

C72611-22110/3

IN THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT OF
HINDS COUNTY, MISSISSIPPI

THE STATE OF MISSISSIPPI *ex rel.*)
ATTORNEY GENERAL JIM HOOD,)

Plaintiff,)

v.)

PRICELINE.COM, INC.)
c/o Corporation Service Company)
2711 Centerville Rd.)
Suite 400)
Wilmington, DE 19808)

LOWESTFARE.COM, INC.)
c/o Corporation Service Company)
2711 Centerville Rd.)
Suite 400)
Wilmington, DE 19808)

TRAVELWEB, LLC)
c/o Corporation Service Company)
2711 Centerville Rd.)
Suite 400)
Wilmington, DE 19808)

TRAVELPORT, INC. (f/k/a CENDANT)
TRAVEL DISTRIBUTION SERVICES)
GROUP, INC.))
c/o Corporation Service Company)
2711 Centerville Rd.)
Suite 400)
Wilmington, DE 19808)

CHEAPTICKETS, INC.)
c/o Corporation Service Company)
2711 Centerville Rd.)
Suite 400)
Wilmington, DE 19808)

TRIP NETWORK, INC.)
c/o Corporation Service Company)
2711 Centerville Rd.)
Suite 400)

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DEC 29 2011

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BY _____ D.C.

Wilmington, DE 19808)
)
ORBITZ, INC.)
c/o Corporation Service Company)
2711 Centerville Rd.)
Suite 400)
Wilmington, DE 19808)
)
ORBITZ, LLC)
c/o Corporation Service Company)
2711 Centerville Rd.)
Suite 400)
Wilmington, DE 19808)
)
EXPEDIA, INC.)
c/o National Registered Agents, Inc.)
160 Greentree Dr.)
Suite 101)
Dover, DE 19904)
)
EXPEDIA, INC.)
c/o National Registered Agents, Inc.)
1780 Barnes Blvd, SW)
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Tumwater, WA 98512-0410)
)
HOTELS.COM)
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160 Greentree Dr.)
Suite 101)
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HOTELS.COM, L.P.)
c/o National Registered Agents, Inc.)
16055 Space Center)
Suite 235)
Houston, TX 77062)
)
HOTELS.COM GP, LLC)
c/o National Registered Agents, Inc.)
16055 Space Center)
Suite 235)
Houston, TX 77062)
)
HOTWIRE, INC.)
c/o National Registered Agents, Inc.)

160 Greentree Dr.)
 Suite 101)
 Dover, DE 19904)
)
 TRAVELNOW.COM, INC.)
 c/o National Registered Agents, Inc.)
 160 Greentree Dr.)
 Suite 101)
 Dover, DE 19904)
)
 SABRE HOLDINGS CORPORATION)
 c/o Corporation Service Company)
 2711 Centerville Rd.)
 Suite 400)
 Wilmington, DE 19808)
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 TRAVELOCITY.COM, LLC)
 c/o Corporation Service Company)
 2711 Centerville Rd.)
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 TRAVELOCITY.COM, LP)
 c/o Corporation Service Company)
 2711 Centerville Rd.)
 Suite 400)
 Wilmington, DE 19808)
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 SITE59.COM, LLC)
 c/o Corporation Service Company)
 2711 Centerville Rd.)
 Suite 400)
 Wilmington, DE 19808)
)
 and)
)
 DOES 1 THROUGH 1000, INCLUSIVE,)
)
)
 Defendants.)

COMPLAINT

Plaintiff, the STATE OF MISSISSIPPI, (hereinafter “Plaintiff” or the “State” or “Mississippi”), brings this action as authorized by MISS. CODE ANN. § 7-5-1 et seq. and alleges

as and for its Complaint against the Defendants (as defined below), upon personal knowledge as to itself and its own acts, and as to all other matters upon information, belief and investigation:

I. INTRODUCTION

1. This Action is one of central importance to the State of Mississippi (“State”) and to the integrity of the State’s tax laws generally. This Action seeks to address a direct and intentional violation and evasion of Mississippi’s Sales Tax Law, specifically Article 27, Chapter 65. This Action is brought by the State in its capacity as a taxing authority against Defendants for their past and continuing failure to remit the full and proper amounts of taxes imposed under Mississippi’s Sales Tax Law in the amount of seven percent (7%) of all “gross income” from sales of hotel rooms to hotel guests or occupants. MISS. CODE ANN. § 27-65-1 et seq.

2. Persons engaged in businesses and deriving income from the sale of hotel rooms are expressly included under Mississippi’s Sales Tax Law: “Upon every person engaging or continuing in any of the following businesses or activities there is hereby levied, assessed and shall be collected a tax equal to seven percent (7%) of the gross income of the business . . . : Hotels (as defined in Section 41-49-3), motels, tourist courts or camps, trailer parks;” MISS. CODE ANN. § 27-65-23.

3. Mississippi’s Sales Tax on hotel room sales applies to out-of-state companies soliciting and doing business in Mississippi just as it does to in-state companies. See MISS CODE ANN. § 27-65-31 (“Any person liable for a privilege tax levied and assessed . . . shall add the amount of such tax due by him to the sales price or gross income and, in addition thereto, shall collect, insofar as practicable, the amount of tax due by him from the purchaser *at the time the sales price or gross income is collected.*”).

4. Mississippi Sales Tax Law requires the seller to collect the tax, and “[i]t shall be unlawful for any person, who is liable for a privilege tax . . . to fail or refuse to add to the sales price and collect, insofar as practicable, the amount of tax due by him on each sale” MISS. CODE ANN. § 27-65-31.

5. Further, any person engaging in a business or activity which would subject such person to the sales tax is required to apply to the commissioner for a permit. *See* MISS CODE ANN. § 27-65-27 (1). In applying for a permit, “a person agrees, regardless of his presence in this state, to . . . collect and remit all taxes levied under this chapter on the type of business or activity to be conducted by the applicant” MISS CODE ANN. § 27-65-27(1)(b). If a person fails to obtain a sales tax permit before engaging in business in Mississippi, the law requires that that person “*shall pay the retail rate* on all purchases of tangible personal property and/or services in this state, even if purchased for resale.” MISS CODE ANN. § 27-65-3(e)(emphasis added).

6. Defendants contract with the hotels to arrange for the rental of hotel rooms to others and/or acquire/buy hotel rooms for subsequent rentals to others. Defendants conduct the business of acquiring and then renting hotel rooms through a two-step process: first, they acquire/buy hotel rooms from hotels at low **wholesale** rates; second, Defendants rent the rooms arranged or acquired for rental to consumers (transient guests) at higher **retail** rates. By the terms of the State Tax Law, Defendants are required to collect and remit the 7% Sales Tax for each **retail** rental of a hotel room to consumers (the transient guest) based upon the gross amount paid by the consumer. Although Defendants charge consumers the sales and other hotel taxes based on the higher retail rate (or more), *Defendants do not remit any Sales Tax directly to the State and only a portion of the Sales Tax is ever paid to the State.*

7. In addition to the state Sales Tax being charged and collected by the Defendants, the Defendants are also charging and collecting local hotel taxes and tax charges, including but not limited to, the “Tourism and Economic Development Taxes” listed in Exhibit A, from hotel guests at the time of purchase. These taxes levied under the authority of a local and private law are to be collected and paid to the State on the retail rate paid by consumers, but the Defendants fail to do so, remitting the local taxes at the wholesale rate paid by the Defendants for the rooms. *See* MISS. CODE ANN. § 27-65-23.1.

