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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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EXPEDIA, INC., et al.,

Plaintiffs/Petitioners

v.

STEADFAST INSURANCE COMPANY, et al.,

Defendants/Respondents.

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I. INTRODUCTION

Two of the three trial court orders challenged by Expedia in this interlocutory appeal address the timing and process of discovery – namely, an order granting Zurich’s CR 56(f) motion to continue Expedia’s motion for summary judgment regarding its coverage, bad faith, and Washington Consumer Protection Act (CPA) claims and another denying Expedia’s requests to obtain an immediate summary judgment hearing date and halt all discovery in this case for the foreseeable future. What Expedia most urgently wants this Court to do, however, is to “reverse” a third trial court order (which denied in part Zurich’s motion for summary judgment regarding certain of its coverage defenses) and direct the trial court to enter an order “enforcing” Zurich’s purported duty to defend. *See* Brief of Plaintiffs/Petitioners (“Pls.’ Br.”) at 3.

Leaving aside that this third order is not properly before this Court, Expedia’s petition fails for two principal reasons. First, whether Zurich is obliged to defend Expedia under the two policies that currently remain at issue was not decided below; thus, there is no existing duty for the trial court to “enforce.” Second, under the factual circumstances present here, which include Expedia’s failure to meet its burden of establishing coverage for multiple underlying claims, the absence of record evidence to support any such showing, and the lack of any ruling addressing Zurich’s

remaining coverage defenses, the trial court did not err when it refused to enter an order declaring that Zurich owes a duty to defend.

In support of its contrary position, Expedia maintains that the trial court “denied Zurich’s motion for summary judgment” as to the duty to defend and held that “coverage was possible.” Pls.’ Br. at 2. Neither statement accurately reflects the record, however, or provides sufficient context to understand what is really at stake here.

The story begins in pertinent part in June 2005, when Expedia tendered to Zurich a lawsuit filed by the City of Los Angeles seeking to recover a tax shortfall allegedly resulting from Expedia’s hotel occupancy tax collection and remittance practices. Unbeknownst to Zurich at the time, those same practices had been repeatedly questioned by numerous taxing authorities years earlier. Indeed, Expedia specifically disclosed this issue to its shareholders and established tens of millions of dollars in reserves for potential payment of contingent tax liabilities – all prior to the issuance of the first Zurich policy.

Zurich timely responded to the June 2005 tender by denying the claim on various grounds, while also inviting Expedia to provide any information it deemed relevant to the claim. For over five years, Zurich heard nothing more from Expedia regarding this or any other tax-related claims. Then, in November 2010, Expedia tendered 56 additional lawsuits

that had been filed during the preceding five years (consistent with the warnings it had earlier given its shareholders) and simultaneously brought this coverage action.

These circumstances produced an extraordinarily complex coverage case, featuring claims against several insurers over nine policy periods and requiring analysis of three materially distinct policy forms and nearly sixty underlying complaints. Zurich initially moved for summary judgment on the duty to defend and the duty to indemnify, relying on several coverage defenses it believed would resolve or at least narrow the issues in the case. Notably, the motion did not include, or even purport to include, all of the policy and other coverage defenses identified in Zurich's responsive pleading as a basis for denying the duty to defend.

The trial court agreed with Zurich as to four of the six policies at issue, finding that an exclusion contained in those policies clearly and unambiguously precluded coverage. Although the trial court disagreed with Zurich as to the remaining two policies, it did not address all of Zurich's coverage defenses and, in fact, left open on the record one of the coverage defenses that was briefed and argued. This particular defense relates to the definition of "damages" contained in the policies and its impact on coverage for each of the underlying lawsuits.

The trial court expressly declined to enter an order on the day of

the hearing and instead invited the parties to submit supplemental briefing. After reviewing these submissions, the trial court issued an order granting in part (as to the four policies) and denying in part (as to the two policies) Zurich's motion for summary judgment on the specific grounds raised, without any further findings regarding the duty to defend.

Expedia contends that the trial court's denial of summary judgment as to the remaining two policies means that Expedia is automatically entitled to judgment as a matter of law regarding Zurich's duty to defend under those two policies. This position ignores Washington law establishing that as the insured, Expedia bears the burden of showing that each underlying matter falls within the scope of a policy's insuring agreement. At no time prior to entry of the referenced order or at any time since has Expedia ever attempted to meet this burden with regard to each of the underlying lawsuits at issue. Instead, Expedia now seeks a ruling from this Court that would eliminate any need to do so.

Such a ruling would be inappropriate under the circumstances present here. As Zurich pointed out in the supplemental briefing that preceded the challenged order, the underlying complaints are not all the same, and the differences (comparing the allegations of the complaints to the policy terms) have significant coverage implications. For example, whereas Expedia seeks coverage for some suits it filed as a plaintiff

against taxing authorities, the policies cover only suits *against Expedia*. Some of the underlying actions seek only declaratory relief, which is excluded from the definition of covered “damages” in the policies. One suit seeks to enjoin alleged unfair trade practices, a type of claim that is also excluded from coverage under the policies. And some suits were filed either before or after the relevant policy periods.

Expedia has not demonstrated that these and various other underlying lawsuits fall within the scope of coverage afforded by the two policies at issue, and the trial court has not addressed these particular coverage issues. More significantly, the trial court did not even have the opportunity to address certain other policy exclusions and defenses raised by Zurich in its responsive pleadings, which negate an insurer’s duty to defend. For these reasons alone, the trial court correctly declined to rule that Zurich owes a duty to defend under the two remaining policies, and there is no reason for this Court to decide the issue in the first instance.

Expedia’s remaining contentions largely focus on the trial court’s decisions to permit additional discovery before resolving the duty to defend. Expedia questions whether it is ever appropriate to consider evidence outside of the relevant policies and complaints in deciding this issue and whether an insurer who has denied defense coverage is required to fund the insured’s defense until a final adjudication is obtained in a

pending coverage action. Washington courts have answered the former question in the affirmative and the latter question in the negative for cases involving similar circumstances, and this Court should follow suit.

Expedia laments that it is being deprived of an early determination regarding the duty to defend and being saddled with a defense burden that it should not have to bear. But the fact of the matter is that Expedia alone is principally responsible for any delay in obtaining the prompt determination it now claims to seek, “having sat on this issue for up to five years in some cases.” June 15, 2012 RP 35:22-36:1. The procedural options suggested by the trial court with regard to the continuation of discovery address the potential risk of prejudice to Expedia while also acknowledging issues of fundamental fairness and Expedia’s outsized role in creating the situation at hand.

In sum, this Court should reject Expedia’s petition. The initial determination of Zurich’s duty to defend (if any) under the remaining policies should be made by the trial court, which has spent the last three years immersed in the complexities of this case. As for the orders concerning the continuance of Expedia’s motion for summary judgment and denial of Expedia’s motion for a blanket protective order, this Court should affirm the trial court’s exercise of its discretion concerning these routine case administration issues.

II. COUNTERSTATEMENT OF ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Should this Court review the portion of the trial court's decision denying in part Zurich's motion for summary judgment where this ruling was not designated in the notice for discretionary review and the procedural discovery order actually appealed from (denying Expedia's request for a protective order and to set summary judgment hearing) is unrelated to the earlier partial summary judgment ruling?

2. Should the trial court have declared that Zurich owes a duty to defend under the two policies that remain at issue where Expedia did not attempt to meet its burden of showing that all of the underlying actions fall within the scope of coverage, the record does not support such a showing, and the trial court has not yet considered certain policy exclusions and other information relevant to determining Zurich's duty to defend under the particular factual circumstances present here?

3. Did the trial court abuse its discretion by denying the particular form of protective order sought by Expedia and suggesting various options for proceeding with discovery before scheduling the hearing to summarily decide the merits of Expedia's coverage, bad faith, and CPA claims?

This Court should answer each of these questions in the negative.

III. COUNTERSTATEMENT OF THE CASE

Expedia posits an alternate reality in which it timely tendered covered claims to Zurich, Zurich “summarily refused” to defend Expedia, and Expedia was then forced to bring this action “to obtain its bargained-for defense” and receive protection from the “ongoing burden of litigation.” Pls.’ Br. at 1-2. The facts tell a different story.

A. Expedia’s “Merchant Model” Dictates Its Hotel Occupancy Tax Collection and Remittance Practices

Under the “merchant model,” Expedia negotiates with hotels to obtain access to rooms at a discounted or wholesale price and then makes those rooms available to online customers for a total price consisting of: (i) the wholesale room price charged to Expedia by the hotel, (ii) an amount retained by Expedia as a “facilitation fee” for its online services, and (iii) an amount for “tax recovery charges and other service fees.” CP 749. The unitemized “tax recovery charge” portion of this third component is calculated based on the wholesale price Expedia pays the hotel, not the total price paid by the customer to Expedia. Thus, if Expedia were to sell a Los Angeles hotel room with a \$70 wholesale price to an online customer for a total price of \$100, Expedia would remit to the hotel \$79.80 (i.e., \$70 wholesale price plus 14% of \$70 in occupancy taxes, or \$9.80) and retain the remaining \$20.20. CP 749-50.

B. Tax Authorities Challenge the “Merchant Model,” Leading Expedia To Notify Shareholders And Establish Reserves

Beginning in 2002, before Zurich had issued any policies to Expedia (*see* § III.C., *infra*), tax authorities in various jurisdictions began to question the “merchant model.” Specifically, these authorities suggested that Expedia should be collecting and remitting tax amounts based on the total price charged to customers instead of the wholesale room price charged by the hotel. CP 4077-78. In its 10-K filings for that year, Expedia openly acknowledged the tax authorities’ inquiries and vowed to “vigorously defend” its position:

Some tax authorities may assert that in some circumstances [Expedia] should collect and remit taxes on that part of their charges to customers which represents compensation for booking services. The amount of any tax liability to [Expedia] on account of this issue would depend on the number of jurisdictions that prevail in assessing such additional tax. Expedia and Hotels.com have not paid nor agreed to pay such taxes and intend to defend their positions vigorously. Should a jurisdiction prevail on such a claim, [Expedia] may consider limiting liability for future transactions in that jurisdiction by passing on such taxes to the consumer.

