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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re TRANSIENT OCCUPANCY TAX CASES	B230457 (Los Angeles County Super. Ct. No. JCCP 4472)

APPEAL from a judgment of the Superior Court of Los Angeles County. Carolyn B. Kuhl, Judge. Affirmed.

Cristina L. Talley, City Attorney, and Moses W. Johnson, Assistant City Attorney; Kiesel Boucher Larson, Paul R. Kiesel, William L. Larson, and Shehnaz M. Bhujwala; Baron & Budd, Laura J. Baughman, Thomas M. Sims, and Kevin McHargue; McKool Smith, Steven D. Wolens and Gary Cruciani for Defendants and Appellants City of Anaheim et al.

Skadden, Arps, Slate, Meagher & Flom, Darrel J. Hieber, Stacy R. Horth-Neubert, and Daniel M. Rygorsky for Plaintiffs and Respondents Priceline.com Incorporated and Travelweb LLC.

Jones Day and Brian D. Hershman for Plaintiffs and Respondents Expedia, Inc., Hotwire, Inc., Travelnow.com, Hotels.com, L.P., and Hotels.com GP, LLC.

Kelly Hart & Hallman, Brian S. Stanger and Chad Arnette for Plaintiffs and Respondents Travelocity.com, L.P. and Site59.com, LLC.

McDermott Will & Emery and Jeffrey A. Rossman for Defendants and Respondents Orbitz, LLC, Cheaptickets.com, and Lodging.com.

In October 2007, the City of Anaheim (City) initiated audits and issued transient occupancy tax assessments (TOT) against respondents, who are online travel service companies (OTCs).[1] The OTCs filed administrative appeals, and the administrative hearing officer concluded that the OTCs were liable for the TOT. The OTCs filed a petition for writ of mandate, which was granted. The City appeals from the decision of the superior court granting the writ of mandate filed by the OTCs and ordering the administrative hearing officer to vacate his ruling, issue a new ruling that the OTCs are not liable for the City's TOT, and set aside the City's assessments.

We find the OTCs are not liable for the TOT under the plain language of the City's TOT ordinance, therefore we affirm the decision of the superior court in full.

FACTS

The City's TOT Ordinance

The City's TOT ordinance imposes a tax of "fifteen percent of the rent" on transients "[f]or the privilege of occupancy of space in any hotel." (Anaheim Mun. Code, § 2.12.010.010).[2]

"Transient" is defined as "any person who exercises occupancy, or is entitled to occupancy, of any room . . . in any hotel." (§ 2.12.005.100.)[3]

"Rent" is defined as "the consideration charged by an operator for accommodations, including . . . (1) unrefunded advance rental deposits or (2) separate charges levied for items or services which are part of accommodations including, but not

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[1] The OTCs are: Priceline.com Incorporated, Travelweb LLC, Expedia, Inc., Hotwire, Inc., Travelnow.com, Hotels.com, L.P., Hotels.com GP, LLC, Travelocity.com, L.P., Site59.com, LLC, Orbitz, LLC, Trip Network, Inc. (doing business as Cheaptickets.com), and Internetwork Publishing Corp. (doing business as Lodging.com).

[2] All further section references are to the Anaheim Municipal Code, unless otherwise noted.

[3] Throughout this opinion, the term transient is synonymous with the terms "consumer" and "customer."

limited to, furniture, fixtures, appliances, linens, towels, non-coin-operated safes, and maid service." (§2.12.005.080.)

"Operator" is defined as "any person, corporation, entity, or partnership which is the proprietor of the hotel, whether in the capacity of owner, lessee, sublessee, mortgagee in possession, debtor in possession, licensee or any other capacity." In addition, "[w]here the operator performs its functions through a managing agent of any type or character other than as an employee, the managing agent shall also be deemed an operator and shall have the same duties and liabilities as its principal." (§2.12.005.050.)

OTCs

OTCs are companies that publish comparative information about airlines, hotels and rental car companies on their websites. These companies allow consumers to book reservations with these different travel providers. OTCs do not possess or operate any airlines, hotels, or rental car companies.

The OTCs use what the parties refer to as a "merchant model" when they facilitate hotel reservations for consumers. Under the merchant model, the OTCs first contract with hotels within the City for rooms at negotiated, discounted room rates (wholesale price). The OTCs then mark up the wholesale price to derive the retail price at which they rent hotel rooms to consumers. When a consumer books the room online, he or she is quoted the retail price for the room plus an amount for taxes and fees. The consumer is presented with these line items: the room price, taxes and fees, and the combined total price. Once the consumer pays for a room through an OTC website, the sale of the room is complete. The OTC is the merchant of record. The OTCs establish the room rate, charge the consumer's credit card, and establish cancellation policies.

