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NO. 69341-7-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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/Appellants,

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/Respondents.

PLAINTIFFS/APPELLANTS' MOTION FOR DISCRETIONARY
REVIEW

Mark S. Parris (WSBA No. 13870)
Paul F. Rugani (WSBA No. 38664)
ORRICK, HERRINGTON & SUTCLIFFE LLP
701 Fifth Avenue, Suite 5600
Seattle, WA 98104-7097
(206) 839-4300

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I. INTRODUCTION

*ATTENTION ALL POLICYHOLDERS: Regardless of your policy's language, your insurer has no duty to defend until you defeat **all** the insurer's defenses to coverage **as a matter of law**, even if to do so you must engage in discovery related to, or litigate, issues that may cause you prejudice in the underlying litigation.*

That was effectively the trial court's ruling in this case. The trial court refused to hear Expedia's duty to defend motion until discovery was completed. This leaves Expedia facing an irreconcilable dilemma—either forgo defense coverage until the underlying lawsuits are concluded or pursue that coverage and potentially prejudice its position in those lawsuits. This result is fundamentally at odds with Washington law.

The Washington Supreme Court has long recognized that the duty to defend is different from the duty to indemnify in both scope and timing. The duty to defend arises at the moment a complaint asserting a potentially covered claim is filed; in other words, at the inception of the underlying lawsuit. The duty to indemnify arises only at the conclusion of the underlying litigation, if and when there is actual liability to indemnify. Unlike the ultimate indemnity obligation, the question of whether the duty to defend has arisen is determined solely from the eight corners of the relevant policy and relevant underlying complaint. The duty to defend determination is designed to and must be made early, so that the policy-

holder receives the benefit of a defense while the underlying lawsuit is ongoing. Otherwise, the duty to provide a “defense” becomes nothing more than an obligation to reimburse after the fact.

The duty to defend and the Washington policy favoring early determination of that duty is frustrated if a policyholder must sue its insurer and wait until trial in the coverage case in order to obtain defense coverage. It is doubly frustrated if the insurer can force its policyholder to engage in discovery that overlaps with and is potentially prejudicial to the policyholder in the underlying lawsuit. To avoid these problems, the Washington Supreme Court *requires* insurers to defend so long as any possibility of underlying indemnity coverage exists. Am. Best Food, Inc. v. Alea London Ltd., 168 Wn.2d 398, 404, 229 P.3d 693 (2010). That Court also has held that an insurer acts in bad faith if it litigates coverage issues that might prejudice its insured’s defense. Mut. of Enumclaw Ins. Co. v. Dan Paulson Constr., Inc., 161 Wn.2d 903, 918, 169 P.3d 1 (2007).

The trial court disregarded these rules. Instead of requiring Zurich to meet its contractual and legal obligation to defend Expedia until it could prove that coverage was impossible as a matter of law, the trial court did the exact opposite. It gave Zurich a free pass to sit on its hands and force Expedia to bear the burden of millions of dollars in defense costs. The trial court refused even to consider Expedia’s motion seeking to obtain a

ruling that the duty to defend had been triggered unless and until Expedia completed “dangerous” and “injurious” discovery. The trial court committed probable error that substantially limits Expedia’s freedom to act. This Court should grant discretionary review and uphold the longstanding principles of Washington insurance coverage law that the trial court cast aside.

II. IDENTITY OF PETITIONER

Petitioner Expedia asks this Court to accept review of the decision designated in Part III of this motion.

III. DECISION BELOW

Expedia seeks discretionary review of the trial court’s August 22, 2012 order refusing to set for hearing Expedia’s motion for summary judgment on the duty to defend and refusing to stay litigation of and discovery into issues that—as the trial court recognized—create a risk of prejudice to Expedia’s interests in the underlying lawsuits (A.1-3, 4-14)¹, as well as all ancillary orders relating to the August 22, 2012 order.

IV. ISSUES PRESENTED FOR REVIEW

1. The trial court refused to consider Expedia’s duty to defend motion based on the policies and underlying complaints and instead continued the motion until Zurich obtains discovery from Expedia

¹ “A. ___” denotes citation to the Appendix to Plaintiffs/Appellants’ Motion for Discretionary Review, filed along with this Motion.

concerning additional information that could be “dangerous” and “injurious” to Expedia in the underlying litigation. Did the trial court commit probable error that substantially limits Expedia’s freedom to act?

V. **STATEMENT OF THE CASE**

A. **Expedia Operates a Merchant Model Business to Assist Consumers with Reserving Rooms from Hotels.**

Expedia makes travel reservations simple. Under its merchant model, Expedia places all relevant information about hotels at a traveler’s fingertips through Expedia’s website. As travelers readily recognize, Expedia does not provide this valuable service for free. Instead, Expedia charges consumers a total price that includes: (1) the rate charged by the hotel for occupancy of the room (the rent); (2) an amount retained by Expedia for the online services it provides to the customer (the facilitation fee); and (3) an amount for “tax recovery charges and service fees,” which consists of an amount equal to any applicable local occupancy tax on the rent and an additional fee for Expedia’s services. (A.17-19.)

An occupancy tax is a levy imposed on short-term hotel occupants. The City of Los Angeles’s ordinance, for example, provides that the hotel guest must pay a percentage of the rent charged by the hotel as a tax for the privilege of occupancy. (A.48.) Although the tax falls on the guest, the City generally does not collect the tax directly from individual travelers. Instead, hotel operators include the tax on the occupant’s bill

and collect it at the same time as the rent for the room is collected.

Expedia does not operate hotels or rent rooms to travelers, but because its customers pay for their hotel room reservations at the time of booking, Expedia's policy is to charge them an amount estimated to be sufficient to cover the occupancy tax that the hotels will be responsible for remitting for their guests' stays. In calculating the estimated tax amounts, Expedia applies the tax rates supplied by the hotels to the discounted rate it negotiated with the hotel (i.e., the rent charged by the operator), rather than the total retail price the customer ultimately pays to Expedia (rent plus fees). (A.19.)

To illustrate, suppose a customer reserves a hotel room in a municipality with a 10% occupancy tax. If Expedia has negotiated a room rate of \$80 from the hotel, it will add \$8 in tax to the customer's bill (10% of the rate charged by the hotel). Expedia transmits to the hotel both the rent and the estimated tax due, and the hotel remits the tax to the municipality. Expedia, meanwhile, retains any fees it charges and pays all applicable taxes owed on that amount (e.g., income taxes, payroll taxes, and the like). In other words, every dollar Expedia obtains from its customers is taxed in some form or another.

B. Cash-Strapped Municipalities Sue Expedia to Pursue Additional Revenue.

Though Expedia's practices comport with the relevant ordinances and have long been the industry standard, cash strapped municipalities have claimed that Expedia should have been charging travelers taxes based on the full retail price of the room. Over the past several years, some local governments have filed suits seeking, among other things, damages equal to the increase in revenue they would have received had Expedia used a retail price calculation. Although there are roughly 7,500 taxing jurisdictions in the United States, only 80 lawsuits have been brought against Expedia. Most cases remain pending, but among those that have been fully adjudicated, Expedia has prevailed in all but a few.

The suits generally allege that Expedia breached a duty, whether innocently, negligently, or by some other error or mistake. (A.33.) Each states a primary claim for violation of the relevant tax ordinance, which does not require the jurisdiction to prove intent or any particular mental state with respect to Expedia. Some jurisdictions also seek punitive damages or other penalties, alleging, for example, that Expedia acted "willfully, wantonly, and with conscious disregard for the rights of the [plaintiff]," and thus the plaintiff is entitled to "additional damages in an amount sufficient to punish Defendants." (A.54.) No court has found that

Expedia has intentionally or willfully violated the law.

C. **Expedia Tendered the Claims to Its Liability Insurers, Who Denied Coverage.**

Expedia procured Travel Agents Professional Liability insurance from three insurance companies over the course of nine policy periods. Each policy provides Expedia with broad coverage for any liability for damages arising out of a negligent act, error, or omission in the course of its travel agency operations. (A.74.) The policies require the insurers to defend Expedia against any suit seeking such damages. (*Id.*) That obligation requires the insurers to provide a defense on an ongoing basis while a potentially covered lawsuit is pending; it is not merely an obligation to reimburse defense expenses after the lawsuit concludes.

After being served with the complaint in the first lawsuit, Expedia's broker tendered the action to its insurers on June 10, 2005. Less than three weeks later, the insurers denied coverage and refused to provide Expedia with a defense. (A.86-90.) In 2010 and 2011 Expedia tendered 62 additional lawsuits to its insurers, who again summarily refused Expedia's tender. (A.91-108.) With the insurers having refused to defend, Expedia has been defending the underlying lawsuits at its own expense, incurring tens of millions of dollars of attorneys' fees.

Expedia filed this action in November 2010, seeking declaratory

relief and asserting claims for breach of contract and bad faith against each of its insurers. With respect to two of the policies—issued by respondent Zurich—the trial court denied Zurich’s motion for summary judgment, finding that Zurich had not proven that coverage for the underlying claims was impossible under those policies. (A.112, 123-24.)

D. The Trial Court Refuses to Hear Expedia’s Motion for Summary Judgment on the Duty to Defend Until the Completion of Prejudicial Discovery.

Following the trial court’s determination that Zurich had not proven that coverage was impossible, Expedia moved for summary judgment on March 30, 2012, seeking a ruling that Zurich’s duty to defend was triggered by the filing of the underlying actions with respect to the two remaining Zurich policies.² Expedia argued that the underlying complaints sought damages from Expedia based on potentially negligent acts, errors, or omissions, thus giving rise to a possibility of coverage under the policies, as confirmed by the trial court’s earlier finding that Zurich could not prove that coverage was impossible.

The motion was set for hearing on April 27. Along with its opposition, Zurich moved for a Rule 56(f) continuance, arguing that it needed to develop evidence outside of the underlying complaints and the policies at issue to raise questions of fact concerning its coverage

² The motion also sought a ruling as to certain bad faith claims.

defenses. Rejecting the “eight corner” rule³ and Expedia’s argument that questions of fact are irrelevant to the question of whether the duty to defend has arisen, the trial court granted Zurich’s motion and took Expedia’s summary judgment motion off calendar. (A.128-29.)

Zurich asserted that before the trial court could determine whether the underlying lawsuit triggered its defense obligation it was entitled to discovery concerning Expedia’s knowledge and intent. Much of this discovery overlaps with issues being litigated by the plaintiffs in the underlying lawsuits who are seeking evidence concerning what Expedia knew about potential occupancy tax liability, and when, to try to prove that Expedia acted with intent. (A.131-37.) Discovery into these overlapping issues exposes Expedia to potential prejudice in the underlying litigation, including punitive damages.

In an effort to get its duty to defend motion heard as quickly as possible, Expedia completed as much of the outstanding discovery as it could without exposing itself to the risk of prejudice in the underlying lawsuits. Expedia then filed a motion seeking to have the trial court (a) set a hearing date for Expedia’s duty to defend motion while (b) protecting Expedia from potentially prejudicial discovery.

The trial court found that there is a “dangerous overlap” between

³ The duty to defend is determined from the four corners of the policy and the four corners of the complaint.

the coverage case and the underlying cases concerning “the discovery seeking Expedia’s knowledge or intent regarding its liability for the payment of the certain occupancy tax amounts.” (A.7.) It further found Zurich’s pursuit of discovery from Expedia “could be injurious to [Expedia’s] interests” in the underlying cases. (Id.) The trial court nonetheless refused to hear Expedia’s duty to defend motion until that dangerous and injurious discovery was complete because it could not “conclude, as a matter of law, that this discovery is not relevant to the [insurance] company’s defenses.” (A.7-8.) The trial court entered an order denying Expedia’s motion on August 22, 2012. (A.1-3.)

VI. ARGUMENT

As a result of the trial court’s order, Expedia is forced to choose between two equally unpalatable alternatives: (1) forgo the defense coverage Zurich promised to provide and fund the underlying lawsuits at its own expense until all of them have fully and finally concluded, or (2) proceed with dangerous and potentially prejudicial discovery in order to pursue its bargained-for defense. Washington law prohibits insurers from forcing policyholders into such problematic choices. Instead, Washington follows two overarching principles designed to protect against that very quandary: (1) the duty to defend arises *at the moment* a complaint is filed asserting potentially covered claims against an

insured—as determined solely from the eight corners of the complaint and the relevant policy—and (2) an insurer owes its insured a duty of good faith and may not engage in conduct that exposes the insured to the risk of prejudice in the underlying litigation. The trial court’s order frustrates both principles. The trial court should have heard Expedia’s motion and determined whether the underlying complaints triggered the policies’ duty to defend. It should not have forced Expedia into the impossible position of choosing either to forgo its bargained-for defense coverage or to litigate factual issues relevant to the occupancy tax cases before those issues are resolved in those cases. Discretionary review is warranted because the order constitutes probable error and limits Expedia’s freedom to act.

A. **Review Is Proper Under RAP 2.3(b)(2) Because the Trial Court Committed Probable Error in a Manner That Limits Expedia’s Freedom to Act.**

This Court may grant discretionary review of any act by a trial court in which it “committed probable error” and the act “substantially alters the status quo or substantially limits the freedom of a party to act.” RAP 2.3(b)(2). Discretionary review is particularly suited to acts by the trial court that have “immediate effects outside the courtroom.” Geoffrey Crooks, Discretionary Review of Trial Court Decisions Under the Washington Rules of Appellate Procedure, 61 Wash. L. Rev. 1541, 1545-46 (1986). Here, the trial court’s order inhibits Expedia’s freedom to act

both in this case and in the underlying lawsuits.

The trial court also committed probable error by requiring Expedia to complete potentially prejudicial discovery related to all of Zurich's various coverage defenses prior to obtaining a ruling on the duty to defend. Under Washington law, the duty to defend arises *at the moment* a covered complaint is filed against a policyholder. Griffin v. Allstate Ins. Co., 108 Wn. App. 133, 138, 29 P.3d 777 (2001). Once a covered complaint has been filed, an insurer *must* defend *until it is clear* that the claim is not covered. Am. Best, 168 Wn.2d at 405. And the duty to defend "must be determined from the complaint" and not any additional evidence sought by the insurer. Or. Mut. Ins. Co. v. Hartford Fire Ins. Co., No. 66755-6-I, slip op. at 9 (Div. 1 Ct. App. Sept. 17, 2012) (A.151). The trial court's decision discards those rules and instead holds a policyholder's right to defense coverage hostage to any number of factual defenses—including defenses for which the related discovery would overlap with, or expose the policyholder to prejudice in, the underlying lawsuits—interposed by an insurer.

1. **The Trial Court Committed Probable Error by Forcing Expedia to Complete Discovery Before Ruling on Expedia's Duty to Defend Motion.**

Liability policies are meant to protect policyholders from litigation, not spawn it. See Hayseeds, Inc. v. State Farm Fire & Cas., 177

W. Va. 323, 329, 352 S.E.2d 73 (W. Va. 1986) (“[W]hen an insured purchases a contract of insurance, he buys insurance—not a lot of vexatious, time-consuming, expensive litigation with his insurer.”). When an insured is sued for *any* potential liability that *might possibly* be covered by its insurance policy, the insurer’s duty is simple and straightforward—provide a defense immediately. “The triggering event is the filing of a complaint alleging covered claims” and the “key consideration in determining whether the duty to defend has been invoked is whether the allegation in the complaint, if proven true, would render the insurer liable to pay out on the policy.” Griffin, 108 Wn. App. at 138 (2001) (internal quotation marks omitted). The trial court’s refusal to hear Expedia’s duty to defend motion constitutes probable error because it robs Expedia of the prompt adjudication of its defense coverage to which it is entitled.

The immediate defense obligation is “one of the main benefits of the insurance contract.” Truck Ins. Exch. v. VanPort Homes, Inc., 147 Wn.2d 751, 760, 58 P.3d 276 (2002). Particularly in the modern world of litigation, the expenses incurred defending against potential liability can be just as burdensome as the ultimate liability itself, if not more so. While the ultimate liability may be avoided, particularly where the allegations prove to be untrue, the defense costs must be borne regardless of the outcome. For this reason, insurers must defend potentially covered claims

until it is clear that no possibility for coverage exists.

If an insurer could refuse to defend its policyholders for so long as disputed issues concerning coverage remained, any incentive for an insurer to defend during the pendency of underlying litigation would disappear. Policyholders would be left without the promised security that their insurance was intended to provide. They would be forced to “double down” and fund two parallel lawsuits—one to avoid liability in the underlying case and one to compel the insurer to provide the bargained-for benefits of the insurance policy. If an insurer could also rely on disputed facts to avoid its defense obligation, it could erect a nearly insuperable barrier of defenses, each of which must be conclusively eliminated by the policyholder before the policyholder receives its promised defense.

Fortunately, the Washington courts do not condone such a perverse result. Instead, they have gone to great lengths to ensure that policyholders are not left to fend for themselves when faced with potentially covered lawsuits. If an insurer disputes coverage, the course of action Washington courts prescribe is to defend under a reservation of rights and then seek to extinguish that defense if *and when* it ultimately develops evidence that conclusively shows that no possibility of coverage exists. VanPort, 147 Wn.2d at 761. An insurer who refuses to defend and thus forces its policyholder to sue to enforce the insurance policy is subject to

the same standards, as it must be to avoid the perverse incentives described above. The insurer can seek to defeat coverage, but in so doing it may not delay a ruling on its duty to defend by reciting the need to conduct discovery. For so long as the insurer has not extinguished the possibility of coverage—something the trial court found that Zurich failed to do with respect to the two policies at issue—it must defend. Am. Best, 168 Wn.2d at 405. The insurer is entitled to investigate to determine if it can extinguish coverage, but if “there is any reasonable interpretation of the facts or the law that could result in coverage, the insurer must defend.” Id. An insurer may not “desert policyholders and allow them to incur substantial legal costs while waiting for an indemnity determination.” Id. Instead, the policyholder may proceed immediately to a determination of the duty to defend based on the eight corners of the policies and the complaints. Woo v. Fireman’s Fund Ins. Co., 161 Wn.2d 43, 53, 164 P.3d 454 (2007); VanPort, 147 Wn.2d at 760; Or. Mut., slip op. at 9 (A.151).

The California Court of Appeals addressed this precise issue and ruled that the policyholder’s right to an adjudication of the duty to defend may not be delayed so that the insurer can conduct discovery into disputed factual issues. In Haskel v. Superior Court, 33 Cal. App. 4th 963, 39 Cal. Rptr. 2d 520 (1995), answering the very question posed to the trial court here—“To what extent, if at all, is an insurer entitled to delay a summary

adjudication of the defense duty issue until discovery has been completed on disputed coverage questions?”—the court held that the insurer *may not* “delay an adjudication of their defense obligation until they develop sufficient evidence to retroactively justify their refusal to provide that defense.” *Id.* at 973, 977. The Haskel court held that such a delay was “directly contrary” to duty to defend principles. *Id.*

The duty to defend principles that animated the Haskel decision are the same ones that provide the framework for the Washington rules discussed above. *See id.* at 976-77 (insurer must provide a defense “unless and until they . . . *conclusively* establish[] that there is no potential for coverage”); *id.* at 976 (noting that the duty to defend arises on tender and lasts “until it has been shown that there is *no* potential for coverage” (internal quotation marks omitted)). The trial court’s order disregards these principles. It allows Zurich to refuse to provide a defense even though it has not carried its burden of proving that coverage is impossible. Its ruling facilitates Zurich’s wrongful refusal to provide a defense based on disputed issues of fact and thus constitutes probable error.

2. **The Trial Court’s Order Limits Expedia’s Freedom to Act by Forcing It to Proceed with Overlapping and Prejudicial Discovery.**

The trial court’s order exposes Expedia to prejudice in two ways. First, Expedia is forced to litigate issues that have yet to be resolved in the

underlying lawsuits, which could expose Expedia to the risk that the underlying plaintiffs may argue that findings by the trial court in this coverage case could bind Expedia in those cases. Second, Expedia is forced to take positions in the coverage action that are diametrically opposed to its positions in the underlying actions.

Washington law is clear that insurers violate their duty of good faith when they take positions in coverage litigation that expose their policyholders to the risk of prejudice in the underlying lawsuits. Dan Paulson, 161 Wn.2d at 918 (insurer acts in bad faith if it litigates coverage issues that “*might* prejudice its insured’s tort defense” (emphasis added, internal quotation marks omitted)); W. Nat’l Assur. Co. v. Hecker, 43 Wn. App. 816, 821 n.1, 719 P.2d 954 (1986) (insurer may not litigate “facts upon which [underlying] liability is based”). Facts that overlap with or are logically related to the issues in the underlying lawsuits are off limits in coverage cases while the underlying lawsuits are ongoing. See Thomas V. Harris, Washington Insurance Law, § 14.02 (3d ed. 2010). The overlapping facts “can only be decided in the damage action”; it is the job of the underlying court, and not the coverage court, to determine those facts in the first instance. Holland Am. Ins. Co. v. Nat’l Indem. Co., 75 Wn.2d 909, 912, 454 P.2d 383 (1969).

The discovery that Zurich pursues—and that the trial court held

must be completed before Expedia's duty to defend motion could be heard—results in precisely the overlap that Washington courts prohibit. Zurich and the underlying plaintiffs both are trying to prove, among other things, that Expedia's actions in failing to pay occupancy taxes were intentional, willful, and deliberate. The focus of much of Zurich's discovery has been on establishing what Expedia knew and when in order to further Zurich's claims that Expedia acted intentionally or that the losses Expedia suffered were known in advance. Zurich has sought documents concerning Expedia's communications with the underlying taxing authorities, other taxing authorities beyond those at issue in the underlying lawsuits, and Expedia's internal analysis of issues relating to occupancy taxes. These are precisely the same topics that the underlying plaintiffs are pursuing in discovery. (A.131-37.) This discovery also extends beyond the complaint and the policies and thus is not relevant to whether the duty to defend has arisen. See Woo, 161 Wn.2d at 53-54.

Forcing Expedia to complete this discovery exposes Expedia to the risk that questions concerning its knowledge and intent could be resolved in the coverage case before they are finally adjudicated in each of the underlying lawsuits. The prejudice caused by such overlapping issues is "obvious." Montrose Chem. Corp. v. Superior Court, 6 Cal. 4th 287, 302, 24 Cal. Rptr. 2d 467 (1993). Indeed, a "classic situation" where an

insured should be protected from discovery and resolution of issues in the coverage litigation is when “the [underlying claimant] seeks damages on account of the insured’s negligence, and the insurer seeks to avoid providing a defense by arguing that its insured harmed the [underlying claimant] by intentional conduct.” Id.

Expedia is further prejudiced by the prospect that it will need to take contradictory positions in this case and the underlying lawsuits. Through discovery Zurich seeks to compel Expedia to identify potentially negligent acts that caused the damages the underlying plaintiffs are pursuing. (A.140, 142.) Proving the occurrence of such negligent acts—which ultimately may be necessary for Expedia to obtain indemnification of any underlying liability—could result in Expedia proving its own liability in the underlying cases. Absent protection from this discovery, Expedia could be required to prove that it breached a duty owed to an underlying plaintiff in a manner that caused that plaintiff damages, precisely the opposite of what it contends in the underlying cases.

B. Delaying Appeal Until After a Final Determination of the Merits Is an Inadequate Remedy.

A post-trial appeal is an inadequate remedy when the Court of Appeals will not be able to protect the rights of the appellant or afford it adequate redress other than through the exercise of discretionary review.

Oliver v. Am. Motors Corp., 70 Wn.2d 875, 879, 425 P.2d 647 (1967).

Washington insurance coverage law guarantees Expedia two rights relevant to this motion: (a) prompt resolution of Zurich's duty to defend; and (b) protection from litigation of and discovery into issues that overlap with or are logically related to the underlying lawsuits. Delaying appeal of the trial court's order until after a final determination on the merits has been reached will forever preclude Expedia from enjoying the benefits of one of those two rights. The trial court's order forces Expedia to forgo defense coverage until the underlying lawsuits are concluded or pursue that coverage at the risk of prejudicing its position in the underlying lawsuits. Only discretionary review of the trial court's order at this stage of the case can provide Expedia with a full and adequate remedy.

VII. CONCLUSION

The trial court committed probable error by refusing to consider Expedia's duty to defend motion until the completion of discovery that overlaps with, and potentially prejudices Expedia in, the lawsuits for which Expedia seeks coverage. The order substantially limits Expedia's freedom to act by forcing it to either forgo the defense coverage to which it is entitled or expose itself to a risk of prejudice through the litigation of overlapping issues. The trial court's errors cannot be remedied at the conclusion of the lawsuit. Discretionary review should be granted.

DATED this 4th day of October, 2012.

Respectfully submitted,

ORRICK, HERRINGTON & SUTCLIFFE LLP

By:



Mark S. Parris (WSBA No. 13870)

mparris@orrick.com

Paul F. Rugani (WSBA No. 38664)

prugani@orrick.com

701 Fifth Avenue, Suite 5600

Seattle, WA 98104-7097

Telephone: (206) 839-4300

Facsimile: (206) 839-4301

Attorneys for Plaintiffs/Appellants

DECLARATION OF SERVICE

I, Char Doolittle, declare under penalty of perjury that I am over the age of 18 and competent to testify and that the parties listed below were served in the manner listed below:

On October 4, 2012, I caused a copy of Plaintiffs/Appellants' (1) Notice of Motion; (2) Plaintiffs/Appellants' Motion for Discretionary Review; (3) Appendix to Plaintiffs/Appellants' Motion for Discretionary Review; and (4) this Declaration of Service to be delivered on this date via Legal Messenger to:

Michael Hooks
Matthew Adams
FORSBERG UMLAUF, P.S.
901 Fifth Avenue, Suite 1400
Seattle, WA 98164-2047

On October 4, 2012, I further served via FedEx copies of the above-referenced documents to Defendants/Respondents' out-of-state co-counsel:

J. Randy Evans
Joanne L. Zimolzak
McKENNA LONG & ALDRIDGE LLP
1900 K Street NW
Washington, D.C. 20006

I hereby declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 4th day of October, 2012, at Seattle, Washington.

Charlene L. Doolittle
Char Doolittle

ORIGINAL

NO. 69341-7-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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/Appellants,

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/Respondents.

APPENDIX TO PLAINTIFFS/APPELLANTS' MOTION FOR
DISCRETIONARY REVIEW

Mark S. Parris (WSBA No. 13870)
Paul F. Rugani (WSBA No. 38664)
ORRICK, HERRINGTON & SUTCLIFFE LLP
701 Fifth Avenue, Suite 5600
Seattle, WA 98104-7097
(206) 839-4300

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The Honorable Kimberley Prochnau

FILED
KING COUNTY, WASHINGTON

AUG 22 2012

SUPERIOR COURT CLERK
EILEEN L. MCLEOD
DEPUTY

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

~~[PROPOSED]~~ ORDER RE PLAINTIFFS' MOTION TO SET SUMMARY JUDGMENT HEARING DATE AND FOR PROTECTIVE ORDER

ORIGINAL

~~[PROPOSED]~~ ORDER RE MOT. TO SET SUMM. J. HEARING DATE: NO. 10-2-41017-1

Orrick Herrington & Sutcliffe LLP
701 5th Avenue, Suite 5600
Seattle, Washington 98104-7097
tel+1-206-839-4300

1 This matter comes before the Court on Plaintiffs' Motion to Set Summary Judgment
2 Hearing Date and for Protective Order. The Court considered the following:

3 1. Plaintiffs' Motion to Set Summary Judgment Hearing Date and for Protective
4 Order;

5 2. Declaration of Mark Parris in Support of Plaintiffs' Motion to Set Summary
6 Judgment Hearing Date and for Protective Order and the exhibits thereto;

7 3. Declaration of Angela Niemann in Support of Plaintiffs' Motion to Set Summary
8 Judgment Hearing Date and for Protective Order and the exhibits thereto;

9 4. March 30, 2012 Declaration of Mark S. Parris in Support of Plaintiffs Motion for
10 Summary Judgment as to Defendant Zurich American Insurance Company's Duty to Defend,
11 Bad Faith, and CPA Violations Under Zurich American Insurance Policies EOL 5329302-02
12 and EOL 8329302-03 and the exhibits thereto;

13 5. Defendants Steadfast Insurance Co. & Zurich American Insurance Co.'s
14 Response in Opposition to Plaintiffs' Motion to Set Summary Judgment Hearing and for
15 Protective Order;

16 6. Declaration of Joanne L. Zimolzak in Support of Zurich's Response to
17 Plaintiffs' Motion to Set Summary Judgment Hearing and for Protective Order and the exhibits
18 thereto;

19 7. Plaintiffs' Reply in Support of Motion to Set Summary Judgment Hearing and
20 for Protective Order;

21 8. Declaration of Mark S. Parris in Support of Plaintiffs' Reply in Support of
22 Motion to Set Summary Judgment Hearing and for Protective Order and the exhibits thereto;

23 9. Arguments of counsel at the June 15, 2012 hearing, which arguments have been
24 set forth in the transcript of that hearing; and

25 10. Plaintiffs' Exhibits 1 & 2 submitted during oral argument.

26 ///

27 ///

28 ///

~~PROPOSED~~ ORDER RE MOT. TO SET SUMM. J. 1
HEARING DATE: NO. 10-2-41017-1

Orrick Herrington & Sutcliffe LLP
701 5th Avenue, Suite 5600
Seattle, Washington 98104-7097
tel+1-206-439-4300

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For the reasons stated on the record at the hearing, IT IS HEREBY ORDERED that
Plaintiffs' Motion to Set Summary Judgment Hearing and for Protective Order is DENIED.

DATED 8/20/12.


The Honorable Kimberley Prochnau
SUPERIOR COURT JUDGE

Presented by:
ORRICK, HERRINGTON & SUTCLIFFE LLP

By: 

Mark S. Parris (Bar No. 13870)
mparris@orrick.com
Paul F. Rugani (Bar No. 38664)
prugani@orrick.com
701 Fifth Avenue, Suite 5600
Seattle, WA 98104
Telephone: (206) 839-4300
Fax: (206) 839-4301

Attorneys for Plaintiffs

I certify that I have mailed/e-mailed
a copy of this order to all parties.
Date: 8/21/2012
Signature: C. Robinson
Bulliff

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

EXPEDIA INC., et al.,)	
PLAINTIFFS,)	CASE NO.
VERSUS)	10-2-41017-1SEA
STEADFAST INSURANCE)	
CO., et al.,)	
DEFENDANTS.)	

Proceedings Before Honorable KIMBERLEY PROCHNAU

KING COUNTY COURTHOUSE
SEATTLE, WASHINGTON

DATED: JUNE 15, 2012

A P P E A R A N C E S:

FOR THE PLAINTIFFS:

BY: DANIEL DUNNE, ESQ.,
 MARK PARRIS, ESQ.,
 PAUL RUGANI, ESQ.

FOR THE DEFENDANTS:

BY: MICHAEL HOOKS, ESQ.,
 JOANNE ZIMOLZAK, ESQ.,
 RUSSELL LOVE, ESQ.

P R O C E E D I N G S

(Afternoon session. Open court.)

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3
4 THE BAILIFF: All rise, court is in session.
5 The Honorable Kimberley Prochnau presiding in the
6 Superior Court in the State of Washington in and for
7 King County.
8 THE COURT: Thank you. Please be seated.
9 This is the Expedia versus Steadfast Insurance matter,
10 10-2-41017-1 SEA.
11 I will have counsel introduce themselves
12 for the purposes of the record, starting with
13 Mr. Parris.
14 MR. PARRIS: Your Honor, Mark Parris on
15 behalf of Expedia together with Paul Rugani and Dan
16 Dunne.
17 MS. ZIMOLZAK: Joanne Zimolzak and with me
18 is Michael Hooks.
19 THE COURT: All right. Thank you.
20 MR. LOVE: Your Honor, Russell Love on
21 behalf of Arrowood.
22 THE COURT: Thank you.
23 THE COURT: All right. I assume that
24 Arrowood was not asking to speak. You are just here
25 to observe.

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15:04:44 5
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15:05:01 11
15:05:03 12
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15:05:10 14
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15:05:17 17
15:05:23 18
15:05:26 19
15:05:31 20
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15:05:44 24
15:05:46 25

THE COURT: All right. Thank you. The court is ready to rule.

Going first to the issue of Expedia's request for 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, including Expedia's knowledge or intent regarding its alleged liability, or the payment of certain occupancy

15:05:49 1 tax amounts and the privilege issue this concerns the
15:05:59 2 three documents attached to the Volusia action,
15:06:13 3 whereby the Volusia plaintiffs attached documents,
15:06:19 4 which Expedia contends are privileged, to their
15:06:24 5 requests for admissions. Then those documents were
15:06:29 6 put into a PDF file by Expedia's registered agent for
15:06:34 7 service of process and then forwarded to in-house
15:06:42 8 counsel, and then forwarded to Orrick, O-r-r-i-c-k,
15:06:48 9 also known as Mr. Parris' law firm.

15:06:52 10 The court agrees with Expedia that there is
15:06:59 11 a dangerous overlap between the discovery seeking
15:07:04 12 Expedia's knowledge or intent regarding its liability
15:07:07 13 for the payment of the certain occupancy tax amounts.
15:07:15 14 While willfulness may not be germane to the issue of
15:07:18 15 coverage, the knowledge of what Expedia knew and when
15:07:26 16 it knew it may be very relevant to the plaintiff's
15:07:30 17 claims.

15:07:32 18 The discovery that Expedia might be forced
15:07:37 19 to give with regards to that issue could be injurious
15:07:40 20 to its interests in the plaintiff's claims.

15:07:43 21 So, I certainly can't conclude that there
15:07:49 22 is no overlap, that there is not a basis for an
15:07:53 23 overlap.

15:07:55 24 On the other hand, I also cannot conclude,
15:07:58 25 as a matter of law, that this discovery is not

15:08:00 1 relevant to the insured's company's defenses.

15:08:08 2 Certainly, I have not been asked to decide,
15:08:13 3 as a matter of law, that extrinsic evidence is not
15:08:16 4 relevant to a determination of coverage and, in fact,
15:08:20 5 the insurance company suggests strong arguments that
15:08:24 6 that would be improper, as a matter of law, to
15:08:26 7 conclude that. But I will guess I will say again, I
15:08:29 8 have not been asked to decide that issue squarely on.