CP 4060-65; *see also* CP 4071-78.

In 2003, Expedia conducted additional analysis and made further public disclosures regarding the company’s hotel occupancy tax-related practices and reserves taken to cover potential liability associated with these practices:

The Company is currently conducting an ongoing review and interpretation of the tax laws in various state and local jurisdictions surrounding state and local sales and hotel occupancy taxes. The current business practice is that the hotels collect and remit these taxes to the various tax authorities based on the amounts collected by the hotels. Consistent with this practice, the Company recovers the taxes from customers and remits the taxes to the hotel operators for payment to the appropriate tax authorities. Several jurisdictions have stated that they may take the position that the tax is also applicable to the Company's gross profit on merchant hotel transactions and one of them has contacted the Company regarding whether hotel occupancy taxes should be remitted on the Company's revenues from its merchant hotel transactions. The Company has not paid nor agreed to pay such taxes but has a reserve for potential payment. An unfavorable outcome of some or all of these matters could have a substantial impact on the Company's financial position, liquidity, and results of operations.

CP 4079-81.¹

Expedia's reserve for potential payment of contingent occupancy tax liabilities for "prior periods" increased from \$10.4 million at the end of 2002 to \$13.2 million at the end of 2003. CP 4066-70. By that time, Expedia had also "... obtained the advice of state and local tax experts with respect to tax laws of certain states and local jurisdictions that represent a large portion of [Expedia's] hotel revenue." CP 4066-70.

Numerous tax authorities subsequently sued Expedia for allegedly failing to remit, as a result of the operation of the "merchant model," the

¹ Twenty-five of the underlying complaints quote from this SEC statement or contain similar language from Expedia's public disclosures as part of their allegations. CP 4036-37.

full amount of occupancy taxes owed. The City of Los Angeles filed the first such suit in December 2004. CP 4196-98. Other tax authorities filed about 25 additional suits against Expedia during 2005-2006 and dozens more thereafter. CP 4122-29. All told, Expedia has initiated or defended approximately 80 tax-related lawsuits across the United States. CP 1893.

The crux of the underlying plaintiffs' claims is that Expedia has remitted hotel occupancy tax based on the wholesale price that hotels charge Expedia, not the higher total price that Expedia charges its customers, allegedly in violation of applicable tax ordinances and other laws. *See, e.g.*, Decl. of Russell C. Love in Supp. of Def. Arrowood Indem. Co.'s Mot. for Summ. J. ("Love decl."), Ex. 1, at 5 (Sub No. 65). The lawsuits generally seek to recover the difference between amounts sufficient to pay occupancy taxes on the total price charged to customers and the amount of taxes remitted based on the wholesale price, based on one or more of the following theories of recovery: (1) violation of pertinent hotel tax ordinance(s); (2) violation of state unfair competition, unfair trade practice, and/or consumer fraud law; (3) conversion; (4) unjust enrichment; (5) constructive trust; (6) legal accounting; and/or (7) restitution or disgorgement. *See, e.g.*, Love decl., Ex. 16, at 737-44. Certain lawsuits seek only declaratory relief. CP 4035-36. Expedia initiated several lawsuits, seeking to abate tax assessments against it. *See,*

e.g., Love decl., Ex. 4, at 403-66; Ex. 5, at 467-91; Ex. 20, at 800-15; Ex. 21, at 816-850.

C. Expedia Obtains The Zurich Insurance Policies

From May 2004 – October 2009, Expedia procured six Travel Agents Professional Liability Insurance policies from Zurich. Only two of those policies are currently at issue: EOL 5329302-02, issued for the October 1, 2005 – October 1, 2006 policy period and EOL 5329302-03, issued for the October 1, 2006 – October 1, 2007 policy period.² The policies generally cover liability for “**Damages**” arising out of negligent acts or omissions committed during the policy period in the course of travel agency operations. CP 4147, 4180. The policies require the insurer to defend any suit against Expedia seeking such “**Damages.**” *Id.* Covered “**Damages**” do not include:

1. Punitive, exemplary, or multiple damages;
2. Criminal or civil fines, penalties (statutory or otherwise), fees, or sanctions;
3. Matters deemed uninsurable;
4. Any form of non-monetary, equitable or injunctive relief;
5. Restitution, return or disgorgement of any fees, funds, or profits.

CP 4152-53, 4185.

The policies require the insured to notify the insurer of any negligent act or omission “as soon as practicable” and of any claim or suit

² As discussed in Section IV.G below, the trial court granted Zurich’s summary judgment motion as to the other four policies.

“immediately.” CP 4147, 4180. The policies also contain, e.g., the following exclusions:

This policy does not apply to:

(K) Any **Claim** or **Suit** based upon or arising out of the **Insured’s** violation of any consumer fraud, consumer protection, consumer privacy, unfair trade or deceptive business practice or statutory or common law unfair competition;

* * *

(P) Any **Claim** or **Suit** based upon or arising out of any misquotation or misstatement of prices, applicable taxes or costs, cancellation provisions, payment terms, pricing changes, failure to secure promotional offers, or any dispute with respect to fees or charges.

CP 4149-50, 4182-83.

D. Expedia Notifies Zurich of the First Tax Authority’s Claim, and Zurich Responds

Expedia tendered the *City of Los Angeles* complaint to Zurich on June 10, 2005. CP 4196-98. Zurich denied coverage in a letter dated June 27, 2005. Zurich provided various bases for its determination, including an exclusion that bars coverage for liability “arising out of or contributed to by the co-mingling of money or the inability or failure to pay or collect any money for any reason.” CP 4200, 4203. Zurich’s response also invited Expedia to forward any additional information related to the claim that Expedia believed should be reviewed. CP 4202, 4205.

E. 2005-2006 Policy Renewals

Between June 27, 2005 and October 1, 2005, when Policy EOL 5329302-02 inceptioned, Zurich heard nothing further from Expedia regarding *City of Los Angeles* or any other tax-related lawsuit.³ CP ____ (Sub. No. 40, ¶¶5-7).⁴ In Expedia's renewal application for Policy EOL 5329302-02, Expedia answered "no" to the following question: "Do you, or does your company, or any owner, partner, officer, or employee have knowledge or information of any occurrence, situation, act, error, or omission which might give rise to a claim or has already resulted in a claim such as would be covered by the proposed insurance?" See Reply Decl. of Mark S. Parris in Supp. of Pls.' Mot. for Summ. J., Ex. 4, at EXP 0007455, Ex. 5, at EXP 0007675 (Apr. 23, 2012), attached hereto as Exhibit A.⁵

Between October 1, 2005 and October 1, 2006, when Policy 5329302-02 expired, Zurich heard nothing further from Expedia regarding *City of Los Angeles* or any other tax-related lawsuit. CP ____ (Sub. No. 40, ¶¶ 5-7). When the parties' policy renewal negotiations continued

³ At least two such lawsuits were filed against Expedia during this timeframe. CP 4118-21.

⁴ References to "CP ____" refer to record materials identified in Zurich's Supplemental Designation of Clerk's Papers and Exhibits filed concurrently with this Brief.

⁵ This declaration and its attached exhibits were filed on April 23, 2012 in King County Superior Court. Because these record materials do not currently appear in the file, however, they are attached hereto.

beyond the expiration date, Expedia requested Zurich to backdate the next policy to October 1, 2006. CP 4215. Zurich (through its agent) advised that in order to do so, Zurich would need a letter “advising us of any incidents that they are aware of that could lead to an incident during this time.” CP 4217. Expedia provided the requested letter on December 7, 2006, in which Expedia represented, e.g., that no officers, directors, or employees of Expedia were aware of any “circumstance, incident, act, error or omission that could result in a claim or suit against [Expedia]”⁶ CP 4220.

F. Expedia Notifies Zurich of Additional Tax-Related Claims and Simultaneously Sues Zurich For Coverage

Zurich heard nothing further from Expedia regarding *City of Los Angeles* or any other tax-related lawsuit until November 2010, when Expedia filed this coverage action and simultaneously purported to tender 56 additional lawsuits filed during 2005-2010. CP 1-17; 4230-51. By that time, many of the underlying lawsuits had been pending for years, and more than two dozen had been fully adjudicated, settled, or substantially litigated through the trial level. CP 3834-35; 4738-39. Zurich answered the complaint and asserted various defenses and a counterclaim, including late notice and resulting prejudice to Zurich, the known loss doctrine, and

⁶ At least 23 tax-related lawsuits were filed against Expedia between October 1, 2005 and December 7, 2006. CP 4123-29.

material misrepresentations in applications/policy negotiations. CP ____ (Sub. No. 34).

G. Zurich's Summary Judgment Motion and Related Proceedings

On August 26, 2011, Zurich moved for summary judgment concerning its coverage obligations to Expedia in connection with the underlying tax cases. CP 105-28. The summary judgment record included fifty-seven separate underlying complaints and six Zurich policies written on three materially distinct forms. CP 129-388. Zurich's motion addressed some but not all of the defenses pled in Zurich's responsive pleading. *Compare* CP 105-28 with CP 27-31.

In September 2011, Expedia purported to tender to Zurich six additional tax-related lawsuits. CP 4253-58. After Zurich denied coverage, Expedia moved for leave to amend its complaint to add one of those six suits to the coverage action and assert new bad faith, CPA, and coverage by estoppel claims. CP 389-394; 395-416. In its eventual response to the amended pleading, Zurich again asserted various defenses and a counterclaim. CP ____ (Sub. No. 147).

