasized S.B. 418 would allow individuals to prosecute fraud on behalf of the government in cases when the state might not have sufficient resources to do so. He reiterated this process would be an extra "tool" in the fight against fraudulent claims. Mr. Terry maintained the system proposed by S.B. 418 would not cost the government anything and could produce increased recoveries for the state.

Senator Neal commented under federal law, an employee of a company which has "shortcut" a specification can come forward with that information and have it investigated. Senator Neal explained the United States Attorney has 60 days to review the matter after such information is received from the employee. He continued if the United States Attorney goes forward with the case, the employee gets 15 percent of any recovery. He stated the employee receives 25 percent of the recovery if he or she has to bring the action on his or her own. Senator Neal commented some ex-military personnel have received substantial amounts of money from recoveries under this system. He added the false-claims law introduced by Abraham Lincoln was generated when the Union army found out the gun powder it was purchasing had been mixed with sawdust. Senator Neal explained the law allowed for prosecution of relevant individuals. He asserted S.B. 418 would not work without a "whistleblower" provision, and he noted the Legislature has already passed a "whistleblower" statute. He concluded, "Unless you have this, then you don't [do not] have an effective way of actually getting at these particular things."

Senator Raggio asked what would happen if a person brings a case under S.B. 418 that turns out to be false. Mr. Terry replied if a case is not adequately investigated by a "relator" and his or her attorney, Rule-11 sanctions could

apply under the state Rules of Civil Procedure. He added if a case is brought with a malicious or improper motive, it would be subject to abuse-of-process or malicious-prosecution countersuits.

Senator Titus commented if a person files a claim, the attorney general must decide if the case is worth pursuing. She emphasized the attorney general's office does not have to take every accusation to court. She indicated Nevada recognizes fraud is a problem, as evidenced by the creation of various fraud units in the attorney general's office.

Mr. Terry mentioned that on several occasions each month, the Medicaid Fraud Control Unit receives an anonymous call from someone who wants to report fraudulent activity. He contended the unit is "pretty much handcuffed" because it cannot seek a search warrant or take other substantial action based on anonymous tips. He suggested people who are afraid to be involved in reporting fraud would see S.B. 418 as a way to report fraud without losing their jobs.

Chairman O'Connell closed the hearing on S.B. 418 and opened a work session. She began discussion on S.B. 533.

**SENATE BILL 533:** Authorizes designee of clerk of state board of examiners to approve certain contracts. (BDR 23-775)

Chairman O'Connell suggested S.B. 533 could go on the consent calendar.

SENATOR RAGGIO MOVED TO DO PASS AND PLACE S.B. 533 ON THE CONSENT CALENDAR.

SENATOR NEAL SECONDED THE MOTION.

THE MOTION CARRIED. (SENATOR O'DONNELL WAS ABSENT FOR THE VOTE.)

\* \* \* \* \*

Chairman O'Connell opened discussion on S.B. 144.

**SENATE BILL 144:** Makes various changes concerning payments to contractors, subcontractors and suppliers for public works projects. (BDR 28-128)