15:08:34 9 The privilege issue is a little bit
15:08:37 10 different, because I see two major aspects of the
15:08:44 11 privilege issue -- at least with respect to the
15:08:46 12 documents we are talking about, which are the Price
15:08:53 13 Waterhouse memo, the Holland and Knight memos, and
15:08:58 14 Mr. Britton's memos.

15:09:04 15 There is the underlying issue of whether
15:09:07 16 these documents are privileged. Only one court
15:09:14 17 heretofore that has considered this issue, I believe,
15:09:19 18 has found them not to be privileged; that, of course,
15:09:24 19 being the Columbia Georgia court. I gather that that
15:09:31 20 issue -- Expedia intends to appeal that issue or has
15:09:36 21 appealed that issue, but it was unsuccessful in
15:09:41 22 seeking interlocutory review, however. Other courts
15:09:47 23 have found those documents privileged and, of course,
15:09:51 24 the issue has not been addressed in all of the courts.
15:09:55 25 Those documents are all in the public domain, of

15:09:58 1 course.

15:09:58 2 I say, "of course," as the parties' know,
15:10:03 3 they somehow made to it a Florida state legislator,
15:10:08 4 who then provided copies of those documents to all of
15:10:10 5 his colleagues and those documents were then made
15:10:14 6 available to the media in Florida. Now, of course,
15:10:17 7 plaintiffs are using those documents to the extent
15:10:20 8 that they can.

15:10:24 9 Expedia has provided the court with a
15:10:27 10 number of opinions, in which the courts indicate that
15:10:30 11 although it is a bit of a legal fiction to say that
15:10:34 12 these documents are confidential, since they are now
15:10:37 13 in the public domain, the purpose of attorney-client
15:10:42 14 privilege and work-product would be thwarted, if we
15:10:45 15 allowed plaintiffs in these lawsuits to use these
15:10:50 16 documents in their cases. So, many courts have
15:10:55 17 indicated that they cannot be used.

15:10:57 18 So, I think that it would be injurious to
15:11:02 19 Expedia's interests to allow the insurer to take the
15:11:06 20 position that those documents are not privileged.
15:11:11 21 That is a serious problem. So, I am not going to
15:11:15 22 visits that issue. I am going to assume for the sake
15:11:19 23 of argument that they are privileged.

15:11:20 24 There is a different issue, which, of
15:11:22 25 course, is whether Expedia waived the privilege by

15:11:26 1 voluntarily providing those documents to their
15:11:32 2 insurer. That is an issue, that I gather, that the
15:11:33 3 parties don't think that I need to address today. So,
15:11:37 4 but all I will say about that issue is that I don't
15:11:40 5 see that as overlapping with the plaintiff's issues.
15:11:43 6 That is a very different thing.

15:11:46 7 In the other cases, we have a situation
15:11:48 8 where Expedia was compelled by the Court Order to turn
15:11:51 9 over these documents to the plaintiffs and was
15:11:57 10 promised, in fact, despite having to be forced to turn
15:12:01 11 those documents over, that the plaintiffs would
15:12:03 12 protect those documents through a protective order.

15:12:08 13 Expedia's arguments, which have been
15:12:13 14 successful so far, are very different than in this
15:12:16 15 case, where Expedia was not compelled by the
15:12:22 16 discovery, or by the Court Order, to turn over these
15:12:25 17 documents and voluntarily turned over these documents.
15:12:29 18 Then there is an argument as to whether that is
15:12:34 19 inadvertent or not, that is a separate issue. I don't
15:12:36 20 see an overlap there.

15:12:37 21 Nevertheless, of course, we have the
15:12:42 22 significant problem with the overlap between the
15:12:55 23 knowledge information that the insurers want and the
15:12:59 24 willfulness information that the plaintiffs want.

15:13:14 25 So it is certainly highly relevant to the

15:13:16 1 plaintiff's concerns and interests to get at when
15:13:21 2 Expedia knew something and what they knew.

15:13:26 3 On the other hand, we have the odd
15:13:28 4 situation where Expedia, in many cases, failed to
15:13:34 5 tender these lawsuits to Zurich for years, was quite
15:13:40 6 happy to litigate these cases, either through in-house
15:13:43 7 counsel or hiring their own selected counsel and then
15:13:51 8 coming before the court and seeking affirmative
15:13:55 9 relief, to force the insurers, after-the-fact, to
15:14:00 10 defend. Expedia has, perhaps, done an excellent job
15:14:04 11 through their counsel of defending these lawsuits, and
15:14:08 12 perhaps have taken strategies and taken actions that
15:14:13 13 the insurers' counsel, would not have taken. They are
15:14:17 14 being put in the position of Expedia having driven the
15:14:21 15 bus all of this time, suddenly getting up from the bus
15:14:28 16 and saying "okay, it is your turn to drive. Never
15:14:33 17 mind that the gas tank may only be half full and never
15:14:36 18 mind that we are on an area that you are not familiar
15:14:39 19 with driving. Second of all, we don't really want to
15:14:43 20 give you all of the information that you need to drive
15:14:46 21 the bus."

15:14:48 22 So, it strikes the court as fundamentally
15:14:54 23 unfair for Expedia to, on the one hand, to say that
15:15:00 24 they want a prompt determination of their summary
15:15:04 25 judgment motion, having sat on this issue for up to

15:15:08 1 five years in some cases, and to also preclude the
15:15:17 2 insureds' insurance companies from developing the
15:15:20 3 evidence that they think that they need to have to
15:15:23 4 address the duty to defend.

15:15:26 5 There are good policy reasons why we
15:15:33 6 ordinarily want insurance companies to step in quickly
15:15:37 7 to defend. We don't want the insured to have to,
15:15:45 8 quote, "fight a two-front war," or have to worry to
15:15:51 9 worry about finding counsel to defend themselves.
15:15:54 10 That is after all of why people get insurance.

15:15:57 11 But this is a somewhat unique situation
15:16:02 12 where Expedia has adequate funds, obviously, to hire
15:16:08 13 counsel, has made conscious decisions not to bring in
15:16:13 14 an insurance counsel before now, and, in fact, to sit
15:16:18 15 on that right for several years while they made their
15:16:22 16 own decisions and sat in the bus driver's seat.

15:16:26 17 Under these circumstances, this is a
15:16:32 18 problem of Expedia's own making, largely, and I think
15:16:36 19 that it is appropriate under these circumstances, if
15:16:40 20 there are problems with the discovery that we cannot
15:16:43 21 sort out and Expedia feels that there is too much of
15:16:46 22 an overlap that Expedia's remedy should be a stay of
15:16:52 23 this action.

15:16:53 24 After all, I have been assured that Expedia
15:16:58 25 is correct and there is a duty to defend and when this

15:17:05 1 all winds up, that they will still have recourse
15:17:10 2 against their insurance company for payment of those
15:17:15 3 fees and then obviously they will also have a right to
15:17:18 4 move on to seek indemnifications as well.

15:17:21 5 But, the discovery the insurers are seeking
15:17:28 6 is appropriate for their defenses. It would simply be
15:17:37 7 fundamentally unfair and inconsistent with our system
15:17:43 8 of trying to resolve cases on the merits to preclude
15:17:47 9 the insurance company from getting this information.

15:17:51 10 Under these circumstances, Expedia has
15:17:54 11 delayed in bringing these actions in seeking to tender
15:17:59 12 these actions. It is not going to suffer any real
15:18:05 13 prejudice by staying the action, since they will have
15:18:08 14 a right to seek indemnification of their costs at a
15:18:13 15 later time.

15:18:27 16 I guess I am not sure whether it is
15:18:29 17 necessary that I go any further with discussing a
15:18:34 18 protocol. I think that it would probably be
15:18:37 19 appropriate to adopt some form of a protocol with
15:18:41 20 regards to discovery issues. Obviously, I am not
15:18:44 21 adopting the protocol that is suggested by Expedia.
15:18:48 22 But I am wondering if, given my ruling, you want to
15:18:54 23 put over these additional issues?

15:18:57 24 MR. PARRIS: Your Honor, I think that we,
15:19:00 25 internally, need to talk about this. As I understand

15:19:03 1 it, what the court is saying, is that the court will
15:19:05 2 either stay the entirety of the action, or if it is
15:19:10 3 not stayed entirely that discovery will go forward,
15:19:14 4 including on to the discovery that is injurious to
15:19:17 5 Expedia in the underlying action.

15:19:19 6 THE COURT: And there is a third approach,
15:19:21 7 of course, if there are motions that Expedia wants to
15:19:25 8 hear, that thinks that they can resolve, that either
15:19:33 9 the insurers agree that they don't need discovery on,
15:19:37 10 or that the Expedia feels that they can provide the
15:19:40 11 discovery, without endangering their positions in the
15:19:44 12 underlying suits, or if you are unable to reach that
15:19:49 13 agreement and you want to set that for a hearing, as
15:19:53 14 to whether there is an overlap, then we can go forward
15:19:56 15 in that way as well. That is the third option as
15:20:04 16 well.

15:20:04 17 MS. ZIMOLZAK: So it sounds like something
15:20:07 18 further needs to happen among the parties before this
15:20:09 19 court can take any action.

15:20:11 20 THE COURT: I think so.

15:20:12 21 MS. ZIMOLZAK: All right.

15:20:13 22 THE COURT: All right. Anything further at
15:20:15 23 this time?

15:20:16 24 MR. PARRIS: No, Your Honor.

15:20:17 25 THE COURT: All right. Thank you.

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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

DECLARATION OF MELISSA MAHER
IN SUPPORT OF PLAINTIFFS'
MOTION FOR SUMMARY
JUDGMENT AS TO DEFENDANT
ZURICH AMERICAN INSURANCE
COMPANY'S DUTY TO DEFEND AND
BAD FAITH UNDER CERTAIN
ZURICH AMERICAN INSURANCE
POLICIES EOL 5329302-02 AND EOL
5329302-03

1 I, Melissa Maher, declare under penalty of perjury under the laws of the State of
2 Washington that the following is true and correct:

3 1. My name is Melissa Maher. I am more than 18 years old and am familiar with the
4 Expedia Companies' hotel reservation facilitation business, including Expedia.com, Hotels.com,
5 Hotwire, and Travelscape, Inc. The facts stated in this declaration are based on my personal
6 knowledge. If called upon to testify as a witness in this case, I could and would competently
7 testify as stated below.

8 **Professional Background**

9 2. I am Vice-President, Global Strategic Accounts and Industry Relations for
10 Expedia, Inc. In my positions, I have been closely involved in, among other things, the business
11 practices of facilitating hotel room reservations between hotels and customers.

12 **Company and Industry Background**

13 3. Expedia, Inc., Hotels.com L.P., and Hotwire Inc. are online travel companies that
14 among other services, allow consumers to make travel arrangements through websites and
15 telephone call centers. Expedia (a Washington corporation), Hotels.com, and Hotwire are sister
16 companies ultimately owned by Expedia, Inc., a Delaware corporation. Over the years Expedia,
17 Hotels.com, and Hotwire have merged many of their business operations relating to the hotel
18 merchant model. Travelscape, Inc. d/b/a Expedia Travel is the company through which the
19 Expedia and Hotels.com merchant model reservations are placed. The Expedia Companies,
20 Travelscape, Hotels.com, Expedia and Hotwire, are collectively referred to in my declaration as
21 "Expedia."

22 4. Expedia enables travelers to make all sorts of reservations (such as hotel and
23 airline reservations) with all sorts of travel suppliers (such as hotels and airlines). Expedia's
24 website is a marketplace bringing together travel suppliers on the one hand and travelers on the
25 other hand.

26 5. Expedia makes traveling easier for consumers by doing all of the necessary
27 legwork for them. Expedia's website hosts collected information about various travel options,
28 including hotel choices, availability, rates and amenities, and quality ratings, in one convenient

1 place available for customers to view 24 hours a day, 7 days a week. Expedia handles
2 communications with the various travel suppliers and arranges for payments to be made on the
3 customer's behalf. Customers who choose to make their travel plans through Expedia benefit
4 from one-stop shopping in that all of their travel needs and information are conveniently
5 presented in one place.

6 6. Before the emergence of the online travel industry, a customer wishing to place a
7 hotel reservation in a particular area, without using a travel agent, had to use a phone book and a
8 map to determine which hotels were located in the area, contact the hotels to collect information
9 on amenities, availability and room rates, analyze the information and determine which facility
10 was most appropriate. Alternatively, a customer engaged a traditional travel agent for this
11 information or engaged a tour operator, travel consolidator, or the like.

12 7. The value that Expedia provides to travelers is substantial. Through Expedia,
13 travelers can compare competing hotels by price and amenities, review comments and ratings
14 from other travelers, and review independent and objective hotel ratings. Expedia's website
15 offers expanded information about destinations, attractions, and other available travel services
16 and products. Travelers can even customize their own travel packages and secure hotel, flight,
17 and rental car reservations often at prices lower than stand-alone reservations.

18 8. Not only does Expedia provide value to consumers, it also provides value to
19 hotels. Through Expedia, hotels reach a global audience of new customers actively engaged in
20 planning and purchasing travel products and services.

21 **Business Model Basics**

22 9. Expedia's business model with respect to making hotel reservations is described as
23 the "merchant model," because, as explained below, Expedia is the entity charging the traveler's
24 credit card. The merchant model has been used by brick-and-mortar travel agencies for decades.
25 Under this model, Expedia negotiates with thousands of hotels to obtain the right to facilitate
26 room reservations at rates lower than what individual customers could obtain on their own. The
27 merchant model works in the following manner.

1 10. A customer seeking to make a hotel reservation through Expedia sees a “booking
2 path,” a series of web pages the customer views to find and make a reservation at a hotel. After
3 inputting his or her desired destination city and indicating arrival and departure dates, number of
4 rooms, and number of travelers, the customer receives a listing of numerous competing hotel
5 properties located in the destination city.

6 11. After studying the list of potential hotels, a customer obtains more information on
7 any listed hotel by clicking on “more lodging info.” The customer receives a detailed report
8 including maps, property details, room details, lists of property and room amenities, photos,
9 promotions, nearby points of interest, details on dining at the hotel, recreation options, additional
10 fees, and any applicable hotel policies.

11 12. One of the many services Expedia provides to its customers includes compiling
12 information on a particular hotel and presenting such information in a format that helps customers
13 make a more informed hotel selection. This information includes, for example, candid reviews
14 from other travelers, ratings from independent ratings systems, and media recognition, which
15 Expedia consolidates to form a “star rating” for each particular hotel. Hotels and agents of hotels
16 do not provide this service.

17 13. If the customer decides to make a reservation at a hotel, the customer continues
18 through the booking path to the stage where he or she chooses among the available room options
19 and rates. Once the customer selects the desired room option, Expedia forwards the customer’s
20 information to the selected supplier and requests the reservation. Expedia must determine the
21 availability of the room and the rate because a reservation is within a hotel’s control and it
22 generally can at any time change or withdraw the availability and rates that it makes available
23 through Expedia, even seconds after a customer is initially informed that a certain rate is
24 available. Expedia summarizes the room rate that includes tax recovery charges and other service
25 fees. Customers can also review Expedia’s terms and conditions, and any rules and restrictions
26 imposed by the hotel.

27 14. After completing the reservation, the customer’s credit card is charged and the
28 customer receives a confirmation number. Expedia charges the customer’s credit card at the time

1 the reservation is made a single total amount comprised of: (1) the rate that the hotel charges for
2 occupancy of the room, which is passed along to the hotel (i.e. the “rent”); (2) an amount retained
3 by Expedia for the online services it provides to the customer (the “facilitation fee”); and (3) an
4 amount for “tax recovery charges and service fees” that includes (a) a tax recovery charge which
5 Expedia pays to the hotel for the “transient occupancy tax” on the rent invoiced by the hotel; and
6 (b) an additional fee for services provided by Expedia to the customer that is grouped together
7 with the tax recovery charge.

8 15. When the customer later travels to the destination, upon arrival at the selected
9 hotel, he or she presents identification and any other information required by the hotel. Pursuant
10 to each hotel’s own check-in and security procedures, the hotel then assigns a specific room to the
11 customer. Only then does the customer become a guest of the hotel with a right to occupy or use
12 a room in the hotel. The hotel determines what services and amenities are provided to the guest,
13 and any changes in the reservation or incidental charges incurred by the guest are solely between
14 the hotel and the hotel’s guest, not Expedia.

15 16. Expedia does not operate hotels and does not purchase the rooms. But because its
16 customers pay for their hotel room reservations at the time of the online reservation, Expedia
17 charges its customers an amount sufficient to cover the estimated occupancy tax owed by the
18 hotel in accordance with a tax rate provided by the hotel. In calculating this tax recovery charge,
19 Expedia uses the rate it negotiated with the hotel, that is, “the rent charged by the hotel operator,”
20 rather than the total retail price the customer ultimately pays to Expedia (rent plus fees). The tax
21 recovery charge based on “the rent charged by the hotel operator” is the amount Expedia believes
22 is owed by its customers for the customers’ occupancy tax obligation, rather than an amount
23 based on the total retail price, which includes Expedia’s facilitation and service fees. Expedia
24 neither charges its customers nor collects from its customers any amounts reflecting a tax on
25 Expedia’s facilitation or service fees. Expedia, however, pays any taxes it owes on the
26 facilitation and service fee revenues.

1 17. The merchant model is not unique to Expedia. Indeed, the merchant model is the
2 norm in the travel industry and is used by Expedia's major online competitors, such as Orbitz,
3 Priceline, and Travelocity.

4 **The Hotel Occupancy Tax Cases Filed Against Expedia**

5 18. Expedia is litigating or has defended 80 lawsuits against various states, counties
6 and municipalities across the United States in which these governmental entities allege that
7 Expedia owes taxes on the retail rate charged to customers rather than on the net rate paid to the
8 hotel. The majority of these lawsuits are still pending, but in cases that have been finally
9 adjudicated, Expedia has prevailed in almost all of these; in the small number of cases in which
10 Expedia has been found liable, Expedia has not been found to have intentionally or willfully
11 violated the law.

12 19. The first lawsuit filed against Expedia was brought by City of Los Angeles in
13 2005. Expedia asked its insurance broker to tender this lawsuit to Expedia's insurers for a
14 defense and indemnification. This lawsuit was tendered to Steadfast Insurance Company, Zurich
15 American Insurance Company's predecessor. Steadfast Insurance Company refused to defend
16 Expedia in that case. Expedia subsequently has tendered other underlying cases to its insurers.
17 Zurich American Insurance Company has denied coverage for all of these cases.

18 20. Because Expedia's insurers, including Zurich American Insurance Company, are
19 not providing a defense in any of the occupancy tax lawsuits, Expedia is defending itself at its
20 own expense, at a cost thus far in the millions of dollars.

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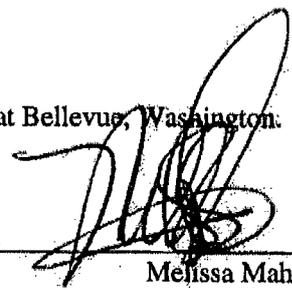
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DATED this 20th day of March, 2012, at Bellevue, Washington.



Melissa Maher

1 Plaintiff City of Los Angeles, California, on behalf of itself and all others similarly
2 situated (*i.e.*, the "Plaintiff Class" or "Class" described and defined, *infra*), complains of
3 Defendants and alleges as follows:

4 **1. PARTIES**

- 5 1. Plaintiff is the City of Los Angeles, California.
- 6 2. Defendant HOTELS.COM, L.P. is a Delaware limited partnership with its
7 principal place of business in Dallas, Texas.
- 8 3. Defendant HOTELS.COM GP, LLC is a Texas corporation with its principal
9 place of business in Dallas, Texas.
- 10 4. Defendant HOTWIRE, INC. is a Delaware corporation with its principal
11 place of business in San Francisco, California.
- 12 5. Defendant CHEAP TICKETS, INC. is a Delaware corporation with its
13 principal place of business in Honolulu, Hawaii.
- 14 6. Defendant EXPEDIA, INC. is a Washington corporation with its principal
15 place of business in Bellevue, Washington.
- 16 7. Defendant INTERNETWORK PUBLISHING CORP. (d/b/a LODGING.COM),
17 is a Florida corporation with its principal place of business in Boca Raton, Florida.
- 18 8. Defendant LOWEST FARE.COM, INC. is a Delaware corporation with
19 its principal place of business in Norwalk, Connecticut.
- 20 9. Defendant ORBITZ, INC. is a Delaware corporation with its principal place of
21 business in Chicago, Illinois.
- 22 10. Defendant ORBITZ, LLC is a Delaware corporation with its principal place of
23 business in Chicago, Illinois.
- 24 11. Defendant PRICELINE.COM, INC. is a Delaware corporation with its
25 principal place of business in Norwalk, Connecticut.
- 26 12. Defendant SITE59.COM, LLC is a Delaware corporation with its
27 principal place of business in New York, New York.
- 28 13. Defendant TRAVELOCITY.COM, INC. is a Delaware corporation with its

1 principal place of business in Southlake, Texas.

2 14. Defendant TRAVELOCITY.COM, LP is a Delaware partnership
3 with its principal place of business in Fort Worth, Texas.

4 15. Defendant TRAVELWEB, LLC is a Delaware corporation with its principal
5 place of business in Dallas, Texas.

6 16. Defendant TRAVELNOW.COM, INC. is a Delaware corporation with its
7 principal place of business in Springfield, Missouri.

8 **2. JURISDICTION AND VENUE**

9 17. This action is brought to remedy violations of law in connection with
10 Defendants' misconduct in failing to remit transient occupancy taxes to Plaintiff and other
11 cities similarly situated. Defendants have failed to remit taxes owed under similar uniform
12 transient occupancy tax schemes to Plaintiff and the Class.

13 18. This Court has jurisdiction over this action pursuant to California Business and
14 Professions Code §§ 17202 and 17203 and California Code of Civil Procedure § 410.10.

15 19. All of Plaintiff's claims and the claims of other members of the Class relate to
16 activities conducted within the state of California, *i.e.*, the collection and remittance of
17 transient occupancy taxes for hotel rooms in the City of Los Angeles in the state of
18 California.

19 20. This Court has personal jurisdiction over these Defendants, including foreign
20 corporate defendants, because each Defendant has established an economic and/or
21 physical presence within the State, and, wherever domiciled, each Defendant engages in
22 the continuous and widespread solicitation of business within the state of California and
23 purposefully avails itself of the economic markets of the state of California.

24 21. Venue is proper in this Court pursuant to California Code of Civil Procedure
25 § 395.5.

26 **3. COMMON ALLEGATIONS**

27 22. Defendants contract with hotels for the right to purchase rooms at discounted,
28 "wholesale" prices. Defendants then sell the rooms to the public through their Internet sites

1 or toll-free numbers at marked-up, "retail" prices, plus certain "tax recovery charges and
2 fees." The Defendants charge the customers' credit cards for the entire amount, which
3 includes the retail price of the rooms and amounts sufficient to pay occupancy taxes on the
4 retail price of the rooms. The hotels in turn invoice the Defendants for the rooms at the
5 discounted price and the applicable occupancy tax rate.

6 23. For example, an online travel company such as Travelocity, Inc. obtains a
7 room from a hotel at a previously negotiated wholesale price of, for instance, \$70.
8 Travelocity, Inc. in turn sells that same hotel room to an occupant over the Internet for \$100.
9 Because Travelocity, Inc. controls the occupancy of the hotel room, the amount due to the
10 city by law in this example is 14% of \$100, or \$14. Travelocity, Inc., however, remits the
11 transient occupancy tax to the cities based upon the lower wholesale price of \$70, thus
12 creating a loss of \$4.20 to the city for that sale alone.

13 **a. Defendants Engaged In Common Practices And Schemes And Acted As**
14 **Managing Agents.**

15 24. At all pertinent times alleged in this Complaint, each Defendant has engaged
16 in the following common practice and scheme regarding transactions for hotel
17 accommodations in the City of Los Angeles, California and other Class cities in the state
18 of California:

- 19 a) the City of Los Angeles levies a 14% tax upon the retail room price. See CITY
20 OF LOS ANGELES MUN. CODE, Article 1.7. Members of the Class likewise apply
21 a percentage occupancy tax to the retail room price;
- 22 b) Defendants negotiate with hotels and/or hotel chains for rooms to use as
23 inventory in reselling hotel rooms to customers;
- 24 c) customers use Defendants' Internet-based search engines and portals to
25 select the desired hotel accommodations using the computer-based
26 information resources made available by Defendants. The Defendants'
27 websites offer various hotel room accommodations at marked-up, retail
28 prices, which include a charge labeled "tax recovery charges and fees;"

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- d) after selecting their desired hotel accommodations, customers provide Defendants with their personal identification and payment information using Defendants' Internet-based portal;
- e) Defendants charge customers' credit cards the retail prices shown on their websites for the hotel accommodations selected, plus Defendants' "tax recovery charges and fees;"
- f) Defendants set the cancellation policies for the customers' chosen accommodations and provide toll free numbers for customers to call with questions or requests to modify their reservations;
- g) Defendants send customers e-mail confirmations, acknowledging the customers' prepaid reservations for the right to occupy the rooms at the hotels on the dates selected at the retail prices charged by Defendants;
- h) Defendants transmit customers' prepaid reservations for the dates selected to the hotels selected by the customers;
- i) hotels confirm the customers' right to occupy the rooms identified by Defendants;
- j) upon customers' arrival at the hotels for check-in, the hotels confirm their identification and confirm that no further payment is required for the pre-arranged right to occupy the hotel rooms;
- k) at checkout, customers are only charged by the hotels for any incidental services provided by the hotels during their stays in the prepaid rooms;
- l) at no time are the hotels, the customers, Plaintiff or members of the Class aware of the retail price Defendants charged the customers for the hotel accommodations;
- m) Defendants remit payment to the hotel, but remit an insufficient amount of transient occupancy tax calculated by taxing the negotiated wholesale price rather than the retail price, as explained *supra*; and
- n) the hotels report and remit the transient occupancy tax collected from

1 Defendants to the appropriate agencies or authorities for the cities where the
2 hotels are located.

3 25. At all pertinent times alleged in this Complaint, under the appropriate transient
4 occupancy tax schemes and the similarly situated Class members' transient occupancy tax
5 schemes, Defendants have always had a duty to collect and remit transient occupancy
6 taxes based on the retail price the Defendants charged their customers for use and
7 occupancy of hotel rooms.

8 26. Defendants have failed to remit the transient occupancy taxes due and
9 owing to Plaintiff and the Class.

10 **b. In The Alternative, Defendants Engaged In Common Practices And**
11 **Schemes As Agents Of The Hotels.**

12 27. Plaintiff and the Class incorporate each of the above allegations by reference
13 as if set forth herein.

14 28. By controlling all aspects of the provision of hotel accommodations as set forth
15 above, and particularly by charging and collecting amounts sufficient to satisfy transient
16 occupancy taxes on the retail price and remitting transient occupancy tax amounts to the
17 hotels, Defendants act as agents for the hotels relative to the hotels' obligations to collect
18 and remit transient occupancy taxes to Plaintiff and the Class.

19 29. As such, pursuant to California Civil Code § 2344 and otherwise, Defendants
20 have duties to the Plaintiff and the Class to remit the difference between the amounts
21 sufficient to pay transient occupancy taxes on the retail price as collected by Defendants
22 and the amount of the transient occupancy taxes actually remitted by Defendants based on
23 the wholesale price. Despite demand, Defendants have failed to pay this difference to
24 Plaintiff and the Class.

25 **c. Many Defendants Are Affiliated Through A Common Corporate Parent.**

26 30. "Expedia Group" – Defendants Expedia, Inc. (Washington); Hotels.com;
27 L.P.; Hotels.com GP LLC; Hotwire, Inc.; and Travelnow.com are affiliated business entities,
28 related through the common corporate parent Expedia, Inc., a Delaware corporation.

1 31. **"Orbitz Group"** – Defendants Orbitz, Inc.; Orbitz LLC; Cheaptickets.com, Inc.;
2 and Internetnetwork Publishing Corp. d/b/a Lodging.com are affiliated business entities, related
3 through the common corporate parent Cendant Corporation, a Delaware corporation.

4 32. **"Travelocity Group"** – Defendants Site59.com LLC; Travelocity.com, Inc.;
5 and Travelocity.com LP are affiliated business entities, related through the common ultimate
6 corporate parent, Sabre Holdings Corporation, a Delaware corporation.

7 33. **"Priceline Group"** – Defendants Priceline.com, Inc.; Lowestfare.com, Inc.;
8 and Travelweb, LLC are all affiliated business entities, related through the common
9 corporate parent Priceline.Com, Inc., a Delaware corporation.

10 34. Defendant Lowestfare.com, Inc. is a wholly owned subsidiary of Priceline.com,
11 Inc. In 2002, Priceline.Com, Inc. purchased the Internet URL and Trademarks of
12 Lowestfare.com and formed a subsidiary corporation, Lowestfare.com, Inc. (Delaware).

13 35. Defendants, in public communications, in communications to Plaintiff and
14 members of the Class, and through the media, have taken the position that they are not
15 liable for transient occupancy taxes on the retail price of their sales of hotel rooms to
16 customers for several reasons. There is, therefore, an actual and live controversy between
17 the parties.

18 d. **Defendants Have Entered Into Agreements With Each Other To Market
19 And Sell Each Other's Hotel Room Inventory.**

20 36. Defendants, including all DOE defendants, at all times herein mentioned, were
21 acting under common plans, schemes or methodologies, and from time to time entered into
22 agreements and ventures between and among themselves for the common marketing,
23 distribution and sale or resale of hotel rooms throughout the state of California.

24 37. Defendants have shared products and customers and entered into
25 agreements and co-ventures for the sale or resale of hotel room inventory by cross-listing
26 between them available hotel rooms on their respective Internet portals. ***Pursuant to the
27 **Protective Order requested by Defendants and ordered by the Court, please see the**
28 **sealed document attached hereto as Exhibit "A" for subparagraphs 37(a) - 37(r).*****

1 38. Given the tangled web of arrangements between Defendants, any room
2 ostensibly purchased by a consumer from one of the Defendants could actually have been
3 purchased from a different defendant. *****Pursuant to the Protective Order requested by**
4 **Defendants and ordered by the Court, please see the sealed document attached**
5 **hereto as Exhibit "A" for the text which would otherwise be placed here.***** There are
6 numerous other such marketing and distribution agreements between and among
7 Defendants, and these interdependent relationships are just the tip of the iceberg.

8 **e. Defendants' Conduct Arises Out Of The Same Series Of Transactions Or**
9 **Occurrences And Involves Common Questions Of Law And Fact.**

10 39. Defendants' conduct arises out of the same series of transactions or
11 occurrences and involves common questions of law and fact. The parties are all interested
12 in the principal questions raised by this Complaint. Moreover, Defendants' affiliations with
13 each other and their agreements to market, sell and distribute each other's hotel room
14 inventory logically connect their respective conduct. As detailed above, Defendants have
15 engaged and presently engage in a common practice and scheme of selling hotel rooms
16 to customers at retail prices, but remitting taxes based on their lower, negotiated wholesale
17 prices.

18 **f. The Structuring Of Defendants' Conduct Is Such That There Is Doubt**
19 **About Which Defendant Is Liable.**

20 40. Given the interrelatedness of each Defendant's activities to those of the other
21 Defendants, and the manner in which Defendants have chosen to structure their business
22 relations, there is doubt as to which Defendant or Defendants owes redress and damages
23 to Plaintiff and the Class. Therefore, all Defendants have been joined with the intent that
24 the question as to which of the Defendants is liable, and to what extent, may be determined
25 between the parties.

26 41. Also, Defendants' memberships in Interactive Travel Service Association
27 ("ITSA") further demonstrates the interrelatedness among the Defendants and confirms the
28 common practices of Defendants in booking hotel rooms. According to ITSA's website, the

1 following Defendants are members of the organization: Hotels.com; Hotwire.com; Cheap
2 Tickets, Inc.; Expedia; Orbitz; Priceline.com; Site 59.com; and Travelocity.com. The ITSA
3 website makes numerous representations regarding the manner in which web-based hotel
4 booking companies do business, the manner in which rooms are booked, and the
5 Defendants' occupancy tax liabilities as a whole.

6 **g. Plaintiff and The Class Have Asserted A Claim, Right, Or Interest**
7 **Adverse To Defendants In The Controversy Which Is The Subject Of The**
8 **Action.**

9 42. Each Defendant has an interest adverse to Plaintiff and the Class in the
10 property and controversy that is the subject of this action. Plaintiff has alleged that each
11 Defendant has failed to remit transient occupancy taxes due and owing to Plaintiff and the
12 Class in the same manner. This common conduct raises common factual and legal issues.
13 Moreover, the claims asserted by Plaintiff and the Class against Defendants are identical,
14 and are clearly asserted against all Defendants. The parties are also directly adverse in
15 relation to the controversies about which declaratory relief is sought herein.

16 **4. CLASS ALLEGATIONS**

17 43. Plaintiff requests that the Court certify this case as a class action. Plaintiff
18 seeks to certify a class action against each Defendant under each cause of action stated
19 in this complaint. The class Plaintiff seeks to certify is as follows:

20 All California cities with a transient occupancy tax ordinance in which the
21 Defendants have sold or booked a hotel room located in that city prior to the
22 filing of the complaint in this action.

23 44. Plaintiff brings this action pursuant to California Code of Civil Procedure § 382.
24 The Plaintiff Class meets the prerequisites for the maintenance of a class action in that:

- 25 a) the Class members are so numerous that joinder of all Class members is
26 impracticable. The practices complained of herein damaged numerous cities;
27 b) there are questions of law and fact common to the Class;
28 c) the claims of the Plaintiff are typical of the claims of each member of the
Class. Like all other members of the Class, the Plaintiff has sustained

- 1 a) whether Defendants were agents of the hotels under California law for
- 2 purposes of the collection and remittance of transient occupancy taxes,
- 3 and/or whether Defendants were "managing agents" under certain transient
- 4 occupancy tax ordinances of the Class members such that Defendants had
- 5 a duty under those ordinances to collect and remit transient occupancy taxes
- 6 on the retail price paid for hotel rooms;
- 7 b) whether Defendants have a legal duty to collect transient occupancy taxes
- 8 from occupants who purchase from Defendants the right to occupy hotel
- 9 rooms in the state of California and whether Defendants have a legal duty to
- 10 remit these taxes to Plaintiff and/or other Class members;
- 11 c) whether, under the appropriate transient occupancy tax ordinance, statute
- 12 and/or rule, the amount of transient occupancy tax due and owing to Plaintiff
- 13 and the Class is to be calculated as a percentage of the total amount charged
- 14 occupants for the right to occupy hotel rooms, without regard to service fees
- 15 and other amounts deducted by Defendants;
- 16 d) whether Defendants have committed acts of conversion;
- 17 e) whether Plaintiff and the Class are entitled to a declaratory judgment; and
- 18 f) whether, and in what amount, the members of the Plaintiff Class are entitled
- 19 to recover court costs, attorneys' fees, penalties and interest.