8. Defendants’ acts of tax evasion give rise to the State’s claims herein for: (1) Declaratory Judgment and Injunctive Relief; (2) Violation of Article 27, Chapter 65, *et seq.* of the Mississippi Sales Tax Law and the local hotel tax laws and/or ordinances listed in Ex. A; (3) Conversion; (4) Unjust Enrichment; (5) Assumpsit for Money Had and Received; (6) Joint Enterprise Liability; (7) Violations of Mississippi’s Consumer Protection Act; and (7) Imposition of a Constructive Trust.

II. PARTIES

9. Plaintiff is the State of Mississippi and a taxing authority empowered to levy and/or administer Sales Taxes and other local taxes on all sellers of hotel rooms within its jurisdiction.

10. The Attorney General, Jim Hood, is expressly authorized by MISS. CODE ANN. § 7-5-39 to represent the State in suits: “The attorney general shall also represent the state, in person or by his assistant, as counsel in all suits against the state in other courts than the supreme court at the seat of government, and he shall, in like manner, act as counsel for any of the state officers in suits brought by or against them in their official capacity, touching any official duty or

trust and triable at the seat of government. He may pursue the collection of any claim or judgment in favor of the state outside of the state.”

11. The Attorney General for the State of Mississippi is further authorized by law to represent Mississippi’s State Tax and Public Service Commissions: “The attorney general, as well as the several district attorneys, is hereby authorized to institute or defend any suits arising out of any act or order of the tax commission or the public service commission affecting the laws and revenues of the state.” MISS. ANN. CODE § 7-5-51.

12. In addition the Attorney General is expressly authorized to recover taxes under MISS. ANN. CODE § 7-5-55: “The attorney general, or any district attorney or county attorney at his request, may bring and prosecute any action in the name of the state to recover the amount of any past due income, inheritance, and privilege taxes and penalties thereon, but any such action shall be brought in the county or district where the taxpayer resides. In case of a nonresident or foreign corporation, the action may be brought in any county where said nonresident or foreign corporation may now be sued in other cases.”

13. Whenever the Attorney General has reason to believe that any person is using or has used any unfair or deceptive trade practice prohibited by Mississippi’s Consumer Protection Act and that proceedings would be in the public interest, the Attorney General is authorized to bring an action in the name of the State against such person “to restrain by temporary or permanent injunction the use of such method, act or practice.” MISS. CODE ANN. § 75-24-9.

14. Finally, the Attorney General “is hereby authorized and empowered to appoint and employ special counsel . . . to assist the attorney general in the preparation for, prosecution, or defense of any litigation in the state or federal courts or before any federal commission or agency in which the state is a party or has an interest.” MISS. ANN. CODE § 7-5-7.

15. As for the Defendants, they can be grouped into four distinct groups, as subsidiaries or indirect subsidiaries of either: A) Priceline; B) Cendant Corporation; C) Expedia, Inc.; or D) Sabre Holdings.

A. The Priceline Defendants

16. *Defendant Priceline.com, Inc.* (“Priceline”) is a Delaware corporation with its principal place of business in Norwalk, Connecticut.

17. *Defendant Lowestfare.com, Inc.* (“Lowestfare”) is a Delaware corporation with its principal place of business in Norwalk, Connecticut. Defendant Lowestfare.com is a wholly-owned subsidiary of Defendant Priceline.

18. *Defendant Travelweb, LLC* (“Travelweb”) is a Delaware corporation with its principal place of business in Dallas, Texas. Defendant Travelweb is a wholly-owned subsidiary of Defendant Lowestfare.

B. The Cendant Defendants

19. *Defendant Travelport, Inc.* (“Travelport”) is a Delaware corporation with its principal place of business in Parsippany, New Jersey. Defendant Travelport is a subsidiary of Cendant Corporation. Defendant Travelport was formerly known as *Cendant Travel Distribution Services Group, Inc.*

20. *Defendant Cheaptickets, Inc.* is a Delaware corporation with its principal place of business in Honolulu, Hawaii. Defendant Cheaptickets.com, Inc. is an indirect subsidiary of Cendant Corporation.

21. *Defendant Trip Network, Inc.* (d/b/a Cheaptickets.com) is a Delaware corporation with its principal place of business in Honolulu, Hawaii. Defendant Trip Network, Inc. is an indirect subsidiary of Cendant Corporation.

22. *Defendant Orbitz, Inc.* is a Delaware corporation with its principal place of business in Chicago, Illinois. Defendant Orbitz, Inc. is an indirect subsidiary of Cendant Corporation.

23. *Defendant Orbitz, LLC* is a Delaware corporation with its principal place of business in Chicago, Illinois. Defendant Orbitz, LLC is an indirect subsidiary of Cendant Corporation.

C. The Expedia Defendants

24. *Defendant Expedia, Inc.* (“Expedia”) is a Delaware corporation with its principal place of business in Bellevue, Washington.

25. *Defendant Expedia, Inc.* (“Expedia (WA)”) is a Washington corporation with its principal place of business in Bellevue, Washington. Defendant Expedia is the parent corporation of Defendant Expedia (WA).

26. *Defendant Hotels.com, Inc.* is a Delaware corporation with its principal place of business in Dallas, Texas. Defendant Hotels.com, Inc. is a subsidiary of Defendant Expedia, Inc, a Delaware Corporation.

27. *Defendant Hotels.com, L.P.* is a Delaware limited partnership with its principal place of business in Dallas, Texas. Defendant Hotels.com, LP is a wholly-owned subsidiary of Defendant Hotels.com, Inc.

28. *Defendant Hotels.com Gp, LLC.* is a Texas corporation with its principal place of business in Dallas, Texas. Defendant Hotels.com, Gp, LLC is a wholly-owned subsidiary of Defendant Hotels.com, Inc.

29. *Defendant Hotwire, Inc.* (“Hotwire”) is a Delaware corporation with its principal place of business in San Francisco, California. Defendant Expedia is the parent company of Defendant Hotwire.

30. *Defendant TravelNow.com, Inc.* is a Delaware corporation, and a wholly-owned subsidiary of Defendant Hotels.com, Inc.

D. The Sabre Holdings Defendants

31. *Defendant Sabre Holdings Corporation* is a Delaware Corporation with its principal place of business in Texas.

32. *Defendant Travelocity.com, Inc.* is a Delaware corporation with its principal place of business in Texas. Defendant Travelocity.com, Inc. is an indirect subsidiary of Sabre Holdings Corporation.

33. *Defendant Travelocity.com, LP.* is a Delaware limited partnership with its principal place of business in Texas.

34. *Defendant Site59.com LLC* is a Delaware limited liability company with its headquarters in New York, New York. Defendant Site59.com, LLC is an indirect subsidiary of Sabre Holdings Corporation, a Delaware Corporation.