In the meantime, regarding Zurich's then-pending summary judgment motion, Expedia moved for a Rule 56(f) continuance, arguing that it needed "to conduct discovery that is likely to raise triable issues of fact concerning the meaning of the insurance policies at issue . . . [and]

put a complete evidentiary record before the court.” CP 418. Zurich agreed to the requested continuance and produced four witnesses for deposition on underwriting and claims issues. CP 3838-39. Zurich also sought additional discovery from Expedia (CP 3839), much of which remains outstanding.

After oral argument and supplemental briefing, the trial court granted Zurich’s motion for summary judgment as to four of the six Zurich policies. Jan. 13, 2012 RP 84:15-87:23. Specifically, the trial court found that the “failure or inability to collect or pay money” exclusion contained in those policies clearly and unambiguously “exclude[d] coverage and the obligation to defend” *Id.* 87:5-6.

Regarding the remaining two policies, the trial court denied Zurich’s motion for summary judgment. CP 1883-87. In discussing the reasons for denial, the trial court never mentioned the other exclusion discussed in Zurich’s motion (unfair trade, deceptive business practices, and/or unfair competition). *See generally* Jan. 13, 2012 RP.

During oral argument, Expedia’s counsel volunteered a theory under which Expedia’s alleged conduct might not be considered a “conscious business decision” but instead a negligent act. Although none of the underlying complaints tendered to Zurich mentioned such a scenario, counsel postulated that the hotel could have supplied the

incorrect tax percentage to Expedia, or Expedia might have failed to update its web site to track rate changes. Based on Expedia's counsel's hypothetical, the trial court did not rule out that Expedia could be found liable due to software miscalculations. Jan. 13, 2012 RP 57:20-58:24; 82:23-83:14.

As to whether the underlying actions seek "**Damages**" as also required under the policies, the trial court ruled against Zurich with regard to "those policies that do not have a definition for damages."⁷ *Id.* 81:6-24. For the policies that do contain a definition of damages (*see* § III.C., *supra*), including the two that remain at issue, the trial court did not mention and claimed not to have seen any of the exclusions contained within the definition (such as, for example, the exclusions for "any form of non-monetary, equitable, or injunctive relief," "fines, sanctions or penalties against any insured," or the "return o[r] reimbursement of fees . . ."). Jan. 13, 2012 RP 81:25-82:22.

The parties disagreed on the appropriate form of order, with Expedia contending that the trial court could not grant Zurich's motion even in part. *Id.* 91:22-92-25. The trial court invited the parties to "submit proposed findings and seek to address" these issues. *Id.* 93:7-9.

⁷ This ruling was not determinative because the same policies contained the "failure to pay money" exclusion discussed above.

In the additional briefing that ensued, Zurich pointed out, e.g., that (i) Expedia never attempted to meet its burden of showing that each and every one of the underlying actions falls within the scope of the relevant policies' insuring agreements; (ii) Zurich asserted a number of additional defenses in its responsive pleading that were not the subject of Zurich's motion and have yet to be briefed, including additional exclusions, late notice and resulting prejudice, and the known loss doctrine; and (iii) the trial court effectively invited additional information regarding whether or not the term "**Damages**" is defined in the two remaining policies, having stated on the record that it either did not see or was not able to focus on this information prior to the hearing. CP 1728-31. Expedia, for its part, sought to convince the trial court to enter an order providing that Zurich "has a duty to defend" under the two remaining Zurich policies. CP 1717. The trial court declined to enter Expedia's proposed order and instead entered an order simply denying Zurich's motion for summary judgment with respect to those two policies. CP 1883-87.

H. Expedia Moves For Summary Judgment And, Subsequently, For A Blanket Protective Order

On March 30, 2012, Expedia filed a Motion for Summary Judgment regarding its remaining coverage claims, as well as its bad faith and CPA claims. CP 1895-921. Expedia did so without having responded

fully to Zurich's discovery requests or produced a knowledgeable witness for deposition.⁸

On April 26, 2012, the trial court granted Zurich's motion for a Rule 56(f) continuance to permit Zurich to complete certain discovery and present a complete factual record to the Court. CP 4540-42. Expedia subsequently provided some additional discovery to Zurich but declined to provide other discovery on grounds that the requested information is potentially prejudicial to Expedia's interests in the underlying actions. Expedia then moved for a protective order to stop Zurich from pursuing any additional discovery until the underlying lawsuits are resolved, while allowing Expedia's motion for summary judgment to proceed. CP 4557-80.

The trial court agreed that certain discovery could potentially prejudice Expedia's interests in the underlying cases if allowed to proceed at this time. June 15, 2012 RP 31:10-20. The trial court did not agree, however, that all of Zurich's discovery was potentially prejudicial or that the requested blanket protective order was the appropriate remedy to address overlapping discovery issues. Instead, the trial court ruled "if there are problems with the discovery that we cannot sort out and Expedia

⁸ The trial court granted Zurich's motion to compel on Mar. 22, 2012. CP _____ (Sub. No. 191-95, 197-99).

feels that there is too much of an overlap [] Expedia's remedy should be a stay of this action." *Id.* 36:19-23.

The trial court never concluded as a matter of law that extrinsic evidence is relevant to a coverage determination; that issue was not before it. *Id.* 32:2-8. Instead, the trial court based its ruling on the particular factual circumstances presented, including Expedia's failure in many cases to tender the underlying lawsuits to Zurich "for years," during which time Expedia elected to handle its own defense:

[Zurich] is being put in the position of Expedia having driven the bus all of this time, suddenly getting up from the bus and saying 'okay, it is your turn to drive. Never mind that the gas tank may only be half full and never mind that we are on an area that you are not familiar with driving. Second of all, we don't really want to give you all of the information that you need to drive the bus.'

Id. 35:13-21. It struck the trial court as "fundamentally unfair and inconsistent with our system of trying to resolve cases on the merits" to preclude Zurich from obtaining any additional discovery, which the trial court deemed "appropriate for [Zurich's] defenses." *Id.* 35:5-9. Staying the case until the underlying actions are resolved, the trial court found, would thus strike the right balance without resulting in any "real prejudice" to Expedia because Expedia would be continuing its longstanding defense strategy and would retain the ability to seek both defense and indemnity from Zurich at a later time. *Id.* 37:10-15.

As an alternative to a complete stay, the trial court invited the parties to try to establish a prospective discovery protocol, identifying issues that may proceed without possible prejudice to Expedia at this time and those issues that may not (with any impasse submitted to the trial court). *Id.* 37:16-23. Expedia rejected this approach⁹ and sought discretionary review of the trial court's August 22, 2012 order. CP ____ (Sub. No. 327-28, 332-33, 336, 341). This Court eventually granted review on July 10, 2013.

IV. ARGUMENT

A. The Issue Of Whether Zurich Owes A Duty To Defend Is Not Properly Before This Court

As discussed in § IV.C. below, two of the three challenged orders address the timing and process of discovery, not the duty to defend. The third order is the trial court's March 22, 2012 order partially denying Zurich's motion for summary judgment without ruling that Zurich owes Expedia a defense as a matter of law. Expedia wants to remove this issue from the trial court's hands, where it belongs, and have it decided in the first instance by this Court. Expedia's request in this regard is both procedurally and substantively deficient, and this Court should reject it.

⁹ Zurich's counsel attempted to meet and confer with Expedia's counsel to work out an agreeable discovery protocol. When Expedia's counsel declined to do so, Zurich submitted a proposal for further proceedings. CP ____ (Sub. No. 308, 309).

1. **RAP 2.4 Does Not Authorize Review Of The Trial Court's March 22, 2012 Order**

This Court may only review a trial court decision that was not specifically noticed in the motion for discretionary review if such review is authorized by RAP 2.4. Here, Expedia sought review of the trial court's August 22, 2012 order denying its motion for a protective order and to set a summary judgment hearing date, as well as unspecified "related orders." Although Expedia did not directly notice for review the order granting Zurich's motion for a Rule 56(f) continuance, that order similarly concerns the timing and process of discovery in this case (and, in any event, Zurich is not challenging its inclusion in the appeal). The other order that Expedia failed to notice for review, however – the trial court's order partially denying Zurich summary judgment – is unrelated to the trial court's August 22, 2012 order.

RAP 2.4(b) provides that an appellate court may review a trial court order not designated in the motion for discretionary review when "(1) the order of ruling prejudicially affects the decision designated in the notice, and (2) the order is entered . . . before the appellate court accepts review." RAP 2.4(b) (emphasis added). To meet this test, Expedia must show that the designated order "would not have happened but for the first order." *Right-Price Recreation, LLC v. Connells Prairie Cmty. Council*,

146 Wn.2d 370, 380, 46 P.3d 789 (2002). Stated differently, the unnoticed decision must be the basis for the noticed decision. See *In re Marriage of Wixom*, 174 Wn. App. 1020, at *3 (Wn. App. 2013). Unnoticed decisions only tangentially related or too attenuated to the noticed decision may not be reviewed. *State of Wash. v. Sims*, 171 Wn.2d 436, 441-42, 256 P.3d 285 (2011) (rejecting argument that broad notice of appeal brought entire order and all related issues into scope of review).

Here, the link between the noticed protective order denial and the trial court's decision partially denying Zurich summary judgment is too attenuated to support a "but for" relationship between them. The protective order denial concerns the timing and process for discovery related to Expedia's own summary judgment motion, which addresses not only the duty to defend but also Expedia's separate bad faith and CPA claims. By contrast, the partial summary judgment decision addressed certain of Zurich's coverage defenses, but it did not address the discovery process or any of Expedia's other claims. Consequently, even if this Court were to reverse the trial court's partial denial of summary judgment to Zurich, the Court would still be required to review and rule on the order denying Expedia's motion for a protective order. In other words, the partial summary judgment decision is not the basis for the August 22, 2012 procedural order. As such, the partial summary judgment decision is

beyond the scope of this Court's review at this time. *See In re Marriage of Wixom*, 174 Wn. App. at *3.