20 **5. CAUSES OF ACTION**

21 **FIRST CAUSE OF ACTION: VIOLATION OF PLAINTIFF AND CLASS TRANSIENT**
 22 **OCCUPANCY TAX ORDINANCES BY FAILURE TO REMIT TRANSIENT**
 23 **OCCUPANCY TAXES ON THE RETAIL PRICE**
 (As against all Defendants)

- 24 48. Plaintiff incorporates each of the above allegations by reference as if set
- 25 forth herein.
- 26 49. Plaintiff and each Class member has a transient occupancy tax ordinance.
- 27 Under those transient occupancy tax ordinances, the calculation of the amount of transient
- 28 occupancy taxes due has always been a stated percentage of the retail price the customer

1 paid for the right to occupy the hotel room. The intent of the Plaintiff and the Class
2 members to collect the amount of transient occupancy tax based on the retail price paid for
3 hotel rooms by customers has never changed.

4 50. Regardless of whether Defendants are agents of the hotels under California
5 law for purposes of the collection and remittance of transient occupancy taxes, or
6 Defendants are "managing agents" under certain transient occupancy tax ordinances of
7 Plaintiff and certain Class members, Defendants have always had a duty to collect and
8 remit transient occupancy taxes on the retail price paid by customers to Defendants for
9 hotel rooms.

10 51. Each Defendant has violated these ordinances by collecting from consumers
11 sufficient amounts to pay transient occupancy taxes based upon the retail price for the hotel
12 rooms, but remitting insufficient transient occupancy taxes based upon the wholesale price
13 of hotel rooms.

14 52. Defendants' failure to remit the full amount of these transient occupancy taxes
15 to Plaintiff and the Class is deemed a debt owed by Defendants to Plaintiff and the Class,
16 and the taxes are hereby sought to be recovered pursuant to the applicable transient
17 occupancy tax ordinances. Defendants have refused demands to pay the deficiency
18 amounts due. Further, Plaintiff and the Class are entitled to penalties and interest to be
19 determined by the applicable transient occupancy tax ordinances.

20 53. Plaintiff and the Class are not required to exhaust any administrative remedies
21 because, among other things:

22 a) the administrative agencies or bodies lack the authority to resolve the
23 underlying dispute between the parties, *to wit*: whether Defendants have one
24 or more legal duties to collect and remit transient occupancy taxes on the
25 retail price paid by customers to Defendants for hotel rooms. Plaintiff and the
26 Class have multiple causes of action, arising under municipal ordinances,
27 state statutes and common law. Determining Defendants' duties is a judicial
28 function, which cannot be performed by the administrative agencies or bodies

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operating under the transient occupancy tax ordinances of Plaintiff and the Class;

b) in the usual case, Plaintiff and members of the Class review the hotels' records for any transient occupancy tax deficiencies and render an insufficiency assessment against specific hotels to cure any deficiencies for underpaid taxes. The hotels in turn can challenge the assessment through the administrative process. Here, however, pursuit of any administrative remedies would be futile in that neither Plaintiff nor the Class has sufficient information to make an insufficiency assessment for the additional transient occupancy taxes due, and thus the administrative process cannot commence. As alleged above, Defendants do not inform the hotels, Plaintiff or the Class members of the retail amounts they charge and collect from customers for hotel rooms;

c) there is no internal remedy for Plaintiff or Class to employ to resolve the above-stated underlying dispute between the parties.

SECOND CAUSE OF ACTION: VIOLATION OF CALIFORNIA BUSINESS & PROFESSIONS CODE § 17200
(As Against All Defendants)

54. Plaintiff incorporates each of the above allegations by reference as if set forth herein.

55. Defendants have engaged in unfair, unlawful and fraudulent business acts and practices, as follows: Defendants have had a duty to collect and remit transient occupancy taxes based on the retail price the Defendants charged their customers for hotel rooms, but Defendants have only remitted transient occupancy taxes on the wholesale price they pay to hotels for the rooms purchased by customers.

56. By engaging in the above-described acts and practices, Defendants have committed one or more acts of unfair competition within the meaning of California Business and Professions Code § 17200, *et seq.*

57. Plaintiff, individually and on behalf of the Class, seeks restitution and all

1 other relief allowed under California Business and Professions Code § 17200, *et seq.*

2 **THIRD CAUSE OF ACTION: CONVERSION**
3 (As Against All Defendants)

4 58. Plaintiff incorporates each of the above allegations by reference as if set forth
5 herein.

6 59. At all times herein mentioned, Plaintiff and the Class were, and are, the sole
7 rightful owners of the transient occupancy taxes due and owing to them.

8 60. At all times herein mentioned, Plaintiff and the Class were, and are, the sole
9 rightful owners of the difference between the amounts sufficient to pay transient occupancy
10 taxes on the retail price as collected by Defendants and the amount of the transient
11 occupancy taxes remitted by Defendants to the hotels based on the wholesale price. At all
12 times herein mentioned, this difference has remained in the possession and under the
13 control of Defendants. Defendants have taken these monies for their own use and benefit,
14 thereby permanently depriving Plaintiff and the Class of the use and benefit thereof.

15 61. As a direct and proximate result of Defendants' conduct, Plaintiff and the
16 Class have suffered, and will continue to suffer damage in an amount to be determined
17 according to proof at the time of trial.

18 **FOURTH CAUSE OF ACTION: VIOLATIONS OF CAL. CIV. CODE § 2223**
19 (As Against All Defendants)

20 62. Plaintiff incorporates each of the above allegations by reference as if set forth
21 herein.

22 63. Defendants have violated California Civil Code § 2223 by wrongfully detaining
23 funds due and owing to the Plaintiff and the Class. Section 2223 provides in pertinent part
24 that "[o]ne who wrongfully detains a thing is an involuntary trustee thereof for the benefit of
25 the owner." *Id.* At all times mentioned herein, Defendants collected from consumers
26 amounts sufficient to pay transient occupancy taxes on the retail price, but remitted
27 transient occupancy taxes to the hotels based on the wholesale price. Defendants have
28 retained for their own use and benefit the difference between the amounts sufficient to pay

1 transient occupancy taxes on the retail price as collected by them and the amount of the
2 transient occupancy taxes remitted by them to the hotels based on the wholesale price.
3 Plaintiff and the Class are entitled to all such monies because under the appropriate
4 transient occupancy tax schemes and the similarly situated Class members' transient
5 occupancy tax schemes, Defendants had a duty to collect and remit transient occupancy
6 taxes based on the retail price the Defendants charged their customers. Defendants are
7 "involuntary trustees" of the monies wrongfully detained and said monies are held for the
8 benefit of the Plaintiff and the Class.

9 64. Plaintiff and the Class seek appropriate legal or equitable remedies to prevent
10 the unjust enrichment of the Defendants by causing payment to Plaintiff and the Class of
11 all amounts wrongfully maintained in the possession of the Defendants as alleged in this
12 cause of action, with appropriate interest, costs and fees, as allowed by law.

13 **FIFTH CAUSE OF ACTION: VIOLATIONS OF CAL. CIV. CODE § 2224**

14 (As Against All Defendants)

15 65. Plaintiff incorporates each of the above allegations by reference as if set forth
16 herein.

17 66. Defendants have violated California Civil Code § 2224 by wrongfully detaining
18 funds due and owing to the Plaintiff and the Class. Section 2224 provides in pertinent part
19 that "[o]ne who gains a thing by...wrongful act, is...an involuntary trustee of the thing
20 gained, for the benefit of the person who would otherwise have had it." *Id.* At all times
21 mentioned herein, Defendants collected from consumers amounts sufficient to pay transient
22 occupancy taxes on the retail price, but remitted transient occupancy taxes to the hotels
23 based on the wholesale price. Defendants have retained for their own use and benefit the
24 difference between the amounts sufficient to pay transient occupancy taxes on the retail
25 price as collected by them and the amount of the transient occupancy taxes remitted by
26 them to the hotels based on the wholesale price. Plaintiff and the Class are entitled to all
27 such monies because under the appropriate transient occupancy tax schemes and the
28 similarly situated Class members' transient occupancy tax schemes, Defendants had a duty

1 to collect and remit transient occupancy taxes based on the retail price the Defendants
2 charged its customers. Defendants are "involuntary trustees" of the monies wrongfully
3 detained and said monies are held for the benefit of the Plaintiff and the Class.

4 67. Plaintiff and the Class seek appropriate legal or equitable remedies to prevent
5 the unjust enrichment of the Defendants by causing payment to Plaintiff and the Class of
6 all amounts wrongfully maintained in the possession of the Defendants as alleged in this
7 cause of action, with appropriate interest, costs and fees, as allowed by law.

8
9 **SIXTH CAUSE OF ACTION: IMPOSITION OF A CONSTRUCTIVE TRUST**
(As Against All Defendants)

10 68. Plaintiff incorporates each of the above allegations by reference as if set forth
11 herein.

12 69. At all times herein mentioned, funds belonging to Plaintiff and the Class were
13 in the possession and under the control of Defendants, *to wit*—the difference between the
14 amounts sufficient to pay transient occupancy taxes on the retail price as collected by
15 Defendants and the amount of the transient occupancy taxes remitted by Defendants to the
16 hotels based on the wholesale price. Defendants have taken this property for their own use
17 and benefit, thereby depriving Plaintiff and the Class of the use and benefit thereof. Plaintiff
18 and the Class have been damaged by their failure to receive the funds.

19 70. By virtue of their actions, Defendants hold these funds as constructive trustees
20 for the benefit of Plaintiff and the Class.

21 71. Plaintiff and the Class seek appropriate legal or equitable remedies to prevent
22 the unjust enrichment of the Defendants by causing payment to Plaintiff and the Class of
23 all amounts wrongfully maintained in the possession of the Defendants as alleged in this
24 cause of action, with appropriate interest, costs and fees, as allowed by law.

25 **SEVENTH CAUSE OF ACTION: DECLARATORY JUDGMENT**
26 (As Against All Defendants)

27 72. Plaintiff incorporates each of the above allegations by reference as if set forth
28 herein.

1 occupancy tax ordinance, statute, or other rule.

2 75. Plaintiff requests on behalf of itself and the Class that Plaintiff and the Class
3 recover all penalties, interest, and reasonable and necessary attorneys' fees they are
4 entitled to recover under the law.

5 76. Plaintiff requests on behalf of itself and the Class pre-judgment and post-
6 judgment interest at the maximum rate allowed by law.

7 **7. PRAYER FOR RELIEF**

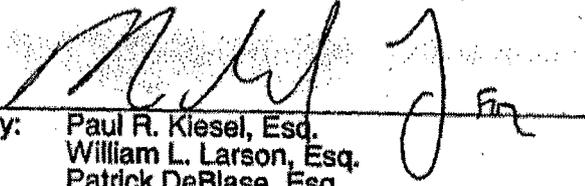
8 WHEREFORE, PREMISES CONSIDERED, Plaintiff and the Class pray for the
9 following judgment in their favor against Defendants:

- 10 a) as to all causes of action, an order certifying this case as a class action
11 against Defendants and appointing Plaintiff and its counsel as Representative
12 of the Plaintiff Class;
- 13 b) for judgment against Defendants and in favor of Plaintiff and the Class on all
14 causes of action asserted in this Complaint;
- 15 c) as to the first and third causes of action, compensatory damages as allowed
16 by law;
- 17 d) as to the third cause of action, punitive damages as allowed by law;
- 18 e) as to the second cause of action, restitution and injunctive relief as allowed
19 by law;
- 20 f) as to the fourth, fifth and sixth causes of action, for a legal or equitable
21 remedy to prevent the unjust enrichment of the Defendants by causing
22 payment to the Plaintiff and the Class, who are the rightful owners of the
23 unremitted taxes in Defendants' possession, at the legal rate and/or as
24 established by Plaintiff's and each Class member's transient occupancy tax
25 ordinance, statute, or other rule;
- 26 g) as to the seventh cause of action, for a declaration and determination by the
27 Court of the rights, duties and remedies for the Defendants' failure to remit
28 sufficient amounts of transient occupancy taxes as alleged in this Complaint;

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- h) for costs of suit incurred herein to the extent allowed by law;
- i) for pre-judgment and post-judgment interest to the extent allowed by law;
- j) for penalties as allowed by law; and
- k) for such other and further relief as this Court may deem just and proper.

DATED: March 2, 2007



By: Paul R. Kiesel, Esq.
 William L. Larson, Esq.
 Patrick DeBlase, Esq.
 KIESEL, BOUCHER & LARSON, LLP
 8648 Wilshire Boulevard
 Beverly Hills, California 90211
 Telephone: 310/854.4444

Steven D. Wolens, Esq.
 Alan B. Rich, Esq.
 Frank E. Goodrich, Esq.
 Gary Cruciani, Esq.
 Carrie Hill, Esq.
 BARON & BUDD, P.C.
 3102 Oak Lawn Avenue, Suite 1100
 Dallas, Texas 75219
 Telephone: 214/521.3605

Rocky Delgadillo, Los Angeles City Attorney
 Jim Colbert, Esq.
 200 North Main Street
 City Attorneys Office 8th Floor, Room 800
 Los Angeles, California 90012
 Telephone: 213/978.7940

Attorneys for the City of Los Angeles and the putative class.

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PROOF OF ELECTRONIC SERVICE

I, CESAR R. GARCIA, declare as follows:

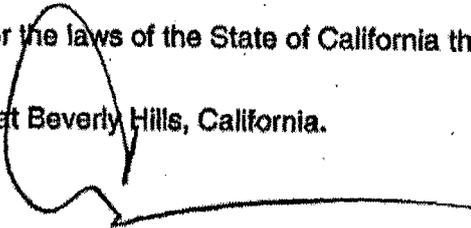
1. I am employed in the County of Los Angeles and am an employee at the law firm of Kiesel, Boucher & Larson LLP, located at 8648 Wilshire Boulevard, Beverly Hills, California 90211-2910.

2. I am over the age of 18 and not a party to the within action.

3. On March 2, 2007, I served the following documents: **THIRD AMENDED CLASS ACTION COMPLAINT (without Exhibit A)** via electronic filing in accordance with the Court's ruling governing the City of Los Angeles, California, et al. v. Hotels.Com, L.P., et al. (and Related Cases) matters requiring all documents to be served upon interested parties via Lexis eService System.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 2nd day of March, 2007, at Beverly Hills, California.



CESAR R. GARCIA

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PROOF OF SERVICE

STATE OF CALIFORNIA) ss:
COUNTY OF LOS ANGELES)

I am employed in the City and County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 8648 Wilshire Boulevard, Beverly Hills, California 90211-2910.

On March 2, 2007, I served the foregoing document(s) described as: **THIRD AMENDED CLASS ACTION COMPLAINT (WITH EXHIBIT A)** on the interested parties by placing () the original (X) a true and correct copy thereof in a sealed envelope addressed as follows:

PLEASE SEE ATTACHED MAILING LIST

VIA OVERNIGHT MAIL:

VIA : By delivering such documents to an overnight mail service or an authorized courier in an envelope or package designated by the express service courier addressed to the person(s) on whom it is to be served.

VIA U.S. MAIL:

I am readily familiar with the firm's practice for collection and processing of correspondence for mailing. Under that practice such envelope(s) would be deposited with the U.S. postal service with postage thereon fully prepaid, at Beverly Hills, California.

VIA PERSONAL DELIVERY:

I personally delivered such envelope(s) by hand to the offices of the addressee pursuant to CCP § 1011.

VIA ELECTRONIC MAIL:

I personally served upon all parties the above-reference documents via electronic mail to the e-mail addresses for those individuals noted to have e-mail addresses on the attached Proof of Service List.

VIA FACSIMILE:

The interested parties receiving the above-referenced document via facsimile have agreed to accept same via facsimile transmission, and the facsimile transmission report indicated that the transmission was complete and without error. A copy of that report, which was properly issued by the transmitting machine, is attached hereto.

STATE:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

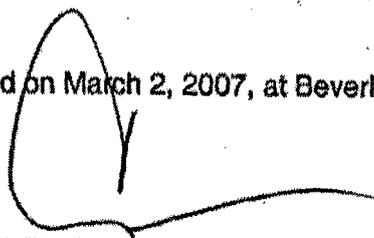
FEDERAL:

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

I declare under penalty of perjury under the laws of the state of California that

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the above is true and correct and was executed on March 2, 2007, at Beverly Hills, California.



CESAR R. GARCIA

Proof of Service

1 City of Los Angeles v. Hotels.Com, LP (and Related Matters)
2 Los Angeles Superior Court, Central Civil West
3 Lead Case Number: BC326693

3 Steve Wolens, Esq.
4 Frank Goodrich, Esq.
5 Baron & Budd P.C.
6 3102 Oak Lawn Avenue
7 Suite 1100
8 Dallas, Texas 75219
9 Telephone: 214/523.6205
10 Facsimile: 214/520.1181
11 E-mail: swolens@baronbudd.com;
12 fgoodrich@baronbudd.com
13 **Counsel for: Plaintiff**

9 Darrel Hieber, Esq.
10 Jeffrey Dasteel, Esq.
11 SKADDEN, ARPS, SLATE, MEAGHER
12 & SLOM, LLP
13 300 South Grand Avenue, 32nd Floor
14 Los Angeles, California 90071-3144
15 Telephone: 213/687.5220
16 Facsimile: 213/687.5600
17 E-mail: dhieber@skadden.com
18 **Counsel for Defendant:**
19 **PRICELINE.COM; TRAVELWEB, LLC;**
20 **LOWESTFARE.COM, INC.**

16 Michael Feuer, Esq.
17 David F. McDowell, Esq.
18 MORRISON & FOERSTER LLP
19 555 West Fifth Street
20 35th Floor
21 Los Angeles, California 90013
22 Telephone: 213/892.5885
23 Facsimile: 213/892.5454
24 E-mail: mfeuer@mfo.com
25 **Counsel for Defendant:**
26 **TRAVELOCITY.COM;**
27 **TRAVELOCITY.COM, L.P.;**
28 **SITE59.COM**

23 Elizabeth B. Herrington, Esq.
24 McDERMOTT, WILL & EMERY LLP
25 227 West Monroe Street
26 Chicago, Illinois 60606-5096
27 Telephone: 312/372.2000
28 Facsimile: 312/984.7700
email: eherrington@mwe.com
Counsel for Defendant:
INTERNETWORK PUBLISHING
CORPORATION d/b/a LODGING.COM

Alan Friedman, Esq.
Jenny L. Riggs, Esq.
Jason L. Haas, Esq.
JONES DAY
555 West 5th Street, Suite 4600
Los Angeles, California 90013-1025
Telephone: 213/489.3939
Facsimile: 213/243.2539
E-mail: aefriedman@jonesday.com
jhaas@jonesday.com

Counsel for Defendants:
HOTELS.COM GP, LLC; HOTELS.COM,
L.P.; EXPEDIA, INC.; HOTWIRE, INC.;
TRAVELNOW.COM, INC.

Deborah S. Sloan, Esq.
Jim Karen, Esq.
JONES DAY
2727 North Harwood Street
Dallas, Texas 75201-1515
Telephone: 214/220.3939
Facsimile: 214/969.5100
E-mail: dsloan@jonesday.com
Counsel for Defendants:
HOTELS.COM GP, LLC; HOTELS.COM,
L.P.; EXPEDIA, INC.; HOTWIRE, INC.;
TRAVELNOW.COM, INC.

Gordon A. Greenberg, Esq.
McDERMOTT, WILL & EMERY LLP
2049 Century Park East, 34th Floor
Los Angeles, California 90067
Telephone: 310/277.4110
Facsimile: 310/277.4730
E-mail: ggreenberg@mwe.com
Counsel for Defendants:
CENDANT TRAVEL DISTRIBUTION
SERVICES GROUP, INC.; CHEAP
TICKETS, INC.; ORBITZ, INC.; ORBITZ,
LLC

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City of Los Angeles v. Hotels.Com, LP (and Related Matters)
Los Angeles Superior Court, Central Civil West
Lead Case Number: BC326693

Robert Dombroff, Esq.
BINGHAM McCUTCHEN
399 Park Avenue
New York, NY 10022
Telephone: 212/705.7757
Facsimile: 212/702.3650
e-mail robert.dombroff@bingham.com
Counsel for Defendants
MAUPINTOUR HOLDING, LLC

John Pernick, Esq.
Bingham McCutchen LLP
3 Embarcadero Center, 18th Floor
San Francisco, California 94111
Telephone: 415/393.2544
Facsimile: 415/393.2286
e-mail: john.pernick@bingham.com
Counsel for Defendants
MAUPINTOUR HOLDING, LLC

Proof of Service

ARTICLE 1.7 TRANSIENT OCCUPANCY TAX

(Added by Ord. No. 127,757, Eff. 7/31/64, Operative 8/1/64.)

Section

- 21.7.1 Title.
- 21.7.2 Definitions.
- 21.7.3 Tax Imposed.
- 21.7.4 Exemptions.
- 21.7.5 Operator's Duties.
- 21.7.6 Registration.
- 21.7.7 Reporting and Remitting.
- 21.7.8 Penalties and Interest.
- 21.7.9 Additional Powers and Duties of Director of Finance, Etc.
- 21.7.10 Assessment -- Administrative Remedy.
- 21.7.11 Records.
- 21.7.12 Refunds.
- 21.7.13 Actions to Collect.

SEC. 21.7.1. TITLE.

This article shall be known as the Uniform Transient Occupancy Tax Ordinance of The City of Los Angeles.

SEC. 21.7.2. DEFINITIONS.

Except where the context otherwise requires, the definitions given in this section govern the construction of this article.

(a) **Person.** "Person" means any individual, firm, partnership, joint venture, association, social club, fraternal organization, joint stock company, corporation, estate, trust, business trust, receiver, trustee, syndicate or any other group or combination acting as a unit.

(b) **Hotel.** "Hotel" means any structure, or any portion of any structure, which is occupied or intended or designed for occupancy by transients for dwelling, lodging or sleeping purposes, and

includes any hotel, inn, tourist home or house, motel, studio, hotel, bachelor hotel, lodging house, rooming house, apartment house, dormitory, public or private club, or other similar structure or portion thereof, and shall further include any trailer court, camp, park or lot where trailer spaces, or combinations of such spaces and trailers, including mobile homes, are occupied or intended or designed for occupancy by transients for dwelling, lodging or sleeping purposes.

(c) **Occupancy.** “**Occupancy**” means the use or possession, or the right to the use or possession of any room or rooms or space or portion thereof, in any hotel for dwelling, lodging or sleeping purposes. The use or possession or right to use or possess any room or any suite of connecting rooms as office space, banquet or private dining rooms, or exhibit, sample or display space shall not be considered “occupancy” within the meaning of this definition unless the person exercising occupancy uses or possesses, or has the right to use or possess all or any portion of such room or suite of rooms for dwelling, lodging or sleeping purposes.

(d) **Transient.** (Amended by Ord. No. 164,961, Eff. 7/24/89, Oper. 8/1/89.) “**Transient**” means:

1. Any person, other than an individual, who exercises occupancy or is entitled to occupancy by reason of concession, permit, right of access, license or other agreement, for any period of time, or

2. Any individual who personally exercises occupancy or is entitled to occupancy by reason of concession, permit, right of access, license or other agreement, for a period of 30 consecutive calendar days or less, counting portions of calendar days as full days. Any such individual so occupying space in a hotel shall be deemed to be a transient until the period of 30 days has expired unless there is an agreement in writing between the operator and the occupant providing for a longer period of occupancy.

Nothing in this definition or in this article shall be construed as prohibiting the operator of a hotel from refunding or making an allowance of credit to a person who has paid tax as required by this article where it is established that the person was not a “transient” as defined in this section or was exempt from the tax for any other reason, or had for any reason overpaid the tax.

(e) **Rent.** “**Rent**” means the consideration charged, whether or not received, for the occupancy of space in a hotel valued in money, whether to be received in money, goods, labor or otherwise, including all receipts, cash, credits and property and services of any kind or nature, without any deduction therefrom whatsoever. Nothing in this definition shall be construed to mean that rent is charged directly or indirectly for the occupancy of space in a hotel when that space is provided to the occupant as a compliment from the operator and where no consideration is charged to or received from any other person.

(f) **Operator.** (Amended by Ord. No. 176,005, Eff. 7/7/04.) “**Operator**” means the person who is either the proprietor of the hotel or any other person who has the right to rent rooms within the hotel, whether in the capacity of owner, lessee, mortgagee in possession, licensee or any other capacity. The owner or proprietor who is primarily responsible for operation of the hotel shall be deemed to be the principal operator. If the principal operator performs or assigns its functions, in whole or in part, through a managing agent, a booking agent, a room seller or room reseller, or any other agent or contractee, including but not limited to on-line room sellers, on-line room resellers, and on-line travel agents, of any type or character other than an employee, those persons shall be deemed to be secondary operators.

A secondary operator shall be deemed an operator for purposes of this article and shall have the same duties and liabilities as the principal operator, including but not limited to the collection and remittance

of the full amount of the tax owed under the provisions of this article to the City. A secondary operator may satisfy its obligations under the provisions of this article by submitting the full amount of tax due under this article, with credit for any taxes remitted to any other operator, either directly to the Director of Finance or through the principal operator. The principal operator may satisfy any potential liability it may have for taxes owed by a secondary operator by entering into a legally binding agreement with that secondary operator to remit the portion of the tax owed by the secondary operator directly to the City. Upon request, the principal operator shall provide the Director of Finance with copies of any such agreements.

Compliance with the provisions of this article by either the principal operator or the secondary operator shall be deemed compliance by both and no provision of this article shall be deemed to require the payment and/or remittance of any amount other than the full amount of the tax owed by the transient.

SEC. 21.7.3. TAX IMPOSED.

For the privilege of occupancy in any hotel, each transient is subject to and shall pay a tax in the amount of four percent (4%) of the rent charged by the operator on or after August 1, 1964, to and including October 31, 1967; and at the rate of five percent (5%) from that date to and including February 28, 1971; and at the rate of six percent (6%) from that date to and including June 30, 1978; and at the rate of seven and one-half percent (7.5%) from that date to and including June 30, 1983; and at the rate of ten percent (10%) from that date to and including December 31, 1985; and at the rate of eleven percent (11%) from that date to and including December 31, 1987; and at the rate of twelve percent (12%) from that date to and including August 31, 1990; and at the rate of twelve and one-half percent (12.5%) from that date to and including July 31, 1993; and at the rate of fourteen percent (14%) thereafter. **(Amended by Ord. No. 168,850, Eff. 8/1/93.)** Said tax constitutes a debt owed by the transient to the City which is extinguished by the payment to the operator or to the City. The transient shall pay the tax to the operator of the hotel at the time the rent is paid. If the rent is paid in installments, or if an amount paid is less than the full amount of rent and tax accrued at the time of payment, a proportionate share of the tax shall be deemed to have been paid with each such payment or installment. The unpaid tax shall be due upon the transient's ceasing to occupy space in the hotel. If for any reason the tax is not paid to the operator of the hotel, the Director of Finance may require that such tax shall be paid directly to the City.

SEC. 21.7.4. EXEMPTIONS.

(Amended by Ord. No. 159,773, Eff. 5/25/85.)

No tax shall be imposed upon:

- (a) Any person as to whom, or any occupancy as to which, it is beyond the power of the City to impose the tax herein provided;
- (b) Any Federal or State of California officer or employee, including employees of federal credit unions, who provides proof that he or she is on official Federal or State business. **(Amended by Ord. No. 172,773, Eff. 9/25/99.)**
- (c) Any officer or employee of a foreign government who is exempt by express provision of federal law or international treaty;
- (d) Any person to whom rent is charged at the rate of \$2.00 per day or less;

(e) Any person as to whom, or any occupancy as to which, rent is paid from funds administered by the Emergency Food and Shelter National Board Program.

No exemption shall be granted under Subsections (a), (b) or (c) except upon a claim therefor made at the time rent is collected and under penalty of perjury upon a form prescribed by the Director of Finance.

It shall be the duty of an operator to keep and maintain for a period of four (4) years written documentation in support of each exemption granted under Subsection (e).

SEC. 21.7.5. OPERATOR'S DUTIES.

Each operator shall collect the tax imposed by this article to the same extent and at the same time as the rent is collected from every transient. The amount of tax shall be separately stated from the amount of the rent charged and each transient shall receive a receipt for payment from the operator. No operator of a hotel shall advertise or state in any manner, whether directly or indirectly, that the tax or any part thereof will be assumed or absorbed by the operator, or that it will not be added to the rent, or that, if added, any part will be refunded except in the manner herein provided.

SEC. 21.7.6. REGISTRATION.

(a) Within 30 days after the operative date of this article, or within 30 days after commencing business, whichever is later, each operator of any hotel renting occupancy to transients shall register said hotel with the Director of Finance and obtain from him a "**Transient Occupancy Registration Certificate**" to be at all times posted in a conspicuous place on the premises. Said certificate shall, among other things, state the following:

1. The name of the operator;
2. The address of the hotel;
3. The date upon which the certificate was issued;

4. "This Transient Occupancy Registration Certificate signifies that the person named on the face hereof has fulfilled the requirements of the Uniform Transient Occupancy Tax Ordinance by registering with the Director of Finance for the purpose of collecting from transients the Transient Occupancy Tax and remitting said tax to the Director of Finance. This certificate does not authorize any person to conduct any unlawful business or to conduct any lawful business in an unlawful manner, nor to operate a hotel without strictly complying with all local applicable laws, including but not limited to those requiring a permit from any board, commission, department or office of this City. This certificate does not constitute a permit."

SEC. 21.7.7. REPORTING AND REMITTING.

(Amended by Ord. No. 176,003, Eff. 7/7/04, Oper. 1/1/05.)

Each operator shall, on or before the 25th day of each calendar month, make a statement to the Director of Finance of the total rents charged and received, and the amount of tax collected for transient occupancies during the preceding calendar month. At the time the statement is filed, the full amount of the tax collected and tax not collected but required to be collected, shall be remitted to the Director of

Finance. Except as provided in Sec. 21.7.8, an operator shall not be required to remit to the Director of Finance any amount of tax not collected and not required to be collected from a transient. All taxes collected and required to be collected by operators pursuant to this article shall be held in trust for the account of the City until payment thereof is made to the City. The full amount of tax due, whether collected or owed but not collected, under this Article shall be deemed a debt owed to the City by the operator and shall be discharged only upon payment to the City.

Statements and payments are due immediately upon cessation of business for any reason, at which time the operator shall furnish the Director of Finance with the name and address of the successor operator.

Notwithstanding the foregoing, the amount of taxes required to be remitted by an operator to the City pursuant to this Section 21.7.7 shall be automatically offset by the City in an amount equal to special taxes levied, collected and satisfied, by a City Community Tax District, formed pursuant to Division 6, Chapter 10 of the Los Angeles Administrative Code, against the operator's property during the preceding calendar month. The sum of the operator's monthly transient occupancy tax remittance to the City and the operator's monthly special tax payment shall equal the amount of transient occupancy tax required to be collected pursuant to this Article. The City may request from the applicable operator or the legislative body of the Community Taxing District documentation or other information necessary to substantiate the special tax payment. **(Added by Ord. No. 177,052, Eff. 11/20/05.)**

The automatic tax offset of the transient occupancy taxes due pursuant to this Article shall not exceed the rate of transient occupancy tax levied by the City, and no tax offset shall be provided for the amount of special taxes paid by an operator in excess of the rate of transient occupancy tax levied by the City. **(Added by Ord. No. 177,052, Eff. 11/20/05.)**

SEC. 21.7.8. PENALTIES AND INTEREST.

(a) Taxes collected by an operator which are not remitted to the Director of Finance on or before the due dates fixed in Sec. 21.7.7, or fixed by the Director of Finance as provided therein, are delinquent.

(b) Interest and penalties for delinquency in remittance of any tax collected or required to be collected, or any deficiency determination, shall attach and be paid by the operator at the rates and in the same manner as is provided in Section 21.05 of this Chapter for delinquency in the payment of Business Tax, except that a month shall commence on the 26th day of each calendar month and terminate on the 25th day of the succeeding calendar month. **(Amended by Ord. No. 176,471, Eff. 3/22/05, Oper. 1/1/05.)**

(c) The Director of Finance shall have power to impose additional penalties upon an operator for fraud and negligence in reporting and remitting in the same manner and at the same rates as are provided in Sec. 21.05 of this chapter for such penalties upon persons required to pay Business Tax.

(d) For collection purposes only, every penalty imposed and such interest as accrues under the provisions of this section shall become a part of the tax herein required to be remitted. **(Amended by Ord. No. 174,085, Eff. 8/19/01.)**

SEC. 21.7.9. ADDITIONAL POWERS AND DUTIES OF DIRECTOR OF FINANCE, ETC.

(a) The Director of Finance shall have the power and duty, and is hereby directed to enforce each

and all of the provisions of this article.

(b) In administering and enforcing the provisions of this article, the Director of Finance shall have the same powers and duties with respect to collecting the tax provided herein as he has under Sec. 21.15 of this chapter with respect to collecting the Business Tax.

(c) The provisions of Sections 21.17, 21.20 and 21.21 of this chapter shall apply to the administration and collection of the tax imposed under the provisions of this article in the same manner as they apply to the administration and collection of the Business Tax.

SEC. 21.7.10. ASSESSMENT – ADMINISTRATIVE REMEDY.

The Director of Finance may make an assessment for taxes not remitted by an operator for any reason specified in Sec. 21.16 of this chapter for making an assessment for unpaid Business Tax. The manner of making and providing notice of such assessment; the right to a hearing and the conduct of such hearing; the preparation and service of findings; filing exceptions; and passing upon exceptions shall be the same as provided in Sec. 21.16 of this chapter.