When a consumer uses an OTC online service to make a reservation, he or she is charged an amount to cover the room rental that will be paid to the hotel, as well as an amount to cover the estimated TOT on that amount. The customer is also charged an amount the OTC retains for providing its online facilitation services. Upon arrival at the hotel, the transient gets the room key and makes arrangements to pay for incidentals directly to the hotel.

The contract between the OTC and the hotel permits the OTC to sell to the consumer the right to occupy a room for a wholesale price that is agreed upon between the hotel and the OTC. However, the rate paid by the consumer is the wholesale rate plus a markup. After it sells the consumer the right to occupy the room, the OTC retains its fee and pays the hotel the wholesale rate and TOT based on the wholesale rate. The hotel then remits the tax to the City. The transient is not informed of the wholesale room rate.

PROCEDURAL HISTORY

Audit proceedings and administrative hearing

In October 2007, the City initiated audit proceedings against the OTCs. On May 23, 2008, the City issued estimated assessments against the OTCs covering an eight-year audit period. Pursuant to section 2.12.060, the OTCs appealed the assessments by way of an application for an administrative hearing filed in June 2008. The administrative hearing took place over eight days between August and December 2008.

On January 28, 2009, the hearing officer issued a decision (administrative decision) finding that the OTCs' room markup and service fees were subject to TOT. Specifically, the hearing officer found that "[t]he liability determination of OTC responsibility for transient occupancy taxes contemplates service fees along with wholesale price . . . and room margin as the total amount the transient pays in rent for the privilege of occupancy." The hearing officer further concluded that OTCs are "operators" pursuant to section 2.12.005, because they "provide key functions and exercise substantial control concerning the provision of these functions." The parties stipulated that the amount of unpaid TOT related to the room markup and service fees, plus interest and penalties, was more than $21 million.

Writ proceedings

The OTCs petitioned for writ of administrative mandamus in the Orange County Superior Court, and subsequently petitioned to have the Orange County proceedings included in the Transient Occupancy Tax Cases, Judicial Council Coordination proceeding No. 4472, pending in Los Angeles Superior Court. The Los Angeles County Superior Court granted the OTCs' request to have the Orange County writ challenges

included in the coordinated proceedings. For the writ proceedings, the OTCs did not challenge the administrative hearing officer's findings of fact, and the trial court accepted the parties' position that "there essentially is no dispute as to the facts concerning the OTCs' mode of doing business."

After extensive briefing and two days of argument, on February 1, 2010, the trial court granted the OTC's motion for judgment granting writ of mandate. The court concluded that, properly interpreted, the TOT ordinance does not impose a tax on the retail price of the rooms offered by the OTCs. The trial court began by recognizing that the TOT ordinance "is a privilege tax -- it is a tax based on the privilege of occupying a hotel room in the City of Anaheim for less than 30 days." Further, the trial court noted, the definition of the tax "focuses on the locus of commercial activity taking place in the City of Anaheim." The court concluded that the "taxable event" is the "non-permanent occupancy of a physical living space."

After considering the purpose and scope of the tax, the trial court turned to the precise language imposing the tax. The measure of tax is the "rent," which is defined as "'the consideration charged by an operator for accommodations.'" Because "rent" is defined in terms of the consideration charged by an operator, the court noted that the definition of the term "operator" was significant. In contrast with the administrative hearing officer, the trial court determined that OTCs are not operators under the definition provided in the ordinance.

The court noted that the definitional section of the ordinance uses the terms "operator" and "proprietor" as synonyms: "'"[o]perator" means any person, corporation, entity, or partnership which is the proprietor of the hotel . . . .'" The court looked up the common definitions of the terms "operator" and "proprietor" and found that both mean "a person or entity that controls and runs a business, in this case, a hotel." The court concluded that OTCs do not "control and run hotels," therefore they are not "operators" or "proprietors" under the plain meaning of the ordinance.

Addressing the City's argument that OTCs could be considered "managing agents" of hotels, the trial court applied the accepted meaning of the term "managing

agent" as it existed in California law when the ordinance was enacted in 1992. Citing *Egan v. Mut. of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 822-823, and *Hobbs v. Bateman Eichler, Hill Richards, Inc.* (1985) 164 Cal.App.3d 174, 193, the court stated that the critical inquiry in determining whether an employee or agent is a managing agent is "'the degree of discretion [the agent] possesses in making decisions that will ultimately determine corporate policy.'" The trial court concluded that the facts found by the administrative hearing officer did not support a finding that the OTCs exercised discretion in making decisions that would ultimately determine the hotels' corporate policies. The trial court noted that "[t]he OTCs have no discretion to determine the price at which the hotels are willing to sell their product and therefore no control of the hotels' corporate pricing policies." In addition, as the administrative hearing officer noted, the hotels determine their own policies with respect to cancellation of a reservation, and the OTCs usually incorporate this policy into its contract with the transient.