2. **Zurich's Duty to Defend Under The Remaining Policies Was Not Decided Below, Rendering It Impossible To "Reverse" Or "Enforce" The Decision**

As noted, what Expedia really wants this Court to do is to "reverse" the trial court's order denying Zurich's partial summary judgment motion, in which the trial court declined to find that Zurich owed a duty to defend under the two remaining policies, and direct the trial court to enter an order "enforcing" Zurich's purported duty to defend. Pls.' Br. at 3. According to Expedia, this relief is warranted because the trial court affirmatively ruled that all of the underlying lawsuits were "potentially covered" under the policies. *Id.* at 21. This is not the case.

In support of its position, Expedia points to certain of the trial court's statements in the January 13, 2012 hearing transcript, concluding that "the trial court found . . . at least one of the potential theories of liability set forth in the underlying complaints could result in the imposition of damages against Expedia for negligent conduct." *Id.* at 9. This ignores, however, a key issue concerning the trial court's understanding regarding the definition of "**Damages**" in the two remaining policies at issue and the resulting impact on coverage. Specifically, the trial court noted that a case cited by Zurich to support its

position that the underlying complaints do not seek “**Damages**” referenced a policy that “had a specific exclusion for fines, sanctions or penalties against any insured, or the return o[r] reimbursement of fees for professional service.” Jan. 13, 2012 RP 82:1-7. The trial court went on to say that its attention “had not been brought to such a provision within these policies,” such that the same argument presumably would not apply in this case. *Id.* 82:8-10.

In fact, both of the relevant policies *do* exclude various matters from the policies’ definition of “**Damages**,” including “fines, penalties . . . fees or sanctions,” “any form of non-monetary, equitable or injunctive relief,” and “restitution, return or disgorgement of any fees, funds or profits.” § III.C., *supra*. Contrary to Expedia’s contention, the trial court could not conclude that the underlying complaints resulted in the imposition of covered “**Damages**” without being aware of or considering the definition of covered “**Damages**” in the policies.

Moreover, it is beyond dispute that the trial court declined to enter an order disposing of Zurich’s summary judgment motion on the date of the hearing. Instead, the trial court invited the parties to “submit proposed findings and seek to address” these issues (Jan. 13, 2012 RP 93:7-9), and the parties obliged. CP 1704-882. After reviewing the parties’ supplemental submissions, the trial court declined to enter Expedia’s

proposed order and instead entered an order simply denying Zurich's motion for summary judgment with respect to those two policies. CP 1883-87. This record does not support Expedia's conclusion that the trial court found a potential for coverage in all of the underlying complaints (or that Zurich failed to prove no potential for coverage in connection with all of the underlying complaints). There is therefore no basis for "reversing" the March 22, 2012 order or "enforcing" Zurich's purported duty to defend.

B. The Trial Court Properly Refused To Order Zurich to Defend Expedia Under The Two Policies That Remain At Issue

Even if this Court were inclined to review the portion of the trial court's March 2, 2012 Order denying in part Zurich's Motion for Summary Judgment, both the record and this Court's precedent support the trial court's refusal to equate a partial denial of Zurich's summary judgment motion with an affirmative finding that Zurich owes a duty to defend under the remaining two policies. This is true for three principal reasons.

First, Washington law makes clear that the insured bears the initial burden of showing that a matter falls within the scope of a policy's insuring agreement; the insurer then bears the burden of showing that an exclusion applies. *E.g., McDonald v. State Farm Fire & Cas. Co.*, 119

Wn.2d 724, 731, 837 P.2d 1000 (1992). As of March 2, 2012, Expedia had never attempted to meet its burden in the former regard with respect to each of the multiple underlying lawsuits at issue, as it must to sustain summary adjudication in its favor.

An insurer's duty to defend arises only when "a complaint against the insured, construed liberally, alleges facts which could, if proven, impose liability upon the insured within the policy's coverage." *Truck Ins. Exch. v. Vanport Homes, Inc.*, 147 Wn.2d 751, 760, 58 P.3d 276 (2002) (internal citation and quotation omitted). Determining the duty to defend thus necessarily requires a comparison of the allegations in *each* underlying complaint for which an insured seeks coverage with the language of the pertinent policies in order to determine if *each* complaint "sets forth facts which, if proved, would trigger coverage." *Id.* at 762. Neither in connection with the briefing on Zurich's summary judgment motion, nor at any time since, has Expedia undertaken such a comparison. Instead, Expedia consistently tries to lump all of the myriad underlying lawsuits at issue together, summarily asserting that "the claim . . . was potentially covered . . ." Pls.' Br. at 21. This is not what the trial court ruled (*see* § IV.A.2, *supra*), however, and no legal authority in Washington or elsewhere suggests that this kind of conclusory analysis is sufficient to affirmatively establish an insurer's duty to defend.

Second, the record does not in any event support Expedia's assertion that the "potential for coverage" exists as to each of the underlying lawsuits. An examination of just a few of the underlying complaints at issue here, together with some of the key policy terms, provides abundant support for the trial court's rejection of Expedia's attempt to paint all of the underlying lawsuits with the same broad brush.

As the record reflects:

- The pertinent policies cover the consecutive annual periods during the October 1, 2005 - October 1, 2007 timeframe.
- Both policies limit coverage, e.g., to claims for "**Damages**" arising out of a negligent act or negligent omission occurring during the policy period.
- Both policies limit in relevant part Zurich's defense obligations as follows: "The Company shall have the right and duty to defend any **Suit against the Insured seeking Damages** on account of such . . . negligent act or negligent omission. . . ." (emphasis added).
- Both policies also define "**Damages**" to exclude certain matters, including "Criminal or civil fines, penalties (statutory or otherwise), fees, or sanctions," "Any form of non-monetary; equitable or injunctive relief," and "Restitution, return or disgorgement of any fees, funds or profits."

See § III.C., *supra*.

Regarding the issue of applicable policy periods, any underlying lawsuits filed outside the policies' inception and termination dates would fall outside the scope of coverage. Expedia has acknowledged that *City of*

Los Angeles is such a case (which is why Expedia's proposed order actually excluded this lawsuit from the duty to defend, *see* CP 1714-17), but it has not addressed this issue with respect to any of the other dozens of underlying lawsuits at issue.

Additionally, several of the underlying lawsuits are declaratory judgment actions initiated by Expedia against taxing authorities, including *Hotels.com, L.P. v. Indiana Dep't of State Revenue* and *Expedia, Inc., et al. v. City and County of San Francisco*. CP 4035-36. The former seeks a declaration regarding the legality and constitutionality of Indiana's tax collection practices, as well as to enjoin the State from collecting certain taxes and penalties assessed against Hotels.com. The latter is "an action for a tax refund and declaratory relief aris[ing] out of the City's attempt to impose an unauthorized, unconstitutional and excessive transient occupancy tax" against Expedia and the other plaintiffs.

Such actions on their face do not constitute "**Suits**" *against* the insured and therefore fall outside the scope of coverage. *See, e.g., Quadrant Corp. v. Am. States Ins. Co.*, 154 Wn.2d 165, 171, 110 P.3d 733 (2005) (unambiguous policy terms must be enforced as written); *see also Weinstein & Riley v. Westport Ins. Co.*, No. C08-1694JLR, 2011 WL 887552, at *18 (W.D. Wn. 10 Mar. 14, 2011) (lawyer's professional liability policy provision obliging insurer to defend any claim for loss

made against the insured did not require insurer to “defend” affirmative claims made by the insured) (emphasis in original). Further, as discussed in § IV.A.2, the record is devoid of any evidence showing either that these actions seek “**Damages**” as required to fall within the scope of coverage or that the trial court made such a finding with respect to these cases. The lack of such evidence supports the trial court’s decision to reject Expedia’s proposed order as to Zurich’s duty to defend.

Third, as of the time of the March 2, 2012 order, the trial court had not yet been presented with additional evidence bearing on the issue of Zurich’s duty to defend under the remaining policies. Zurich asserted a number of defenses in its responsive pleading that were not part of Zurich’s initial summary judgment briefing. These include breach of the policies’ notice, reporting, and cooperation provisions and resulting prejudice to Zurich; the known loss doctrine; additional exclusions not raised or decided in Zurich’s initial motion for summary judgment; and material misrepresentations in applications/policy negotiations. CP ____ (Sub. No. 34, 147). Zurich is entitled to an adjudication regarding these defenses before the issue of its duty to defend, if any, under the remaining policies is determined. *See, e.g., Overton v. Consol. Ins. Co.*, 145 Wn.2d 417, 38 P.3d 322 (2002) (reinstating summary judgment ruling in favor of insurer on known loss grounds where evidence showed that insured knew

of soil contamination prior to purchasing insurance); *Unigard Ins. Co. v. Leven*, 97 Wn. App. 417, 428-32, 983 P.2d 1155 (1999), *review denied*, 140 Wn.2d 1009, 999 P.2d 1263 (2000) (reversing trial court's grant of summary judgment against insurer on duty to defend based on late notice and resulting prejudice).

Expedia challenges this position on grounds that it is never appropriate to look outside of the eight corners of the underlying complaint and the insurance policy. Pls.' Br. at 18. But as discussed in § IV.C.2 below, this is not true with respect to the particular defenses at issue and under the particular circumstances present here.

Expedia also asserts that even if Zurich's coverage defenses prove meritorious, Zurich is obliged to defend Expedia until such time as Zurich can obtain a final ruling as to those defenses. Pls.' Br. at 20-23. This, too, is contrary to Washington law. The dissent in *Overton* raised substantially the same argument, maintaining that "[t]he allegations in the complaint were sufficient to trigger [the] duty to defend" (notwithstanding the evidence of the insured's knowledge of loss prior to policy inception), and the insurers therefore should have provided a defense during the five years it took to obtain a favorable order on summary judgment. 145 Wn.2d at 435. This argument was not persuasive to the majority in *Overton*, and this Court likewise should reject it here.