SEC. 21.7.11. RECORDS.

(Amended by Ord. No. 173, 587, Eff. 12/7/00.)

It shall be the duty of every operator liable for the collection and payment to the City of any tax imposed by this article to keep and preserve, for a period of three years, all records as may be necessary to determine the amount of such tax as he may have been liable for the collection of and payment to the City, which records the Office of Finance shall have the right to inspect at all reasonable times.

SEC. 21.7.12. REFUNDS.

(a) Whenever the amount of any tax has been overpaid or paid more than once or has been erroneously or illegally collected or received by the City under this article it may be refunded as provided in this section. Except as otherwise provided in this section, refunds of overpaid taxes shall be made in the same manner as is provided in Sec. 21.07 of this chapter for refunds of overpayments in Business Taxes.

(b) An operator may claim a refund or take as credit against taxes collected and remitted the amount overpaid, paid more than once or erroneously or illegally collected or received when it is established in a manner prescribed by the Director of Finance that the person from whom the tax has been collected was not a transient; provided, however, that neither a refund nor a credit shall be allowed unless the amount of the tax so collected has either been refunded to the transient or credited to rent subsequently payable by the transient to the operator.

(c) A transient may obtain a refund of taxes overpaid or paid more than once or erroneously or illegally collected or received by the City by filing a claim in the manner provided in Sec. 21.07 of this chapter, but only when the tax was paid by the transient directly to the Director of Finance, or when the transient having paid the tax to the operator, establishes to the satisfaction of the Director of Finance that the transient has been unable to obtain a refund from the operator who collected the tax.

(d) No refund shall be paid under the provisions of this section unless the claimant establishes his right thereto by written records showing entitlement thereto.

SEC. 21.7.13. ACTIONS TO COLLECT.

Any tax required to be paid by any transient under the provisions of this article shall be deemed a debt owed by the transient to the City. Any such tax collected by an operator which has not been paid to the City shall be deemed a debt owed by the operator to the City. Any person owing money to the City under the provisions of this article shall be liable to an action brought in the name of the City for the recovery of such amount. Any operator who undertakes legal action to recover unpaid rent due from a transient may include the amount of tax due from the transient in the amount sought to be recovered.

NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

WAKE COUNTY

NOV 3 3: 58

06 CVS _____

WAKE COUNTY

WAKE COUNTY, CSC

Plaintiff,

v.

HOTELS.COM, LP; HOTWIRE, INC.;
TRIP NETWORK, INC. (d/b/a CHEAP
TICKETS.COM;) TRAVELPORT,
INC. (f/k/a CENDANT TRAVEL
DISTRIBUTION SERVICES GROUP,
INC.); EXPEDIA, INC.,
INTERNETWORK PUBLISHING
CORP. (D/B/A LODGING.COM);
LOWESTFARE.COM,
INCORPORATED; MAUPIN-TOUR
HOLDING, LLC; ORBITZ, LLC;
PRICELINE.COM INCORPORATED;
SITES9.COM, LLC;
TRAVELOCITY.COM, LP;
TRAVELWEB LLC; AND
TRAVELNOW.COM, INC.,

Defendants.

VERIFIED COMPLAINT AND ACTION
FOR DECLARATORY JUDGMENT

Plaintiff, Wake County, North Carolina (hereinafter "County" or "Wake
County"), by and through its undersigned attorneys, and on information and belief,
alleges and states as follows:

NATURE OF ACTION

This is an action to collect taxes and penalties due Wake County as the result of
gross receipts realized by Defendants and derived from the rental of rooms, lodging and

56. As a direct and proximate result of the conduct of the Defendants, the County has suffered and will continue to suffer damages in an amount in excess of \$10,000.00, the exact amount to be determined at trial.

57. At all times alleged herein, Defendants acted willfully, wantonly, and with conscious disregard for the rights of the County, such that Wake County request that the trier of fact, award the County additional damages in an amount sufficient to punish Defendants for their conduct.

COUNT IV

Imposition of Constructive Trust

58. Wake County alleges the previous allegations as if fully set forth herein.

59. At all times herein mentioned, the County's Tax monies were in the possession and under the control of Defendants. Defendants have taken this money for their own use and benefit thereby depriving the County of the use and benefit thereof.

60. The conduct of Defendants has deprived the County of a beneficial interest in the tax monies.

61. By virtue of their actions, Defendants hold these funds as constructive trustees for the benefit of the County. Wake County requests that Defendants be directed to immediately give possession of the funds to Wake County.

62. As a direct and proximate cause of Defendants' conduct, the County has suffered and will continue to suffer damages in an amount in excess of \$10,000.00, the exact amount to be determined at trial.

COUNT V

Demand for Accounting

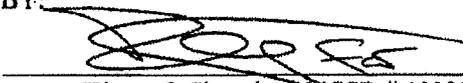
63. Wake County alleges the previous allegations as if fully set forth herein.

14. For such other and further relief as the Court may deem just and proper.

Respectfully submitted this the 3rd day of November, 2006,

SHANAHAN LAW GROUP

BY:



Kieran J. Shanahan, NCSB # 13329
Reef C. Ivey, II, NCSB #05921
207 Fayetteville Street Mall
Raleigh, North Carolina 27601
(919) 856-9494
(919) 856-9499

VERIFICATION

Michael R. Ferrell, being first duly sworn, deposes and says that he is an official of the Plaintiff and executes this Verification on behalf of the Plaintiff. He has read the contents of the foregoing Complaint, knows the contents thereof and that the same are true of his own knowledge, except as to matters stated upon information and belief, and as to those matters, he believes them to be true.

Michael R. Ferrell
Plaintiff

SWORN TO AND SUBSCRIBED BEFORE ME

This the 3rd day of November, 2006.

Cherie W. Lee
Notary Public (Cherie W. Lee)

My Commission Expires:

3/5/10

Declarations

Travel Agents And Tour Operators

Professional Liability Insurance Policy



This insurance is provided by:

Zurich American Insurance Company

Policy Number: **EOL 5329302-02**

Item 1. Named Insured: **Expedia, Inc., et al.**
 Address: **13810 SE Eastgate Way**
Suite 400
Bellevue, WA 98005

The Named Insured is: Individual Partnership Joint Venture Corporation Organization LLC

Item 2. Policy Period: From: **10/01/2005** To: **10/01/2006**
 12:01 A.M. Standard Time at the address shown in Item 1.

Item 3. Coverages:		Limits of Liability	Deductible
A. Bodily Injury and Property Damage (except Automobile)	Each Occurrence	\$5,000,000	\$50,000
B. Bodily Injury and Property Damage Automobile (except owned automobile)	Each Occurrence	\$5,000,000	\$50,000
C. Professional Liability	Each Negligent Act or Negligent Omission	\$5,000,000	\$50,000
D. Personal Injury	Each Offense	\$5,000,000	\$50,000
General Aggregate Limit		\$5,000,000	

Item 4. Fire Legal Liability (if applicable) Any One Fire \$50,000 \$50,000

Item 5. Premium: **\$355,754.00**

Item 6. Endorsements Effective At Inception: See Attached Schedule of Forms and Endorsements

Broker: Aon Financial Services Group, Tech & Prof Risks,
 Aon Center
 200 East Randolph, Floor 11
 Chicago, IL 60601

Signed by: *Maureen Kaye*
 Authorized Representative

Date: November 15, 2005

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 Page 1 of 1



Schedule of Forms and Endorsements

Policy No.	Eff. Date of Pol.	Exp. Date of Pol.	Eff. Date of End.
EOL 5329302-02	10/1/05	10/1/06	10/1/05

Named Insured:

Expedia, Inc., et al.

The following Forms and Endorsements are included on the policy:

<u>Form No.</u>	<u>Edition</u>	<u>Title</u>
U-TAP-120-A-CW	10/04	Travel Agents and Tour Operators Professional Liability Insurance
U-TAP-113-A CW	08/04	Named Insured
U-TAP-116-A CW	08/04	Schedule of Locations
U-TAP-101-A CW	08/04	Advertising Injury
U-TAP-107-A-CW	08/04	Defense Deductible
U-TAP-108-A CW	08/04	Extended General Liability
U-GU-692-A CW	08/04	Disclosure of Premium
U-TAP-187-A WA	10/04	Washington Amendatory



Named Insured

Policy No.	Eff. Date of Pol.	Exp. Date of Pol.	Eff. Date of End.
EOL 5329302-02	10/1/05	10/1/06	10/1/05

Named Insured and Address:

Expedia, Inc., et al.
13810 SE Eastgate Way
Suite 400
Bellevue, WA 98005

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

This endorsement modifies insurance provided under the:

Travel Agents and Tour Operators Professional Liability Policy

It is hereby understood and agreed that Item 1 of the Declarations, **Named Insured**, is amended to include the following:

Item 1: Named Insured

Activity Information Center, Inc.
d/b/a: Activity World
C.A. ID SA (Anyway.com)
Classic Custom Vacations, LLC
d/b/a: Classic Hawaii
d/b/a: Classic America
d/b/a: Classic Caribbean
d/b/a: Classic Mexico
d/b/a: Classic Europe
d/b/a: Hyatt Vacations
d/b/a: Las Vegas Reservations, Inc.
d/b/a: Professional Travel Services, Inc.
e-Long, Inc. (plus subs)
Expedia, Inc.

ALL OTHER TERMS AND CONDITIONS OF THIS POLICY REMAIN UNCHANGED.



Named Insured

Policy No.	Eff. Date of Pol.	Exp. Date of Pol.	Eff. Date of End.
EOL 5329302-02	10/1/05	10/1/06	10/1/05

Named Insured and Address:

Expedia, Inc., et al.
13810 SE Eastgate Way
Suite 400
Bellevue, WA 98005

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

This endorsement modifies insurance provided under the:

Travel Agents and Tour Operators Professional Liability Policy

It is hereby understood and agreed that Item 1 of the Declarations, **Named Insured**, is amended to include the following:

Item 1: Named Insured

Expedia, Inc. (New Expedia, Inc. post spin)
Expedia Australia Pty, Ltd.
Expedia Canada Corp.
Expedia.com GmbH
Expedia.com Limited
Expedia Corporate Travel, LLC
Expedia Corporate Travel UK Ltd.
Expedia Corporate Travel Europe S.A.
Expedia Corporate Travel France S.A.S.
Expedia Finland OY
Expedia France S.A.S.
Expedia Holdings KK
Expedia Italy SRL
Expedia Mexico S.R.L. de C.V.

ALL OTHER TERMS AND CONDITIONS OF THIS POLICY REMAIN UNCHANGED.



Named Insured

Policy No.	Eff. Date of Pol.	Exp. Date of Pol.	Eff. Date of End.
EOL 5329302-02	10/1/05	10/1/06	10/1/05

Named Insured and Address:

Expedia, Inc., et al.
13810 SE Eastgate Way
Suite 400
Bellevue, WA 98005

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

This endorsement modifies insurance provided under the:

Travel Agents and Tour Operators Professional Liability Policy

It is hereby understood and agreed that Item 1 of the Declarations, **Named Insured**, is amended to include the following:

Item 1: Named Insured

Expedia.nl BV
Expedia S.A.
Expedia Corporate Travel Belgium S.A.
Expedia Services S.A.S.
Expedia Spain, S.L.
Expedia Asia Pacific Limited (after spin-off, entity will be transferred from Hotels.com to Expedia)
GL-Expedia S.A.S.(Joint Venture, 49% ownership)
Greenhouse Media LLC
HRN France SAS
Newtrade Technology Corp.
Premier Getaways, Inc.
Travelscape, LLC
d/b/a: Hyatt Vacations
Webseed, LLC

ALL OTHER TERMS AND CONDITIONS OF THIS POLICY REMAIN UNCHANGED.



Named Insured

Policy No.	Eff. Date of Pol.	Exp. Date of Pol.	Eff. Date of End.
EOL 5329302-02	10/1/05	10/1/06	10/1/05

Named Insured and Address:

Expedia, Inc., et al.
13810 SE Eastgate Way
Suite 400
Bellevue, WA 98005

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

This endorsement modifies insurance provided under the:

Travel Agents and Tour Operators Professional Liability Policy

It is hereby understood and agreed that Item 1 of the Declarations, **Named Insured**, is amended to include the following:

Item 1: Named Insured

World Travel Management

WWTE, Inc.

d/b/a: World Wide Travel Exchange (WWTE)

IAC Holdings S.A.S.

IAC Global LLC

IACT US, Inc.

IACT Asia Pacific Ltd.

USA Media Corp.

USA Media, LLC

XEI Sub 1, Inc.

XEI Sub 2, Inc.

XEI Sub 3, Inc.

ALL OTHER TERMS AND CONDITIONS OF THIS POLICY REMAIN UNCHANGED.

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Schedule of Locations

Policy No.	Eff. Date of Pol.	Exp. Date of Pol.	Eff. Date of End.
EOL 5329302-02	10/1/05	10/1/06	10/1/05

Named Insured and Address:

Expedia, Inc., et al.
13810 SE Eastgate Way
Suite 400
Bellevue, WA 98005

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

This endorsement modifies insurance provided under the:

Travel Agents and Tour Operators Professional Liability Policy

Schedule of Locations:

1. All of the named insured's Travel Agency and/or Tour Operator locations.

ALL OTHER TERMS AND CONDITIONS OF THIS POLICY REMAIN UNCHANGED.

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Page 1 of 1

Advertising Injury Liability Coverage Endorsement



Policy No.	Eff. Date of Pol.	Exp. Date of Pol.	Eff. Date of End.
EOL 5329302-02	10/1/05	10/1/06	10/1/05

Named Insured and Address:

Expedia, Inc., et al.
13810 SE Eastgate Way
Suite 400
Bellevue, WA 98005

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

This endorsement modifies insurance provided under the:

Travel Agents and Tour Operators Professional Liability Policy

The policy is hereby amended to include Advertising Injury Liability:

- I. It is hereby understood and agreed that Section I - INSURING AGREEMENT, Paragraph A 4, Coverage D is deleted in its entirety and replaced by the following:

4. Coverage D Personal and Advertising Injury Liability

The Company will pay on behalf of the **Insured** those sums that the **Insured** becomes legally obligated to pay as **Damages** because of **Personal and Advertising Injury** Liability caused by an offense anywhere in the world arising out of **Travel Agency Operations** of the **Named Insured** provided such offense is committed during the **Policy Period**.

- II. It is further understood and agreed Section I - INSURING AGREEMENT, Paragraph B, is deleted in its entirety and replaced by the following:

B. Defense

The Company shall have the right and duty to defend any **Suit** against the **Insured** seeking **Damages** on account of such **Bodily Injury, Property Damage**, negligent act or negligent omission or **Personal and Advertising Injury** to which this insurance applies, even if any of the allegations of the **Suit** are groundless, false or fraudulent. The Company shall have the right to conduct such investigation and settlement of any **Claim** or **Suit** as it deems expedient. The Company shall not be obligated to pay any **Claim** or judgment or to defend any **Suit** after the applicable Limit of Liability has been exhausted by payment of judgments or settlements.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Paragraph C below.

- III. It is hereby understood and agreed that Section II - EXCLUSIONS, Paragraphs R, S, and Y. are deleted in their entirety and replaced with the following:

R. Under Coverage C, to **Bodily Injury, Property Damage** or **Personal and Advertising Injury**;

S. **Personal and Advertising Injury**:

1. Caused by or at the direction of the **Insured** with the knowledge that the act would violate the rights of another or would inflict **Personal and Advertising Injury**;
2. Arising out of oral or written publication or utterance of material, if done by or at the direction of the **Insured** with knowledge of its falsity;

3. Arising out of oral or written publication of material whose first publication took place before the beginning of the **Policy Period**;
 4. For which the **Insured** has assumed liability in a contract or agreement, except an **Incidental Contract**. This exclusion does not apply to liability for **Damages** that the **Insured** would have in the absence of the contract or agreement;
 5. Arising out of an electronic chatroom or bulletin board the **Insured** hosts, owns or over which the **Insured** exercises control;
 6. Arising out of a breach of contract, except an implied contract to use another's advertising idea in the **Insured's Advertisement**;
 7. Arising out of the failure of goods, products or services to conform with any statement of quality or performances made in the **Insured's Advertisement**;
 8. On the part of the **Insured** whose business is advertising, broadcasting, publishing, or telecasting;
 9. Arising out of the unauthorized use of another's name or product in the **Insured's** email address, domain name, megatag, or any other similar tactics to mislead another's potential customer.
- Y. Any **Claim** or **Suit** based upon or arising out of any piracy, infringement of a patent, copyright, trademark, servicemark, trade dress, trade name, trade secret or any other intellectual property rights. However, this exclusion does not apply to infringement, in the **Insured's Advertisement**, of copyright, trade dress or slogan.

IV. It is hereby understood and agreed that the following Definition is added to Section IV - DEFINITIONS:

Advertisement means a notice that is broadcast or published to the general public or specific market segments about the **Insured's** goods, products or services for the purpose of attracting customers or supporters. For the purpose of this definition:

1. Notices that are published include material placed on the Internet or on similar electronic means of communication; and
2. Regarding web-sites, only that part of a web-site that is about the **Insured's** goods, products or services for the purposes of attracting customers or supporters is considered an advertisement.

V. It is hereby understood and agreed that Section IV - DEFINITIONS, Paragraph P is deleted in its entirety and replaced by the following:

P. Personal and Advertising Injury means injury including consequential **Bodily Injury** arising out of one or more of the following offenses:

1. False arrest, detention or imprisonment,
2. Malicious prosecution;
3. The oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products, or services.
4. Oral or written publication, in any manner, of material that violates a person's right of privacy;
5. Wrongful eviction from; wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor.
6. Infringing upon another's copyright, trade dress or slogan in the **Insured's Advertisement**; or
7. The use of another's advertising idea in the **Insured's Advertisement**.

VI. It is hereby understood and agreed that Section V - LIMITS OF LIABILITY, Paragraph F is deleted in its entirety and replaced by the following:

F. Under Coverage D:

1. Subject to B above, the Limit of Liability shown in the Declarations for Coverage D is the most the Company will pay for **Damages** on account of any offense to which Coverage D applies.
2. All **Personal and Advertising Injury** arising out of an offense or series of related offenses shall be considered as arising out of a single offense.

ALL OTHER TERMS AND CONDITIONS OF THIS POLICY REMAIN UNCHANGED.

Deductible



Policy No.	Eff. Date of Pol.	Exp. Date of Pol.	Eff. Date of End.
EOL 5329302-02	10/1/05	10/1/06	10/1/05

Named Insured and Address:

Expedia, Inc., et al.
13810 SE Eastgate Way
Suite 400
Bellevue, WA 98005

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

This endorsement modifies insurance provided under the:

Travel Agents and Tour Operators Professional Liability Policy

I. For purposes of this endorsement, the following definition is added to Section IV - DEFINITIONS:

Defense Cost means:

1. Fees, costs and expenses charged by attorneys retained or approved by the Company; and
2. Reasonable and necessary fees, costs and expenses resulting from the investigation, adjustment, defense and appeal of a **Claim** or **Suit**.

Defense Cost shall not include:

1. Salaries, loss of earnings, reimbursement for the **Insured's** time or attendance required in any investigation, defense or appearance otherwise provided under Section I - INSURING AGREEMENT C4;
2. Other remuneration by or to any **Insured**.

II. For purposes of this endorsement, Section VI - DEDUCTIBLE is deleted in its entirety and replaced by the following:

VI. DEDUCTIBLE

The Deductibles set forth in the Declarations of the policy apply as follows:

- A. Under Coverage A, the each **Occurrence** Deductible applies to all **Damages** and **Defense Cost** because of all **Bodily Injury** and **Property Damage** as the result of any one **Occurrence**, regardless of the number of persons or organizations who sustain **Damages** because of that **Occurrence**.
- B. Under Coverage B, the each **Occurrence** Deductible applies to all **Damages** and **Defense Cost** because of all **Bodily Injury** and **Property Damage** as the result of any one **Occurrence**, regardless of the number of persons or organizations who sustain **Damages** because of that **Occurrence**.
- C. Under Coverage C, the each negligent act or negligent omission Deductible applies to all **Damages** and **Defense Cost** because of any negligent act or negligent omission or series of related negligent acts or negligent omissions, regardless of the number of persons or organizations who sustain **Damages** because of such negligent act or negligent omission or series of related negligent acts or negligent omissions.
- D. Under Coverage D, the each offense Deductible applies to all **Damages** and **Defense Cost** because of any offense or series of related offenses, regardless of the number of persons or organizations who sustain **Damages** because of such offense or series of related offenses.
- E. The **Limits of Liability** shall not be reduced by the application of the Deductible.
- F. If more than one coverage part applies to any **Occurrence**, negligent act or negligent omission, or offense, the **Named Insured** is required to pay a single Deductible, as determined by the highest applicable Deductible.

ALL OTHER TERMS AND CONDITIONS OF THIS POLICY REMAIN UNCHANGED.

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Extended General Liability



Policy No.	Eff. Date of Pol.	Exp. Date of Pol.	Eff. Date of End.
BOL 5329302-02	10/1/05	10/1/06	10/1/05

Named Insured and Address:

Expedia, Inc., et al.
13810 SE Eastgate Way
Suite 400
Bellevue, WA 98005

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

This endorsement modifies insurance provided under the:

Travel Agents and Tour Operators Professional Liability Coverage Form

I. The following is added to Item 3 of the Declarations:

Item 3.	Coverages	Limits of Liability
E.	Medical Payments	Each Person \$1,000

II. The following coverage is added to Section I - INSURING AGREEMENT, Paragraph A:

I. INSURING AGREEMENT

A. Coverages

5. Coverages E Medical Payments

- a. The Company will pay medical expenses as described below for **Bodily Injury** caused by an accident:
 - (1) On premises the **Named Insured** owns or rents;
 - (2) On ways next to premises the **Named Insured** owns or rents; or
 - (3) Because of the **Named Insured's Travel Agency Operations**, provided that the following apply to Paragraphs a(1), a(2) and a(3) above:
 - (i) The accident takes place anywhere in the world during the **Policy Period**;
 - (ii) The expenses are incurred and reported to the Company within one (1) year of the date of the accident;
 - (iii) The injured person submits to physical examination, at the Company's expense, by physicians of the Company's choice as often as the Company reasonably required;
 - (iv) The injured person provides the Company with copies of all medical bills, reports, and records requested and shall furnish the Company with such authorizations as may be necessary in that regard;
 - (v) The injured person shall cooperate with the Company in providing information in the form of interviews, statements or testimony relevant to the Company's investigation of **Claim**.
- b. The Company will make these payments regardless of fault. These payments will not exceed the applicable Limit of Liability. The Company will pay reasonable expenses for:

U-TAP-108-A CW (08/04)

Page 1 of 2

- (1) First aid at the time of an accident;
- (2) Necessary medical, surgical, x-ray and dental services, including prosthetic devices; and
- (3) Necessary ambulance, hospital, professional nursing and funeral services.

III. For purposes of this endorsement, the following exclusions are added to Section V - EXCLUSIONS:

ADDITIONAL EXCLUSIONS

This policy does not apply to:

- A. Any person who has presented a **Claim** or filed **Suit** against any **Insured** seeking **Damages** for **Bodily Injury** caused by an **Occurrence** as described above;
- B. **Bodily Injury** to any **Insured**;
- C. **Bodily Injury** to a person injured in that part of premise the **Named Insured** owns or rents that the person normally occupies;
- D. Any person hired to do work for or on behalf of any **Insured** or a tenant of any **Insured**;
- E. Any person to whom benefits for the **Bodily Injury** are payable or must be provided under a worker's compensation or disability benefits law or a similar law;
- F. Any person injured while taking part in athletics; or
- G. Any **Bodily Injury** excluded under Coverage A of the policy.

IV. For purposes of this endorsement, Section V - LIMITS OF LIABILITY, Paragraph B is amended as follows:

- B. The General Aggregate Limit shown in the Declarations is the most the Company will pay for the sum of all **Damages** under Coverage A, B, C, D and E.

Furthermore, the following is added to Section V - LIMITS OF LIABILITY:

Under Coverage E:

1. The each person Limit of Liability shown in this endorsement is the most the Company will pay for the sum of medical expenses under Coverage E above because of **Bodily Injury** sustained by any one person arising out of any one **Occurrence**.
2. All **Bodily Injury** arising out of continuous or repeated exposure to substantially the same general harmful conditions shall be considered as arising out of one **Occurrence**.

V. EXPANDED DEFINITION OF INCIDENTAL CONTRACT

For purposes of this endorsement, solely with respect to Coverage A and Coverage D of the policy, it is hereby understood and agreed that Section IV - DEFINITIONS, Paragraph G is deleted in its entirety and replaced with the following:

- G. **Incidental Contract** means a written hold harmless or indemnification agreement relating to the conduct of **Travel Agency Operations** by the **Named Insured** in which the **Named Insured** has assumed the tort liability of another party, provided such agreement was executed prior to the date of any injury or **Damage**.

ALL OTHER TERMS AND CONDITIONS OF THIS POLICY REMAIN UNCHANGED.



**THIS ENDORSEMENT IS ATTACHED TO AND MADE PART OF YOUR POLICY.
THIS ENDORSEMENT DOES NOT GRANT ANY COVERAGE OR CHANGE THE TERMS
AND CONDITIONS OF ANY COVERAGE UNDER THE POLICY.**

**DISCLOSURE OF PREMIUM
(RELATING TO DISPOSITION OF TRIA)**

SCHEDULE*

(1) Premium attributable to risk of loss from certified acts of terrorism through the end of the policy period based on the extension of the Terrorism Risk Insurance Act of 2002 ("TRIA"):

\$ 0

If TRIA terminates, the portion of this premium attributable to the remaining part of the policy period, as modified by any change shown in (2) of this Schedule, applies to the risk of loss from terrorism after the termination of TRIA.

(2) Premium change upon termination of TRIA or upon applicability of a Conditional Endorsement:

No change unless one of the following is completed -

Return Premium:

Additional Premium:

If we notify you of an additional premium charge, the additional premium will be due as specified in such notice.

* Information required to complete this Schedule, if not shown above, will be shown in the Declarations.

A. Disclosure of Premium

In accordance with the federal Terrorism Risk Insurance Act of 2002 ("TRIA"), we are required to provide you with a notice disclosing the portion of your premium, if any, attributable to the risk of loss from terrorist acts certified under that Act. That portion of your premium attributable is shown in the Schedule of this endorsement or in the Declarations.

B. Disclosure of Federal Participation in Payment of Terrorism Losses

The United States Government, Department of the Treasury, will pay a share of terrorism losses insured under the federal program. The federal share equals 90% of that portion of the amount of such insured losses that exceeds the applicable insurer retention. The Act currently provides for no insurance industry or United States government participation in terrorism losses that exceed \$100 billion in any one calendar year. The federal program established by the Act is scheduled to terminate at the end of 12/31/05 unless extended by the federal government.

C. Possibility of Additional or Return Premium

The premium attributable to the risk of loss from certified acts of terrorism coverage is calculated based on the coverage (if any) in effect at the beginning of your policy for certified acts of terrorism. If your policy contains a Conditional Endorsement, the termination of TRIA or extension of the federal program with certain modifications (as explained in that endorsement) may modify the extent of coverage (if any) your policy provides for terrorism. If TRIA terminates or the Conditional Endorsement becomes applicable to your policy, the return premium (if any) or additional premium (if any) shown in (2) of the Schedule will apply. If the level or terms of federal participation change, the premium shown in (1) of the schedule attributable to that part of the policy period extending beyond such a change may not be appropriate and we will notify you of any changes in your premium.

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U-GU-692-A CW (08/04)

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Washington Amendatory



Policy No.	Eff. Date of Pol.	Exp. Date of Pol.	Eff. Date of End.
EOL 5329302-02	10/1/05	10/1/06	10/1/05

Named Insured and Address:

Expedia, Inc., et al.
13810 SE Eastgate Way
Suite 400
Bellevue, WA 98005

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

This endorsement modifies insurance provided under the:

Travel Agents and Tour Operators Professional Liability Policy

The following condition is added to Section VII - CONDITIONS:

Cancellation

1. This policy may be canceled by the first **Named Insured** shown in Item 1 of the Declarations by surrender of the policy to the Company or by mailing written notice to the Company stating when such cancellation shall take effect. If canceled by the first **Named Insured** shown in Item 1 of the Declarations, the Company shall retain the customary short-rate proportion of the premium. In no event may the requested date of cancellation be greater than ten (10) days prior to the date the request is received by the Company.
2. The Company may cancel this policy by mailing written notice of cancellation by certified mail or delivered to the first **Named Insured** at the address shown in Item 1 of the Declarations no fewer than ten (10) days prior to the effective date of cancellation, and mailing within five (5) working days to the producer of record, if any, if cancellation is for nonpayment of premium. The Company may cancel this policy by mailing written notice of cancellation by certified mail or delivered to the first **Named Insured** at the address shown in Item 1 of the Declarations at least forty-five (45) days prior to the effective date of cancellation and mailing within five (5) working days to the producer of record, if any, if cancellation is for any other reason. Such notice shall state the reason for cancellation and if applicable be accompanied by a refund of unearned premium, except a premium that has been financed. The written notice of cancellation to the producer of record, if any, may be provided electronically.

The Company shall also mail or deliver like notice to any mortgage holder, pledgee, or other person shown in this policy to have an interest in any **Claim** which may occur under this policy. This notice shall be the same as that mailed or delivered to the first **Named Insured**. For purpose of this amendatory, "deliver" includes electronic transmittal, facsimile, or personal delivery.
3. The commissioner of insurance has the authority to cancel the policy:
 - a. Under a statutory delinquency proceeding commenced under the provisions of chapter 48.31 RCW; or
 - b. On a showing that the continuation of such coverage can reasonably be expected to create a condition in the Company hazardous to its **Insureds**, or to its creditors, or to its member subscribers, or stockholders, or to the public.
4. If notice is mailed, proof of mailing will be sufficient proof of notice.

Nonrenewal

1. If the Company elects not to renew this policy, the Company shall mail written notice of nonrenewal by certified mail to the first **Named Insured** at the address shown in Item 1 of the Declarations, and mail to the producer of record, if any, at least forty-five days prior to the expiration of this policy.

2. If the Company fails to provide timely written notice required by the paragraph above, this policy cannot be extended to meet the notice requirement.
3. If notice is mailed, proof of mailing will be sufficient proof of notice.
4. The transfer of a policy between companies within the same insurance group or changes in Deductible, premium, Limits of Liability or coverage are not refusals to renew.

Conditional Renewal

1. If the Company elects to renew this policy, the Company shall mail written notice of conditional renewal by certified mail to the first **Named Insured** at the address shown in Item 1 of the Declarations, and mail to the producer of record, if any, at least twenty (20) days prior to the expiration of this policy. The Company must provide the first **Named Insured** renewal terms including the premium due. If the first **Named Insured** subsequently fails to pay the premium when due, the coverage is nonrenewed. The written notice of conditional offer to renew must also include an explanation of the premium changes or policy provision changes along with any premium due and the premium due date.
2. If the Company fails to meet the above, a renewal policy must be issued with the same terms and conditions, and rates as the expiring policy. The Company is then permitted to change the terms and conditions, and rates of the renewal policy one time after giving twenty (20) days prior notice to the first **Named Insured**.

ALL OTHER TERMS AND CONDITIONS OF THIS POLICY REMAIN UNCHANGED.

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Travel Agents and Tour Operators Professional Liability Policy

Zurich

Insurance is provided by the company designated on the Information Page.
(A stock insurance company, herein called the Company.)

TRAVEL AGENTS AND TOUR OPERATORS PROFESSIONAL LIABILITY POLICY



This policy is an Occurrence Policy. Read the entire policy carefully to determine rights, duties and what is and what is not covered. Various provisions in this policy restrict coverage.

This policy has been issued in reliance upon the statements in the Applications submitted for this insurance.

Wherever used in this policy, the words **Named Insured** shall mean any person or organization shown in the Declarations. The word **Insured** means any person or organization qualifying as such under the PERSONS INSURED section of this policy. The word "Company" refers to the Company providing this insurance.

Other words and phrases in this policy that appear in bold have special meanings. Refer to Section IV -- DEFINITIONS of the policy for any defined terms.

I. INSURING AGREEMENT

A. Coverages

1. Coverage A Bodily Injury and Property Damage Liability

The Company will pay on behalf of the **Insured** those sums that the **Insured** becomes legally obligated to pay as **Damages** because of **Bodily Injury** or **Property Damage** caused by an **Occurrence** anywhere in the world during the **Policy Period** arising out of **Travel Agency Operations** of the **Named Insured**.

2. Coverage B Non-owned and Hired Auto Liability

The Company will pay on behalf of the **Insured** those sums that the **Insured** becomes legally obligated to pay as **Damages** because of **Bodily Injury** or **Property Damage** caused by an **Occurrence** anywhere in the world during the **Policy Period** arising out of the operation, maintenance or use, including **Loading or Unloading**, of a **Non-Owned Auto** or **Hired Auto** in the **Travel Agency Operations** of the **Named Insured**.

3. Coverage C Professional Liability

The Company will pay on behalf of the **Insured** those sums that the **Insured** becomes legally obligated to pay as **Damages** arising out of a negligent act or negligent omission anywhere in the world committed by the **Insured** or any other person for whose acts the **Named Insured** is legally liable in the conduct of **Travel Agency Operations** by the **Named Insured** provided such negligent act or negligent omission occurs during the **Policy Period**.

4. Coverage D Personal Injury Liability

The Company will pay on behalf of the **Insured** those sums that the **Insured** becomes legally obligated to pay as **Damages** because of **Personal Injury** caused by an offense anywhere in the world arising out of **Travel Agency Operations** of the **Named Insured** provided such offense is committed during the **Policy Period**.

B. Defense

The Company shall have the right and duty to defend any **Suit** against the **Insured** seeking **Damages** on account of such **Bodily Injury**, **Property Damage**, negligent act or negligent omission or **Personal Injury** to which this insurance applies, even if any of the allegations of the **Suit** are groundless, false or fraudulent. The Company shall have the right to conduct such investigation and settlement of any **Claim** or **Suit** as it deems expedient. The Company shall not be obligated to pay any **Claim** or judgment or to defend any **Suit** after the applicable Limit of Liability has been exhausted by payment of judgments or settlements.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Paragraph C below.