Finally, the trial court addressed the constitutional limits on a California city's ability to increase its tax base: "Creation of a larger tax rate or a larger tax base requires voter approval pursuant to Proposition 218 and its implementing legislation. . . . Judicial interpretation may not be used as a means to avoid these restrictions."

The trial court issued a writ of mandate ordering the hearing officer to vacate his ruling in favor of the City, issue a new ruling that the OTCs are not liable for TOT, and set aside the City's assessments.

On February 11, 2010, the City filed a motion for reconsideration of the trial court's order granting the OTCs' writs of administrative mandamus. The trial court denied the motion. First the trial court noted that the motion was improper because the arguments raised therein could and should have been raised in the City's writ motion briefing. The trial court also rejected the City's new legal arguments, finding that they "do not alter the decision this court reached in granting the OTCs' Motion for Judgment Granting the Writ of Mandate."

The trial court allowed the City to file an amended cross-complaint in March 2010, asserting common law and statutory claims. The first amended cross-complaint

contained causes of action for: (1) preliminary and permanent injunction; (2) conversion; (3) violation of Civil Code section 2223; (4) violation of Civil Code section 2224; (5) imposition of a constructive trust; (6) breach of fiduciary duty; (7) fraudulent concealment; (8) money had and received; (9) unjust enrichment; (10) violation of City of Anaheim Ordinance 2.12.020.050; and (11) declaratory relief. On August 30, 2010, the trial court sustained the OTCs' demurrer, dismissing the amended cross-complaint with prejudice. The City's tagalong claims failed because all were largely premised on the OTCs owing TOT on the amounts they charge and retain.

Final judgment in the matter was entered on December 16, 2010. On January 24, 2011, the City filed its notice of appeal.

DISCUSSION

I. Standard of review

The parties agree that the facts of this case are essentially undisputed. Therefore, we presume that the administrative hearing officer's factual findings are correct. (*Lee v. Board of Civil Service Comrs.* (1990) 221 Cal.App.3d 103, 108.) The construction of the TOT ordinance is a pure issue of law which we review de novo. (*People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432.)

II. Rules governing statutory construction

The canons of statutory construction are well settled. The fundamental rule of statutory construction is that the court should ascertain the intent of the drafters so as to effectuate the purpose of the law. (*Select Base Materials v. Board of Equalization* (1959) 51 Cal.2d 640, 645 (*Select Base*).)

In determining the intent of the enacting body, we first examine the words of the statute itself. (*California Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 698 (*California Teachers*).) If the language of the statute is clear and unambiguous, there is no need for statutory construction. (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.) However, "the 'plain meaning' rule does not prohibit a court from determining whether the literal meaning of a statute comports with its purpose." (*Ibid.*) "If . . . the terms of a statute provide no definitive answer, then courts may resort to

extrinsic sources, including the ostensible objects to be achieved and the legislative history. [Citation.]" (*People v. Coronado* (1995) 12 Cal.4th 145, 151.) Every statute should be construed "'with reference to the whole system of law of which it is a part so that all may be harmonized and have effect.' [Citation.]" (*Select Base, supra*, 51 Cal.2d at p. 645.) "'We must select the construction that comports most closely with the apparent intent of the [drafters], with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences.' [Citation.]" (*Coronado, supra,* at p. 151.) The purpose of the statute "will not be sacrificed to a literal construction" of any part of the statute. (*Select Base*, at p. 645.)

In interpreting tax statutes, we must find an express intent to impose a tax. The Supreme Court has declared: "In every case involving 'the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government, and in favor of the citizen.' [Citations.]" (*Pioneer Express Co. v. Riley* (1930) 208 Cal. 677, 687.)

In sum, a taxing authority must be held to the express terms of a tax statute. (*Agnew v. State Board of Equalization* (1999) 21 Cal.4th 310, 327.)

III. The City's TOT ordinance

Our first task is to examine the words of the ordinance. (*California Teachers, supra*, 28 Cal.3d at p. 698.) The ordinance provides: "For the privilege of occupancy of space in any hotel, each transient is subject to and shall pay a tax in the amount of fifteen percent of the rent." (§ 2.12.010.010) As set forth below, we find that the words of the statute are clear and unambiguous, and do not reveal an intent to tax service fees and markups charged by the OTCs.