The “one and done” approach to summary judgment that Expedia favors simply does not work in cases like this one, where the insurer through no fault of its own is faced with the prospect of obtaining a determination as to whether multiple policy forms issued over six policy periods provide coverage for nearly sixty underlying complaints. Zurich appropriately sought summary judgment as to certain of its defenses, and the trial court’s ruling effectively narrowed the remaining issues in the case. It cannot be redundant to require Expedia to make the showing with respect to coverage that is required under Washington law but that Expedia has never bothered to make. To the contrary, it was reasonable, fair, and consistent with the efficient use of judicial resources for the trial court to enter an order granting in part and denying in part Zurich’s motion for summary judgment without ruling on the issue of Zurich’s duty to defend.

C. **The Trial Court Did Not Abuse Its Discretion By Continuing Expedia’s Summary Judgment Motion And Denying Expedia’s Blanket Protective Order Request**

1. **The Trial Court’s Discovery and Continuance-Related Orders Do Not Implicate The Duty To Defend**

Orders like the ones granting Zurich’s CR 56(f) motion and denying Expedia’s motion for a protective order and to have an immediate hearing date set, which regulate the timing and administration of a case, are firmly committed to the trial court’s discretion. *See, e.g., Rhinehart v.*

Seattle Times Co., 98 Wn.2d 226, 232, 654 P.2d 673 (1982) (under CR 26(c), providing for protective orders, “the trial court exercises a broad discretion to manage the discovery process in a fashion that will implement the goal of full disclosure of relevant information and at the same time afford the participants protection against harmful side effects”); *Coggle v. Snow, M.D.*, 56 Wn. App. 499, 504, 784 P.2d 554 (1990) (ruling on a motion for continuance is within the discretion of the trial court and reversible only for a manifest abuse of discretion). A trial court abuses its discretion by exercising it on untenable grounds or for untenable reasons. *Minehart II v. Morning Star Boys Ranch, Inc.*, 156 Wn. App. 457, 463, 232 P.3d 591 (2010) (internal citation omitted). “[E]ven where an appellate court disagrees with a trial court, it may not substitute its judgment for that of the trial court unless the basis for the trial court’s ruling is untenable.” *Id.*

Applying these principles to the facts present here, it is plain that the challenged orders were within the trial court’s discretion and should be affirmed. The trial court has sifted through literally thousands of pages of briefing and record materials and held numerous hearings related to the parties’ respective positions in this case. Based on all of the information before it, the trial court determined that Zurich should be allowed to complete discovery deemed necessary and appropriate to facilitating a

decision before the hearing on Expedia's motion for summary judgment is set. It also addressed Expedia's concerns about potential prejudice by suggesting various options for proceeding (including a complete stay of the case until the underlying actions are complete or working to fashion a mutually agreeable form of protective order). June 15, 2012 RP 36:20-37:23. Making these kinds of calls is the trial judge's job. *See, e.g., Rhinehart*, 98 Wn.2d at 256.

According to Expedia, the trial court erred in deciding the issues of when the duty to defend arises, when it may be adjudicated, and whether its adjudication may be delayed by discovery. *See generally* Pls.' Br. at 16-37. This is simply not the case. As the trial court expressly noted, Expedia requested an order "providing that no further discovery or litigation be permitted concerning issues that overlap or are logically related to the matters and issues of the underlying actions" June 15, 2012 RP 30:19-23. The trial court was neither asked to decide nor decided, as a matter of law, whether extrinsic evidence is relevant to a determination of coverage. *Id.*

Expedia's assertion that the trial court confused the duty to defend and the duty to indemnify when it held that the discovery Zurich pursued was necessary to resolve Expedia's motion for summary judgment "on the merits" is equally unavailing. Pls.' Br. at 19 (quoting June 15, 2012 RP

37:8). For one thing, the record contradicts this assertion; the trial court never once mentioned the duty to indemnify in its oral ruling, while it mentioned the duty to defend numerous times. *See generally* June 15, 2012 RP. For another, nothing supports Expedia's apparent view that only indemnity, but not defense, may be resolved "on the merits" at the summary judgment stage. *See* Jay Tidmarsh, *Resolving Cases "On the Merits,"* 87 Denv. U. L. Rev., 407, 409 (2010) ("A case is resolved 'on the merits' when it is resolved accurately, on the basis of the law and the facts."); *see also, e.g., Nat'l Union Fire Ins. Co of Pittsburgh, Pa. v. Northwest Youth Servs.,* 97 Wn. App. 226, 232-33, 983 P.2d 1144 (1999) ("a grant of summary judgment constitutes a final judgment 'on the merits'").

Expedia's position is also undermined by its suggestion that its summary judgment motion, which Expedia seeks to have heard without allowing Zurich to complete any additional discovery, is limited to the duty to defend. Pls.' Br. at 10-11. In fact, Expedia requested summary disposition of its bad faith-related and CPA claims against Zurich as part of the same motion. It is well settled that whether an insurer acted in bad faith is a question of fact dependent upon the reasonableness of the insurer's conduct under the circumstances. *Smith v. Safeco Ins. Co.,* 150 Wn.2d 478, 78 P.3d 1274 (2003); *Wellman & Zuck, Inc. v. Hartford Fire*

Ins. Co., 170 Wn. App. 666, 285 P.3d 892 (2012), *review denied*, 176 Wn.2d 1019, 297 P.3d 707 (2013). It was thus appropriate and within the trial court's discretion to permit additional discovery to supplement the record before ruling on Expedia's motion.

2. **Expedia's Position Regarding The Evidence Available To Support Certain Coverage Defenses Is Contrary To Washington Law**

Despite the trial court's express statement to the contrary, Expedia insists that it could only have deferred ruling on Expedia's summary judgment motion if it determined that evidence Zurich was pursuing through its CR 56(f) motion was relevant to Expedia's motion. Pls.' Br. at 23-24 n.3. Leaving aside the matter of the trial court's intent, Expedia's position regarding the evidence available to support Zurich's remaining defenses only makes sense if this Court ignores the holding in *Overton*, 145 Wn.2d 417, and other relevant precedent.

According to Expedia, as long as the underlying complaints and the policies at issue raise the possibility of coverage, Zurich may not rely on extrinsic evidence to substantiate its known loss defense (or any other defenses) and must defend Expedia until it obtains a judicial determination regarding same. Pls.' Br. at 20-23. As discussed in § IV.B, the trial court did not hold, and Expedia has never attempted to meet its burden of showing, that all of the underlying complaints raise the possibility of

coverage. More significantly, Expedia's position with regard to Zurich's ability to rely on extrinsic evidence to support certain defenses that negate an insurer's duty to defend and its obligation to defend Expedia in the meantime is contrary to Washington law.

In *Overton*, an insured sought coverage in connection with a lawsuit instituted against it by the new owners of allegedly contaminated property purchased from the insured. When the insured tendered defense of the action (seeking contribution towards cleanup costs), both insurers refused to defend on several grounds, including that the claim was a "known loss." 145 Wn.2d at 423. The "known loss" doctrine prevents an insured from collecting on an insurance policy where, prior to policy inception, the insured possessed knowledge of a "substantial probability" that it would face the same type of loss or suit that eventually occurred. *See, e.g., Pub. Util. Dist. No. 1 v. Int'l Ins. Co.*, 124 Wn.2d 789, 807-08, 881 P.2d 1020 (1994).

To substantiate this defense, the insurers in *Overton* relied on evidence outside of the underlying complaint and the policies showing that the insured was aware of the property's contamination well before purchasing insurance. In reinstating the trial court's order granting summary judgment in the insurers' favor, this Court considered that same evidence (reports showing that the insured received notice of

contamination a year before purchasing insurance) and deposition testimony in the coverage action relating to the nature and timing of the insureds' knowledge. 145 Wn.2d at 429-31. According to the Court, "because [the insureds] knew of the PCB contamination before purchasing the policies, [defense and indemnity] coverage was properly denied . . . under the known-loss principle."¹⁰ *Id.* at 433.

Expedia's assertion that Zurich may not rely on extrinsic evidence in support of its known loss defense here is thus contrary to *Overton*. Overturning Washington precedent requires "a clear showing that the established rule is incorrect and harmful." *Am. Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 420, 229 P.3d 693 (2010) (dissenting opinion) (internal citation and alteration omitted). Expedia has not attempted to make this showing with respect to *Overton*. Instead, Expedia makes repeated reference to boilerplate language concerning application of the "eight corners" rule in insurance cases and an insurer's purported inability *ever* to rely on extrinsic evidence to deny a defense. *See, e.g.*, Pls.' Br. at 18 (citing cases).

It is fair to say that this is generally the case under Washington law. But it is also fair to say that this Court in *Overton*, as well as

¹⁰ The *Overton* court also found that coverage was properly denied on the ground there was no "occurrence." *Id.* at 432.

Washington courts in other pertinent contexts, have recognized limited exceptions permitting such use, generally in cases involving policy conditions or certain threshold matters. *See, e.g., Campbell v. Ticor Title Ins. Co.*, 166 Wn.2d 466, 475, 209 P.3d 859 (2009) (title insurer had no duty to defend a policyholder where the policy excluded coverage for easements not disclosed by the public record or arising after issuance of the policy); *Leven*, 97 Wn. App. at 428-32 (relying on evidence outside policies and pleadings concerning insured's late notice and resulting prejudice to the insurer in reversing trial court's finding that insurer owed duty to defend); *Hartford Fire Ins. Co. v. Leahy*, 774 F. Supp. 2d 1104, 1111-12 (W.D. Wn. 2011) (applying Washington law in finding that insurer could consider putative insured's deposition testimony in underlying tort litigation for purposes of determining whether insurer had duty to defend; "[b]efore the general principle regarding the duty to defend applies, it must be shown that the person claiming coverage is, in fact, an insured") (citation omitted); *Trinity Universal Ins. Co. v. Northland Ins. Co.*, No. C07-0884-JCC, 2008 WL 4386760 (W.D. Wn. Sept. 23, 2008) (applying Washington law in denying duty to defend based on insured's knowledge of property damage prior to policy inception, shown through statements outside of relevant pleading); *see also Reynolds v. Farmers Ins. Co.*, 90 Wn. App. 880, 960 P.2d 432 (1998)

(allowing post-tender reformation of a policy to correct the reinstatement time/date; because of the reformation, coverage was unavailable under the policy; absent the reformation, coverage would have been triggered). Like the insurers in these and other cases, Zurich is entitled to rely on extrinsic evidence to support the particular defenses at issue here (i.e., known loss, late notice and resulting prejudice, and material misrepresentations in applications/policy negotiations).