C. Supplementary Payments

The following payments by the Company will not reduce the Limits of Liability. The Company will pay with respect to any **Claim** we investigate or settle, or any **Suit** against the **Insured** the Company defends:

1. All expenses incurred by the Company.

2. Up to \$250 for cost of bail bonds required because of accidents or traffic law violations arising out of the use of any Auto to which Coverage B applies. The Company does not have to furnish these bonds.
3. The cost of bonds to release attachments, but only for bond amounts within the applicable Limit of Liability. The Company does not have to furnish these bonds.
4. All reasonable expenses incurred by the Insured at the Company's request to assist the Company in the investigation or defense of the Claim or Suit, including actual loss of earnings up to \$250 a day because of time off from work.
5. All costs taxed against the Insured in the Suit.
6. Prejudgment interest awarded against the Insured on that part of the judgment we pay. If the Company makes an offer to pay the applicable Limit of Liability, we will not pay any prejudgment interest based on that period of time after the offer.
7. All interest on the full amount of any judgment that accrues after entry of the judgment and before the Company has paid, offered to pay, or deposited in court the part of the judgment that is within the applicable Limit of Liability.

II. EXCLUSIONS

This policy does not apply to:

- A. Any Claim or Suit based upon or arising out of an Insured's breach of contract or warranty, except Claims for tort liability of another party assumed by the Named Insured under a hold harmless or indemnification agreement contained in an Incidental Contract;
- B. Under Coverage B, any Claim or Suit based upon or arising out of the ownership, operation, maintenance, use, entrustment to others or Loading or Unloading of any Auto other than a Non-Owned Auto or Hired Auto;
- C. Under Coverage A, C and D, any Claim or Suit based upon or arising out of the ownership, operation, maintenance, use, entrustment to others or Loading or Unloading of any Auto;
- D. Any Claim or Suit based upon or arising out of the ownership of any watercraft by any Insured; nor arising out of the operation, maintenance, use, entrustment to others or Loading or Unloading of any watercraft except if the operation, maintenance, use, entrustment to others, Loading or Unloading is performed for the Named Insured by independent contractors;
- E. Any Claim or Suit based upon or arising from the ownership of any aircraft by any Insured; nor arising out of the operation, maintenance, use, entrustment to others or Loading or Unloading of any aircraft. However, this exclusion does not apply if the operation, maintenance, use, entrustment to others or Loading or Unloading is performed for the Named Insured by independent contractors who are:
 1. Scheduled airlines;
 2. Supplemental airlines;
 3. Air taxis; or
 4. Air charters;
- F. Any Claim or Suit, however caused, arising directly or indirectly out of:
 1. War, including undeclared or civil war;
 2. Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or
 3. Insurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these;
- G. Any Claim or Suit for which the Insured or his indemnitee may be held liable by reason of:
 1. Causing or contributing to the intoxication of any person;
 2. The furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or
 3. Any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages.

However, this exclusion applies only if the **Insured** is in the business of manufacturing, distributing, selling, serving or furnishing alcoholic beverages;

H. Any obligation of the **Insured** under a workers' compensation, disability benefits or unemployment compensation law or any similar law;

I. Any **Claim** or **Suit** by:

1. An employee of the **Insured** arising out of and in the course of:

- a. Employment by the **Insured**; or
- b. Performing duties related to the conduct of the **Insured's** business; or

2. The spouse, child, parent, brother or sister of that employee as a consequence of Paragraph 1 above.

This exclusion applies:

- a. Whether the **Insured** may be liable as an employer or in any other capacity; and
- b. To any obligation to share **Damages** with or repay someone else who must pay **Damages**, even if the liability is assumed by the **Insured** under an **Incidental Contract**;

J. **Property Damage** to:

- 1. Property the **Insured** owns, rents, or occupies, including any costs or expenses incurred by the **Insured**, or any other person, organization or entity, for repair, replacement, enhancement, restoration or maintenance of such property for any reason, including prevention of injury to a person or damage to another's property;
- 2. Premises the **Insured** sells, gives away or abandons, if the **Property Damage** arises out of any part of those premises;
- 3. Property loaned to the **Insured**;
- 4. Personal property in the care, custody or control of the **Insured**;

Paragraphs 1, 3, and 4 of this exclusion do not apply to the **Insured's** legal liability for **Property Damage** caused by an **Occurrence** resulting in fire to any building or structure rented or leased to the **Named Insured** in connection with **Travel Agency Operations**, including fixtures permanently attached thereto subject to the Limit of Liability for Fire Legal Liability Coverage set forth in Item 4 of the Declarations, which establishes the maximum amount payable by the Company.

This exclusion does not apply to **Property Damage** to any hotel rooms and suites, meeting rooms, or other similar premises for the first thirty (30) days that such premises are rented, occupied by, or in the care, custody or control of the **Named Insured**;

Paragraph 4 of this exclusion does not apply to **Lost Property** left in the care of the **Insured** during the course of a tour conducted by such **Insured**.

- 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;
- L. Any **Claim** or **Suit** based upon or arising out of any violation by any **Insured** of federal laws, statutes, regulations, rules or orders restricting foreign trade or travel by United States citizens or the spending of United States funds in foreign countries, including, but not limited to violations of the Trading With The Enemy Act and the rules and regulations of the United States Treasury Department, Office of Foreign Assets Control or any **Claim** or **Suit** that another party was caused to violate same due to an act or omission on the part of any **Insured**;
- M. Any **Claim** or **Suit** based upon or arising out of any violation of the Fair Labor Standards Act or any similar federal, state or local law pertaining to working conditions, hours, employee benefits, or wages;
- N. Any **Claim** or **Suit** based upon or arising out of any **Occurrence**, act, or omission, or offense by the **Insured** which is intentional, dishonest, fraudulent or malicious, or criminal, regardless of whether the resultant **Damages** were intended;
- O. Any **Claim** or **Suit** based upon or arising from any co-mingling of money, or the inability to pay or collect money or other negotiable instruments for any reason, whether on the part of the **Insured**, or any other party, including but not limited to unauthorized or illegal credit card transactions; debit memos; commissions, profits or refunds; and bankruptcy, insolvency, receivership, liquidation and/or cessation of operations;

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- 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;
- Q. Any **Claim** or **Suit** based upon or arising out of any act or omission relating to the recommendation, sale, maintenance or procurement of any insurance policy or bond or investigation, adjustment or outcome of any insurance claim;
- R. Under Coverage C, **Bodily Injury, Property Damage, or Personal Injury**;
- S. **Personal Injury**:
1. Caused by or at the direction of the **Insured** with the knowledge that the act would violate the rights of another or would inflict **Personal Injury**;
 2. Arising out of oral or written publication or utterance of material, if done by or at the direction of the **Insured** with knowledge of its falsity;
 3. Arising out of oral or written publication of material whose first publication took place before the beginning of the **Policy Period**;
 4. For which the **Insured** has assumed liability in a contract or agreement, except an **Incidental Contract**. This exclusion does not apply to liability for **Damages** that the **Insured** would have in the absence of the contract or agreement; or
 5. Arising out of an electronic chatroom or bulletin board the **Insured** hosts, owns or over which the **Insured** exercises control;
- T. **Bodily Injury** or **Property Damage** which arises out of an act that is intended by the **Insured** or can be expected from the standpoint of a reasonable person to cause **Bodily Injury** or **Property Damage**, even if the **Bodily Injury** or **Property Damage** is of a different degree or type than actually intended or expected. This exclusion does not apply to **Bodily Injury** resulting from the use of reasonable force to protect persons or property;
- U. Any **Claim** or **Suit** based upon or arising out of the gaining of profit or advantage to which the **Insured** was not legally entitled;
- V. Any **Claim** or **Suit** based upon or arising out of an **Insured's** acts or omissions in the administration of any employee benefit program or as a fiduciary in connection with any employee insurance, retirement or pension plan, including but not limited to any alleged violation of the Employee Retirement Income Security Act of 1974 and its amendments, or any similar state or local laws, or any regulations or orders issued in connection therewith;
- W. Any **Claim** or **Suit** based on, attributable to, related to, or in any manner arising out of any actual or alleged:
1. Failure to employ;
 2. Termination of employment, including actual or alleged constructive dismissal;
 3. Breach of employment contract;
 4. Coercion, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation, discrimination, employment related misrepresentation, employment related emotional distress, retaliation or other employment related practices, policies, acts or omissions; or
 5. Any consequential liability, **Damage**, loss, cost or expense as a result of 1, 2, 3, and 4 above;
- X. Any **Claim** or **Suit** against an **Insured** by or on behalf of:
1. Any other **Insured**;
 2. Any entity:
 - a. Which is owned, operated or controlled by the **Insured**;
 - b. Which owns, operates or controls the **Insured**; or
 - c. Which is affiliated with the **Insured** through any common ownership, operation or control; or
 - d. In which the **Insured** is a director, officer, partner, trustee, shareholder, member, manager or employee; or
 3. Any business enterprise, charitable organization or pension, welfare, profit sharing, mutual or investment fund or trust owned or sponsored by the **Insured**;

- Y. Any **Claim** or **Suit** based upon or arising out of any piracy, infringement of a patent, copyright, trademark, servicemark, trade dress, trade name, trade secret or any other intellectual property rights;
- Z. Any **Claim** or **Suit** based upon or arising out of **Internet Technology Services** provided by the **Insured**, including but not limited to the transmission of computer viruses, corruption of databases, misappropriation, alteration or deletion of data or harm to the integrity of a computer system. However, this exclusion does not apply to any negligent act or negligent omission involving researching travel related information, placing reservations, or communicating by electronic mail by the **Insured** as part of the **Insured's Travel Agency Operations**;
- AA. Any **Claim** or **Suit** based upon or arising out of the rendering or failure to render any first-aid, medical, dental, surgical, nursing or therapeutic service of treatment, or from the furnishing or failure to furnish any drugs, medications, medical or dental supplies or appliances, or to any **Claim** or **Suit** that the **Insured** was alleged to be negligent in its screening, selection, hiring, retention, training, instruction or supervision of any employee, officer or partner of the **Insured** or any other person or organization engaged in providing or failing to provide such services;
- BB. Any **Claim** or **Suit** based upon or arising from the breach of any employment agreement, non-competition agreement, non-solicitation agreement, confidentiality agreement, fiduciary duty or duty of loyalty on the part of the **Insured** or any past, present or prospective employee, independent contractor, director, officer, partner or shareholder of the **Insured**;
- CC. Any **Claim** or **Suit** based upon or arising out of the booking, leasing, sale, rental or management of any **Time-Share** properties. This exclusion does not apply with respect to incidental travel arrangements made by the **Named Insured** on behalf of travelers to or from such **Time-Share** properties. Incidental travel includes airline ticketing, automobile rental and ground transportation;
- DD. Any **Claim** or **Suit** arising from the sale, rental or distribution of any sports or recreational equipment by the **Insured**, including but not limited to, ski equipment, bicycles, rafts, snowmobiles, and scuba diving and snorkeling equipment;
- EE. **Pollution**
 - 1. Any injury or **Damages** which would not have occurred in whole or in part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of **Pollutants** at any time.
This exclusion does not apply to any injury or **Damages** arising out of heat, smoke, or fumes from a **Hostile Fire** unless that **Hostile Fire** occurred or originated:
 - a. At any premise, site or location which is or was at any time used by or for the **Insured**, or others for the handling, storage, disposal, processing or treatment or waste; or
 - b. At any premises, site or location on which the **Insured** or any contractors or subcontractors working directly or indirectly on the **Insured's** behalf are performing operations to test for, monitor, clean up, remove, contain, treat, detoxify, neutralize or in any way respond to, or assess the effects of, **Pollutants**;
 - 2. Any loss, cost or expense arising out of any:
 - a. Request, demand, order or statutory or regulatory requirement that the **Insured** or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of **Pollutants**; or
 - b. **Claim** or **Suit** by or on behalf of a governmental authority for **Damages** because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, **Pollutants**;
- FF. Any **Claim** or **Suit** based upon or arising, in whole or in part, out of any:
 - 1. Alleged, actual or threatened **Sexual Abuse** or **Sexual Harassment** by anyone of any person;
 - 2. The negligent employment, investigation, or supervision of any person who causes or commits or is alleged to have caused or committed **Sexual Abuse** or **Sexual Harassment**; or
 - 3. Failure to report **Sexual Abuse** or **Sexual Harassment** to the proper authorities;
- GG. Any **Claim** or **Suit** arising out of any actual or alleged violation of:
 - 1. The federal Telephone Consumer Protection Act (47 U.S.C. § 227), Drivers Privacy Protection Act (18 U.S.C. § 2721 - 2725) or Controlling the Assault of Non-Solicited Pornography and Marketing Act (15 U.S.C. § 7701, et seq.); or
 - 2. Any other federal, state or local statute, regulation or ordinance that imposes liability for the:

- a. Unlawful use of telephone, electronic mail, internet, computer, facsimile machine or other communication or transmission device; or
- b. Unlawful use, collection, dissemination, disclosure or re-disclosure of personal information in any manner;

by any Insured or on behalf of any Insured.

III. PERSONS INSURED

Each of the following is an Insured under this policy to the extent set forth below:

- A. The Named Insured shown in Item 1 of the Declarations of this policy;
- B. Any owner, principal, executive officer, director, or stockholder of the Named Insured acting within the scope of their duties for the Named Insured;
- C. Any employees of the Named Insured while acting in the scope of their duties for the Named Insured;
- D. Independent contractors who are individuals working under contract with the Named Insured to sell the Named Insured's travel services, but only when selling the Named Insured's travel services or conducting the Named Insured's Travel Agency Operations; or
- E. Any individual while acting as a tour guide or tour escort working under contract with the Named Insured, but only with respect to liability out of a tour being conducted for the Named Insured.

IV. DEFINITIONS

- A. **Auto** means a land motor vehicle, trailer or semi-trailer designed for travel on public roads, including any attached machinery or equipment.
- B. **Bodily Injury** means physical injury, sickness or disease, including death of a person. **Bodily Injury** to such person also means mental anguish, mental injury, humiliation, or shock if directly resulting from physical injury, sickness or disease.
- C. **Claim** means a written demand for money or services.
- D. **Damages** means the monetary portion of any judgment, award or settlement provided such settlement is negotiated with the assistance and approval of the Company. **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; or
 - 5. Restitution, return or disgorgement of any fees, funds or profits.
- E. **Hired Auto** means a **Non-Owned Auto** rented or chartered by the Insured:
 - 1. Without a driver or chauffeur for a period of not more than thirty (30) consecutive days; or
 - 2. With a driver or chauffeur;

provided that the owner of the Hired Auto maintains a policy insuring against liability for **Bodily Injury** and **Property Damage** with limits of liability not less than those specified under the applicable financial responsibility or similar laws governing auto insurance.

Hired Auto does not include any auto rented or chartered from the Insured.
- F. **Hostile Fire** means a fire which becomes uncontrollable or breaks out from where it was intended to be.
- G. **Incidental Contract** means any written hold harmless or indemnification agreement relating to the conduct of **Travel Agency Operations** by the Named Insured in which the Named Insured has assumed the tort liability of another party, which is:
 - 1. Contained within a lease of premises agreement executed prior to the date of any **Occurrence** or negligent act or negligent omission; or
 - 2. An agreement to indemnify a federal, state, county or municipal government or agency, provided such agreement was executed prior to the date of any **Occurrence** or negligent act or negligent omission.

- H. **Insured** means any person or organization qualifying as an **Insured** in the **Persons Insured** section of the policy.
- I. **Internet Technology Services** means any of the following:
1. Advertising, web casting, electronic publishing, transmission, dissemination, distribution, serialization, creation, production, origination, or exhibition of material over the internet;
 2. Designing, constructing or maintaining an internet site;
 3. The integration of electronic information or business processes with an internet site;
 4. Providing access to the internet through a browser that enables others to send and receive electronic information;
 5. Providing access to or dissemination of material, goods or services through the internet;
 6. Providing internet search or navigational tools or internet site tools and/or technology;
 7. Providing others with a unique internet address that can function as the beginning and end point of electronic information transfers;
 8. Providing electronic mail services;
 9. Establishing, operating, maintaining or monitoring chat rooms or bulletin boards;
 10. Creating, manufacturing, developing, distributing, licensing, leasing, selling, operating, repairing or maintaining any computer hardware, software or related electronic product, or training others in the use of such computer hardware, software or related electronic product; or
 11. Systems analysis, systems programming, data processing, systems integration, systems development, system design, system management, or the installation, operation, repair or maintenance of computer products, networks or systems.
- J. **Loading or Unloading** means the handling of property:
1. After it is moved from the place where it is accepted for movement into or onto an aircraft, watercraft or **Auto**;
 2. While it is in or on an aircraft, watercraft or **Auto**; or
 3. While it is being moved from an aircraft, watercraft or **Auto** to the place where it is finally delivered;
- but **Loading or Unloading** does not include the movement of property by means of a mechanical device, other than a hand truck, that is not attached to the aircraft, watercraft or **Auto**.
- K. **Long-Term Rental Auto** means an **Auto** rented or leased by the **Insured** (other than by an employee solely for his or her personal use) for any period or consecutive periods which in total are in excess of thirty (30) days.
- L. **Lost Property** means baggage, tickets for transportation, passports or visas lost while in the care of the **Insured** in the course of a tour conducted by the **Insured**. **Lost Property** does not include accounts, bills, currency, deeds, evidences of debt, letters of credit, documents, money, notes or securities.
- M. **Named Insured** means:
1. The person(s) and organization(s) shown in Item 1 of the Declarations of this policy;
 2. Any newly acquired or formed organization, other than a partnership, joint venture or limited liability company, over which the **Named Insured** maintains majority interest. This policy does not apply to any injury or damage that took place before the **Named Insured** acquired or formed the organization. Coverage under this provision is afforded only if the newly acquired or formed organization is reported to the Company within sixty (60) days after it has been acquired or formed and the **Named Insured** pays the additional premium if applicable.
- N. **Non-Owned Auto** means an **Auto** which is not owned by or registered to:
1. Any **Named Insured**;
 2. An officer, director, shareholder, or partner of any **Named Insured**;
 3. A corporate parent, subsidiary, or affiliate of any **Named Insured**;
 4. Any member of a joint venture of which any **Named Insured** is a member; or
 5. A spouse, child, parent, relative or resident of the same household of any person described herein.

Non-Owned auto does not include any **Long-Term Rental Auto**.

- O. **Occurrence** means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.
- P. **Personal Injury** means injury including consequential **Bodily Injury** arising out of one or more of the following offenses:
1. False arrest, detention or imprisonment;
 2. Malicious prosecution;
 3. The publication or utterance of a libel or slander or of other defamatory or disparaging material;
 4. A publication or utterance in violation of an individual's right of privacy; except publications or utterances in the course of or related to advertising or broadcasting activities conducted by or on behalf of the **Named Insured**; or
 5. Wrongful eviction from; wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor.
- Q. **Policy Period** means the period of time between the effective date as shown on the Declarations and the date of expiration or cancellation of this policy.
- R. **Pollutants** means any man-made or naturally occurring solid, liquid, gaseous or thermal irritant or contaminant, including but not limited to: smoke; vapor; soot; fumes; acids; alkalis; chemicals; and waste. Waste includes materials to be recycled, reconditioned or reclaimed.
- S. **Property Damage** means:
1. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
 2. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the **Occurrence** that caused it.
- For the purposes of this insurance, electronic data is not tangible property. As used in this definition, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CD-ROMS, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment.
- T. **Sexual Abuse** means actual or alleged physical abuse arising out of a single, continuous or repeated exposure of one or more persons to acts of a sexual nature involving inappropriate physical contact caused by or committed by:
1. One person; or
 2. Two or more persons acting together or in related acts or series of acts.
- All related, interrelated, repeated or continuous episodes of **Sexual Abuse** involving the same claimant or perpetrator shall be deemed to be a single **Occurrence**.
- U. **Sexual Harassment** means inappropriate non-physical actions or verbal comments or suggestions of a sexual nature.
- V. **Suit** means a civil proceeding in which **Damages** because of **Bodily Injury**, **Property Damage**, negligent acts or negligent omissions or **Personal Injury** to which this insurance applies are alleged. **Suit** includes:
1. An arbitration proceeding in which such **Damages** are claimed and to which the **Insured** must submit or does submit with the Company's consent; or
 2. Any other alternative dispute resolution proceeding in which such **Damages** are claimed and to which the **Insured** submits with the Company's consent.
- W. **Time-Share** means a system for sharing ownership of any apartment, condominium, villa, or the like as defined in the time-sharing agreement.
- X. **Travel Agency Operations** means all operations necessary to the conduct of a travel agency, meeting planner, cruise-only agency or tour operator.

V. LIMITS OF LIABILITY

- A. The Limits of Liability shown in Item 3 of the Declarations and the rules below fix the most the Company will pay regardless of the number of:
1. **Insureds;**
 2. **Claims made or Suits brought;**
 3. **Persons or organizations making Claims or bringing Suits.**
- B. The General Aggregate Limit shown in Item 3 of the Declarations is the most the Company will pay for the sum of all **Damages** under Coverages A, B, C and D.
- C. Under Coverage A:
1. Subject to B above, the Limit of Liability shown in Item 3 of the Declarations for Coverage A is the most the Company will pay for **Bodily Injury or Property Damage** caused by an **Occurrence** to which Coverage A applies. However, the most the Company will pay for **Property Damage** for any article of **Lost Property** consisting in whole or in part of silver, gold or platinum, or watches, or articles trimmed with, or consisting principally or entirely of furs shall be \$100 for each article.
 2. All **Bodily Injury and Property Damage** arising out of continuous or repeated exposure to substantially the same general harmful conditions shall be considered as arising out of one **Occurrence**.
- D. Under Coverage B:
1. Subject to B above, the Limit of Liability shown in Item 3 of the Declarations for Coverage B is the most the Company will pay for **Bodily Injury or Property Damage** caused by an **Occurrence** to which Coverage B applies.
 2. All **Bodily Injury and Property Damage** arising out of continuous or repeated exposure to substantially the same general harmful conditions shall be considered as arising out of one **Occurrence**.
- E. Under Coverage C:
1. Subject to B above, the Limit of Liability shown in Item 3 of the Declarations for Coverage C is the most the Company will pay for any negligent act or negligent omission to which Coverage C applies.
 2. All related negligent acts or negligent omissions shall be considered a single negligent act or negligent omission.
- F. Under Coverage D:
1. Subject to B above, the Limit of Liability shown in Item 3 of the Declarations for Coverage D is the most the Company will pay for **Damages** on account of any offense to which Coverage D applies.
 2. All **Personal Injury** arising out of an offense or series of related offenses shall be considered as arising out of a single offense.
- G. Fire Legal Liability Coverage
- The Fire Legal Liability Limit stated in Item 4 of the Declarations is the most the Company will pay for **Damages** because of **Property Damage** to any building or structure rented or leased to the **Named Insured** to which this insurance applies arising out of any one fire.
- H. If more than one coverage of this policy applies to the same **Occurrence**, negligent act or negligent omission, or offense, the maximum limit of the Company's liability shall not exceed the highest applicable Limit of Liability under any one coverage of this policy.
- I. The Limits of Liability of this policy apply separately to each consecutive **Policy Period**. The **Policy Period** begins with the effective date shown in the Declarations. If the **Policy Period** is extended after issuance for any additional period, the additional period will be deemed part of the last preceding period for the purpose of determining the Limits of Liability.
- J. If this policy and any other policy issued by the Company provides coverage to the same **Claim or Suit** against the **Insured**, the maximum limit of liability under all of the policies shall not exceed the highest remaining limit of liability under any one policy.

VI. DEDUCTIBLE

The Deductibles set forth in Item 3 of the Declarations of the policy apply as follows:

- A. Under Coverage A, the each Occurrence Deductible applies to all Damages because of all Bodily Injury and Property Damage as the result of any one Occurrence, regardless of the number of persons or organizations who sustain Damages because of that Occurrence.
- B. Under Coverage B, the each Occurrence Deductible applies to all Damages because of all Bodily Injury and Property Damage as the result of any one Occurrence, regardless of the number of persons or organizations who sustain Damages because of that Occurrence.
- C. Under Coverage C, the each negligent act or negligent omission Deductible applies to all Damages because of any negligent act or negligent omission or series of related negligent acts or negligent omissions, regardless of the number of persons or organizations who sustain Damages because of such negligent act or negligent omission or series of related negligent acts or negligent omissions.
- D. Under Coverage D, the each offense Deductible applies to all Damages because of any offense or series of related offenses, regardless of the number of persons or organizations who sustain Damages because of such offense or series of related offenses.
- E. The Limits of Liability shall not be reduced by the application of the Deductible.
- F. If more than one coverage of this policy applies to any Occurrence, negligent act or negligent omission or offense, the Named Insured is required to pay a single Deductible, as determined by the highest Deductible for the applicable coverages.

VII. CONDITIONS

A. Premium

All premiums for this policy shall be computed in accordance with the Company's rules, rates, rating plans, premiums and minimum premiums applicable to the insurance afforded herein.

B. Insured's Duties in the Event of Occurrence, Claim or Suit

1. As a condition precedent to coverage, the Insured must notify the Company as soon as practicable of an Occurrence, a negligent act or negligent omission or an offense. To the extent possible, notice should include:
 - a. How, when and where the Occurrence, a negligent act or negligent omission or an offense took place;
 - b. The names and addresses of any injured persons and witnesses; and
 - c. The nature and location of any Damage arising out of the Occurrence, a negligent act or negligent omission or an offense.
2. If a Claim is made or Suit is brought against the Insured, as a condition precedent to coverage, the Insured must:
 - a. Immediately record the specifics of the Claim or Suit and the date received; and
 - b. Notify the Company as soon as practicable.

The Insured must see to it that the Company receive written notice of the Claim or Suit as soon as practicable.
3. The Insured must:
 - a. Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the Claim or Suit; and
 - b. Authorize the Company to obtain records and other information.

C. Assistance and Cooperation of the Insured

1. The Insured shall cooperate with the Company and, upon the Company's request, assist in making settlements, in the conduct of Suits and in enforcing any right of contribution or indemnity against any person or organization who may be liable to the Insured because of Bodily Injury, Property Damage, Personal Injury or any Damages arising out of any negligent act or negligent omission, with respect to which insurance is afforded under this policy.
2. The Insured shall attend hearings and trials and assist in securing and giving evidence and obtaining the attendance of witnesses.
3. The Insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for first aid to others at the time of Occurrence without the Company's consent. The Insured shall promptly take at his or her expense all reasonable steps to prevent related Damages from arising out of the same or similar conditions, but such expenses shall not be recoverable under this policy.

4. The **Insured** shall cooperate with the Company in its investigation of any **Claim** or **Occurrence**, negligent act or negligent omission or offense including prompt compliance with all requests for documents and information deemed relevant by the Company and providing interviews, statements and/or examinations under oath as often as the Company shall reasonably require.
5. All coverage under this policy shall be void if the **Insured** knowingly misrepresents or conceals any material fact in connection with the presentation or submission of any **Claim** or **Suit**, or the Company's investigation or defense thereof.

D. Legal Action Against The Company

No person or organization has a right under this policy:

1. To join the Company as a party or otherwise bring the Company into a **Suit** asking for **Damages** from an **Insured**; or
2. To sue the Company on this policy unless all of its terms have been fully complied with.

A person or organization may sue the Company to recover on any settlement by the Company or on a final judgment against the **Insured**; but the Company will not be liable for **Damages** that are not payable under the terms of this policy or that are in excess of the applicable **Limit of Liability**.

E. Bankruptcy

Bankruptcy or insolvency of the **Insured** or of the **Insured's** estate will not relieve the Company of its obligations under this policy.

F. Other Insurance

This insurance will apply only as excess insurance over any other valid and collectible insurance.

G. Changes

This policy contains all the agreements between the **Insured** and the Company concerning the insurance afforded. The first **Named Insured** shown in the Declarations is authorized to make changes in the terms of this policy with the Company's consent. This policy's terms can be amended or waived only by endorsement issued by the Company and made a part of this policy.

H. Assignment

Assignment of interest under this policy shall not bind the Company until its consent is endorsed hereon; if, however, the **Named Insured** shall die, such insurance as is afforded by the policy shall apply: (1) to the **Named Insured's** legal representative, as the **Named Insured**, but only while acting within the scope of his duties as such; and (2) with respect to the property of the **Named Insured**, to the person having proper temporary custody thereof, as **Insured**, but only until the appointment and qualification of the legal representative.

I. Transfer Of Rights Of Recovery Against Others To The Company

If the **Insured** has rights to recover all or part of any payment the Company has made under this policy, those rights are transferred to the Company. The **Insured** must do nothing after **Damage** to impair them. At the Company's request, the **Insured** will bring **Suit** or transfer those rights to the Company and help the Company enforce them.

J. Representations and Warranties

By acceptance of this policy, the **Named Insured** agrees, represents and warrants that the statements in the Declarations are truthful, accurate and complete: that this policy is issued in reliance upon the truth, accuracy and completeness of such representations.

K. Separation of Insureds

Except with respect to the **Limits of Liability**, and any rights or duties specifically assigned in this policy to the **Named Insured**, this insurance applies:

1. As if each **Named Insured** were the only **Named Insured**; and
2. Separately to each **Insured** against whom **Claim** is made or **Suit** is brought.

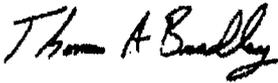
L. Sole Agent

If there is more than one **Named Insured** in this policy, the first **Named Insured** shall act on behalf of all **Insureds** for all purposes, including but not limited to:

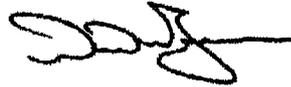
1. The payment or return of premium;
2. Receipt and acceptance of any endorsement(s) issued to form a part of this policy;
3. Giving and receiving notice of cancellation, nonrenewal or conditional renewal; and
4. Reimbursement to the Company of any applicable Deductible advanced.

In return for the payment of premium and subject to all the terms of the policy, the Company agrees with the **Insured** to provide insurance as stated in this policy. This policy shall not be valid unless countersigned by the Company's duly authorized **Representative**.

In Witness Whereof, the Company has executed and attested these presents and, where required by law, has caused this policy to be countersigned by its duly authorized **Representative**.



President



Corporate Secretary



Author's Direct Line: 312-381-4101
Author's Fax: 312-381-6795
Email: Tanya.Anderson@ars.aon.com

*Risk Services
 Financial Services Group*

VIA OVERNIGHT DHL: 26622093551

June 10, 2005

Greg Takehara
 Vice President, Claims
 Berkely Agency (Steadfast Insurance Company)
 300 Jericho Quadrangle
 P.O. Box 9022
 Jericho, NY 11753

RE: **Insured:** Expedia, Inc. et al.
 Policy: Policy Number EOL 5329302-01
 October 1, 2004 – October 1, 2005
 Matter: City of Los Angeles, California et al.

Dear Claims Manager:

On behalf of Expedia, Inc. et al. (the "Insureds"), and in accordance with the reporting provisions of the Policy, we hereby give notice under the Policy, or any other applicable policies, that a claim has been made against certain Insureds in the above-referenced matter. I have enclosed a copy of the Summons and Complaint for the above-referenced matter; the details follow:

Claimant	Court & File Date	Allegations
<i>City of Los Angeles, California et al.</i>	Superior Court of the State of California for the County of Los Angeles, Central District. Case No. BC326693 December 30, 2004	Alleged Violations of Uniform Transient Occupancy Tax Ordinances; Unfair Business Practices; Conversion; Imposition of a Constructive Trust.

At this time, we do not have confirmation as to the Insured's choice of defense counsel in the above-referenced matter. As soon as we receive this information, we will forward it to you.

Please acknowledge receipt of this claim and provide Steadfast Insurance Company/Zurich's consent to the retention of defense counsel, and authorization to incur defense costs. If there are any litigation management guidelines with which you would request the Insureds comply, please provide a copy of those guidelines.

By copy of this letter, we are also providing the Insured's excess E&O carrier with notice of this claim.

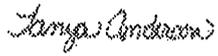
In addition to me, courtesy copies of any correspondence should be sent to: Moira Mooney, Expedia Inc., 152 W. 57th Street, 19th Floor, New York, NY 10019, telephone (212) 314-7323, email moira.mooney@iac.com.

June 10, 2005
Expedia – City of Los Angeles
Page 2 of 2

Aon Financial Services Group

If you need any additional information, or if I can be of further assistance, please do not hesitate to contact me.

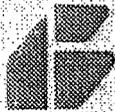
Sincerely,



Tanya Anderson
Claims Coordinator

Enclosure

cc: Moira Mooney – Expedia, Inc. w/o enclosure
Kevin Kalinich – Aon w/o enclosure
Aaron Davidson – Aon w/o enclosure
Chubb – w/enclosure
Policy # 7978-42-77 LIO
Claims Manager
15 Mountain View Road
Warren, NJ 07059
Via Overnight DHL: 26622134350



Berkely Agency

Professional Liability Claims

June 27, 2005

Ms. Tanya Anderson
Aon Risk Services
Aon Financial Services Group, Inc.
200 E. Randolph Street
11th Floor
Chicago, IL 60601

Insured: Expedia, Inc.
Claimant: City of Los Angeles
Date of Loss: 5/2/01 (beginning)
Policy No: EOL 5329302-01
Claim No: 05ZUR0100

Dear Tanya:

This will acknowledge receipt of the above-captioned class action that was received in our office. Please be advised that we are the Managing General Agent and Claims Administrator for the above-referenced policy with Steadfast Insurance Company/Zurich American Insurance Company of Illinois ("Zurich").

We have established a claim file under the insured's Travel Agents Professional Liability Policy, EOL 5329302-01, effective October 1, 2004 through October 1, 2005. This policy carries limits of liability of \$5,000,000 in the aggregate with a \$50,000 per occurrence indemnity and defense deductible.

A review of the claim documentation indicates that this matter arises from individuals booking hotel accommodations through the insured's internet site. Apparently, the insured was allegedly overcharging for hotel taxes and remitting only a portion of the taxes to the appropriate authority. At this time, the City of Los Angeles is seeking payment of the entire tax amount charged by the insured to their clients.