35. The true names and capacities, whether individual, corporate, associate or otherwise, of each of the Defendants designated herein as a DOE are unknown to Mississippi at this time and therefore said Defendants are sued by such fictitious names. The State will ask leave of the Court to amend this Complaint to show their true names and capacities when the same have been ascertained. The State is informed and believes, and alleges, that each of the Defendants designated herein as a DOE is legally responsible in some manner (including under

the laws of agency) and liable for the events and practices herein alleged and, as such, proximately caused damages to the State as hereinafter further alleged.

III. JURISDICTION AND VENUE

36. All Defendants regularly transact business within and profit by virtue of business within the State of Mississippi and the claims asserted herein arise from their business conducted within this State. Defendants are thus subject to the jurisdiction of this Court.

37. This Court possesses subject matter jurisdiction of the claims asserted herein. All or a substantial part of the transactions and conduct giving rise to the causes of action plead herein occurred in Mississippi. The Defendants have transacted - and continue to transact - substantial business within the State and possess general contacts with this jurisdiction.

38. Venue is proper in this Court because all or a substantial part of the transactions giving rise to the harms complained of by the State occurred within Mississippi.

IV. SUBSTANTIVE ALLEGATIONS

A. General Allegations

39. Defendants, each of them, are online sellers and/or online resellers and/or online renters of hotel rooms to the general public. Defendants sold and/or provided and/or rented hotel rooms to the public, but failed to pay Sales Tax on their sales of Mississippi hotel rooms.

40. Mississippi's Sales Tax Code (MISS. ANN. CODE § 27-65-1 et seq.) requires that "every person engaged or continuing in" the business of selling/renting hotel rooms pay taxes on the "gross income" obtained from such sales. MISS. ANN. CODE § 27-65-23. Under Mississippi law, "[g]ross income means the total charges for service or the total receipts (actual or accrued) derived from trades, business or commerce . . . without any deduction . . ." MISS. ANN. CODE § 27-65-3 (emphasis added). "Business" means and includes "all activities or acts engaged in

(personal or corporate), for benefit or advantage, either direct or indirect” See MISS. ANN. CODE § 27-65-9(1). A person engaged in the business of selling/renting hotel rooms is required to add the amount of sales tax due by him to the sales price or gross income and collect the amount of sales tax “due by him from the purchaser at the time the sales price or gross income is collected.” MISS CODE ANN. § 27-65-31 (emphasis added).

41. The Sales Tax imposed is 7% of the gross income: “Upon every person engaging or continuing in any of the following businesses or activities there is hereby levied, assessed and shall be collected a tax equal to seven percent (7%) of the gross income of the business.” MISS. ANN. CODE § 27-65-23.

42. Thus, the amount of the Sales Tax on hotel rooms sold/rented in Mississippi should be correctly calculated as a percentage of the gross amount each consumer occupant (the transient guest) pays each Defendant for a hotel room. That is the amount each Defendant is required to remit to the State.

43. Defendants are liable to the State of Mississippi for said Sales Taxes whether or not they charged and collected said taxes from the ultimate occupier of the hotel room.

44. Upon information and belief, Defendants are charging and collecting retail tax charges (including the Sales Tax and local hotel taxes¹) from consumers that are not being remitted to the State. The tax charges are being paid by the consumer occupants to Defendants and ostensibly collected on behalf of the State of Mississippi and its local governments.²

¹ These local hotel taxes include, but are not limited to, “Tourism and Economic Development Taxes”, *inter alia*, attached hereto as Exhibit A.

² The Defendants often argue that they really only collect taxes on the wholesale amounts. However, they fail to acknowledge the truth, which is that their “taxes and fees” line is a bundled charge that is designed to approximately equal or exceed taxes on the hotel rooms’ retail amounts. The algorithms Defendants use were specifically created to mimic the retail tax charges paid by other sellers of hotel rooms (including the hotels themselves), even though after collecting such charges, the Defendants only pay a smaller amount to the hotels for taxes. The difference, or spread, creates illegal profit for the OTCs.

45. For example, the City of Philadelphia levies a local hotel tax “at the rate of three percent (3%) of the gross proceeds of sales derived from room rentals of hotels and motels.” *See* City of Philadelphia Tourism and Economic Development Tax, S.B. 3199, 1999 Regular Session of Mississippi Legislature (1999); *See also* MISS. ANN. CODE § 21-17-5 (authorizing governing authorities of municipalities to levy taxes of any kind if specifically authorized by the State of Mississippi).

46. Upon information and belief, Defendants are charging and collecting retail tax charges (including the State Sales Tax and the City of Philadelphia, Mississippi’s local hotel tax) from consumers that are not being remitted to the State. *See* MISS. ANN. CODE § 27-65-23.1(1). The tax charges are being paid by the consumer occupants to Defendants and ostensibly collected on behalf of the State of Mississippi and the City of Philadelphia, MS. Yet, upon information and belief, Defendants are not remitting the retail tax charges. In addition, Defendants are bundling the tax charges with alleged “fees” in order to disguise how much they actually remit in taxes. *See* Philadelphia, MS Transaction attached as Exhibit B.

47. Defendants contract with hotels for rooms at negotiated discounted room rates. Defendants then mark up their inventory of rooms and rent the rooms to transient guests, who actually occupy the rooms. The retail tax charges are paid by the guests based on the marked up room rates. However, the State of Mississippi and its local governments only receive tax revenues based on the lower, negotiated room rates. Each Defendant then pockets the difference.

48. For example, if a consumer pays Expedia.com \$100.00 for a room in a hotel located in Jackson, Mississippi, Expedia.com calculates the tax charges based upon the amount the consumer pays – “gross amount” (\$100.00). Expedia.com, however, obtains that room at a lower “net” rate, for instance, \$60.00. Because Expedia.com and other Defendants act as

retailers and/or agents, the amount of Sales Tax due is 7% of \$100, or \$7.00. However, the amount of Sales Tax remitted to the State by Defendants has been and is based on the lower “net” rate. In this example, Mississippi would only receive \$4.20 (7% of \$60.00), an underpayment of the Sales Tax liability by \$2.80. Thus, in this single example, the State’s collected Sales Tax would be 40% less than the tax charges that the Defendants actually collect.

49. All of the Defendants utilize this practice when offering hotel rooms in Mississippi for sale. The actual charges shown to the occupant are telling. The online travel companies show the customers a line pertaining to taxes but fail to pay that amount of money to the State or local governments. For example, the Hilton Garden Inn located in Jackson, Mississippi selling rooms on its website presents charges as shown on the left, while Expedia.com presents its charges as shown on the right:

<u>A</u>		<u>B</u>	
<u>Hilton.com Booking</u>		<u>Expedia.com Booking</u>	
(Hilton Garden Inn Jackson Downtown)		(same hotel)	
Room Rate:	\$119.00	Room Rate:	\$119.00
Taxes:	\$ 13.84³	Taxes and Fees:	\$ 14.46
Total:	\$132.84	Total:	\$133.46

See Expedia.com Transaction attached as Exhibit C. In this example, the State receives \$13.84 (11% x \$119 + \$.75) from the transaction in Column A and should receive the same amount from the Expedia.com transaction in Column B. Instead, Expedia.com transmits some lesser amount for the room that is determined by its confidential contracts plus 11% of that lesser amount as taxes. Neither the amount paid by Expedia.com for the room nor the amount paid for taxes is revealed to the customer. The Defendants attempt to disguise their deceptive trade practice by improperly bundling their private profits (disguised as a “fee”) with taxes, such that

³ This represents an 11.00% per room per night tax, which encompasses the State and local hotel taxes, and a \$0.75 per room per night secondary tax. See Ex. C.

the occupant cannot determine how much they paid in taxes. *See* Exhibits C, D (“Priceline.com Transaction”), E (“Orbitz Transaction”), and F (“Travelocity Transaction”).