Zurich also is entitled to discovery relating to its defenses in order to present a complete record to the trial court on summary judgment. Contrary to Expedia's position, this is a rather routine occurrence in cases like this one, involving defenses like those at issue here. This Court's decision in *Overton*, for example, contains a detailed discussion of the insured's deposition testimony in the coverage case concerning the key facts supporting the insurer's known loss defense. 145 Wn.2d at 429-31. Similarly in *Leven*, the Court of Appeals reviewed the insured's interrogatory responses and deposition testimony before finding that the trial court had erred in concluding that the insurer owed a duty to defend the insured in certain underlying proceedings. 97 Wn. App. at 428-32. And, most recently in *National Surety Corp. v. Immunex Corp.*, this Court affirmed that discovery on the issue of whether an insured's late notice has prejudiced the insurer is appropriate. 176 Wn.2d 872, 891, 297 P.3d 688

(2013).

Expedia's heavy reliance on *Immunex* to support its position (*see, e.g.,* Pls.' Br. at 26) is misplaced. *Immunex* held that the mere fact of late notice, without more, is insufficient to establish prejudice to an insurer as a matter of law. Thus, an insurer that has agreed to provide a defense under a reservation of rights cannot simply withdraw its defense and avoid any payment obligation based on an allegation of late notice. 176 Wn.2d at 890-91. *Immunex* does not stand for the proposition that in a case like this one, which does not involve a reservation of rights defense, an insurer must pay defense costs until it obtains a judicial declaration that it owes no duty to defend.

3. The Trial Court Focused Not On Expedia's Financial Needs, But Instead Upon Expedia's Self-Imposed Delay

Expedia argues that the trial court declined to adjudicate Expedia's Motion for Summary Judgment in part because Expedia is a large corporate entity with the means to fund its own defense. Pls.' Br. at 29-32. Expedia's interpretation of the trial court's comments is misplaced. The trial court, reflecting on Expedia's years-long delay in tendering its claims to Zurich, stated as follows:

On the other hand, we have the odd situation where Expedia, in many cases, failed to tender these lawsuits to Zurich for years, was quite happy to litigate these cases, either through in-house counsel or hiring their own selected counsel and

then coming before the court and seeking affirmative relief, to force the insurers, after-the-fact, to defend. Expedia has, perhaps, done an excellent job through their counsel of defending these lawsuits, and perhaps have taken strategies and taken actions that the insurers' counsel, would not have taken. They are being put in the position of Expedia having driven the bus all of this time, suddenly getting up from the bus and saying "okay, it is your turn to drive. Never mind that the gas tank may only be half full and never mind that we are on an area that you are not familiar with driving. Second of all, we don't really want to give you all of the information that you need to drive the bus."

June 15, 2012 RP 35:3-16. The trial court went on to discuss the policy reasons supporting its decision:

There are good policy reasons why we ordinarily want insurance companies to step in quickly to defend. We don't want the insured to have to, quote, "fight a two-front war," or have to worry to worry about finding counsel to defend themselves. That is after all of why people get insurance.

But this is a somewhat unique situation where Expedia has adequate funds, obviously, to hire counsel, has made conscious decisions not to bring in an insurance counsel before now, and, in fact, to sit on that right for several years while they made their own decisions and sat in the bus driver's seat.

Id. 36:5-16.

Read in its full context, it is plain that the trial court did not simply decline to rule because Expedia has the means to pay for its defense. To the contrary, the trial court's reasoned explanation for its decision rests on the unique facts of this case, including repeated references to Expedia's late tender and other deliberate actions. Essentially, the trial court merely

pointed out that Expedia is a sophisticated insured who “has made conscious decisions not to” seek defense coverage until now. Courts in Washington, including this Court, have made similar observations about insureds in the past. *See, e.g., Grange Ins. Ass’n v. Great Am. Ins. Co.*, 89 Wn.2d 710, 716, 575 P.2d 235 (1978) (noting “The situation here, though, is very different” from “the more common situation of a layperson applying for insurance” in holding that city officials had the insurance and legal aptitude to understand their rejection of certain coverage and made an informed choice in that regard.); *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 706, 15 P.3d 115 (2000) (recognizing the relevance of an insured’s resources in noting “Weyerhaeuser is one of Washington’s major corporations and a Washington court can certainly take judicial notice of Weyerhaeuser’s business sophistication and ability to fend for itself while making arm’s length insurance contracts with equally sophisticated insurance companies.”).

4. The Challenged Orders Do Not Unfairly Prejudice Expedia In The Underlying Actions Or This Case

Expedia’s assertion that the challenged continuance and discovery-related orders must be reversed as a result of potential prejudice to Expedia in the underlying actions fares no better. Pls.’ Br. at 33-37. As an initial matter, although the trial court found that some of Zurich’s

pending discovery overlaps with issues in the underlying actions or risks prejudice to Expedia, it found that other discovery does not. June 15, 2012 RP 30:19-38:16. For example, based on review of the factual record, the trial court specifically ruled that there is no overlap between the waiver issue presented in Zurich's motion for in camera privilege review and the waiver issue being pursued by certain underlying plaintiffs relating to the same documents. *Id.* Additionally, given Expedia's reliance upon a 5-page, 20-paragraph declaration in support of its motion for summary judgment (CP 1888-94), it is difficult to conceive how Zurich's deposition of the declarant concerning the factual averments in her declaration could be deemed unfairly prejudicial to Expedia.

To sort through these and other issues while affording appropriate protection to Expedia, the trial court suggested that the parties confer regarding a prospective discovery protocol, with the trial court resolving any remaining disputes. June 15, 2012 RP 37:16-23. Other courts have embraced a similar approach, and Expedia has not demonstrated why this approach constitutes an abuse of discretion here. *See, e.g., Haskel, Inc. v. Superior Ct.*, 33 Cal. App. 4th 963, 39 Cal. Rptr. 2d 520 (1995) (remanding case for trial court to review evidence to determine which of insurer's discovery requests would prejudice insured in underlying action and to what extent a confidentiality order might afford adequate

protection).

Expedia's contention that it "is further prejudiced by the prospect that it could be forced to take contradictory positions in this case and in the underlying lawsuits" (Pls.' Br. at 35) is wholly unsupported. Expedia complains that "Zurich seeks to compel Expedia to identify potentially negligent acts that caused the damages the underlying plaintiffs are pursuing." *Id.* In an effort to show how there could be a potential for coverage under the policies, Expedia voluntarily supplied the trial court with examples of how it might have committed a negligent act. *See* § III.G, *supra*, at 16-17. Some of Zurich's pending discovery seeks to explore Expedia's on the record comments regarding its own negligence (which is required for coverage). Under these circumstances, Expedia cannot now accuse Zurich or the trial court of forcing it to take any contradictory positions in the underlying lawsuits.

What is more, the record makes abundantly clear that no one is "forcing" Expedia to do anything. Certainly no one "forced" Expedia to wait five years before providing notice to Zurich and filing this coverage lawsuit at a time when the dozens of underlying cases it was litigating remained active and ongoing. That timing was Expedia's choice alone. Proceeding with the option of staying the underlying case (one of the alternatives discussed in the trial court's ruling) would ensure that Expedia

is not “forced” to respond to any of Zurich’s discovery, whether potentially overlapping or not. Expedia’s rejection of this option is its prerogative, but it does not somehow transform the trial court’s August 22, 2012 ruling into one that “forces” Expedia to proceed with certain discovery.

The facts also belie Expedia’s claim that the trial court abused its discretion by depriving Expedia of a prompt resolution on its terms or its preferred form of a protective order precluding further discovery. Pls.’ Br. at 36-37. Given that Expedia waited years before simultaneously tendering the bulk of the underlying actions and initiating this lawsuit – at which time Expedia had either settled or litigated to the dispositive motion stage or beyond more than two dozen of the underlying cases – its professed concern about delay simply does not ring true.

Nor has the trial court’s action denied Expedia any needed “protection.” *Id.* To the contrary, in accordance with the trial court’s order, Expedia may seek to stay the entire case until any potential risk of prejudice has passed, or the parties can fashion a discovery protocol to allow non-prejudicial discovery and other proceedings to proceed in the interim. Either way, Expedia may continue with the defense strategy it unilaterally has controlled for years and may seek to recover defense (and indemnity) from Zurich at a later time. Expedia has not presented any

Washington or other authority finding the options for proceeding with discovery outlined by the trial court are harmful to insureds. Indeed, the reverse is true. *See, e.g., Montrose Chem. Corp. v. Superior Ct.*, 6 Cal. 4th 287, 301, 861 P.2d 1153 (1993) (option of staying a coverage action while underlying lawsuits are pending as an appropriate way to “eliminate the risk of inconsistent factual determinations that could prejudice the insured”).

In sum, Expedia has not shown that the trial court’s continuance and discovery-related rulings were based on untenable grounds, as it must to demonstrate an abuse of discretion. *See Minehart II*, 156 Wn. App. at 463-64. In light of Expedia’s failure in this regard, its petition should be denied.