We regret to inform you that there is no coverage under the above-referenced policy and accordingly, Zurich will not be providing a defense or indemnity. We would like to draw your attention to the insured's policy, specifically Endorsement No. 12 that states:

NO COVERAGE WITH RESPECT TO PIRACY, PATENT INFRINGEMENT, VIOLATION OF INTELLECTUAL PROPERTY RIGHTS, UNFAIR TRADE PRACTICES, UNFAIR COMPETITION OR "ADVERTISING INJURY"

THIS ENDORSEMENT MODIFIES THE LIABILITY COVERAGE AFFORDED UNDER THE TRAVEL AGENTS' PROFESSIONAL LIABILITY POLICY AS FOLLOWS:

NOTWITHSTANDING ANY POLICY LANGUAGE TO THE CONTRARY, NO LIABILITY COVERAGE IS AFFORDED UNDER COVERAGES A, B, C, OR D OF THIS POLICY WITH RESPECT TO ANY CLAIM FOR "DAMAGES" BECAUSE OF PIRACY, PATENT INFRINGEMENT, VIOLATION OF INTELLECTUAL PROPERTY RIGHTS, STATUTORY OR COMMON LAW UNFAIR TRADE PRACTICES, UNFAIR COMPETITION OR "ADVERTISING INJURY", CAUSED BY AN OFFENSE COMMITTED IN THE COURSE OF ADVERTISING YOUR GOODS, PRODUCTS OR SERVICES. FOR THE PURPOSE OF THIS

BY CALIFORNIA: Berkely Agency is a Division of Aon Direct Insurance Administration, CA License # 0735463.

IN ALL OTHER STATES: Berkely Agency is a Division of Affinity Insurance Services, Inc. in all states other than CA, IL, NY, NJ, OH, PA, and VA. Affinity Insurance Agency, Inc. in OH, and Affinity Insurance Agency in VA and NY.

300 Jericho Quadrangle • P.O. Box 9022 • Jericho, New York 11753
800-803-1213 • 516-294-0220 • Fax 516-294-1038

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Ms. Tanya Anderson
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ENDORSEMENT, THE TERM "ADVERTISING INJURY" MEANS INJURY ARISING OUT OF ONE OR MORE OF THE FOLLOWING OFFENSES:

- (A) ORAL, WRITTEN OR ELECTRONIC PUBLICATION OF MATERIAL THAT SLANDERS OR LIBELS A PERSON OR ORGANIZATION OR DISPARAGES A PERSON'S OR ORGANIZATION'S GOODS, PRODUCTS OR SERVICES;
- (B) ORAL, WRITTEN OR ELECTRONIC PUBLICATION OF MATERIAL THAT VIOLATES A PERSON'S RIGHT OR PRIVACY;
- (C) MISAPPROPRIATION OF ADVERTISING IDEAS OR STYLE OF DOING BUSINESS; OR INFRINGEMENT OF COPYRIGHT, TITLE OR SLOGAN.

The insured's policy also contains Exclusion P that states:

THIS POLICY DOES NOT APPLY:

UNDER COVERAGES C AND D, TO LIABILITY ARISING OUT OF ANY ACT, ERROR OR OMISSION WHICH IS WILFULLY DISHONEST, FRAUDULENT OR MALICIOUS, OR IN WILFUL VIOLATION OF ANY PENAL OR CRIMINAL STATUTE OR ORDINANCE, AND IS COMMITTED (OR OMITTED) BY OR WITH THE KNOWLEDGE OR CONSENT OF THE "INSURED"

Endorsement No. 9 of the insured's policy further states:

EXCLUSION (Q) IS DELETED AND REPLACED BY THE FOLLOWING EXCLUSION:

THIS POLICY DOES NOT APPLY:

(Q) UNDER COVERAGE C, TO ANY 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, INCLUDING THE FOLLOWING:

- 1. INSOLVENCY;**
- 2. RECEIVERSHIP;**
- 3. BANKRUPTCY;**
- 4. LIQUIDATION; OR**
- 5. UNAUTHORIZED OR ILLEGAL CREDIT CARD TRANSACTIONS;**

WHETHER SUCH CO-MINGLING OF MONEY OR FAILURE OR INABILITY TO PAY OR COLLECT MONEY IS ON THE PART OF THE "INSURED" OR ANY OTHER PARTY.

As these matters arise from the insured's alleged failure to either pay the taxing authorities for the taxes collected and their alleged failure to reimburse the clients for overcharging the taxes and alleged unfair trade practices, coverage for this claim would be excluded under the above endorsements and exclusions.

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Ms. Tanya Anderson
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June 27, 2005

This correspondence is not intended to be, nor should it be, construed as an exhaustive listing of policy terms, conditions or exclusions which might preclude coverage for this matter under Steadfast Insurance Company's (Zurich's) policy. Steadfast Insurance Company/Zurich reserves the right to supplement this declination should facts and circumstances indicate the applicability of additional grounds to deny this claim.

We regret that our response cannot be more favorable. If you have any information you feel should be reviewed by our office, please forward it to the attention of the undersigned at Affinity Insurance Services, 300 Jericho Quadrangle, 3rd Floor, Jericho, New York, 11753.

Sincerely,

BERKELY AGENCY
FOR STEADFAST INSURANCE COMPANY/ZURICH



Greg R. Takehara
Vice President, Claims

EXP 0007267



ORRICK, HERRINGTON & SUTCLIFFE LLP
THE ORRICK BUILDING
405 HOWARD STREET
SAN FRANCISCO, CALIFORNIA 94105-2669
tel +1-415-773-5700
fax +1-415-773-5759
WWW.ORRICK.COM

Richard DeNatale
(415) 773-4570
rdenatale@orrick.com

November 24, 2010

VIA FEDERAL EXPRESS

Zurich American Insurance Company
1400 American Lane
Schaumburg, IL 60196-1056

Re: Zurich American Insurance Company Policies EOL 5329302-02, EOL 5329302-03,
EOL 5329302-04, EOL 5329302-05

To the Claims Department:

We have been retained as coverage counsel for Expedia, Inc. (Washington corporation), Expedia, Inc. (Delaware corporation), Hotels.com, L.P., Hotels.com, GP, LLC, Hotwire, Inc., and Travelscape (collectively, "Expedia"). Expedia has been sued in the lawsuits listed in Attachment A (the "Actions"). Copies of the complaints (including the complaint in *City of Los Angeles vs. Hotels.com, et al.*, which was previously tendered) are enclosed. On behalf of Expedia, we hereby tender the Actions to you and ask you to confirm that you will defend and indemnify Expedia pursuant to the insurance policies listed above.

Sincerely,

Richard DeNatale

Enclosures

OHS West:261017868.1

EXP 0009304

ATTACHMENT A
LIST OF UNDERLYING LAWSUITS

Case Name	Court	Defendants¹
1. City of Los Angeles v. Hotels.com, et al.	Superior Court of the State of California, County of Los Angeles	Hotels.com, L.P. Hotels.com, GP, LLC Hotwire, Inc. Expedia, Inc.
2. City of San Diego v. Hotels.com LP, et al.	Superior Court of the State of California, County of Los Angeles	Hotels.com, L.P. Hotels.com, GP, LLC Hotwire, Inc. Expedia, Inc.
3. Expedia, Inc. v. City of Anaheim, et al.; Hotels.com, L.P. v. City of Anaheim, et al.; Hotwire, Inc. v. City of Anaheim, et al.	Superior Court of the State of California, County of Los Angeles	Expedia, Inc. Hotels.com, L.P. Hotwire, Inc. (plaintiffs)
4. Expedia, Inc. v. City and County of San Francisco, et al.; Hotwire, Inc. v. City and County of San Francisco, et al.	Superior Court of the State of California, County of Los Angeles	Expedia, Inc. Hotwire, Inc. (plaintiffs)
5. City of Santa Monica, California v. Expedia, Inc.	Superior Court of the State of California, County of Los Angeles	Expedia, Inc. Hotels.com, L.P. Hotels.com GP, LLC Hotwire, Inc.
6. City of Chicago, Illinois v. Hotels.com, L.P., et al.	Circuit Court of Cook County, Illinois, County Department, Law Division, Tax & Miscellaneous Remedies Section	Hotels.com, L.P. Hotwire, Inc. Expedia, Inc.
7. Village of Rosemont, Illinois v. Priceline.com Incorporated, et al.	United States District Court for the Northern District of Illinois	Expedia, Inc. Hotels.com, L.P. Hotwire, Inc.

¹ This is a non-exhaustive list that includes only Expedia and corporate affiliates. In certain cases, as noted, the parties listed are plaintiffs in the lawsuit.

Case Name:	Court	Defendants¹
8. City of Columbus, et al. v. Hotels.com, L.P., et al.	United States District Court, Northern District of Ohio, Western Division	Hotels.com, L.P. Hotwire, Inc. Expedia, Inc.
9. Hamilton County, Ohio, et al. v. Hotels.com, L.P., et al.	Court of Common Pleas, Hamilton County, Ohio	Hotels.com, L.P. Hotwire, Inc. Expedia, Inc.
10. City of Rome, Georgia, et al. v. Hotels.com L.P., et al.	United States District Court, Northern District of Georgia, Rome Division	Hotels.com, L.P. Hotels.com GP LLC Hotwire, Inc. Expedia, Inc.
11. City of Atlanta, Georgia v. Hotels.com, LP, et al.	Superior Court of Fulton County, State of Georgia	Hotels.com, L.P. Hotels.com GP LLC Hotwire, Inc. Expedia, Inc.
12. Columbus, Georgia vs. Hotels.com, Inc. et al.; Columbus, Georgia v. Expedia, Inc.; Columbus, Georgia vs. Orbitz, Inc., et al.	Superior Court of Muscogee County, Georgia	Hotels.com, L.P. Expedia, Inc.
13. Wake County v. Hotels.com, LP, et al.	North Carolina Business Court	Hotels.com, LP Hotwire, Inc. Expedia, Inc.
14. Dare County v. Hotels.com, et al.	North Carolina Business Court	Hotels.com, LP Hotwire, Inc. Expedia, Inc.
15. Buncombe County v. Hotels.com, et al.	North Carolina Business Court	Hotels.com, LP Hotwire, Inc. Expedia, Inc.
16. Mecklenburg County v. Hotels.com, LP, et al.	North Carolina Business Court	Hotels.com, LP Hotwire, Inc. Expedia, Inc.

Case Name	Court	Defendants ¹
17. Orange County, et al. v. Expedia, Inc., et al.	Florida Complex Business Litigation Court	Expedia, Inc.
18. City of Jacksonville v. Hotels.com, L.P., et al.	In the Circuit Court, Fourth Judicial Circuit, in and for Duval County, Florida	Hotels.com, L.P. Hotels.com GP, LLC Hotwire, Inc. Expedia, Inc.
19. County of Monroe, Florida v. Priceline.com Incorporated., et al.	United States District Court, Southern District of Florida	Expedia, Inc. Hotels.com, L.P. Hotwire, Inc.
20. Orbitz, LLC, et al. v. Broward County, Florida and Florida Department of Revenue	Second Judicial Circuit Court, State of Florida, Leon County	Hotwire, Inc. Hotels.com, L.P. Expedia, Inc. (plaintiffs)
21. Expedia, Inc. v. Miami-Dade County, Florida & Florida Department of Revenue	In the Circuit Court of the Second Judicial Circuit, In & For Leon County, Florida	Expedia, Inc. Hotwire, Inc. Hotels.com, L.P. (plaintiffs)
22. Anne Gannon, in her capacity as Palm Beach County Tax Collector, on behalf of Palm Beach County v. Hotels.com, L.P., et al.	In the Circuit Court of the 15 th Judicial Circuit in and for Palm Beach County, Florida	Hotels.com, L.P. Hotels.com GP, LLC Hotwire, Inc. Expedia, Inc. (WA)
23. Brevard County, Florida v. Priceline.com, Incorporated, et al.	United States District Court, Middle District of Florida, Orlando Division	Expedia, Inc. Hotels.com, L.P. Hotwire, Inc.
24. Leon County, et al. v. Expedia, Inc., et al. ("Leon County (1)")	In the Circuit Court for the Second Judicial Circuit in and for Leon County, Florida	Expedia, Inc. Hotels.com, L.P. Hotwire, Inc.
25. Leon County v. Expedia, Inc., et al. ("Leon County (2)")	In the Circuit Court for the Second Judicial Circuit in and for Leon County, Florida	Expedia, Inc. Hotels.com, L.P. Hotels.com GP, LLC Hotwire, Inc.

Case Name	Court	Defendants ¹
26. City of Charleston, South Carolina v. Hotel.com, et al.	United States District Court for the District of South Carolina, Charleston Division	Hotels.com, L.P. Hotwire, Inc. Expedia, Inc.
27. Horry County, et al. v. Hotels.com, LP, et al.	Court of Common Pleas, County of Horry, South Carolina	Hotels.com, L.P. Hotwire, Inc. Expedia, Inc.
28. Town of Hilton Head Island, South Carolina v. Hotels.com, L.P. et al.	Court of Common Pleas, County of Beaufort, South Carolina	Hotels.com, L.P. Hotels.com, L.P. Hotwire, Inc. Expedia, Inc. Travelscape
29. City of San Antonio v. Hotels.com, L.P.	United States District Court, Western District of Texas, San Antonio Division	Hotels.com, L.P. Hotels.com, GP, LLC Hotwire, Inc. Expedia, Inc.
30. City of Bowling Green, Ky. v. Hotels.com, L.P., et al.	Commonwealth of Kentucky, Warren Circuit Court, Division 1	Hotels.com, L.P. Hotwire, Inc. Expedia, Inc.
31. County of Nassau, New York v. Hotels.com, LP, et al.	United States District Court, Eastern District of New York	Hotels.com, LP Hotels.com GP, LLC Hotwire, Inc. Expedia, Inc.
32. City of Branson v. Hotels.com, LP, et al.	In the Circuit Court of Greene County, Missouri	Hotels.com, LP Hotwire, Inc. Expedia, Inc.
33. St. Louis County, Missouri v. Prestige Travel, Inc. (d/b/a Tripres.com), et al.	In the Circuit Court of St. Louis County, Missouri	Expedia, Inc. (DE) Expedia, Inc. (WA) Hotels.com Hotels.com, L.P. Hotels.com GP, LLC Hotwire, Inc.
34. City of Gallup, New Mexico v. Hotels.com, L.P., et al.	United States District Court, District of New Mexico	Hotels.com, L.P. Hotwire, Inc. Expedia, Inc.

Case Name	Court	Defendants ¹
35. City of Goodlettsville, Tennessee v. Priceline.com, Inc, et al.	United States District Court, Middle District of Tennessee	Expedia, Inc. Hotels.com, L.P. Hotwire, Inc.
36. Township of Lyndhurst, New Jersey v. Priceline.com, Inc., et al.	United States District Court, District of New Jersey	Expedia, Inc. Hotels.com, L.P. Hotwire, Inc.
37. Mayor & City Council of Baltimore v. Priceline.Com, Inc., et al.	United States District Court, District of Maryland, Baltimore Division	Expedia, Inc. (DE) Expedia, Inc. (WA) Hotels.com Hotels.com, L.P. Hotels.com GP, LLC Hotwire, Inc
38. County Commissioners of Worcester County, Maryland v. Priceline.Com, Inc., et al.	United States District Court, District of Maryland, Baltimore Division	Expedia, Inc. (DE) Hotels.com, L.P. Hotwire, Inc.
39. Baltimore County, Maryland v. Priceline.com, Inc.	United States District Court, District of Maryland, Baltimore Division	Expedia, Inc. Hotels.com Hotels.com, L.P. Hotels.com GP, LLC Hotwire, Inc.
40. County of Genesee, Michigan, et al. v. Hotels.com, L.P., et al.	State of Michigan, In the Circuit Court for the County of Ingham	Hotels.com, L.P. Hotels.com GP, LLC Expedia, Inc.
41. County of Lawrence, PA v. Hotels.com, L.P., et al.	Court of Common Pleas of Lawrence County, PA	Hotels.com, L.P. Hotels.com GP, LLC Hotwire, Inc. Expedia, Inc.
42. Pine Bluff Advertising & Promotion Commission, Jefferson County, Arkansas, et el. v. Hotels.com, L.P., et al.	In the Circuit Court of Jefferson County, Arkansas	Hotels.com, L.P. Hotwire, Inc. Expedia, Inc.

Case Name	Court	Defendants
43. City of Birmingham, et al. v. Orbitz, Inc., et al.	In the Circuit Court of Jefferson County, Alabama	Expedia, Inc. Hotels.com, L.P. Hotels.com GP, LLC Hotwire, Inc.
44. Lake County Conventions and Visitors Bureau; Marshall County, and All Others Similarly Situated, v. Sabre Holdings Corporation;	United States District Court for the Northern District of Indiana, Hammond Division	Hotels.com, L.P. Expedia, Inc. Hotwire, Inc.
45. Town of Mount Pleasant, South Carolina v. Hotels.com, et al	United States District Court for the District of South Carolina, Charleston Division	Hotels.com, L.P. Hotwire, Inc. Expedia, Inc.
46. City of North Myrtle Beach v. Hotels.com., LP, et al	United States District Court for the District of South Carolina, Charleston Division	Hotels.com, L.P. Hotwire, Inc. Expedia, Inc.
47. Louisville/Jefferson County Metro Government v. Hotels.com et al	United States District Court, Western District of Kentucky, Louisville Division	Hotels.com, L.P. Hotwire, Inc. Expedia, Inc.
48. Marshall County and All Others Similarly Situated, v. Hotels.com, LP et al	United States District Court for the Northern District of Indiana	Hotels.com, LP, Hotels.com GP, LLC Hotwire, Inc.
49. City of Jefferson, Missouri and All Others Similarly Situated, v. Hotels. Com, LP et al	Circuit Court of Cole County, State of Missouri	Hotels.com, LO Hotels.com GP, LLC Hotwire, Inc.
50. State of Florida, Office of the Attorney General, Department of Legal Affairs v. Expedia, Inc. et al	Circuit Court for the Second Judicial Circuit in and for Leon County, Florida	Expedia, Inc.
51. Expedia, Inc. et al v. City of New York Department of Finance, et al.	Supreme Court of the State of New York, County of New York	Expedia, Inc. Hotels.com, L.P.. Hotwire, Inc. (plaintiffs)

Case Name	Court	Defendants ¹
52. Travelscape, LLC v. South Carolina Department of Revenue	State of South Carolina, Supreme Court	Travelscape, LLC (plaintiff)
53. The State of Oklahoma ex rel., Oklahoma Tax Commission v. Priceline.com, Inc. et al	District Court of Oklahoma County, State of Oklahoma	Expedia, Inc. Hotels.com, L.P. Hotwire, Inc.
54. Hotels.com, L.P. v. Indiana Department of State Revenue	Indiana Tax Court	Hotels.com, L.P. (plaintiff)
55. City of Myrtle Beach, South Carolina v. Hotels.com, LP, et al.	Court of Common Pleas, 15th Judicial Circuit, Court of Horry, South Carolina	Hotels.com, L.P. Hotwire, Inc. Expedia, Inc.
56. City of Houston, Texas, et al. v. Hotels.com, L.P., et al.	District Court of Harris County, Texas	Hotels.com, L.P. Hotwire, Inc. Expedia, Inc.
57. City of Philadelphia, Pennsylvania v. Hotels.com et al.	Court of Common Pleas of Philadelphia County, Pennsylvania	Expedia, Inc. Hotels.com Hotels.com, GP, LLC Hotwire.com



ORRICK, HERRINGTON & SUTCLIFFE LLP
701 FIFTH AVENUE
SUITE 5600
SEATTLE, WASHINGTON 98104-7097

tel +1-206-839-4300
fax +1-206-839-4301

WWW.ORRICK.COM

Richard DeNatale
(415) 773-4570
rdenatale@orrick.com

September 1, 2011

VIA FEDERAL EXPRESS

Zurich American Insurance Company
1400 American Lane
Schaumburg, IL 60196-1056

Re: Zurich American Insurance Company Policies EOL 5329302-02, EOL 5329302-03,
EOL 5329302-04, EOL 5329302-05

To the Claims Department:

As we stated in our letter of November 24, 2010, we have been retained as coverage counsel for Expedia, Inc. (Washington corporation), Expedia, Inc. (Delaware corporation), Hotels.com, L.P., Hotels.com, GP, LLC, Hotwire, Inc., and Travelscape (collectively, "Expedia"). Since our prior letter, Expedia has been sued in the lawsuits listed in Attachment A (the "Actions"). Copies of the complaints are enclosed. On behalf of Expedia, we hereby tender the Actions to you and ask you to confirm that you will defend and indemnify Expedia pursuant to the insurance policies listed above.

Sincerely,

A handwritten signature in black ink, appearing to be "R. DeNatale".

For
Richard DeNatale

Enclosures

EXP 0009066

EXHIBIT A

SUITS TENDERED ON SEPTEMBER 1, 2011

Case Name	Court	Defendants
Expedia, Inc. v. Osceola County, Florida and Florida Department of Revenue	Second Judicial Circuit Court, State of Florida, Leon County	Plaintiffs: Expedia, Inc.
Montgomery County, Maryland v. priceline.com, Inc., et al.	United States District Court for the District of Maryland, Northern Division	Expedia Inc. (DE) Expedia, inc. (WA) Hotels.com Hotels.com, L.P. Hotels.com GP, LLC Hotwire, Inc. TravelNow.com, Inc.
Montana Department of Revenue v. Priceline.com, Inc., et al.	Montana First Judicial District Court, Lewis and Clark County	Expedia, Inc. Hotels.com Hotels.com, L.P. Hotels.com GP, LLC Hotwire, Inc. TravelNow.com, Inc.
City of Duluth v. Expedia, Inc., et al.	Minnesota Sixth Judicial District Court, St. Louis County	Expedia, Inc.
District of Columbia vs. Expedia, Inc.	Superior Court of The District of Columbia Civil Division	Expedia, Inc. (DE) Expedia, Inc. (WA) Hotels.com, L.P. Hotwire, Inc.
County of Volusia, et al. v. Expedia, Inc., et al.	Seventh Judicial Circuit Court, State of Florida, Volusia County	Expedia, Inc. Hotels.com, L.P. Hotwire, Inc. TravelNow.com, Inc.

Albany
Atlanta
Brussels
Denver
Los Angeles

**McKenna Long
& Aldridge**
Attorneys at Law

1900 K Street, NW • Washington, DC 20006-1108
Tel: 202.496.7500 • Fax: 202.496.7756
www.mckennalong.com

New York
Philadelphia
Sacramento
San Diego
San Francisco
Washington, D.C.

JOANNE L. ZIMOLZAK
(202) 496-7375

EMAIL ADDRESS
jzimolzak@mckennalong.com

September 30, 2011

RECEIVED

OCT 03 2011

BY E-MAIL AND U.S. MAIL

Richard DeNatale
Orrick, Herrington & Sutcliffe LLP
701 Fifth Avenue
Suite 5600
Seattle, WA 98104-7097

Re: Insureds: Expedia, Inc. (Washington corporation); Expedia, Inc. (Delaware corporation); Hotels.com, L.P.; Hotels.com, G.P., LLC; Hotwire, Inc.; and Travelscape (collectively, "Expedia" or "the insureds")

Policy Nos.: EOL 5329302-02, EOL 5329302-03, EOL 5329302-04, and EOL 5329302-05

Claimants: District of Columbia; Osceola County, FL; Montana Department of Revenue; Montgomery County, MD; City of Duluth, MN; and County of Volusia, FL

Dear Mr. DeNatale:

On behalf of Zurich American Insurance Company ("ZAIC"), this letter addresses ZAIC's coverage evaluation under the above-referenced insurance policies for the following six lawsuits recently tendered by Expedia to ZAIC: *Expedia, Inc. v. Osceola County, Florida and Florida Department of Revenue*, No. 2011CA0206; *Montgomery County, Maryland v. Priceline.com, et al.*; *Montana Department of Revenue v. Priceline.com, et al.*, No. CDv2010-1056; *City of Duluth v. Expedia, Inc.*, No. ; *District of Columbia v. Expedia, Inc.*, No. 2011 CA 002117; and *County of Volusia, et al. v. Expedia, Inc., et al.*, No. 2011-10834-CIDL. Based on the terms and conditions of the policies as well as the facts and information available to ZAIC, it does not appear that the policies provide a duty to defend or indemnify Expedia in these lawsuits. Accordingly, ZAIC denies coverage for same based upon the terms and conditions of Policy Nos. EOL 5329302-02, EOL 5329302-03, EOL 5329302-04, and EOL 5329302-05 ("the ZAIC Policies") as outlined below.

EXP 0009275

Factual Background

A review of the claim documentation submitted with your September 1, 2011 letter reveals that the insureds are internet-based travel companies that operate websites where customers can research and evaluate hotel rentals and other travel products and services. It is alleged that Expedia negotiates with hotels to obtain access to rooms that Expedia can reserve or book for its customers. Expedia obtains these rooms at a lower wholesale price and makes them available to customers through its website at a higher retail price, plus certain tax recovery charges and fees. Expedia allegedly retains the difference as compensation for the transaction.

The government entities involved in the lawsuits (in five cases as plaintiffs and, in one case instituted by Expedia, as the defendant) (collectively the "Government Entities") levy certain taxes on the sale of hotel rooms, generally referred to as hotel occupancy tax or transient tax. The challenged Expedia model calls for calculation and payment of these taxes on the wholesale price of the room, not the retail price paid by the consumer.

The Government Entities assert that Expedia has remitted hotel occupancy tax based on the discounted wholesale amount that hotels charge Expedia, not the higher retail amount that Expedia charges its customers, in violation of applicable tax ordinances and other laws.

In one of the six lawsuits at issue, *County of Volusia, Florida v. Expedia, et al.*, No. 2011-10834-CIDL, the plaintiff seeks only a declaratory judgment as to Expedia's tax liability and other equitable (non-monetary) relief. Another lawsuit, *Expedia, Inc. v. Osceola County, Florida et al.*, No. 2011 CA 000206, was instituted by Expedia seeking a refund or reversal of taxes assessed. The remaining four lawsuits, *District of Columbia v. Expedia, Inc. et al.*, No. 0002117-11; *Montana Dept. of Revenue v. Priceline.com, et al.*, No. COV 2010-1056; *Montgomery County, Maryland v. Priceline.com, et al.*, No. 8:10-cv-03558-AW; and *City of Duluth v. Expedia, Inc.*, seek unpaid taxes and related relief based on one or more of the following theories of recovery: (1) violation of pertinent hotel tax ordinance(s); (2) conversion; (3) unjust enrichment; (4) constructive trust; (5) legal accounting; and/or (6) restitution or disgorgement.

By letter dated June 10, 2005, Expedia tendered a lawsuit raising many of the same and/or similar allegations, *City of Los Angeles v. Hotels.com LP, et al.*, No. BC 326693, under an insurance policy issued by Steadfast Insurance Company ("Steadfast") to the insureds, No. EOL 5329302-00. Berkely Travel responded on behalf of Steadfast to the referenced tender with a letter of declination dated June 27, 2005.

In November 2010, Expedia tendered fifty-six additional lawsuits raising many of the same and/or similar allegations and simultaneously filed a lawsuit against ZAIC and others in the Superior Court for King County, Washington, seeking a declaration of coverage under the ZAIC Policies and other relief (the "coverage lawsuit"). ZAIC responded to Expedia's coverage claims regarding these lawsuits by filing an Answer and Counterclaim in the coverage lawsuit, which remains ongoing. ZAIC's responsive pleading set forth the company's position that the ZAIC

Policies do not provide a duty to defend or indemnify Expedia in the *City of Los Angeles* suit or any of the fifty-six additional underlying actions at issue in the coverage lawsuit, identifying with specificity the policy provisions, facts, and circumstances relied on as a basis for ZAIC's position.

The ZAIC Policies

ZAIC issued to the Expedia insureds identified on the pertinent Declaration page(s) a Travel Agents' Professional Liability Policy No. EOL5329302-02, with a policy period of October 1, 2005- October 1, 2006. Expedia renewed its coverage with ZAIC annually for the next three years through October 1, 2009 (EOL5329302-03, EOL5329302-04, and EOL5329302-05). Policy No. EOL5329302-02 featured limits of \$5 million per occurrence / \$5 million aggregate and a deductible amount of \$50,000. The remaining ZAIC Policies at issue featured limits of \$1 million per occurrence / \$1 million aggregate and a deductible amount of \$50,000.

The ZAIC Policies provide errors and omissions coverage (Coverage C) as follows:

Coverage C Professional Liability

The Company will pay on behalf of the **Insured** those sums that the **Insured** becomes legally obligated to pay as **Damages** arising out of a negligent act or negligent omission anywhere in the world committed by the **Insured** or any other person for whose acts the **Named Insured** is legally liable in the conduct of **Travel Agency Operations** by the **Named Insured** provided such negligent act or negligent omission occurs during the **Policy Period**.

Insuring Agreement, ¶ A.3.

The insurer's defense obligations under the ZAIC Policies are 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 . . . to which this Insurance applies, even if any of the allegations of the **Suit** are groundless, false or fraudulent. The Company shall have the right to conduct such investigation and settlement of any **Claim** or **Suit** as it deems expedient. The Company shall not be obligated to pay any **Claim** or judgment or to defend any **Suit** after the applicable **Limit of Liability** has been exhausted by payment of judgments or settlements.

Insuring Agreement, ¶ B.

The ZAIC Policies limit coverage to claims for “damages.” All of the ZAIC Policies define damages to specifically exclude:

- (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; and (5) restitution, return or disgorgement of any fees, funds, or profits.

Policies, DEFINITIONS, § IV.D.

The ZAIC Policies set forth certain coverage conditions, including the following provisions regarding the insured’s notice and cooperation obligations:

As a condition precedent to coverage, the **Insured** must notify the Company as soon as practicable of an **Occurrence**, a negligent act or negligent omission or an offense.

§ VII. Conditions, ¶ B.1

If a claim is made or a suit is brought against the **Insured**, as a condition precedent to coverage, the **Insured** must immediately record the specifics of the **Claim** or **Suit** and the date received; and Notify the Company as soon as practicable. The Insured must see to it that the Company receive written notice of the **Claim** or **Suit** as soon as practicable.

§ VII. Conditions, ¶ B.2

The -03, -04, and -05 ZAIC Policies also contain the following exclusionary language:¹

This policy does not apply to:

- (O) Any **Claim** or **Suit** based upon or arising from any co-mingling of money, or the inability or failure to pay or collect money or the value of mileage points, vouchers, travel credits, or

¹ The -02 Policy contains a similarly worded exclusion that precludes coverage for claims arising out of the *inability* to pay money but does not reference the *failure* to pay money (as in the other Policy forms): “This policy does not apply to: . . . (O) Any **Claim** or **Suit** based upon or arising from any co-mingling of money, or the inability to pay or collect money or other negotiable instruments for any reason” The word “failure” reappears in the revised version of the form used in connection with the -03, -04, and -05 Policies.

other negotiable instrument, for any reason, whether on the part of the **Insured**, or any other party, including but not limited to unauthorized or illegal credit card transactions; debit memos; commissions, profits, or refunds; and bankruptcy, insolvency, receivership, liquidation and/or cessation of operations.

Policy, Exclusions, § II.O.

The ZAIC Policies also exclude coverage for claims arising out of unfair trade practices and unfair competition as follows:

This policy does not apply to: 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.

Policy, Exclusions, § II.K.

The ZAIC Policies also exclude coverage for:

Any **Claim** or **Suit** based upon or arising out of any **Occurrence**, act, or omission, or offense by the **Insured** which is intentional, dishonest, fraudulent or malicious, or criminal, regardless of whether the resultant **Damages** were intended.

Policy, Exclusions, § II.N.

Discussion

As these matters arise from Expedia's alleged failure to pay the Government Entities the full amount of taxes owed and Expedia's allegedly deceptive tax collection and remittance practices, the claims at issue do not fall within the insuring agreement in the ZAIC Policies. This is true for two principal reasons.

First, there is no coverage for the Government Entities' claims because they do not seek "damages" within the meaning of the ZAIC Policies. All of the ZAIC Policies limit coverage to claims for "damages," which are defined to specifically exclude:

(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; and (5) restitution, return or disgorgement of any fees, funds, or profits.

A review of the claim documentation shows that all of the lawsuits at issue involve claims for this kind of relief. Because the claims at issue seek in various combinations

declaratory, injunctive, or other purely equitable relief; restitution and disgorgement; and penalties or fees, they are not claims for “damages” within the meaning of the insuring agreements in the ZAIC Policies.

Second, the lawsuits at issue do not allege “negligence” within the meaning of the ZAIC Policies. The ZAIC Policies do not cover intentional or willful conduct, which is explicitly excluded from coverage. The Government Entities that have sued Expedia² do not allege that Expedia failed to pay its taxes due to neglect or inadvertence, but allege that Expedia’s conduct was premeditated and intentional. A review of the claim documentation submitted for the various claims also reveals numerous allegations of intentional, willful, wanton, fraudulent, and deceptive conduct. Such conduct does not constitute a covered risk (i.e., a negligent error or omission) under the ZAIC Policies.

The ZAIC Policies also contain certain exclusions that preclude coverage for the claims at issue. Exclusion O contained in the -03, -04, and -05 ZAIC Policies, for example, bars coverage for claims against Expedia arising out of or contributed to by Expedia’s failure to collect or pay money for any reason. Each of the claims at issue arises out of Expedia’s alleged failure to pay taxes, and taxes unquestionably are money. As such, Exclusion O precludes coverage for the Government Entities’ claims under these policies.³

In addition, the ZAIC Policies specifically exclude unfair trade practices or unfair competition (Exclusion K). To the extent that certain of the complaints allege unfair practices by Expedia arising from a failure to pay the correct amount of hotel occupancy taxes and/or to fully disclose the nature of the insureds’ tax collection and remittance practices, this exclusion applies to preclude coverage for such claims. See *Montana Dept. of Revenue v. Priceline.com, et al.* (discussing insureds’ allegedly deceptive tax collection practices) and *Montgomery County, Maryland v. Priceline.com, et al.* (alleging that insureds hid additional and illegal profit streams under the guise of “taxes and fees”).

Under Exclusion N, the ZAIC Policies also preclude coverage for liability arising out of any act or omission “which is intentional, dishonest, fraudulent or malicious, or criminal, regardless of whether the resultant **Damages** were intended.” As reflected in the claim documentation, the Government Entities that have sued Expedia assert that Expedia intentionally

² One of the six lawsuits tendered, *Expedia, Inc. v. Osceola County Florida, et al.*, was instituted by Expedia as the plaintiff. This lawsuit falls outside the scope of coverage provided by the ZAIC Policies, which limit the insurer’s defense obligation to “any Suit *against* the Insured seeking **Damages**” (Bold text in original; emphasis added).