50. Defendants have failed to remit the full Sales Taxes due and owing to the State and their conduct continues.

51. Defendants’ business practices include charging the general public (transient guest) a “taxes and services” fee on the rental of each hotel room. The general public is led to believe Defendants are remitting the correct amount of Sales Tax and other hotel taxes to the State. *See* Exs. B-F. Defendants, however, are improperly calculating their tax liabilities based upon the amount Defendants paid the hotel for the room, not upon the gross amount the general public paid Defendants. As a result, the Sales Tax liabilities paid by the general public and owed to the State are underpaid/unpaid by the Defendants, who unlawfully pocket the difference. These practices deprive the State and its citizens of the full amounts due and owing from the rental of each Mississippi hotel room. In short, Defendants collect greater tax amounts from the general public than are remitted to the State.

52. In addition to failing to properly pay collected or owed Sales Taxes, Defendants do not delineate to the general public the amount being paid for the Sales Tax, other taxes, and the amount, if any, being paid separately as “service fees.” *See* Exs. B-F. The funds collected by the Defendants from the purchaser are considered “trust fund monies,” and the Defendants are required to hold these funds in trust for the State. *See* MISS. CODE ANN. § 27-65-31. The sales taxes collected by the Defendant OTCs are to be separately accounted for as provided under Mississippi law. *See* MISS. CODE ANN. § 27-65-31. Yet the Defendants require that the hotels not reveal to the general public what Defendants paid for the hotel room. Likewise, the hotels do not know what the general public paid Defendants for the hotel room. The only way for the

hotel to pay the correct Sales Tax to the State is if Defendants inform the hotel of the gross amount for which the hotel room was actually rented to the consumer by Defendants and to submit to the hotel the additional Sales Tax owed to the State (and which was actually paid by the consumer to Defendants).

B. Defendants' Statements Regarding The "Merchant Model"

53. In recent years, the internet travel industry has seen explosive growth. By some estimates, more than half of all hotel bookings in the United States are made online, many through internet travel companies owned by the Defendants. Through their web portals, the Defendants allow consumers to rent hotel rooms in many different hotels throughout the country and the world. The Defendants offer their services to hotels and consumers through two different business models: the "Agency Model" and the "Merchant Model." Upon information and belief, the Merchant Model represents a majority of the Defendants' total online bookings. The two models are described in the 2002 annual report of Defendant Expedia, Inc. as filed with the Securities and Exchange Commission on Form 10-K on March 31, 2003, and the 2004 Annual Report on Form 10-K as filed with the SEC of IACI Interactive Corp. (the parent company - at that time - of Expedia.com, Hotwire.com and Hotels.com), p. 9.

54. Under the Merchant Model, the Defendants do not function merely as service providers collecting a fixed transaction fee. Rather, the Merchant Model consists of two related transactions whereby an internet travel company, including each of Defendants: (i) first purchases and takes title to inventories of hotel rooms at negotiated rates from the hotels ("wholesale" rates); and (ii) then re-sells the rooms to consumers at higher rates ("retail" rates), keeping the difference as profit. The Defendants purchase rooms from hotels at the lower wholesale rate using their own credit cards. The selling hotels collect and remit to the applicable

taxing authority hotel room taxes based on that lower wholesale rate. The Defendants then rent hotel rooms to consumers at a higher retail rate; the consumers pay through a credit card transaction in which the particular Defendant is the merchant of record. In their transactions with consumers, the Defendants charge retail tax amounts sufficient to cover the applicable hotel room taxes, but do not remit any such taxes to the taxing authority. These merchant transactions were described in public filings by Expedia as follows:

Under the merchant model, **we receive inventory** (hotel rooms, airline seats, car rentals, destination services) from suppliers at negotiated rates. **We determine the retail price paid by the customer and we then process the transactions as the merchant of record for the transaction. Acting as a merchant enables us to achieve a higher level of gross profit per transaction** compared to the agency model and allows us to provide better prices to customers compared to agency transactions. Merchant transactions comprised 58% of our total revenues in 2002 and are derived from the difference between what we pay for the inventory and what we charge the customer.

Expedia, Inc., Annual Report (Form 10-K), at F-3 (Mar. 31, 2003) (emphasis added).

55. Similarly, Priceline.com specifically admitted that it actually “purchases” and “takes title” to hotel rooms before reselling them to end users:

For most of these transactions, we establish the price we will accept, have total discretion in supplier selection, **purchase and take title to the particular product and are the merchant of record.** Consumers agree to hold their offers open for a specified period of time to enable us to fulfill their offers from inventory provided by participating sellers. Once fulfilled, offers generally cannot be canceled. (Emphasis added.)

Priceline.com, Annual Report (Form 10-K), at 29 (Mar. 15, 2003).

56. Hotels.com also identified itself as a “reseller” of hotel rooms obtained from the hotels:

We contract with hotels and other lodging properties in advance for volume purchases and guaranteed availability of rooms at wholesale prices **and resell these rooms to consumers** through our websites, third-party affiliated websites and our toll-free call centers.

Hotel Reservations Network, Inc., Annual Report (Form 10-K), at 3, 18 (Apr. 2, 2001) (emphasis supplied)

57. Similarly, Orbitz admitted that it “receive[s] inventory directly from a hotel” that it “then mark[s]-up and sell[s] to consumers:”

Our hotel agreements include ... merchant hotel contracts with certain hotels, hotel management groups and hotel chains that give us access to discounted negotiated rates **that we then mark-up and sell to consumers on a prepaid basis.**

* * *

Our strategy calls for us to increase the number of hotel rooms we can offer under our Orbitz Merchant Hotel program based on merchant arrangements we make directly with individual hotel properties and independent chains. Under the Orbitz Merchant Hotel program, **we receive inventory directly from a hotel at a negotiated rate, and we determine the retail price at which we choose to offer it to the consumer.**

* * *

We must also pay net rates to hotels in the event merchant hotel bookings sold on our website are purchased fraudulently.

Orbitz, Inc., Annual Report (Form 10-K), at 11, 28, 74 (Mar. 18, 2004) (emphasis supplied).

This provision demonstrates that Defendant Orbitz did assume the risk of loss in certain of these **sale** transactions.