V. CONCLUSION

Expedia is not entitled to any of the relief it seeks. The trial court’s order denying in part Zurich’s motion for summary judgment is not properly before this court. Beyond that infirmity, the issue of Zurich’s duty to defend Expedia under the two relevant policies was not decided below, so there is no decision to “reverse” or existing duty for the trial court to “enforce.” Nor, in light of the particular factual circumstances present here, did the trial court err when it refused to enter an order declaring that Zurich owes a duty to defend. Those circumstances include

Expedia's failure to meet its affirmative burden of establishing coverage for each of the nearly sixty underlying claims, the lack of record evidence to support any such showing, and the existence of other defenses to coverage that were not before the trial court at the time of its ruling.

The remaining two orders challenged by Expedia concern routine continuance and discovery issues that are within the trial court's discretion and should be affirmed. Although Expedia complains that the referenced orders deprived it of an early determination regarding the duty to defend and forced it to bear its own defense costs, this is not the case. Rather, Expedia's own conscious decision to wait as long as five years before tendering the bulk of the underlying lawsuits and simultaneously filing this coverage suit guaranteed these results.

DATED this 24th day of October, 2007.

FORSBERG & UMLAUF, P.S.

By: /s/Michael Hooks
Michael Hooks, WSBA #24153

MCKENNA LONG & ALDRIDGE LLP

By: /s/Joanne L. Zimolzak
J. Randolph Evans, *pro hac vice*
Joanne L. Zimolzak, *pro hac vice*

Attorneys for Respondents

Exhibit A

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

EXPEDIA, INC., a Washington
Corporation; EXPEDIA, INC., a Delaware
Corporation; HOTELS.COM, L.P., a Texas
Limited Liability Partnership;
HOTELS.COM, GP, LLC, a Texas Limited
Liability Company; HOTWIRE, INC., a
Delaware Corporation; TRAVELSCAPE, a
Nevada Limited Liability Company,

Plaintiffs,

v.

STEADFAST INSURANCE COMPANY,
a Delaware Corporation; ZURICH
AMERICAN INSURANCE COMPANY, a
New York Corporation; ROYAL & SUN
ALLIANCE, a Foreign Corporation;
ARROWPOINT CAPITAL CORP., a
Delaware Corporation; ARROWOOD
SURPLUS LINES INSURANCE
COMPANY, a Delaware Corporation;
ARROWOOD INDEMNITY COMPANY,
a Delaware Corporation,

Defendants.

Case No. 10-2-41017-1 SEA

REPLY DECLARATION OF MARK S.
PARRIS IN SUPPORT OF PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT AS
TO DEFENDANT ZURICH AMERICAN
INSURANCE COMPANY'S DUTY TO
DEFEND, BAD FAITH, AND CPA
VIOLATIONS UNDER ZURICH
AMERICAN INSURANCE POLICIES EOL
5329302-02 AND EOL 5329302-03

1 I, Mark S. Parris, declare under penalty of perjury under the laws of the State of Washington
2 that the following is true and correct:

3 1. I am an attorney with Orrick, Herrington & Sutcliffe LLP, counsel in the above-
4 captioned action for Plaintiffs Expedia, Inc., a Washington corporation; Expedia, Inc., a Delaware
5 corporation; Hotels.com, L.P.; Hotels.com, GP, LLC; Hotwire, Inc. and Travelscape (collectively,
6 "Expedia"). I have personal knowledge of the facts contained herein, am over the age of 18 years,
7 and am otherwise competent to testify hereto.

8 2. Attached hereto as Exhibit 1 is a true and correct copy of excerpts of the transcript of
9 the January 13, 2012 hearing on Defendants' motions for summary judgment.

10 3. Attached hereto as Exhibit 2 is a true and correct copy of six advisory rulings
11 relating to occupancy taxes issued prior to the inception date of the first Zurich policy at issue in
12 this motion, numbered EXP 0012754-EXP 0012782. The identity of the six jurisdictions and the
13 date of their rulings is provided in Exhibit 2.

14 4. Attached hereto as Exhibit 3 is a true and correct copy of excerpts of Expedia Inc.'s
15 Annual Report for 2006.

16 5. Attached hereto as Exhibit 4 is a true and correct copy of excerpts of Expedia, Inc.'s
17 Travel Agents/Tour Operators Professional Liability Insurance Application dated September 22,
18 2005, numbered EXP 0007452-0007461.

19 6. Attached hereto as Exhibit 5 is a true and correct copy of excerpts of Expedia, Inc.'s
20 Travel Agents and Tour Operators Professional Liability Insurance Application dated July 21, 2006,
21 numbered EXP 0007673-0007675.

22 Dated this 23rd day of April, 2012 at Seattle, Washington.

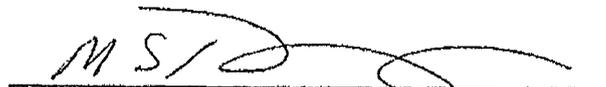
23
24 
25 Mark S. Parris
26
27
28

Exhibit 4



Expedia, Inc.

Don't just travel. Travel Right.

f a x f o r m

Expedia, Inc.
13810 SE Eastgate Way, Suite 400
Bellevue, WA 98006
United States of America

Phone: (425) 564-7200
Fax: (425) 564-7240

To: **Kristina McGrath**
Company: **Aon Financial Services Group**
CC:
Phone: **(312) 381-4470**
Fax: **(312) 381-8604**

From: **Brian Berge**
Bldg/Room: **Expedia/Bldg 3/4012**
Phone: **(425) 679-7120**
FAX: **(425) 564-7252**
Date: **9/23/05**
Qty of Pages: **12 pages (including cover)**

- Urgent For Review Please Comment Please Reply Please Recycle

Message...

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Travel Agents/Tour Operators Professional Liability Insurance Application

NOTE:

- Completion of this application does not obligate you in any way to purchase this insurance.
- Sections 1 & 2 are to be completed by all applicants.
- Sections 3 & 4 are to be completed if you operate or package your own tours.

SECTION 1

Business type: Corporation Partnership Sole Proprietor - List full legal name and all other operating names/DBAs.
 Independent Contractor/Home-Based Agent Other _____

Applicant Name: Expedra, Inc.

Trade Names: _____

Street Address: 3150 139th Avenue SE City: Belleve
 (Physical location of principal office, not a P.O. Box)

State: WA Zip: 98005

Phone: 425-679-7120 Fax: 425-679-3163

1. List all entities to be insured, including all Trade Names. Attach a separate sheet if necessary.
(SEE ATTACHED)

2. List all branch locations (including a mailing address if different from above). Attach a separate sheet if necessary.
(SEE ATTACHED)

3. Check all applicable categories and their percentages of total gross volume.
100 % Travel Agency _____ % Meeting Planner _____ % Student Tours
 _____ % Tour Operator _____ % Independent Contractor _____ % Adventure Tours

4. Type of Operation: 100 % Retail
 _____ % Wholesale *Include as Wholesale any business on which a commission is paid to another firm or agency*

5. On what date did present management assume control or ownership of the company? August 9, 2005

6. Gross Volume (Not Commissions)

A. Total Gross Sales from your travel business last year:	\$ _____
B. Gross Sales ONLY from the sale of air, rail, and bus transportation tickets last year:	\$ _____
C. Gross Sales ONLY from the sales of cruises last year:	\$ _____
D. Estimate of Total Gross Sales for the current year:	\$ _____
E. Percentage of sales derived from corporate travel:	_____ %
F. Percentage of sales booked via your agency's website:	_____ %

7. Number of Employees (other than owners): F/T 6 P/T 20 3,650 F/T Employees
 Number of Independent Salespeople: F/T _____ P/T _____ Number of Active Owners: _____

8. List all travel/tour associations, consortia, and/or franchisees in which you hold membership(s):
ARC, ASTA, IATA, NTA, USTOA

9. If you are an independent contractor, list the name(s) of your host agencies:

10. Does applicant operate their own tours or sell tours to other travel agents or affinity and/or non-affinity groups?
 Yes No
 If yes, complete sections 2, 3, and 4.
 If no, complete section 2 ONLY.

Please see SH Document

SECTION 2

11. Has any similar insurance been issued to applicant at any time? Yes No
 If a renewal, list expiring Policy No. _____ **SEE ATTACHED**
 Insurance Co.: _____ Exp. Date: _____ Limits: _____ Premium: _____

12. List desired effective date of coverage: OCTOBER 1, 2005

13. Optional Coverage Enhancements (check all desired):
 Additional Insureds (attach full names, address, and relationship to applicant)
 Fire Legal Liability; if greater than \$50,000
 Third Party Bankruptcy (available to retail agencies and independent contractors only)
 General Extended Liability (Hold Harmless agreements and Premises Medical)
 Advertising Injury Liability, Coverage B
Note - Inclusion of the above enhancements is subject to additional premium and underwriting guidelines. These options will be quoted separately (if available).

14. Does your agency currently offer Travel insurance? Yes No

15. Do you, or does your company, have an interest in any other business? Yes No If yes, please explain.

16. Do you, or does your company, or any owner, partner, officer, or employee have knowledge or information of any occurrence, situation, act, error, or omission which might give rise to a claim or has already resulted in a claim such as would be covered by the proposed insurance? Yes No
 If yes, state the nature of the claim, the amount involved and results, the date when the claim was made and the date when the act was committed.

I/we hereby declare that the above statements and particulars are true and that I/we have not suppressed or misstated any material facts and I/we agree that this application shall be the basis of the contract with the insurance company. It is understood and agreed that the completion of this application does not bind the company to issue nor the applicant to purchase the insurance.

Program Administered By:

Berkely Agency
 P.O. Box 9366
 100 Garden City Plaza
 Garden City, NY 11530
 (800) 645-2474 • Fax: (516) 494-1821
 www.berkely.com
 E-mail: info@berkely.com

Name of Principal: Kret Myers
 (please print)
 Signature: [Signature] Date: 9-22-05
 Tel: 425-679-7451 Fax: 425-679-3123
 E-mail: _____
 Website: _____

NOTICE TO APPLICANTS: Any person who knowingly and with intent to defraud any Insurance Company or other person files an application for insurance containing any false information or conceals for the purpose of misleading information concerning any false material thereto, commits a fraudulent insurance act, which is a crime.