³ Exclusion O in the -02 Policy also may preclude coverage for the Government Entities’ claims. See footnote 1, *supra*.

Richard DeNatale
September 30, 2011
Page 7

and dishonestly violated the pertinent tax code and statutory provisions. For this and all of the reasons discussed above, the claims at issue are not covered under the ZAIC Policies.⁴

Conclusion

Based on the terms and conditions of the ZAIC Policies, as well as the facts and information available to ZAIC, it does not appear that the ZAIC Policies provide a duty to defend or indemnify Expedia in any of the six lawsuits tendered under cover of your September 1, 2011 letter. Accordingly, ZAIC denies coverage for same based upon the terms and conditions of the ZAIC Policies. If you believe that any of the factual information cited in this letter as a basis for ZAIC's decision is incomplete or inaccurate, or if there is additional information you wish ZAIC to consider, please let me know immediately.

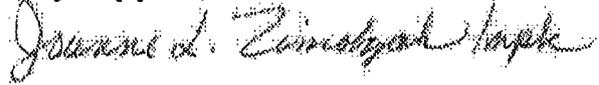
This correspondence is not intended to be, nor should it be construed as, an exhaustive listing of policy terms, conditions, or exclusions which might preclude coverage for the above-referenced lawsuits under the ZAIC Policies. ZAIC expressly reserves the right to amend or supplement this letter based upon any other provisions of the ZAIC Policies, whether or not mentioned herein, and as additional information concerning the ZAIC Policies and/or the claims is provided or obtained. There may be other policy provisions that affect coverage for the claims asserted, and ZAIC's coverage position as set forth in this letter is not a waiver of those provisions. Instead, all of ZAIC's rights under the ZAIC Policies, under applicable law, and under principles of public policy or equity are expressly reserved.

Finally, it appears that the above-referenced lawsuits were sent to a generic address for ZAIC. This is contrary to the instructions that were provided to the insureds at the time the above-referenced policies were issued, which provide for claim submission directly to Berkely Travel, ZAIC's Third Party Administrator for claims under the ZAIC Policies. In the event that Expedia in the future seeks to tender any additional claims under the ZAIC Policies, please direct any and all such correspondence to Greg. R. Takehara at Berkely Travel, 300 Jericho Quadrangle, Jericho, NY 11753.

⁴ It also bears noting that the lawsuits at issue appear to have been filed during the last year, with the earliest filing date being November 2010 and the latest being May 2011. Expedia did not provide notice regarding any of these lawsuits until this month.

Richard DeNatale
September 30, 2011
Page 8

Very truly yours,

A handwritten signature in cursive script, appearing to read "Joanne L. Zimolzak".

Joanne L. Zimolzak

cc: Greg R. Takehara, Senior Vice President, Aon Affinity
George Peterson, Claims Counsel, Professional Programs Claims, Zurich American
Insurance Company

EXP 0009282

MAR 02 2012

SUPERIOR COURT CLERK
Honorable Kimberly Proctor
ERIKEN MOLEOD
DEPUTY

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND 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,

vs.

STEADFAST INSURANCE COMPANY, a
Delaware corporation, ZURICH AMERICAN
INSURANCE COMPANY, a New York
corporation; ARROWOOD INDEMNITY
COMPANY, a Delaware corporation,

Defendants.

No. 10-2-41017-1 SEA

~~PROPOSED~~ ORDER GRANTING
ZURICH'S AND STEADFAST'S MOTION
FOR SUMMARY JUDGMENT
*IN PART AND DENYING
IN PART*

THIS MATTER came before the above-entitled Court upon Defendants Steadfast Insurance Company and Zurich American Insurance Company's Motion For Summary Judgment; and the Court having reviewed the records and files pertaining to this action, and having specifically reviewed the following:

1. Motion for Summary Judgment of Defendants Zurich American Insurance Company and Steadfast Insurance Company;

~~PROPOSED~~ ORDER GRANTING ZURICH AND
STEADFAST'S MOTION FOR SUMMARY JUDGMENT - PAGE 1
608297 / 232.000

FORSBERG & UMLAUF, P.S.
ATTORNEYS AT LAW
901 FIFTH AVENUE • SUITE 1400
SEATTLE, WASHINGTON 98164-2050
(206) 689-8500 • (206) 689-8501 FAX

ORIGINAL
Appendix 109

1 2. Declaration of Michael Hooks in Support of Defendants Zurich American
2 Insurance Company and Steadfast Insurance Company's Motion for Summary Judgment, with
3 attachments thereto;

4 3. Defendant Arrowood Indemnity Company's Motion For Summary Judgment;

5 4. Declaration of Russell C. Love in Support of Defendant Arrowood Indemnity
6 Company's Motion For Summary Judgment, with attachments thereto;

7 5. Plaintiffs' Combined Opposition to Defendants' Motions For Summary
8 Judgment;

9 6. Declaration of Melissa Maher in Support of Plaintiffs' Combined Opposition
10 to Defendants' Motions For Summary Judgment;

11 7. Declaration of Mark S. Parris in Support of Plaintiffs' Combined Opposition to
12 Defendants' Motions For Summary Judgment, with attachments thereto;

13 8. Errata to Plaintiffs' Combined Opposition to Motions For Summary Judgment
14 Filed by Defendants Arrowood Indemnity Company, Steadfast Insurance Company, and
15 Zurich American Insurance Company;

16 9. Defendant Arrowood's Reply on Motion For Summary Judgment;

17 10. Defendants Steadfast Insurance Co. & Zurich American Insurance Co.'s Reply
18 in Support of Motion For Summary Judgment;

19 11. Plaintiffs' Supplemental Brief Re January 13, 2012 Hearing on Motions For
20 Summary Judgment;

21 12. Declaration of Mark S. Parris in Support of Plaintiffs' Supplemental Brief Re
22 January 13, 2012 Hearing on Motions For Summary Judgment, with attachments thereto;

23 13. Defendants Steadfast Insurance Co. & Zurich American Insurance Co.'s
24 Response to Expedia's Supplemental Brief Re January 13, 2012 Hearing on Motions For
25 Summary Judgment;

1 14. Supplemental Declaration of Michael P. Hooks in Support of Steadfast
2 Insurance Co. & Zurich American Insurance Co.'s Response to Expedia's Supplemental Brief
3 Re January 13, 2012 Hearing on Motions For Summary Judgment, with attachments thereto;

4 15. Arrowood's Response to Expedia's Supplemental Brief on Insurers' Motions
5 For Summary Judgment;

6 16. Declaration of Russell C. Love in Support of Arrowood's Response Expedia's
7 Supplemental Brief Re January 13, 2012 Hearing on Motions For Summary Judgment, with
8 attachments thereto;

9 17. Plaintiffs' Combined Supplemental Reply Brief Re January 13, 2012 Hearing
10 on Motions For Summary Judgment;

11 18. Declaration of Mark S. Parris in Support of Plaintiffs' Combined Supplemental
12 Reply Brief Re January 13, 2012 Hearing on Motions For Summary Judgment, with
13 attachments thereto.

14 And the Court, having heard argument of counsel and otherwise being fully advised,
15 now therefore rules as follows:

16 IT IS HEREBY ORDERED that Defendants Steadfast Insurance Company's and
17 Zurich American Insurance Company's Motion for Summary Judgment is GRANTED in part
18 and denied in part, as follows:

19 (a) The Motion is GRANTED as to Steadfast Insurance Company Policy
20 Nos. EOL 5329302-00 and 5329302-01. Defendant Steadfast Insurance Company does not
21 owe any duty to defend or duty to indemnify plaintiffs for any of the 57 underlying actions
22 listed in Exhibit B to plaintiffs' original Complaint filed in this action under these two
23 insurance policies. This ORDER does not preclude plaintiffs from maintaining their claims
24 that Steadfast Insurance Company and Zurich American Insurance Company have acted in
25 bad faith.

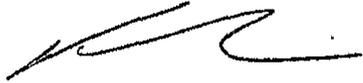
26 (b) The Motion is GRANTED as to Zurich American Insurance Policy
Nos. 5329302-04 and 5329302-05. Zurich American Insurance Company does not owe any

1 duty to defend or duty to indemnify plaintiffs for any of the 57 underlying actions listed in
2 Exhibit B to plaintiffs' original Complaint filed in this action under these two insurance
3 policies. This ORDER does not preclude plaintiffs from maintaining their claims that
4 Steadfast Insurance Company and Zurich American Insurance Company have acted in bad
5 faith.

6 (c) The Motion for Summary Judgment is DENIED as to Zurich American
7 Insurance Policy Nos. 5329302-02 and 5329302-03, ~~without prejudice to the parties'~~ *KP*
8 ~~submission of additional evidence bearing on the existence or nonexistence of a duty to~~
9 ~~defend under those policies.~~

10
11 DONE this 2 ^{MARCH} day of February, 2012.

12
13 Judge


KIMBERLEY PROCHNAU

14 PRESENTED BY:

15 FORSBERG & UMLAUF, P.S.

16
17 By: 

18 Michael P. Hooks, WSBA #24153
19 Attorneys for Defendants Steadfast
Insurance Company and Zurich
American Insurance Company

I certify that I have mailed/e-mailed
a copy of this order to all parties.

Date: 3/2/2012

Signature: C. Robinson-Bailliff

20 MCKENNA LONG & ALDRIDGE, LLP

21
22 By: 

23 J. Randolph Evans, Georgia Bar #252336
24 Joanne L. Zimolzak, DC Bar #452035
(admitted *pro hac vice*)
25 Attorneys for Defendants
Steadfast Insurance Company and
Zurich American Insurance Company

26 Approved as to form; presentation waived:

ORRICK & HERRINGTON

[PROPOSED] ORDER GRANTING ZURICH AND
STEADFAST'S MOTION FOR SUMMARY JUDGMENT - PAGE 4
608297 / 232.000

FORSBERG & UMLAUF, P.S.
ATTORNEYS AT LAW
901 FIFTH AVENUE • SUITE 1400
SEATTLE, WASHINGTON 98164-2050
(206) 689-8500 • (206) 689-8501 FAX

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By: _____
Mark S. Parris, WSBA #13870
Attorneys for Plaintiffs

THORSRUD CANE & PAULICH

By: _____
Russell C. Love, WSBA #8941
Attorneys for Defendants
Arrowood Indemnity Company

1 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
2 IN AND FOR THE COUNTY OF KING

3 EXPEDIA, INC, A WASHINGTON)
CORPORATION; EXPEDIA INC., A)
4 DELAWARE CORPORATION; HOTEL.COM,)
L.P., A TEXAS LIMITED LIABILITY)
5 PARTNERSHIP; HOTELS.COM, GP, LLC,)
A TEXAS LIMITED LIABILITY COMPANY;))
6 HOTWIRE, INC., A DELAWARE)
CORPORATION; TRAVELSCAPE, A NEVADA)
7 LIMITED LIABILITY COMPANY,)
PLAINTIFFS,)

CASE NO.

8)
9 VERSUS)
STEADFAST INSURANCE COMPANY, A)
10 DELAWARE CORPORATION; ZURICH)
AMERICAN INSURANCE COMPANY, A NEW)
11 YORK CORPORATION; ARROWOOD)
INDEMNITY COMPANY, A DELAWARE)
CORPORATION,)
12 DEFENDANTS.)

10-2-41017-1SEA

13 Proceedings Before Honorable KIMBERELEY PROCHNAU

14 KING COUNTY COURTHOUSE
15 SEATTLE, WASHINGTON

16 DATED: JANUARY 13, 2012

17 A P P E A R A N C E S:

18 FOR THE PLAINTIFFS:

19 BY: MARK PARRIS, ESQ.,
20 PAUL RUGANI, ESQ.,

21 FOR THE DEFENDANTS:

22 Zurich American and Steadfast
23 BY: MIKE HOOKS, ESQ.,
JOANNE ZIMOLZAK, ESQ.
24 RANDY EVANS, ESQ., Pro Hace Vice

25 Arrowood Indemnity Company:
BY: RUSSELL LOVE, ESQ.

13:34:59 22
13:34:57
13:35:07 23
13:35:02
13:19:10 24
13:35:13
13:35:13 25
13:35:13

P R O C E E D I N G S

(Afternoon session. Open court.)

THE BAILIFF: All rise. Court is in

session, The Honorable Kimberley Prochnau presiding in the Superior Court in the State of Washington in and for King County.

THE COURT: Thank you. Please be seated.

This is the matter of Expedia versus Steadfast Insurance, et al., 10-2-41017-1 SEA, I am Judge Prochnau. I will go ahead and have counsel introduce themselves.

MR. PARRIS: Good afternoon, Mark Parris and

Paul Rugani representing Expedia. Today we have two clients representing Expedia, also former refugees of Heller, like Paul and I.

MR. HOOKS: I am Mike Hooks, attorney for

Zurich American and Steadfast. And with me is Randy Evans, Pro Hac Vice, who is making the argument today and Joanne Zimolzak.

MR. LOVE: Russell Love on behalf of

Arrowood Indemnity Company.

THE COURT: Very nice to meet you all. In terms of logistics, how much time were each of you hoping to use for your total time of argument?

We had discussed, I think that my bailiff

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THE COURT: Thank you.

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15:33:20 16

So, I thank all counsel for the very able oral arguments, as well as the very capable briefs. I don't thank you for all of the -- for citing 200 cases, necessarily, but I do thank you for your briefing.

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This action involves 57 lawsuits brought by cities and municipalities, alleging that Expedia had a duty to collect and remit certain hotel occupancy taxes. Some or perhaps all of those lawsuits allege unfair business practices, or Consumer Protection claims.

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15:33:56 1 The City of LA, a class action, was cited
15:34:02 2 as a representative lawsuit, in which they claim
15:34:05 3 Expedia has a duty to collect and remit transient
15:34:08 4 occupancy taxes on the retail price paid by customers
15:34:15 5 for hotel rooms. But Expedia remits an insufficient
15:34:20 6 amount of the occupancy taxes based on the wholesale
15:34:23 7 price of the hotel rooms.

15:34:25 8 Expedia itself has described in its SEC
15:34:31 9 filings that the lawsuits concern Expedia's alleged
15:34:35 10 failure to structure its transactions in a manner that
15:34:48 11 ~~results in the customer paying taxes based on the~~
15:34:51 12 entire amount paid to Expedia, rather than a portion
15:34:53 13 of the price. But Expedia claims it intends to
15:34:56 14 structure its transactions or intended to structure
15:34:59 15 its transactions in a way that captured and remitted
15:35:01 16 all applicable taxes owed by customers.

15:35:06 17 Expedia has a number of policies. It has
15:35:11 18 six policies with the Steadfast Zurich Insurance
15:35:15 19 companies. We may have to go back and sort this out,
15:35:26 20 because in the slides I have been given today by
15:35:32 21 Expedia, they referenced the policies in a different
15:35:38 22 manner.

15:35:41 23 So it is a little hard for me to track
15:35:45 24 which policies we are talking about, but my notes
15:35:47 25 indicate from looking at the policies and the briefing

15:35:52 1 that Steadfast and Zurich issued six policies. The
15:35:56 2 first policy ran for six months period in 2004 and
15:36:02 3 thereafter they were 12-month policies running from
15:36:06 4 October to October of every year.

15:36:10 5 The 2000 and 2001 policies do not define
15:36:15 6 damages.

15:36:16 7 The 2002 through 2005 policies did provide
15:36:21 8 a definition of damages.

15:36:24 9 Coverage C, under all of the Steadfast
15:36:28 10 Zurich policies, was similar in providing coverage for
15:36:39 11 ~~liability arising out of any negligent act, error or~~

15:36:44 12 omission creating a duty to defend any suit seeking
15:36:52 13 damages on account of any act, error, or omission.

15:37:01 14 There are differences in the various policies in terms
15:37:04 15 of the exclusions, which I will get to later.

15:37:08 16 As to the Arrowood policies, there are
15:37:09 17 three policies issued for one-year periods between May
15:37:13 18 2001 and May 2004; some or all of those policies were
15:37:19 19 issued by their predecessor, Connecticut.

15:37:23 20 Again, coverage C, contains similar
15:37:28 21 language providing coverage for any negligent act,
15:37:33 22 error or omission of the insured, creating a duty to
15:37:36 23 defend against any suit seeking damages on account of
15:37:42 24 bodily harm act property damage or negligent act,
15:37:45 25 error, or omission. Damages are not defined.

15:37:48 1 Again, there are some differences in the
15:37:51 2 exclusionary sections, which I will get to later.

15:37:57 3 None of these policies were negotiated
15:38:01 4 between the principals. They were simply policies
15:38:05 5 drafted by the insurer and accepted by the insured.

15:38:11 6 Policy interpretation questions are, of
15:38:16 7 course, a question of law. The insured has the
15:38:22 8 initial burden of showing that the claim that they
15:38:26 9 seek to have defended comes within the insuring
15:38:33 10 agreement. If they meet that burden, it shifts to the
15:38:38 11 insurer to show that the claim is excluded, with

15:38:42 12 ambiguous exclusions to be resolved in the favor of
15:38:45 13 insured.

15:38:45 14 The policy is to be read as a whole.
15:38:52 15 Extrinsic evidence is not available, except with
15:38:56 16 respect to when there has been negotiation, and in
15:39:01 17 some cases where the evidence is ambiguous or -- not
15:39:04 18 the evidence, excuse me -- where the provisions are
15:39:07 19 ambiguous.

15:39:08 20 Although that exception applies only to
15:39:14 21 benefit the insured with respect to exclusionary
15:39:20 22 sections of the policy.

15:39:23 23 The duty to defend of an insured on an
15:39:26 24 action brought against a policyholder arises when the
15:39:28 25 complaint is filed and when the allegations of the

15:39:31 1 complaint could, if proven, impose liability upon the
15:39:34 2 insured within the coverage of the policy.

15:39:40 3 The court has particularly looked at the
15:39:44 4 first question. Are these claims, claims for damages
15:39:49 5 within the meaning of the policy?

15:39:59 6 With respect to those policies that do not
15:40:01 7 have a definition for damages, the court would look to
15:40:08 8 the dictionary definitions, but also looks to the case
15:40:13 9 law.

15:40:17 10 In this case, Expedia, the parties disagree
15:40:40 11 on how this money was not remitted. Expedia argues

15:40:46 12 that it simply wasn't collected. First of all, it
15:40:52 13 wasn't owed under their interpretation; it wasn't owed
15:40:55 14 and it wasn't collected. They don't have it. So
15:40:59 15 there is no basis for disgorgement or restitution.

15:41:05 16 The insurer argues that, in fact, "they did
15:41:09 17 collect it and kept it under the guise of service
15:41:14 18 fees."

15:41:17 19 Given the broad duty to defend, since both
15:41:22 20 of those theories -- either one of those theories
15:41:24 21 could nevertheless lead to the liability, given that
15:41:29 22 the cities do not have to prove intent, one of those
15:41:37 23 theories, at least, would put this more in the
15:41:42 24 category of damages, rather than restitution.

15:41:47 25 The court has been directed to look at

15:41:53 1 Pacific versus Burnett. They did discuss, in passing,
15:42:03 2 whether the complaint sought damages as that term is
15:42:07 3 defined in the policy. But Pacific pointed out that
15:42:13 4 that policy had a specific exclusion for fines,
15:42:16 5 sanctions or penalties against any insured, or the
15:42:19 6 return of reimbursement of fees for professional
15:42:22 7 service.

15:42:23 8 My attention hasn't been brought to such a
15:42:26 9 provision within these policies. So Pacific Insurance
15:42:30 10 does not appear to help the insurers. This is
15:42:36 11 ~~different than as the insurers argue, a tax evasion~~
15:42:42 12 case where someone is not paying their own taxes.

15:42:45 13 This is rather more than of a situation
15:42:48 14 where someone is violating the statutory duty,
15:42:52 15 allegedly, but just as someone running a red light
15:43:02 16 violates a statutory duty and may end up with fines
15:43:07 17 owed to the municipality but also could be result in
15:43:11 18 liability. This is a situation where it is not their
15:43:17 19 own unpaid taxes that are being paid, but a question
15:43:20 20 of whether their conduct leads to a breach in as much
15:43:25 21 as they are not remitting other people's taxes under
15:43:29 22 one theory of the case.

15:43:32 23 As Expedia points out, although willful
15:43:41 24 misconduct may be excluded from coverage under the
15:43:45 25 policy, there is under at least one conceivable theory

15:43:52 1 a situation where Expedia could be found to be liable
15:43:57 2 under the underlying complaints, yet not have engaged
15:44:01 3 in willful misconduct.

15:44:03 4 So, for example, the court could ultimately
15:44:08 5 determine that Expedia's theory of tax law is correct,
15:44:13 6 but nevertheless, there was a miscalculation as to the
15:44:19 7 amounts owed. They could have remitted the wrong
15:44:21 8 amount.

15:44:22 9 Their theory could have been they were only
15:44:26 10 required to remit a percentage based on the wholesale
15:44:30 11 fees, but yet through some software miscalculations,
15:44:34 12 remitted less than that. They would still owe to the
15:44:44 13 city, based on that, and could be subject to liability
15:44:49 14 based on that.

15:44:55 15 The cases from other jurisdictions are
15:45:13 16 interesting, but Washington appears to have
15:45:15 17 extraordinarily vigorous protections for the insured
15:45:21 18 with regards to the duty to defend. I think that Woo
15:45:25 19 is the best example of that.

15:45:31 20 Nor do the arguments on public policy or
15:45:37 21 fortuity avail the insurer. Certainly, they argued
15:45:46 22 that this could be contrary to public policy, because
15:45:49 23 it could lead to delay in forwarding tax receipts --
15:45:55 24 this is not a tax evasion situation, though. It is
15:45:57 25 not Expedia's taxes that they are allegedly failing to

15:46:01 1 remit. It is other people's taxes.

15:46:04 2 So certainly, although there may be public
15:46:08 3 policy reasons to encourage people to remit those
15:46:13 4 taxes on time, there are likewise public policy
15:46:17 5 reasons for people not to be negligent on a score of
15:46:21 6 other situations, to look behind them, when they back
15:46:25 7 out, for example. Yet we don't forbid insurance for
15:46:29 8 those purposes.

15:46:31 9 The Queen City Farms allowed for --
15:46:41 10 although certainly made a distinction between
15:46:44 11 intentional versus negligent pollution, the Queen City
15:46:50 12 Farms still allowed for the possibility of coverage
15:46:57 13 for a negligent pollution, even though that pollution
15:47:00 14 is obviously something against public policy.

15:47:03 15 The next thing that we turned to is whether
15:47:14 16 these underlying lawsuits are nevertheless excluded
15:47:20 17 under the exclusionary language in the insurance
15:47:24 18 policies. There is some variety between the insurance
15:47:29 19 policies.

15:47:55 20 Because I am a little unsure now, based on
15:48:08 21 my notes, as to which policies have which language, I
15:48:12 22 am going to speak more generally.

15:48:14 23 A number of the policies indicates that for
15:48:26 24 the purposes of this endorsement, any claim or suit
15:48:31 25 based upon or arising from any commingling of money,

15:48:35 1 or the inability to pay or collect money, et cetera,
15:48:42 2 for any reason, whether on the part of the insured or
15:48:45 3 any other party, is excluded.

15:48:51 4 In those cases, that is a clear statement
15:48:55 5 that the inability to pay or collect money is excluded
15:48:59 6 from coverage. However, those policies fail to
15:49:08 7 include language with respect to the failure to pay.

15:49:11 8 Of course, one of the theories of --
15:49:14 9 probably the primary theory of the municipalities, is
15:49:17 10 it is not that Expedia didn't have the ability to pay
15:49:21 11 this money. It is that they simply failed to pay this

15:49:24 12 money. Whether through negligence or wanton
15:49:27 13 misconduct, it doesn't matter to the cities, because,
15:49:30 14 of course, it is a strict liability situation.

15:49:33 15 So, those policies exclusions would not
15:49:37 16 assist the insurer. Those do not exclude coverage.

15:49:42 17 However, the majority of the policies, I
15:49:48 18 believe, have exclusionary language that states:

15:49:52 19 "Any claim or suit based upon or arising
15:49:55 20 from any commingling of money or the inability or
15:49:59 21 failure to pay or collect money."

15:50:02 22 These do have the operative language:
15:50:06 23 "Inability or failure to pay or collect money."

15:50:10 24 That language is broad. Those exclusions
15:50:14 25 are broad. They are clear and unambiguous.

15:50:18 1 In excluding, "any inability or failure to
15:50:20 2 pay or collect money," they use a number of examples.
15:50:25 3 Those examples are probably considered to be the
15:50:32 4 outliers to make it clear that they are not talking
15:50:34 5 simply about willful failure to pay, but even
15:50:39 6 regardless of the blamelessness of the insured, they
15:50:42 7 are not going to cover.

15:50:43 8 So even if the insured goes into
15:50:46 9 bankruptcy, and has no legal ability to pay those
15:50:49 10 obligations, or receivership, or cease its operations,
15:50:59 11 there is going to be no coverage under that type of

15:51:03 12 policy. The court agrees with the insurer, that the
15:51:06 13 exclusion applies to the entire policy and that it is
15:51:11 14 intended to apply to the duty to defend; that there
15:51:18 15 is, therefore, no coverage under those sections.

15:51:23 16 Then there is another policy version of the
15:51:31 17 exclusions in some of the Arrowood and Steadfast
15:51:36 18 policies, which states:

15:51:39 19 "This policy does not apply under coverage
15:51:44 20 C to any liability arising out of or contributing to
15:51:48 21 by the commingling of money or the inability or
15:51:52 22 failure to pay or collect any money for any reason,
15:51:55 23 including the following."

15:51:58 24 There again, a number of examples are
15:52:00 25 provided, such as bankruptcy. And further, coverage

15:52:06 1 is excluded, regardless of whether such commingling of
15:52:08 2 the money, or failure, or inability to pay or collect
15:52:10 3 money is on the part of the insured or any other
15:52:12 4 party.

15:52:13 5 Again, those exclusions do clearly exclude
15:52:17 6 coverage and the obligation to defend, because it
15:52:22 7 references "the policy." Without a policy, there is
15:52:27 8 no duty to defend. Because, after all, what you are
15:52:33 9 purchasing the policy for, is for both indemnification
15:52:39 10 and defense. If you haven't purchased a policy you,
15:52:43 11 obviously, don't have a right to demand the insurer to
15:52:47 12 defend you.

15:52:49 13 Therefore, that provision is clear. It is
15:52:52 14 unambiguous. It is not the product of the
15:52:57 15 negotiations. It covers the gamut of inability or
15:53:06 16 failure to pay, or collect any money for any reason
15:53:12 17 under any conceivable theory that Expedia could be
15:53:15 18 held liable. It all comes around, still, back to "the
15:53:20 19 inability or failure to pay or collect money."

15:53:44 20 I will depend upon you to match up my
15:53:50 21 decision with the particular insurance policies I
15:53:55 22 think that I have clarified. I think that I have
15:53:57 23 identified the language that I am talking about.

15:54:01 24 I believe that since we are not going to
15:54:03 25 address the estoppel argument, that addresses the

15:54:06 1 arguments raised by each of you.
15:54:10 2
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~~15:54:32 11~~
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15:54:44 16
15:54:47 17
15:54:49 18
15:54:50 19
15:54:51 20
15:54:55 21
15:54:59 22
15:55:02 23
15:55:05 24
15:55:08 25

Honorable Kimberly Prochnau
NOTED FOR: Friday, April 27, 2012
1:30 p.m.

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND 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,

vs.

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.

No. 10-2-41017-1 SEA

~~[PROPOSED]~~ ORDER GRANTING
DEFENDANTS' MOTION FOR RULE
56(f) CONTINUANCE

~~[CLERK'S ACTION REQUIRED]~~

THIS MATTER came before the above-entitled Court upon Defendants Steadfast
Insurance Company and Zurich American Insurance Company's Motion For Rule 56(f)

ORDER GRANTING DEFENDANTS STEADFAST AND ZURICH'S MOTION
FOR 56(f) CONTINUANCE - PAGE 1

FORSBERG & UMLAUF, P.S.
ATTORNEYS AT LAW
901 FIFTH AVENUE • SUITE 1400
SEATTLE, WASHINGTON 98164-2030
(206) 689-8500 • (206) 689-8501 FAX

582219 / 232.0001

ORIGINAL

ORIGINAL

1 Continuance, and the Court having reviewed the records and files pertaining to this action,
2 and having specifically reviewed the following;

3 1. Defendants Steadfast Insurance Insurance Company and Zurich American
4 Insurance Company's Motion For Rule 56(f) Continuance;

5 2. Declaration of Joanne Zimolzak in Support of Defendants Steadfast Insurance
6 Company and Zurich American Insurance Company's Motion For Rule 56(f) Continuance,
7 with attached exhibits;

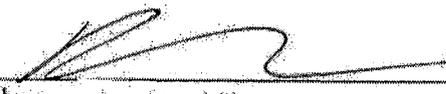
8 3. RESPONSE _____;

9 4. _____;

10 5. _____; and

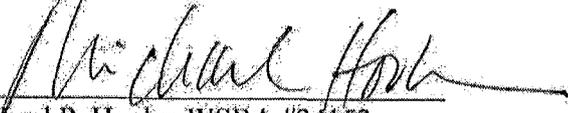
11 and the Court, having considered the files and pleadings in the matter, and otherwise being
12 fully advised, now therefore rules as follows:

13 IT IS HEREBY ORDERED that Defendants Steadfast Insurance Company and Zurich
14 American Insurance Company's Motion For 56(f) Continuance is GRANTED. *Parties*
15 *to coordinate ~~and~~ new date for next with Bailiff*
16 DONE IN OPEN COURT this 26 day of April 2012.

17 
18 Judge: KIMBERLEY PROCHNAU

19 PRESENTED BY:
20 FORSBERG & UMLAUF, P.S.

I certify that I have mailed/e-mailed
a copy of this order to all parties.
Date: 4/26/2012
Signature: *Robertson Bruliff*

21 By: 
22 Michael P. Hooks, WSBA #24153
23 Attorneys for Defendants Steadfast
Insurance Company and Zurich
American Insurance Company

ORDER GRANTING DEFENDANTS STEADFAST AND ZURICH'S MOTION
FOR 56(f) CONTINUANCE -- PAGE 2

FORSBERG & UMLAUF, P.S.
ATTORNEYS AT LAW
901 FIFTH AVENUE • SUITE 1400
SEATTLE, WASHINGTON 98164-2050
(206) 689-8500 • (206) 689-8501 FAX

1 **MCKENNA LONG & ALDRIDGE, LLP**

2
3 By: _____
4 J. Randolph Evans, Georgia Bar #252336
5 Joanne L. Zimolzak, DC Bar #452035
6 (admitted *pro hac vice*)
7 Attorneys for Defendants
8 Steadfast Insurance Company and
9 Zurich American Insurance Company

10 Approved as to form; presentation waived;

11 **ORRICK & HERRINGTON**

12 By: _____
13 Mark S. Parris, WSBA #13870
14 Attorneys for Plaintiffs

15 **THORSRUD CANE & PAULICH**

16 By: _____
17 Russell C. Love, WSBA #8941
18 Attorneys for Defendants
19 Arrowood Indemnity Company; Royal &
20 Sun Alliance; Arrowpoint Capital Corp.; and
21 Arrowood Surplus Lines Insurance Co.

DISCOVERY REQUESTS TO EXPEDIA BY UNDERLYING PLAINTIFFS AND ZURICH

Plaintiffs' Request

Rog 1

State when you first discussed whether you and/or other online travel companies were obligated to collect, account for and/or remit hotel occupancy taxes to taxing authorities in the United States, including but not limited to the Brevard Hotel Tax, and describe in detail the nature of, and conclusion derived from, the discussion, and identify participants in the discussion.

Rog 2

State how, when and why and describe under what circumstances you determined that the moneys you receive from consumer customers in your merchant model hotel business (including but not limited to your markup, service fees and the like) are not subject to hotel occupancy taxes such as and including but not limited to the Brevard Hotel Tax.

Zurich's Request

2nd Set – Rog 4

State when YOU first adopted as a business practice or took the position that TAXES do not apply to YOUR revenues from merchant hotel transactions.

Zurich's 30(b)(6) topic

DISCOVERY REQUESTS TO EXPEDIA BY UNDERLYING PLAINTIFFS AND ZURICH

Plaintiffs' Request

Rog 5

Identify all assessment notices, deficiency notices, audit requests, audit findings, demands for payment, certificates of authority, and Complaints ever brought against you by any other taxing authority in connection with your alleged nonpayment or underpayment of hotel occupancy taxes.

Zurich's Request

3rd Set – Rog 1

With regard to any TAX audits initiated by TAXING AUTHORITIES against YOU since 2000, IDENTIFY the initiating authority; the date of initiation; and the outcome of the audit.

3rd Set – RFP 3

Produce all DOCUMENTS relating to any COMMUNICATION(S) between you and any TAXING AUTHORITY about the applicability of TAXES to your revenues from merchant hotel transactions.

Zurich's 30(b)(6) topic

Topic 2

Expedia's knowledge and information regarding administrative or legal proceedings other than the Underlying Actions that involve government authorities and Expedia's hotel occupancy tax practices for "merchant model hotel transactions," including:

- (a) When such administrative or legal proceedings were initiated;
- (b) When and how Expedia received notice regarding any such administrative or legal proceedings; and
- (c) Any communications with the government authorities involved in the referenced administrative or legal proceedings concerning the timing and/or subject matter of such administrative or legal proceedings.

DISCOVERY REQUESTS TO EXPEDIA BY UNDERLYING PLAINTIFFS AND ZURICH

Plaintiffs' Request

Rog 8

For Merchant Hotel Business Transactions, please describe in detail the methodology, practices and procedures by which you have determined the taxes (or "tax recovery charges") charged to Consumer Customers. If the methodology, practices and/or procedures have changed over time and/or based on the nature of the transaction, please describe those changes and the resultant methodology, practices and procedures with specificity.