58. Likewise, Travelocity.com, Inc. also distinguished its purchase and re-sale transactions under the Merchant Model from those where it merely provided a service:

In order to increase its sales of higher margin products, Travelocity’s business plan calls for it to increase **merchant model sales** pursuant to which **Travelocity serves as the merchant of record in the transaction rather than as a sales agent.** In the merchant business, suppliers make inventory, such as airline seats, hotel rooms, car rentals, cruises, and vacation packages, available to Travelocity at wholesale or “net” rates. The merchant of record then sets the retail price that the customer pays and processes the transaction. **The merchant business generally delivers higher revenue per transaction than comparable sales under the agency model, in which Travelocity acts as an agent in the**

transaction, passing a customer's reservation to the travel supplier and receiving a commission from the supplier for its services.

Travelocity.com, Inc., Annual Report (Form 10-K), at 7 (Mar. 26, 2002) (emphasis supplied).

59. As Defendants have admitted in these sworn public filings, Defendants collect the hotel rental charges from consumers.

60. Defendants all employ the Merchant Model. By using this business model to acquire title to large blocks of hotel rooms, Defendants are able to negotiate a lower, "wholesale" purchase or lease price from the hotels. Defendants then re-sell or re-lease the hotel rooms to consumers at a substantially higher "retail" rate. This purchase and re-sale "Merchant" business model is far more profitable for the Defendants, and has become their dominant business paradigm in recent years.

61. Due to the contractual or factual relationship between the Defendants and the hotels, the Defendants and the hotels act on behalf of each other to provide/sell customers Lodging, and are thus, agents of one other. The Defendants and the hotels join in a common undertaking to sell hotel rooms for their mutual benefit with the understanding that they are to share, to some degree, in the profits or losses generated. As such, they operate as joint enterprise members and, thus, the Defendants have joint enterprise membership liability.

62. Upon information and belief, there are occasions where Defendants unlawfully retain *all* monies charged to and collected from consumers as revenue without remitting *any* taxes to the State. Known in the industry as "breakage," the situation arises when a consumer books and prepays a Defendant for a hotel room, and all monies (including Sales Tax and local hotel taxes) are collected, but the Defendant never remits *any* tax monies to the State.

63. For example, in a no-show scenario, where a consumer books and prepays a hotel directly for the room rental but neither shows up nor timely cancels, the hotel retains the room

rate but still remits the applicable Sales Taxes to the State. However, if a consumer books and prepays with an OTC Defendant, and neither shows up nor timely cancels, the OTC Defendant retains all monies paid by the consumer, including the Sales Taxes and other taxes charged to and collected from the consumer. In both of these scenarios, the State is entitled to the full amount of taxes collected from the consumer at the time the transaction occurs, as the Defendants have a duty to remit the taxes regardless of any invoicing irregularities that may occur in a no-show scenario.⁴

C. Defendants Developed Intentionally Misleading Tax Practices

64. Years ago, the Defendants recognized an opportunity. They decided that if they collected taxes at retail (which is what customers expect to pay), but paid taxes at wholesale, they could make lots of money on the “spread”. They could simply multiply the tax rate times the retail price when charging customers, but multiply the tax rate times the net cost when paying hotels. They realized, though, that if they handled (or continued handling) things this way on their books, it would be illegal, and obviously so. Therefore, the Defendants developed an “opaque” scheme to make it less obvious.

65. Under this scheme, step one involved charging customers “tax money” that appeared to be in line with simply multiplying the tax rate times the retail price. Step two involved remitting taxes on the wholesale rates and pocketing the difference. However, to disguise things, the Defendants developed algorithms and then made up “service fees” and surcharges to act as camouflage. These algorithms, service fees, and surcharges bore no relation to any services. Instead, these tools were really just roundabout ways to charge taxes at retail without saying it.

⁴ A Texas jury deemed the Defendants’ practices illegal, including their “breakage” activities, and awarded more than \$20 million in total to Texas local governments. Penalties and interest will be added to that total.

66. The outcome was intended to be the same, as the earlier discussed example transactions showed. Note that the Defendants' tax line closely resembles or approximates the tax line of the hotels. In fact, the Defendants ensured that the practice was revenue neutral and yielded them the same money from their "taxes and fee" charges just as if they were collecting taxes on the retail charges without a service fee.

67. The Defendants' own employees questioned the OTCs' tax practices and recognized the problem they had under the law: **"It's always a risk that as we educate the regulators or elected officials that they are better able to cook our goose."**⁵

68. While the algorithms and resulting tax charges have been adjusted over time, the core features continue to share commonality on a number of key points: 1) there is a combined or bundled charge; 2) there is no disclosure about what amount of money is actually being paid in taxes; 3) the bundled tax charges resemble the amount of taxes at retail as charged by hoteliers and others so much so that it confuse(s) taxing authorities and consumers alike into believing that taxes are being collected and paid on the retail amounts when they are not; and 4) nobody can determine the amount of taxes actually being paid by the OTCs (unless they obtain the confidential internal OTC documents).

69. In sum, the Defendants create substantial "confusion and misunderstanding" by virtue of their presentation of hotel and tax charges to the customers, the use of formulas to reverse engineer retail tax charges, and the net effect of these practices, which results in underpayment to the State of Mississippi and Mississippi's local governments.

⁵ Orbitz Document cited in its Privilege Log Entry in the *City of Atlanta* Case and as cited in *Columbus, Georgia v. Orbitz, LLC*, Civil Action No. SU-06-CV-1895-05, slip. op. at p. 18 (Ga. Super. Ct., Jan. 30, 2007) (now vacated upon a joint request of the parties in conjunction with a payment of \$450,000 by Orbitz to settle with the City of Columbus) (emphasis added).

70. Mississippi's Consumer Protection Act ("MCPA") prohibits "[u]nfair methods of competition affecting commerce and unfair or deceptive trade practices in or affecting commerce" MISS. CODE ANN. § 75-24-5(1). "Trade" and "commerce" mean "the advertising, offering for sale, or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value wherever situated . . . and any trade or commerce directly or indirectly affecting the people of this state." MISS. CODE ANN. § 75-24-3(b).

71. As shown in the public statements made by Defendants and in the allegations above concerning their tax calculation, collection, and remittance practices, Defendants have been utilizing unfair and deceptive trade practices for years, which have substantially affected commerce to the detriment of the State, its residents, and its visitors and tourists. Consumers have been taken advantage of by the Defendants in being charged and paying for taxes that, according to the Defendants, are not owed. These actions by the Defendants constitute unfair trade practices and are the type of practices prohibited by the MCPA.

72. As stated earlier, the Attorney General is authorized to bring an action in the name of the state against any such person whom the Attorney General has reason to believe is using or has used any method, act or practice prohibited by the MCPA. *See* MISS. CODE ANN. § 75-24-9. Any person who violates the terms of an injunction issued under the MCPA may incur a civil penalty in a sum not to exceed Ten Thousand Dollars (\$10,000.00) per violation. *See* MISS. CODE ANN. § 75-24-19(1)(a). Further, if the court finds that a person knowingly and willfully used any unfair or deceptive trade practice, method, or act prohibited by the MCPA, the Attorney General may recover on behalf of the state a civil penalty in a sum not to exceed Ten Thousand Dollars per violation. *See* MISS. CODE ANN. § 75-24-19(1)(b). A "knowing and

willful violation occurs when the court finds from clear and convincing evidence that the party committing the violation knew or should have known that his conduct was a violation” of the MCPA. *See* MISS. CODE ANN. § 75-24-19(3).