SECTION 3

Tour Operator Supplemental Questionnaire

MA

In order for us to complete our underwriting review, this form **MUST** be completed if you are operating your own tours.

1. What percentage of your total gross sales is derived from the operation of tours? _____%
2. What percentage of your total gross sales is derived from (total must equal 100%): Domestic Tours (United States & Canada): _____% International Tours: _____%
3. What percentage of your total gross sales for domestic locations go to the following location, if applicable, (total must equal 100%) Boston, Chicago, Los Angeles, New York, Philadelphia, San Francisco, Seattle, and/or Washington DC: _____% All other U.S./Canadian locations: _____%
4. What percentage of your total gross sales for international tours go to the following locations, if applicable, (total must equal 100%) Africa _____% Central America (excluding Mexico) _____% Mexico _____% South America _____% Southeast Asia _____% Eastern Europe _____% Middle East _____% Other _____%
5. A. Is applicant actively involved in the sale of: Student Tours? <input type="checkbox"/> Yes <input type="checkbox"/> No Adventure Tours? (skiing, river rafting, etc.) <input type="checkbox"/> Yes <input type="checkbox"/> No B. Does applicant operate such tours? <input type="checkbox"/> Yes <input type="checkbox"/> No C. If you answered "Yes" to either 5A or 5B, what percentage of your total gross sales are derived from these tours? _____%
6. A. If 25% or more of your volume involves student tours, please complete the following: _____ % Domestic Tours _____ % International Tours B. What percentage of your Domestic Tours are: Educational: _____ % Leisure: _____ % C. What percentage of your International Tours are: Educational: _____ % Leisure: _____ % D. What percentage of your Domestic Educational Tours are: Camps: _____ % Homestays: _____ % Adventure: _____ % E. What percentage of your Domestic Leisure Tours are: Camps: _____ % Homestays: _____ % Adventure: _____ % F. What percentage of your International Educational Tours are: Camps: _____ % Homestays: _____ % Adventure: _____ % G. What percentage of your International Leisure Tours are: Camps: _____ % Homestays: _____ % Adventure: _____ % H. Number of students handled annually: _____
7. Attach samples of tour brochures/itineraries or a detailed description of operations. Also include Sample Responsibility/Disclaimer provisions.
8. Risk Management - General Please check which of the following loss control/risk management procedures are currently used by your organization. Please provide at least one sample for all affirmative answers. <input type="checkbox"/> Use of Disclaimers/Responsibility Clauses on brochures or travel documents. <input type="checkbox"/> Collection of Certificates of Insurance from Vendors <input type="checkbox"/> Emergency Hot-Lines <input type="checkbox"/> Sale of Travel Insurance <input type="checkbox"/> Operations Manual - written procedures <input type="checkbox"/> Loss Control Manual - written procedures <input type="checkbox"/> Continuing Education requirements and/or Certification Programs <input type="checkbox"/> Use of Preferred Suppliers and percentage of total volume this represents _____%

Name of Applicant: _____ City: _____ State: _____

SECTION 4

Application for Transportation Coverage - Hired & Non-Owned Automobile

NA

In order for us to complete our underwriting review, this form **MUST** be completed if you operate tours. Please check if any of the following characteristics apply to your operations. Attach supporting documentation, if applicable. If none apply, please show N/A on the lines provided.

A. Transportation Services - Motorcoach Tours				
1. Percentage of your total gross sales for:				
Domestic Motorcoach Tours: _____%				
International Motorcoach Tours: _____%				
2. Please complete the following table regarding your top 3 destinations:				
Top 3 Destinations	% of Total Sales	Total Passengers	Average Trip Cost per Passenger	Average # of Days per Tour
1.				
2.				
3.				
3. Check the miles traveled per day for your average tour:				
<input type="checkbox"/> Up to 50 miles <input type="checkbox"/> Up to 100 miles <input type="checkbox"/> Up to 200 miles <input type="checkbox"/> Over 200 miles				
4. Check the average seating capacity of the vehicles used to transport your clients:				
<input type="checkbox"/> Fewer than 16 <input type="checkbox"/> 16 or over				
B. Transportation Services - Airport Transfers				
1. What percent of tours involve airport transfers? Domestic Tours _____% International Tours _____%				
C. Vendor Selection - Motorcoach and Airport Transfers				
1. Please attach your standard operating procedures for the selection of transportation vendors for your domestic and international tours.				
2. Does your company or any of its owners or principals or any affiliated company have any ownership interest in any ground or receptive operator? <input type="checkbox"/> Yes <input type="checkbox"/> No				
If yes, please list: _____				
D. Transportation Vendor Agreements				
Attach a sample of your typical transportation vendor agreement. If none is used, please check here _____				
E. Risk Management/Loss Control				
1. Disclaimer/Responsibility Clauses				
<ul style="list-style-type: none"> • Please attach a copy of your responsibility/disclaimer language that appears in any of your materials/brochures. • For internet sales (on-line bookings), please explain how this responsibility clause/disclaimer is communicated to the buyer and how can you document their acceptance of its terms and conditions? _____ _____				
2. Certificates of Insurance				
<ul style="list-style-type: none"> • What are your standard operating procedures for the collection of certificates of insurance (evidence of liability coverage) from your vendors? Do you require minimum limits? If so, how much and under what circumstances would these limits vary? _____ _____				
3. Loss Control Programs				
<ul style="list-style-type: none"> • Are written loss control guidelines in place? <input type="checkbox"/> Yes <input type="checkbox"/> No If yes, please attach samples. • Do you ever attend Risk Management Seminars? <input type="checkbox"/> Yes <input type="checkbox"/> No If yes, please explain. _____ _____				

Name of Applicant: _____ City: _____ State: _____

Exhibit 5

Travel Agents and Tour Operators Professional Liability Insurance Application
ZURICH AMERICAN INSURANCE COMPANY
SECTION 1

Business type: Corporation Partnership Sole Proprietor Independent Contractor/Home-Based Agent Other _____

Company/Applicant Name: Expedia, Inc

Street Address: 3150 139th Avenue SE City: Bellevue State: WA Zip: 98005
 (Physical location of principal office, not a P.O. Box) Phone #: 425-679-7120 Fax #: 425-679-8163

1. List all entities to be insured, including all Trade Names. Attach a separate sheet if necessary. (see attached)

2. List all branch locations (including a mailing address if different from above). Attach a separate sheet if necessary. (see attached)

3. Check all applicable categories and their percentages of total gross volume. 100% Travel Agency _____ % Tour Operator
 _____ % Host Agency _____ % Meeting Planner _____ % Other (explain) _____

4. Type of Operation: 100% Retail _____ % Wholesale (any business on which a commission is paid to another firm or agency)

5. On what date did present management assume control or ownership of the company? Aug 9, 2005

Please see website EDG PR

6. Gross Volume (Not Commissions):
 A. Total Gross Sales from the applicant's travel, tour, and/or meeting planning business last year: \$ _____
 B. Gross Sales ONLY from the sale of air, rail, and bus transportation tickets last year: \$ _____
 C. Gross Sales ONLY from the sale of cruises last year: \$ _____
 D. Estimate of Total Gross Sales from your travel, tour, and/or meeting planning for the current year: \$ _____
 E. Percentage of sales derived from corporate travel: _____ %
 F. Percentage of sales booked via the applicant's website: _____ %

7. Number of Employees (other than owners): 4157 P/T _____
 Number of Independent Salespeople: P/T _____ P/T _____ Number of Active Owners: _____

8. Number of Certified: A. Travel Counselors/Master Cruise Counselors on staff: _____
 B. Tour Professionals on staff: _____
 C. Meeting Planners on staff: _____

9. A. Check all of following organizations in which the applicant holds an appointment: ARC IATAN CLIA
 B. List all travel/tour associations, consortia, and/or franchises in which the applicant holds membership(s): ARC, ASTA, IATA, NTA, USTOA

10. If the applicant is an independent contractor, list the name(s) of the applicant's host agencies: _____

11. Has any similar insurance been issued to applicant at any time? Yes No If renewal, list expiring Policy No. _____
 Insurance Co. _____ Exp. Date: _____ Limit: _____ Premium: _____

12. List desired effective date of coverage: Oct 1, 2006 ADW Has Information

13. Does the applicant's agency currently offer Travel Insurance? Yes No

14. Does the applicant, or does the applicant's company, have an interest in any other business? Yes No If yes, please explain _____

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PLEASE PROCEED TO THE NEXT PAGE**

U-TAP-191-A CW (11/04)
Page 5 of 10

CONFIDENTIAL

EXP 0007674

OFFICE RECEPTIONIST, CLERK

To: Jean M. Young
Cc: Michael P. Hooks; Zimolzak, Joanne; Zaltsberg, Michelle; Wagner, Carol
Subject: RE: Supreme Court Case No. 88673-3 Expedia, et al v. Steadfast, et al.

Rec'd 10/24/2013

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Jean M. Young [mailto:JYoung@forsberg-umlauf.com]
Sent: Thursday, October 24, 2013 2:30 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Michael P. Hooks; Zimolzak, Joanne; Zaltsberg, Michelle; Wagner, Carol
Subject: Supreme Court Case No. 88673-3 Expedia, et al v. Steadfast, et al.

RE: *Expedia, Inc., et al. v. Steadfast Insurance, et al.*
King County Superior Court Cause No. 10-2-41017-1
Supreme Court Cause No. 88673-3

Clerk of the Court:

Please file the attached on behalf of Respondents Steadfast Insurance Company, et al.

Thank you for your attention to this matter.

Jean Marie Young | Forsberg & Umlauf, P.S.
Legal Assistant
901 Fifth Avenue, Suite 1400 | Seattle, WA 98164
Tel: 206-346-3923 (direct) | Fax: 206-689-8501
www.forsberg-umlauf.com

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