Rog 10

For Merchant Hotel Business Transactions, please describe in detail how your "service fee" and/or "fee" and/or "surcharge" is calculated. If the methodology for calculating that "service fee" and/or "fee" and/or "surcharge" has changed over time and/or based on the nature of the transaction, please describe with specificity each change and/or difference.

Zurich's Request

2nd Set – Rog 8

DESCRIBE in detail how EXPEDIA calculates, charges, and/or collects TAXES (including "tax recovery charges" as that term is used in the Declaration of Melissa Maher submitted with Expedia's Combined Opposition to the Motions for Summary Judgment filed by Arrowood, Steadfast, and ZAIC) from consumers who reserve hotel rooms through any of EXPEDIA's various websites.

2nd Set – RFP 9

Produce any and all DOCUMENTS relating to or tending to show the nature and amount of "fees" charged by EXPEDIA to consumers who reserve hotel rooms through any of EXPEDIA's various websites including, specifically, how such fees are calculated. "Fees" include, without limitation, "tax recovery charges and fees", "taxes and fees", "taxes and services fees", "service fees", "fees and taxes", or any other similar charge.

Zurich's 30(b)(6) topic

Topic 7

Expedia's adoption, implementation, and/or alteration of the "merchant model" business model described in paragraph 9 of the Maher Declaration.

Topic 7

Expedia's adoption, implementation, and/or alteration of the "merchant model" business model described in paragraph 9 of the Maher Declaration.

DISCOVERY REQUESTS TO EXPEDIA BY UNDERLYING PLAINTIFFS AND ZURICH

Plaintiffs' Request

Rog 16

Describe in detail all efforts that you or any trade organization, lobbyist, or other person or entity working on your behalf have made at either the state or federal level to pass legislation that would grant you immunity from paying Hotel occupancy taxes such as the Brevard Hotel Tax. Include in your response: (i) the identity of all such persons or entities working on your behalf; (ii) the bill number or other information sufficient to identify the proposed legislation; and (iii) the essential substance of any such proposed legislation.

Zurich's Request

2nd Set -- RFP 5

Produce all non-privileged DOCUMENTS relating to any and all advice sought by YOU from any consultant (e.g., attorney, accountant, business consultant, public relations firm, lobbying firm, etc.) regarding the risk that EXPEDIA would face litigation by any TAXING AUTHORITY concerning EXPEDIA's liability for TAXES.

Zurich's 30(b)(6) topic

Topic 9

Expedia's retention or engagement of non-attorney consultants, including, but not limited to, accountants, lobbyists, public relations advisors, and/or investor relations advisors, in connection with the hotel occupancy tax issues that are the subject of the Underlying Actions.

OVERLAPPING DISCOVERY REQUESTS TO EXPEDIA BY UNDERLYING PLAINTIFFS AND ZURICH

Topic	Plaintiffs' Request ¹	Zurich's Request ²	Zurich's 30(b)(6) Topic ³
<p>Expedia's knowledge and understanding of occupancy tax statutes and when Expedia had such knowledge</p>	<p>Interrogatories No. 1, 2, and 16</p>	<p>1st Set: Interrogatories No. 4 and 5; Requests for Production No. 4, 6, 36, and 37 2nd Set: Interrogatories No. 1, 2, 3, 4, and 5; Requests for Production No. 1, 2, 3, and 5 3rd Set: Interrogatory No. 1 and Requests for Production No. 3 and 5 4th Set: Requests for Production No. 2, 3, and 4</p>	<p>Topics No. 1, 2, 12, and 13</p>
<p>Communications Expedia had with occupancy tax authorities and when those communications took place</p>	<p>Interrogatories No. 5 and 16</p>	<p>1st Set: Interrogatory No. 5, Requests for Production No. 4, 6, 36, and 37 2nd Set: Interrogatories No. 1 and 2, Requests for Production No. 1 and 2 3rd Set: Interrogatory No. 1 and Requests for Production No. 3 and 5 4th Set: Requests for Production No. 2 and 3</p>	<p>Topics No. 1, 2, 12, and 13</p>

¹ All requests are in Exhibit 1 to the May 31, 2012 Declaration of Angela Niemann.

² All requests are in Exhibits 2 ("1st Set"), 3 ("2nd Set"), 4 ("3rd Set"), and 5 ("4th Set") to the May 31, 2012 Declaration of Mark Parris.

³ All topics are in Exhibit 6 to the May 31, 2012 Declaration of Mark Parris.

OVERLAPPING DISCOVERY REQUESTS TO EXPEDIA BY UNDERLYING PLAINTIFFS AND ZURICH

Topic	Plaintiffs' Request	Zurich's Request	Zurich's 30(b)(6) Topic
Discussions Expedia had internally concerning occupancy taxes and when those discussions took place	Interrogatories No. 1, 2, and 6	2nd Set: Interrogatory No. 1, Request for Production No. 1 4th Set: Request for Production No. 4	Topics No. 1, 2, 12, and 13
External consultants Expedia contacted concerning occupancy taxes	Interrogatory No. 16	2nd Set: Interrogatory No. 5, Request for Production No. 5 4th Set: Request for Production No. 4	Topic 9
Expedia's knowledge and understanding and communications regarding potential exposure in connection with occupancy taxes	Interrogatories No. 1, 2, and 5	1st Set: Interrogatories No. 4 and 5, Requests for Production No. 4, 6, 36, and 37 2nd Set: Interrogatories No. 1, 2, 3, 4, and 5; Requests for Production No. 1, 2, 3, and 5 3rd Set: Interrogatory No. 1 and Requests for Production No. 3 and 5 4th Set: Requests for Production No. 2, 3, and 4	Topics No. 1, 2, 12, and 13

OVERLAPPING DISCOVERY REQUESTS TO EXPEDIA BY UNDERLYING PLAINTIFFS AND ZURICH

Topic	Plaintiffs' Request	Zurich's Request	Zurich's 30(b)(6) Topic
<p>Expedia's receipt of any notices, request, demands, or complaints made against Expedia with respect to occupancy taxes</p>	<p>Interrogatory No. 5</p>	<p>1st Set: Interrogatory No. 5, Requests for Production No. 36 and 37 2nd Set: Interrogatories No. 1 and 2, Requests for Production No. 1 and 2 3rd Set: Interrogatory No. 1 and Requests for Production No. 3 and 5 4th Set: Requests for Production No. 2 and 3</p>	<p>Topics No. 1, 2, 12, and 13</p>
<p>Expedia's merchant hotel business model and any changes over time</p>	<p>Interrogatories No. 3, 8, 9, 10, and 11</p>	<p>2nd Set: Interrogatories No. 8 and 9, Requests for Production No. 7, 8, and 9</p>	<p>Topic 7</p>

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Honorable Kimberley Prochnau

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND 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,

vs.

STEADFAST INSURANCE COMPANY, a
Delaware corporation, and ZURICH
AMERICAN INSURANCE COMPANY, a
New York corporation,

Defendants.

No. 10-2-41017-1 SEA

AMENDED
NOTICE OF DEPOSITION OF EXPEDIA,
INC., HOTELS.COM, L.P., HOTELS.COM,
GP, LLC, HOTWIRE, INC., &
TRAVELSCAPE, LLC

TO: 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

AND TO: Mark Parris, Orrick Herrington & Sutcliffe LLP, Plaintiffs' Attorneys

PLEASE TAKE NOTICE that in accordance with CR 30(b)(6), Steadfast Insurance
Company and Zurich American Insurance Company (collectively "Zurich") will take the

AMENDED NOTICE OF DEPOSITION OF EXPEDIA, INC.,
HOTELS.COM, L.P., HOTELS.COM, GP, LLC, HOTWIRE, INC., &
TRAVELSCAPE, LLC - PAGE 1

657661 / 232.0001

FORSBERG & UMLAUF, P.S.
ATTORNEYS AT LAW
901 FIFTH AVENUE • SUITE 1400
SEATTLE, WASHINGTON 98164-2050
(206) 689-8500 • (206) 689-8501 FAX

ORIGINAL

1 deposition of Expedia, Inc., Hotels.com, L.P., Hotels.com, GP, LLC, Hotwire, Inc., and
2 Travelscape (collectively "Expedia") on THURSDAY, MAY 31, 2012 at 10:00 A.M. at the
3 offices of Forsberg & Umlauf, P.S., 901 Fifth Avenue, Suite 1400, Seattle, Washington
4 98164-2050. Expedia must designate one or more officers, directors, or managing agents, or
5 other persons who consent to testify on their behalf, on the matters identified in Attachment A
6 to this notice.

7 DATED this 22nd day of May.

8 FORSBERG & UMLAUF, P.S.

9 
10 _____

11 Michael P. Hooks, WSBA #24153
12 FORSBERG & UMLAUF, P.S.
13 Attorney for Defendants Steadfast Insurance Co.
14 & Zurich American Insurance Co.
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AMENDED NOTICE OF DEPOSITION OF EXPEDIA, INC.,
HOTELS.COM, L.P., HOTELS.COM, GP, LLC, HOTWIRE, INC., &
TRAVELSCAPE, LLC - PAGE 2

657661 / 232.0001

FORSBERG & UMLAUF, P.S.
ATTORNEYS AT LAW
901 FIFTH AVENUE • SUITE 1400
SEATTLE, WASHINGTON 98164-2050
(206) 689-8500 • (206) 689-8501 FAX

5. Expedia's defense of the Underlying Actions, including:
 - (a) Identities of counsel involved in defense and timing of their retention;
 - (b) The timing, nature, and extent of discovery conducted;
 - (c) Mediations or other alternative dispute resolution proceedings conducted, including the results of such proceedings;
 - (d) Settlement offers made, including the results of such offers; and
 - (e) Defense expenses incurred to date (segregated by underlying action).

6. Expedia's search for and production of documents responsive to Zurich's requests for production.

7. Expedia's adoption, implementation, and/or alteration of the "merchant model" business model described in paragraph 9 of the Maher Declaration, including but not limited to:
 - (a) When Expedia first adopted its "merchant model" business model for hotel transactions;
 - (b) Any changes to Expedia's "merchant model" business model for hotel transactions since the "merchant model" was first adopted, including, but not limited to, any periods of time during which Expedia, in calculating the "tax recovery charge" charged to its customers, used "the total retail price the customer ultimately pays to Expedia" instead of the "rent charged by the hotel operator" (as the terms in quotation marks are used in paragraph 16 of the Maher Declaration)?
 - (c) The persons involved in Expedia's decisions to adopt, implement, and/or alter the "merchant model" business model for hotel transactions since January 1, 2000; and
 - (d) Expedia's investigation or analysis conducted in connection with the adoption, implementation, and alteration of the "merchant model" business model for hotel transactions since January 1, 2000.

8. Whether and to what extent Expedia committed any mistakes, errors, miscalculations, and/or misapplication of rates in calculating "tax recovery charges" charged to customers or remitting amounts recovered as "tax recovery charges" from customers to hotels. The term "tax recovery charges" as used in this topic has the same meaning as used in paragraph 16 of the Maher Declaration.

9. Expedia's retention or engagement of non-attorney consultants, including, but not limited to, accountants, lobbyists, public relations advisors, and/or investor relations advisors, in connection with the hotel occupancy tax issues that are the subject of the Underlying Actions.

10. Expedia's communications with any brokers relating to the Underlying Actions or the hotel occupancy tax issues that are the subject of the Underlying Actions.

11. Expedia's Travel Agent Professional Liability policy renewals for the October 1, 2005 -- October 1, 2006 and October 1, 2006 -- October 1, 2007 policy periods.

MSP

Honorable Kimberley Prochnau

02-17-12P02:18 RCVD

02-17-12P02:18 RCVD

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND 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,

vs.

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.

No. 10-2-41017-1 SEA

SECOND INTERROGATORIES AND
REQUEST FOR PRODUCITON TO
PLAINTIFFS OF DEFENDANTS
STEADFAST INSURANCE COMPANY
AND ZURICH AMERICAN INSURANCE
COMPANY

COMES NOW Defendants Steadfast Insurance Company ("Steadfast") and Defendant
Zurich American Insurance Company ("ZAIC") (collectively, "Zurich"), by counsel, and
submits the following Interrogatories and Requests for Production to Plaintiffs Expedia, Inc.,
a Washington Corporation, Expedia, Inc., a Delaware Corporation, Hotels.com, L.P.,

SECOND INTERROGATORIES AND REQUEST FOR PRODUCITON TO
PLAINTIFFS OF DEFENDANTS STEADFAST INSURANCE COMPANY AND
ZURICH AMERICAN INSURANCE COMPANY - PAGE 1

623467 / 232.0001

FORSBERG & UMLAUF, P.S.
ATTORNEYS AT LAW
901 FIFTH AVENUE • SUITE 1400
SEATTLE, WASHINGTON 98164-2050
(206) 689-8500 • (206) 689-8501 FAX

ORIGINAL

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taxes", or any other similar charge.

RESPONSE:

REQUEST FOR PRODUCTION NO. 10: Produce any and all DOCUMENTS relating to any occasion(s) since 2000 on which EXPEDIA applied the incorrect TAX rate in connection with its remittance of TAXES to any of the TAXING AUTHORITIES involved in the UNDERLYING ACTIONS.

RESPONSE:

DATED this 17th day of February 2012.

FORSBERG & UMLAUF



Michael P. Hooks, WSBA # 24153
Matthew S. Adams, WSBA# 18820
Attorneys for Defendants
Steadfast Insurance Company
Zurich American Insurance Company

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

WELLMAN &
corporation,)
Plaintiff,) DIVISION ONE
OREGON MUTUAL INSURANCE)
COMPANY, an Oregon corporation,)
Appellant,) PUBLISHED OPINION
v.)
HARTFORD FIRE INSURANCE)
COMPANY,)
Respondent.) FILED: September 17, 2012

Leach, C.J. — Oregon Mutual Insurance Company appeals a trial court’s summary dismissal of its lawsuit against Hartford Fire Insurance Company, which asserted claims based on Hartford’s refusal to defend two underlying lawsuits. A lawsuit triggers an insurer’s duty to defend if the insurance policy between the insurer and insured conceivably covers the complaint’s allegations.¹ Because no conceivable interpretation of the complaints in the lawsuits at issue here could have triggered Hartford’s obligations under its policy with the insured, we affirm.

¹ Woo v. Fireman’s Fund Ins. Co., 161 Wn.2d 43, 52-53, 164 P.3d 454 (2007).

FACTS

This matter arises from two underlying lawsuits involving the construction of the Olympic Condominiums in Bellingham: Buchholz v. Wellman & Zuck, Inc., and State Farm Fire & Casualty Co. v. Wellman & Zuck, Inc.

Appellant Oregon Mutual is the assignee of Wellman & Zuck Inc. (Wellman), which acted as the general contractor on the condominium project. As part of the project, Wellman subcontracted with Otis Elevator Company to install an elevator. At Otis's request, respondent and cross appellant Hartford issued a specialized owners and contractors protective (OCP) policy to Wellman as the named insured. The OCP policy applies to claims for "property damages" caused by an "occurrence" arising from operations performed by Otis for Wellman. The OCP policy covered the period from October 1, 1995, to October 1, 1996. Construction of the condominiums lasted from 1995 until 1999.

In January 2002, the condominium developer filed the Buchholz lawsuit, alleging that Wellman breached the construction contract by failing to provide defect-free work, and "as a direct and proximate result . . . the condominiums and common spaces therein have suffered severe and significant water damage which require repair." Exterior Research & Design (ERD) investigated the condominiums for construction defects and associated damages. ERD's report,

issued in November 2002, describes no defect allegations, damages, or repair recommendations related to the elevator installation.

In January 2003, one year after the Buchholz lawsuit was filed, Wellman's attorney, Frank Chmelik, tendered its defense to Hartford. Four months later, Hartford declined this tender.² Meanwhile, several condominium owners intervened in the Buchholz litigation and asserted third party claims against the developer. The developer's insurer, State Farm Fire & Casualty Company, defended and settled those claims. In July 2003, State Farm sued Wellman to recover the full settlement amount. The State Farm complaint alleged "substantial defects in the work performed by Wellman & Zuck, Inc. in the construction of the Olympic Condominium" and asserted the Buchholz litigation was based on "damages arising from the construction, marketing and sale of

² In a letter to Chmelik, Hartford explained its position:

The claims against Wellman & Zuck, Inc., involve economic loss arising out of a breach of agreement and inadequate design and construction. The damages alleged are not "property damage" or "bodily injury," nor are the damages the result of an "occurrence" as defined by the Policy. Thus, coverage for these damages would be precluded under section I, of the Policy. . . .

Additionally, since the Complaint does not specify a date when the damages are alleged to have occurred, to the extent that any of these damages occurred outside of the policy period, no coverage would be provided.

Lastly, even if there had been coverage provided under the insuring Agreement, there are exclusions that would apply to the claim.

units, limited common areas and common areas” of the condominiums.

In August 2004, Wellman tendered the State Farm defense to Hartford, noting that State Farm’s claim was “distinct from” but “related to and involves the same underlying facts as the previous notice of claim.” Hartford also declined to defend the State Farm litigation. Chmelik responded with a second letter, informing Hartford that Wellman believed its failure to defend constituted bad faith. The letter reiterated that the damages alleged in the State Farm complaint included “water intrusion and resulting water damage, and other damage” and offered to provide Hartford with documentation, including ERD’s report. Hartford did not respond to this letter.

Oregon Mutual defended Wellman and paid to settle the claims against it.³ In November 2005, Oregon Mutual, acting on its own behalf and as Wellman’s assignee, sued Hartford, alleging claims for breach of contract, bad faith, negligence, statutory violations, a Consumer Protection Act (CPA)⁴ violation, attorney fees, estoppel, contribution, and subrogation. A volley of summary judgment motions followed, resulting in the trial court dismissing each of Oregon Mutual’s claims against Hartford. The procedural facts follow.

³ Oregon Mutual insured Wellman under a policy effective from May 1, 1994, to May 1, 1999.

⁴ Ch. 19.86 RCW.

In May 2006, Oregon Mutual moved for summary judgment on its claims for breach of contract, bad faith, the CPA violation, and attorney fees. On October 6, the trial court granted Oregon Mutual's motion in part, ruling that Hartford had breached its duty to defend both lawsuits in bad faith.⁵ Oregon Mutual then filed a motion for partial summary judgment, arguing that Hartford could not rebut the presumption of harm arising from the trial court's bad faith ruling. Hartford filed a cross motion for summary judgment on the ground that Wellman suffered no harm from Hartford's breach because the complaints did not implicate Otis's elevator installation. On June 8, 2007, the trial court entered an order denying both the motion and the cross motion. Later, Hartford filed a motion to vacate the portion of the trial court's October 6, 2006, partial summary judgment order finding Hartford had acted in bad faith. The trial court granted Hartford's motion. Oregon Mutual filed a motion for reconsideration and clarification, which the trial court denied.

Oregon Mutual sought discretionary review of the trial court's order granting Hartford's motion to vacate. A commissioner of this court denied

⁵ The trial court declined to rule on (1) whether Hartford's bad faith resulted in estoppel to deny coverage, (2) to what extent Oregon Mutual was entitled to damages as a result of Hartford's bad faith breach of its duty to defend, (3) whether and to what extent Oregon Mutual was entitled to damages under the CPA, or (4) whether and to what extent Oregon Mutual was entitled to attorney fees and costs under Olympic Steamship Co. v. Centennial Insurance Co., 117 Wn.2d 37, 811 P.2d 673 (1991).

discretionary review on February 7, 2008, after finding that the petition did not meet RAP 2.3(b)'s requirements.

Back in the trial court, Hartford moved to dismiss Oregon Mutual's estoppel claim. Hartford argued that Oregon Mutual had unclean hands because it tendered the defenses to Hartford "knowing" that Otis's work did not cause the Buchholz and State Farm plaintiffs' damages. Therefore, according to Hartford, Oregon Mutual could not avail itself of this equitable remedy. The trial court granted Hartford's motion and dismissed Oregon Mutual's estoppel claim.

Oregon Mutual then moved for partial summary judgment and requested that the court rule that Hartford breached its duty to defend both lawsuits. Hartford filed a counter motion asserting it had no such duty. The trial court granted Oregon Mutual's motion in part, ruling as a matter of law that Hartford breached its duty to defend the Buchholz lawsuit but that Hartford did not have a duty to defend the State Farm lawsuit.

Reviving its "unclean hands" argument, Hartford moved to dismiss Oregon Mutual's claim for attorney fees under Olympic Steamship Co. v. Centennial Insurance Co.⁶ The trial court granted Hartford's motion. Next, Hartford moved to dismiss all of Oregon Mutual's remaining claims. The trial

⁶ 117 Wn.2d 37, 811 P.2d 673 (1991).

court granted Hartford's motion in part, dismissing Oregon Mutual's contribution claim. In August 2010, Hartford moved to dismiss Oregon Mutual's bad faith and CPA claims. In October, the trial court granted Hartford's motion. Oregon Mutual asked the trial court to revise its ruling that Hartford did not have a duty to defend the State Farm lawsuit. The trial court declined to do so.

In December 2010, Hartford moved for summary judgment dismissal of Oregon Mutual's remaining breach of contract and negligence claims based on its argument that Wellman suffered no damages from Hartford's failure to defend the Buchholz lawsuit. In turn, Oregon Mutual moved for an order requiring Hartford to pay all Buchholz defense costs. On February 4, 2011, the trial court denied Oregon Mutual's motion for defense costs and granted Hartford's motion, stating, "[A]ll of Plaintiff's claims against Hartford in this matter have been Dismissed with Prejudice."

Oregon Mutual appeals the trial court's orders dismissing its claims against Hartford. Hartford cross appeals, arguing the trial court erred by finding it breached its duty to defend the Buchholz lawsuit.

STANDARD OF REVIEW

We review summary judgment orders de novo, engaging in the same inquiry as the trial court.⁷ Summary judgment is appropriate only when there are

no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.⁸ When reviewing a summary judgment order, we consider the facts and reasonable inferences from the facts in the light most favorable to the nonmoving party.⁹

ANALYSIS

Duty To Defend

Central to this appeal and cross appeal is whether Hartford breached its duty to defend the Buchholz and State Farm lawsuits. We conclude that Hartford had no duty to defend either lawsuit because no facts alleged in either complaint, if proven, would have imposed liability under the OCP policy.

An insurance company's duty to defend, which is broader than the duty to indemnify,¹⁰ "arises at the time an action is first brought, and is based on the potential for liability."¹¹ A lawsuit triggers the duty to defend if the complaint against an insured alleges facts that could, if proven, impose liability upon the insured within the policy's coverage.¹² With two exceptions not applicable here,

⁷ Hadley v. Maxwell, 144 Wn.2d 306, 310, 27 P.3d 600 (2001).

⁸ CR 56(c).

⁹ Right-Price Recreation, LLC v. Connells Prairie Cmty. Council, 146 Wn.2d 370, 381, 46 P.3d 789 (2002).

¹⁰ Woo, 161 Wn.2d at 52.

¹¹ Truck Ins. Exch. v. VanPort Homes, Inc., 147 Wn.2d 751, 760, 58 P.3d 276 (2002).

the duty to defend must be determined from the complaint.¹³ “An insurer is not relieved of its duty to defend unless the claim alleged in the complaint is ‘clearly not covered by the policy.’”¹⁴ Therefore, if the insurance policy conceivably covers the allegations in the complaint, an insurer must defend the lawsuit.¹⁵

We liberally construe an ambiguous complaint in the insured’s favor.¹⁶ But a complaint must “give the opposing party fair notice of what the claim is and the ground upon which it rests.”¹⁷

The OCP policy providing liability coverage required Hartford to “pay those sums that the insured becomes legally obligated to pay as damages because of . . . ‘property damage’ to which this insurance applies.” As relevant here, the policy applies only if the property damage caused by Otis’s operations at the condominiums occurred during the policy period. The policy defines “property damages” as “[p]hysical injury to tangible property, including all resulting loss of use of that property . . . or . . . [l]oss of use of tangible property that is not physically injured.” “Occurrence” is “an accident including continuous

¹² Truck Ins., 147 Wn.2d at 760 (quoting Unigard Ins. Co. v. Leven, 97 Wn. App. 417, 425, 983 P.2d 1155 (1999)).

¹³ Woo, 161 Wn.2d at 53.

¹⁴ Woo, 161 Wn.2d at 53 (quoting Truck Ins., 147 Wn.2d at 760).

¹⁵ Woo, 161 Wn.2d at 53.

¹⁶ Woo, 161 Wn.2d at 53.

¹⁷ Lewis v. Bell, 45 Wn. App. 192, 197, 724 P.2d 425 (1986) (citing Lightner v. Balow, 59 Wn.2d 856, 370 P.2d 982 (1962)).

or repeated exposure to substantially the same general harmful conditions.”

The Buchholz complaint generally alleged breach of the construction contract and its warranty that caused water damage. The complaint specifically alleged damage for the installation of siding, vinyl covering applied to decks, roofing and flashing, failure to install window coverings, and failure to install landscaping. The complaint made no reference to any act or omission of Otis or the elevator generally.

The State Farm complaint contained far fewer factual allegations. It alleged substantial delays and substantial defects in the work performed by Wellman constituting breaches of the construction contract and its warranty and causing damage to condominium unit owners. State Farm settled these claims and sought indemnification. Like the Buchholz complaint, this complaint made no reference to any act or omission of Otis or the elevator generally.

Even a liberal construction of these two complaints cannot support Oregon Mutual's contention that it pleaded sufficient allegations, if proved, to trigger the OCP policy's provision providing coverage for "property damage" arising out of Otis's work. The reading that Oregon Mutual urges us to adopt—that general allegations of water damage and construction defects implicates Otis's elevator installation—lies beyond the range of conceivable

reasonable interpretations and is simply speculative. Additionally, under Oregon Mutual's broad reading, the complaints would implicate the work of every contractor involved in the condominiums' construction. More broadly, any complaint alleging defective performance of a construction contract, without more, would implicate the insurer for every entity providing labor or materials to the project. In short, Oregon Mutual's interpretation is unreasonable, and we decline to adopt it.

The complaints did not trigger Hartford's duty to defend. Therefore, Hartford did not breach its duty by rejecting the tenders. Although the trial court did not err by ruling that Hartford did not breach its duty to defend State Farm, it erred by ruling that Hartford breached its duty to defend Buchholz. But the trial court ultimately dismissed Oregon Mutual's claims for Hartford's alleged breaches of the duty to defend, making reversal unnecessary.

Bad Faith

Oregon Mutual claims the trial court erred by dismissing its bad faith claims. An insurer has an obligation to act in good faith.¹⁸ The failure to provide a defense may provide the basis for a bad faith claim.¹⁹ The insured does not

¹⁸ Tank v. State Farm Fire & Cas. Co., 105 Wn.2d 381, 385, 715 P.2d 1133 (1986).

¹⁹ Am. Best Food, Inc. v. Alea London, Ltd., 168 Wn.2d 398, 412, 229

establish bad faith when the insurer denies coverage or fails to provide a defense based upon a reasonable interpretation of the insurance policy.²⁰ Because Hartford did not breach its duty to defend, the trial court did not err by dismissing Oregon Mutual's bad faith claim.

Estoppel

Oregon Mutual claims that the trial court should not have dismissed its estoppel claim. If the insurer acted in bad faith, there is a presumption of harm and coverage by estoppel.²¹ Therefore, a viable estoppel claim requires a finding that the defendant acted in bad faith. Because Hartford did not act in bad faith, the trial court properly dismissed Oregon Mutual's estoppel claim.²²

Consumer Protection Act

We next turn to Oregon Mutual's claim that the trial court erred by dismissing its CPA claim. We review whether a party's particular actions gave rise to a CPA violation de novo, as a question of law.²³ Generally, to prevail in a

P.3d 693 (2010) ("An insurer acts in bad faith if its breach of the duty to defend was unreasonable, frivolous, or unfounded.").

²⁰ Overton v. Consol. Ins. Co., 145 Wn.2d 417, 433, 38 P.3d 322 (2002).

²¹ Holly Mountain Res. Ltd. v. Westport Ins. Corp., 130 Wn. App. 635, 650, 104 P.3d 725 (2005).

²² Given the resolution of this issue, we need not discuss Hartford's argument that the unclean hands doctrine precludes Oregon Mutual's estoppel claim.

²³ Ledcor Indus., Inc. v. Mut. of Enumclaw Ins. Co., 150 Wn. App. 1, 12,

private CPA claim, the plaintiff must prove (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) affecting the public interest, (4) injury to a person's business or property, and (5) causation.²⁴ A violation of an insurance regulation constitutes an unfair trade practice, which may result in CPA liability if the remaining elements are established.²⁵ Further, "bad faith constitutes a per se violation of the CPA."²⁶

Because Oregon Mutual cannot establish bad faith on Hartford's part, it cannot establish a per se violation of the CPA on that basis. Therefore, it must show that its claim meets the elements of the five-part test. Because Oregon Mutual cannot demonstrate injury and resulting damage, it cannot establish the fourth element. Oregon Mutual claims \$5,100 in damages, which is the amount it claims it expended attempting to persuade Hartford to defend the lawsuits. In the duty to defend context, damages may include "the amount of expenses, including reasonable attorney fees the insured incurred defending the underlying action."²⁷ Oregon Mutual, however, did not incur \$5,100 in attorney fees defending the lawsuit. And it has not cited relevant authority demonstrating that

206 P.3d 1255 (2009).

²⁴ Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 784-85, 719 P.2d 531 (1986).

²⁵ Ledcor, 150 Wn. App. at 12.

²⁶ Ledcor, 150 Wn. App. at 12.

²⁷ Kirk v. Mount Airy Ins. Co., 134 Wn.2d 558, 561, 951 P.2d 1124 (1998).

prelitigation damages are recoverable under these circumstances. Additionally, the record does not support Oregon Mutual's arguments that Hartford violated the insurance regulations by inadequately responding to the tender of defense. For these reasons, the trial court properly dismissed Oregon Mutual's CPA claim.

Contribution

Oregon Mutual claims entitlement to contribution. "Contribution in tort is the right of one who has paid a common liability to recover a portion of the payment from another tortfeasor who shares in that common liability."²⁸ "In the context of insurance law, contribution allows an insurer to recover from another insurer where both are independently obligated to indemnify or defend the same loss."²⁹ Equity does not provide a right for an insurer to seek contribution from another insurer who has no obligation to the insured.³⁰ Oregon Mutual's contribution claim against Hartford fails.³¹

²⁸ Kottler v. State, 136 Wn.2d 437, 441, 963 P.2d 834 (1998).

²⁹ Mut. of Enumclaw Ins. Co. v. USF Ins. Co., 164 Wn.2d 411, 419, 191 P.3d 866 (2008).

³⁰ Mut. of Enumclaw, 164 Wn.2d at 420.

³¹ Further, Oregon Mutual did not oppose Hartford's argument below that the contribution claim be dismissed. Oregon Mutual therefore failed to raise an issue regarding contribution for trial, and the trial court did not err by dismissing the claim. See Young v. Key Pharm., Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

Negligence

A party claiming negligence must prove (1) duty, (2) breach, (3) causation, and (4) injury.³² The parties dispute only whether Oregon Mutual raised a genuine issue of material fact regarding the fourth element. As we discussed in the context of Oregon Mutual's CPA claim, Oregon Mutual has not established that the prelitigation costs it claims as damages are recoverable for an alleged breach of the duty to defend. Therefore, Oregon Mutual did not raise a genuine issue of material fact regarding damages, and the trial court did not err by granting Hartford summary judgment on Oregon Mutual's negligence claim.

Defense Costs

Oregon Mutual claims that Hartford is liable for all defense costs. Damages recoverable in the failure to defend context include "(1) the amount of expenses, including reasonable attorney fees the insured incurred defending the underlying action, and (2) the amount of the judgment entered against the insured."³³ Because Hartford did not breach its duty to defend, it is not liable for any share of defense costs.

³² Dombrosky v. Farmers Ins. Co. of Wash., 84 Wn. App. 245, 261, 928 P.2d 1127 (1996).

³³ Kirk, 134 Wn.2d at 561.

Olympic Steamship Attorney Fees and Fees on Appeal

Oregon Mutual claims entitlement to attorney fees on appeal and below based on Olympic Steamship. An insured may recover Olympic Steamship fees when an insurer “compels the insured to assume the burden of legal action, to obtain the full benefit of his insurance contract.”³⁴ Recovery of Olympic Steamship fees stands as an equitable exception to the American Rule on attorney fees.³⁵ We review a party’s entitlement to attorney fees as a question of law, de novo.³⁶

Because Oregon Mutual has not prevailed on appeal, Oregon Mutual is not entitled to fees under Olympic Steamship. For the same reason, Oregon Mutual was not entitled to fees below. The trial court did not abuse its discretion by denying Oregon Mutual’s request for fees.

CR 11 Sanctions

Hartford requests attorney fees on appeal under CR 11, arguing that Oregon Mutual’s appeal “is not grounded in fact or warranted by law or brought

³⁴ Olympic S.S., 117 Wn.2d at 53.

³⁵ McRory v. N. Ins. Co. of New York, 138 Wn.2d 550, 554, 980 P.2d 736 (1999). Under the American Rule, each party pays its own attorney fees and costs unless an award of litigation costs is authorized by statute, rule, or case law. Johnson v. Horizon Fisheries, LLC, 148 Wn. App. 628, 633, 201 P.3d 346 (2009).

³⁶ Ledcor, 150 Wn. App. at 16.

in good faith.” Under RAP 18.9, we may impose sanctions based on a frivolous appeal. An appeal is frivolous if it presents no debatable issues upon which reasonable minds could differ and there is no possibility of reversal.³⁷ We resolve all doubts regarding the frivolous nature of an appeal in favor of the appellant.³⁸ Resolving all doubts in Oregon Mutual’s favor, we conclude that sanctions or fees are not appropriate. We decline to exercise our discretion to award fees in this case and deny Hartford’s request.

CONCLUSION

Hartford did not breach its duty to defend the Buchholz and State Farm lawsuits, and Oregon Mutual fails to raise a genuine issue of material fact regarding its other claims. The trial court did not err by granting Hartford summary judgment. We affirm.

Leach, C. J.

WE CONCUR:

³⁷ In re Marriage of Schumacher, 100 Wn. App. 208, 997 P.2d 399 (2000).

³⁸ Skinner v. Holgate, 141 Wn. App. 840, 858, 173 P.3d 300 (2007).

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Appelwick J