73. The Defendants have used unfair and deceptive trade practices for years with full knowledge that their actions are in violation of many states’ tax codes, including the Sales Tax Code and the local hotel tax codes of the State of Mississippi.

D. Defendants Refuse to Pay Assessments and Argue Threshold Legal Issues

74. Taxing authorities around the country have repeatedly assessed and/or audited the Defendants. The Defendants have always denied legal liability and asserted constitutional defenses, tying up the matters in the administrative process for years.

75. For example, the Indiana Department of Revenue (“DOR”) conducted an investigation and determined that Defendants should have collected and remitted sales tax on the total amount the OTC collected from its customers for the years 2004-2006. Despite issuing proposed assessments for sales tax and interest, the Indiana DOR was not paid following its audit and assessment. It was not until 2008 that a Letter of Findings was issued, many years after the initial audit and assessment was conducted. *See* Indiana Department of State Revenue, Letter of Findings No. 08-0434 (2008), available at www.in.gov/dor/reference/legal/rulings/pdfs/0420080434revlof.pdf.

76. Additionally, the South Carolina Department of Revenue (“SC DOR”) conducted an audit of an OTC defendant’s records for a period from 2001 through 2006. After determining that the OTC was required to pay a sales tax on the gross proceeds received from furnishing hotel accommodations in South Carolina, the SC DOR issued an assessment and penalty. The OTC contested the assessment and penalty and tied up the matter in administrative hearings.

Despite an order from the South Carolina Administrative Law Court (“ALC”) that the OTC was required to pay the taxes, the OTC appealed. It was not until 2011 that the South Carolina Supreme Court issued an opinion affirming the ALC’s decision. *See Travelscape, LLC v. S.C. Dep’t of Rev.*, 391 S.C. 89, 705 S.E.2d 28 (SC 2011).

77. Numerous Georgia local governments now represented in the *City of Rome* case previously sent multiple requests for information and assessments to the OTCs, but they were not paid and were forced to resort to litigation to collect the tax monies owed to the local governments. *See City of Rome v. Hotels.com*, 2007 U.S. Dist. LEXIS 98522 (N.D. Ga. 2007).

78. As demonstrated above, despite audits and assessments and attempts to resolve the matter administratively, Defendants employ a practice of stalling in order to evade the payments of taxes owed to governments. Moreover, the threshold question, whether or not the online travel companies are subject to Mississippi’s Taxes, is one of law and does not require the Department of Revenue’s expertise. It presents a question of law peculiarly within judicial competence, and judicial economy would be served where the legal issues involved would be resolved with less expense and more efficiently and expeditiously within the judicial system.

V. CAUSES OF ACTION

COUNT I: DECLARATORY JUDGMENT

79. The State of Mississippi incorporates each of the above allegations by reference as if fully rewritten herein.

80. Defendants have been and continue to deceptively and unlawfully collect tax charges at or above the retail rate while only paying taxes on wholesale rates. Defendants cannot hide an additional and illegal profit stream under the guise of “taxes and fees.” The violations are simple and extremely harmful to the State’s Tax Code and those who travel to and stay in

Mississippi. First, the intended transparency of the State's Sales Tax Law is being ignored and the law requiring individual itemization of sales tax (separate from any other charges or fees) is being violated. *See* MISS. CODE ANN. § 27-65-31. Second, the tax dollars that should be flowing to Mississippi and its local governments for education, tourism, economic development, and other vital needs are being diverted into Defendants' out-of-state coffers. *See* MISS. CODE ANN. § 27-65-75.

81. All of the above outlined conduct is illegal and threatens the integrity of Mississippi's Tax Code. If this practice of collecting money as "taxes and fees" with no separate itemization and only partial payment persists, other businesses may decide to only pay Mississippi taxes at wholesale rates while charging customers (supposed) "taxes" at retail. If taken to the extreme, other businesses may decide to consider most of their charges to the public to be non-taxable services and only remit taxes on a small portion of their revenues. Under this erroneous view, a Holiday Inn could decide to charge \$100 dollars for the rental of a room, collect "taxes and fees" on the \$100, but later remit Hotel Room Taxes on a single dollar of that transaction and pocket the rest of the "taxes and fees" as a service fee. This is not the law. The law requires transparent tax administration and full payment of the Sales Taxes on the "gross" amounts.

82. When Marriott rents a room on its online website, it charges and collects and remits Hotel Room Taxes based on the retail rate. When Expedia rents a Marriott room on its website, it charges and collects Sales Taxes and other hotel taxes at or above the retail rate, but remits on a lesser wholesale rate. This is fundamentally wrong. The rule of law must be imposed and these Defendants must be brought in line with other renters of hotel rooms, so that Mississippi's revenues can be returned to the proper levels under the law.

83. The State of Mississippi seeks a declaratory judgment against all Defendants finding Defendants' business practices as to the collection of the Sales Taxes and local hotel taxes illegal, deceptive, and unlawful and in violation of the laws and ordinances designated herein.

84. Further, the State seeks a declaratory judgment from the Court asking it to declare the rights and obligations of the Defendants with respect to the State relating to their Sales Tax obligations under the sections cited herein. Specifically, the State of Mississippi seeks a judgment declaring that Defendants are subject to the applicable provisions of Mississippi's Sales Tax Code and local hotel tax codes and further declaring that Defendants are legally required to collect such taxes on the gross amount paid by the transient guest who obtain rooms through Defendants and that Defendants are required to remit to Mississippi the tax charges collected by Defendants on the gross amounts paid by transient guests.

85. A justifiable controversy is stated herein concerning the Defendants' Sales Tax liability.

86. Such a declaratory judgment is proper. *See* M.R.C.P. 57 ("Courts of record within their respective jurisdictions may declare rights, status, and other legal relations regardless of whether further relief is or could be claimed.")

COUNT II: INJUNCTIVE RELIEF

87. The State of Mississippi incorporates each of the above allegations by reference as if fully rewritten herein.

88. Defendants continue and will continue their business practices pertaining to the underpayment of Sales Taxes on hotel rooms. Defendants' representatives, in sworn testimony

given in other cases pertaining to similar issues, have stated that Defendants have not paid and will not pay taxes, such as Mississippi's Sales Tax, prior to being ordered to do so by a Court.

89. Based upon this sworn testimony, there is a substantial likelihood that Mississippi will prevail upon the merits of this case when tried.

90. Further, the State has incurred and will continue to incur irreparable harm from the Defendants' failure and refusal to pay the full amount of taxes due to the State. Sales Tax revenues provide funding for education, redevelopment, tourism, and other vital programs which benefit the citizens of the State of Mississippi; the local hotel taxes are equally vital. Notwithstanding the possibility of ascertaining the amount of tax charges collected by Defendants and not remitted to the State, the State is unable to measure the harm caused to it and its citizens from the diversion of these funds away from their intended purpose(s). Until appropriate relief is granted, the State will continue to lose the benefits provided by these taxes and these lost opportunities cannot be remedied solely by monetary damages.

91. The balance of harms is entirely in favor of the State. The ultimate taxpayers are the hotel guests, and the Defendants are acting as their agents and as tax collection agents when they charge and collect tax dollars from those guests. All retail tax charges should be remitted. Because that is not occurring, the State is deprived of needed and vital revenue resources to promote tourism and by extension economic development in the State, for the benefit of its citizens, where Defendants are collecting, but refusing to pay over moneys collected from the ultimate taxpayers.

92. The utilization of taxes for the support of tourism and related economic development is well recognized as social policy.

93. Therefore, the State of Mississippi respectfully asks that the Court enjoin Defendants from further, future violation of the applicable Sales Tax and local hotel tax laws and that Defendants be ordered to: (1) collect said taxes on the gross amount paid to them by the consumer (transient guest) to whom they rent rooms; (2) identify, categorize and quantify to the State the Sales Taxes and local hotel taxes due and being paid; (3) and remit the proper amount.

**COUNT III: VIOLATIONS OF THE STATE OF MISSISSIPPI'S
SALES TAX LAW**

94. The State of Mississippi incorporates each of the above allegations by reference as if fully rewritten herein.

95. Mississippi imposes a sales tax on every person engaged in the business of selling/renting hotel rooms, which means all activities or acts engaged in for benefit or advantage, whether direct or indirect. *See* MISS. ANN. CODE § 27-65-9(1). Under Mississippi's Sales Tax Code, a person engaged in the business of selling/renting hotel rooms is required to charge a 7% Sales Tax on the "gross income," or the total receipts *without any deduction*, derived from such sales. *See* MISS. ANN. CODE §§ 27-65-23 and 27-65-3. The seller is required to add the Sales Tax *separately* to the sales price and *collect* the Sales Tax from the purchaser *at the time of the transaction*. *See* MISS CODE ANN. § 27-65-31. When the seller collects the Sales Tax from the purchaser, the seller is holding these funds in trust for the State and must remit the Sales Tax collected on the sales price paid by the consumer to the State. *See* MISS CODE ANN. § 27-65-31.

96. As shown in their public statements and as alleged herein, the Defendants are engaged in the business of selling/renting hotel rooms in the State. They contract with hotels to sell, and they do subsequently sell, Mississippi hotel rooms. Accordingly, the amount of the Sales Tax on hotel rooms sold/rented in Mississippi by Defendants should be correctly calculated

as a percentage of the *gross amount* each consumer pays to Defendants for a hotel room. And that is the amount each Defendant is required to collect and remit to the State.

97. Upon information and belief, Defendants are charging and collecting the Sales Tax from consumers that are not being remitted to the State. The tax charges are being paid by the consumer to Defendants and ostensibly collected on behalf of the State of Mississippi, but the Defendants are remitting only part of the money due as Sales Taxes. Further, they are not adding the Sales Tax separately to the sales price but are deceptively hiding illegal profit streams under labels such as “taxes” or “taxes or fees” or “tax recovery charges.”

98. The State of Mississippi seeks the restoration of transparency as addressed above, and the payment of all Sales Tax monies/“trust fund monies” that should have been paid to date based upon the retail rates Defendants charged consumers for the rental of hotel rooms in Mississippi, along with all applicable penalties, interest and attorney fees.

COUNT IV: VIOLATIONS OF LOCAL HOTEL TAXES

99. The State of Mississippi incorporates each of the above allegations by reference as if fully rewritten herein.

100. Mississippi’s local governments have been authorized by the legislature to tax hotel room sales. *See* MISS. ANN. CODE § 21-17-5 and Ex. A. These local hotel taxes, labeled variously as “Tourism and Convention Tax,” “Tourism and Economic Development Tax,” or “Hotel and Motel Tax,” *See* Ex. A, mainly range in value from 1% to 3% and are levied in addition to the Sales Tax. Such local hotel taxes are imposed on “the gross proceeds of sales derived from room rentals of hotels and motels” or “the gross revenue derived from occupancy of hotels, motels” or “the gross income derived from the rental of hotel and motel rooms.” *See* Ex. A. Similar to the state Sales Tax, the local hotel taxes are to be collected and paid to the

State on the retail rate paid by consumers, and penalties and interest apply on unpaid taxes. *See* MISS. CODE ANN. § 27-65-23.1.

101. Upon information and belief, Defendants are charging and collecting the local hotel taxes from consumers that are not being remitted to the State. The local hotel tax charges are being paid by the consumer occupants to Defendants and ostensibly collected on behalf of the State of Mississippi and the local governments. Yet, upon information and belief, Defendants are not remitting the local hotel taxes on the retail rate paid by the consumer. In addition, Defendants are bundling the local hotel tax charges with alleged “fees” in order to disguise how much they actually remit in taxes. *See* Ex. B.

102. The State of Mississippi seeks the restoration of transparency as addressed above, and the payment of all local hotel tax monies that should have been paid to date based upon the retail rates Defendants charged consumers for the rental of hotel rooms in Mississippi.

**COUNT V: VIOLATIONS OF MISSISSIPPI'S
CONSUMER PROTECTION ACT**

103. The State of Mississippi incorporates each of the above allegations by reference as if fully rewritten herein.

104. At all times alleged herein, Defendants employ the practice of charging retail tax charges but only remitting taxes on the wholesale rate and utilize the method of bundling such taxes with alleged fees in order to hide their deceptive and unfair trade practices. As detailed above, to accomplish their scheme, the Defendants employ algorithms and surcharges to reverse engineer retail taxes, while labeling them otherwise.

105. Such unfair and deceptive trade practices and methods have caused economic loss and harm to the State, its residents, and consumers, and it would be in the interest of the public to enjoin the Defendants from continuing their deceptive actions. The State requests an order that

Defendants be restrained by permanent injunction from the use of such confusing and misleading methods, acts, or practices.

106. In addition, Defendants have knowingly and willfully violated the provisions of the MCPA in using such practices and methods. In addition to seeking all damages allowed under the MCPA, the State also requests an order finding that Defendants owe a sum not to exceed Ten Thousand Dollars for each violation of the provisions of the MCPA committed by the Defendants, in an amount to be determined by this Court.

107. Moreover, due to Defendants' knowledge of their wrongdoing and the impact of the Defendants' conduct upon the State and its citizens, the State seeks punitive damages to punish the Defendants and to deter similar misconduct in the future.

COUNT VI: CONVERSION

108. At all times alleged herein, the State of Mississippi was and is the sole rightful owner of the taxes due and owing to it under the Mississippi Sales Tax Law and related code sections, subsections, and other tax provisions.

109. At all times alleged herein, the taxes due and owing to the State were in the possession and under the control of Defendants. Defendants have taken these monies for their own use and benefit, thereby permanently depriving the State of Mississippi and its local governments of the use and benefit thereof.

110. At all times alleged herein, Defendants acted willfully, wantonly, with oppression, and with a conscious disregard of the rights of the State of Mississippi, such that the State requests that the trier of fact, in the exercise of sound discretion, award additional damages for the sake of example and in sufficient amount to deter and punish Defendants for their conduct.

111. As a direct and proximate result of Defendants' conduct, the State of Mississippi has, and will continue to, suffer damages in an amount to be determined according to proof at the time of trial.

112. Pursuant to Defendants' willful and conscious disregard of the rights of the State of Mississippi in converting tax monies rightfully owed to Mississippi, the State seeks punitive damages to punish the Defendants and to deter similar misconduct in the future.

COUNT VII: UNJUST ENRICHMENT

113. The State of Mississippi incorporates each of the above allegations by reference as if fully rewritten herein.

114. Defendants have unjustly received and retained a benefit to the detriment of and at the expense of Plaintiff by exercising the privilege of renting hotel rooms in the State, and collecting, but failing to remit, the correct taxes due. By collecting taxes on the basis and upon the representation that said taxes are required by and for the benefit of State, Defendants have promised to pay the sales tax to which the State is entitled in equity and good conscience and by law. However, Defendants have not remitted the full amount of taxes to the State. Defendants should not be allowed to enrich themselves unjustly at the expense of the State and its citizens. Under the principles of equity, Defendants must be disgorged of said collected but un-remitted taxes.

COUNT VIII: ASSUMPSIT FOR MONEY HAD AND RECEIVED

115. The State of Mississippi incorporates each of the above allegations by reference as if fully rewritten herein.

116. In unlawfully collecting the Sales Tax but failing to remit the tax on the retail amount, Defendants have received money that in good conscience and equity ought to be paid

over to the State. Retention of the tax monies by Defendants is a monetary benefit conferred upon Defendants by the State, of which the Defendants are aware and appreciate. It would be inequitable for the Defendants to retain the benefit of these tax dollars rightfully owed to the State and its citizens where Defendants have wrongfully pocketed such funds in violation of Mississippi's Laws and where Defendants have knowingly and intentionally accepted and retained such benefits. Under the principles of equity, Defendants must be disgorged of said collected but un-remitted taxes which in equity and good conscience belong to the State of Mississippi, its local governments and its citizens.

COUNT IX: JOINT ENTERPRISE LIABILITY

117. The State of Mississippi incorporates each of the above allegations by reference as if fully rewritten herein.

118. By contract or de facto, Defendants have entered into relationships with hotels in Mississippi to provide/sell hotel rooms to customers, combining money, property, knowledge, skills, experience, time or other resources in the furtherance of their particular undertaking. It is understood that the profits and losses are to be shared, although the liability of Defendants or hotels for a proportionate part of the losses or expenditures of the joint enterprise may be affected by the terms of the express or implied contracts. As evidenced by the statements made by the Defendants in public filings, each has some degree of control over the joint enterprise. Accordingly, the Defendants and hotels are agents of one another and operate as joint enterprise members. Thus, the Defendants possess enterprise membership liability for the taxes rightfully owed to the State which are unlawfully retained by Defendants.

COUNT X: IMPOSITION OF A CONSTRUCTIVE TRUST

119. The State of Mississippi incorporates each of the above allegations by reference as if fully rewritten herein.

120. At all times alleged herein, the State's tax monies were in the possession and under the control of Defendants. Defendants have taken this property/these monies for their own use and benefit, thereby depriving State of the use and benefit thereof. The State has been damaged by its failure to receive its proper tax revenues.

121. By virtue of Defendants' actions, Defendants hold these tax monies as constructive trustee for the benefit of the State. The State requests an order that Defendants be directed to give possession thereof to the State.

COUNT XI: DAMAGES

122. The State of Mississippi incorporates each of the above allegations by reference as if fully rewritten herein.

123. The State of Mississippi requests that the Court order Defendants to provide restitution to it and to disgorge the tax monies due and owing to the State.

124. Under Mississippi Law, the State is entitled to interest and penalties on the unpaid Sales Tax and local hotel taxes on hotel rooms and they are to be collected as part of the Tax itself.

125. The State of Mississippi requests that it recover all penalties, interest, and reasonable and necessary attorneys' fees it is entitled to under the law and in equity, including, but not limited to, those provided under MISS. CODE ANN. §§ 27-65-85 and 75-24-19.

126. The State of Mississippi requests both prejudgment and post-judgment interest at the maximum rate allowed by law.

COUNT XII: PUNITIVE DAMAGES

127. The State of Mississippi incorporates each of the above allegations by reference as if fully rewritten herein.

128. As stated above in Count IV, Defendants have committed the intentional tort of conversion.

129. At all times alleged herein, Defendants acted willfully, wantonly, with oppression, with a conscious disregard of the rights of the State, and with intent to injure, and malice toward, the State by depriving it of needed tax revenue such that the State requests that the trier of fact, in the exercise of sound discretion, award the State additional damages for the sake of example and in sufficient amount to deter and punish Defendants for their conscious wrongdoing.

PRAYER FOR RELIEF

WHEREFORE, the State of Mississippi prays for the following judgment in its favor against Defendants:

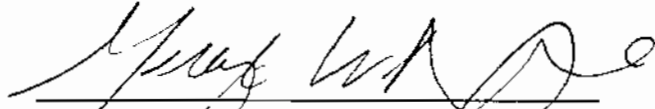
- A. For judgment against Defendants and in favor of the State on all claims asserted in this Complaint;
- B. For a judgment declaring that Defendants are subject to the applicable provisions of Mississippi's Sales Tax Law relative to the hotel sales/rentals and any local hotel tax laws as set forth in Ex. A, and further declaring that Defendants are legally required to collect such taxes on the gross amounts paid by the transient guests who obtain rooms through Defendants and that Defendants are required to remit to the State the taxes collected by Defendants on the gross amount paid by transient guests, including but not limited to "breakage";

- C. For injunctive relief requiring Defendants' future compliance with the State of Mississippi's Tax Laws;
- D. For a permanent injunction restraining Defendants from continuing their trade practices of charging and collecting retail tax charges but only remitting taxes on the wholesale price and restraining Defendants from continuing their method of hiding such practices by bundling such taxes with alleged fees (as well as from continuing to collect and retain "breakage");
- E. For a civil penalty in a sum not exceeding Ten Thousand Dollars per violation of the MCPA committed by the Defendants;
- F. For payments of all Hotel Room Tax monies due to the State of Mississippi, including but not limited to "breakage";
- G. For damages for the sake of example and in sufficient amount to deter and punish Defendants for their conduct;
- H. For disgorgement and restitution plus interest due thereon at the legal rate and/or as established by the State of Mississippi;
- I. For payment of all monies being held by Defendants as constructive trustee for the State of Mississippi;
- J. For prejudgment and post judgment interest to the extent allowed by law;
- K. For penalties as allowed by law;
- L. For costs of this Action;
- M. For reasonable and necessary attorney's fees incurred herein; and
- N. For such other and further relief as this Court may deem appropriate.

Respectfully submitted, this the ^{21st}~~7th~~ day of December 2011.

**JIM HOOD, ATTORNEY GENERAL
STATE OF MISSISSIPPI**

BY:



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