A. The definition of "rent" does not include service fees charged by an OTC

The City focuses its argument on the term "rent," which is defined in the ordinance as "the consideration charged by an operator for accommodations, including

without limitation any . . . separate charges levied for items or services which are part of such accommodations including, but not limited to, furniture, fixtures, appliances, linens, towels, non-coin-operated safes, and maid service." (§2.12.005.080.)

The City argues that the term "rent," as defined by the ordinance, must include the total amount of consideration paid for accommodations -- including the OTCs' profit, room markup and service fees. The City claims that whether the OTCs are "operators" makes no difference to the tax base, because in either event, the OTCs' profits must be considered part of the rent. The City points out that the definition of rent includes "separate charges levied for items or services," and expressly disallows deductions from rent for related services and expenses, including commissions. (§2.12.020.050.)[4]

Further, the City argues, the term "accommodations" is similarly broadly construed to include "'"whatever supplies a want or affords ease, refreshment, or convenience . . . ."' [Citation.]" (*Batt v. City and County of San Francisco* (2010) 184 Cal.App.4th 163, 172.) In *Batt*, the City points out, the provision of parking spaces was part of the "accommodation," even if physically separate from the hotel. Thus, the City argues, the service that the OTCs provide may be considered part of the accommodations.

The City's primary emphasis on the definition of "rent" largely ignores the ordinance's express direction that "rent" only includes "consideration *charged by an operator*." (§ 2.12.005.080, italics added.) The ordinance defines "operator" as "any person, corporation, entity, or partnership which is the proprietor of the hotel . . . ." (§ 2.12.005.050.) The term "proprietor" is not defined in the ordinance itself, therefore we may look to the dictionary definition of that term to discern its ordinary meaning. (*Wasatch Property Management v. Degrate* (2005) 35 Cal.4th 1111, 1121-1122.) The word "proprietor" is defined in the Oxford English Dictionary as "[a] person who owns something, or who has a (usually exclusive) right or title to its use or disposal; an owner,

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[4] Section 2.12.020.050 states: "Nothing contained in this chapter shall be deemed to authorize as a credit against tax any amount paid by the operator to any tour promoter, travel agent, or third party other than the transient. Travel agent commissions are an expense of the operator and may not be deducted from the rent."

esp. of land, or (in later use) of a business." (Oxford English Dict. (3d ed. 2007) <http://www.oed.com/view/Entry/152839?redirectedFrom=proprietor#eid>.) Thus, the term "operator" is defined to mean a person or entity who owns, or has a right or title, to land or a business.

The plain meaning of the term "proprietor" as someone with ownership or possession of a hotel is substantiated by the ordinance's further elaboration on the scope of that term. The ordinance specifies that the "operator" is the "proprietor" of the hotel, "whether in the capacity of owner, lessee, sublessee, mortgagee in possession, debtor in possession, licensee or any other capacity." (§ 2.12.005.050.) These examples of the different possible legal positions which the proprietor may occupy all require either ownership or a right of physical possession of the hotel.[5]

Under the plain meaning of the ordinance, the OTCs cannot be considered to be operators of the hotels for which they provide room reservations. The administrative hearing officer made no findings suggesting that OTCs own, possess, lease, sublease, or otherwise act as the proprietor of any hotels in the City.[6] Therefore the service fees and markups that they charge to transients are not "charged by an operator." Because the OTCs' service fees cannot be considered "consideration charged by an operator for accommodations" (§ 2.12.005.080), such service fees are not within the scope of the ordinance.

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5 We reject the City's suggestion that the words "or any other capacity" should be broadly construed to encompass OTCs. When a statute uses a list of items, "'"'a court should determine the meaning of each by reference to the others, giving preference to an interpretation that uniformly treats items similar in nature and scope.'"' [Citations.]" (*In re Corrine W.* (2009) 45 Cal.4th 522, 531.) Thus, we interpret the phrase "or any other capacity," as used in section 2.12.005.050, to mean a capacity in which a person or entity might act as the proprietor of a hotel.

6 In fact, the administrative hearing officer found that OTCs are mere "collection agents for rent."

B. OTCs do not assume the role of operator

The City attempts to fit the OTCs within the definition of "operator." They argue that the OTCs *function* as operators under the merchant model. The City points out that the definition of the term "operator" includes the following language: "Where the operator performs its *functions* through a managing agent of any type or character other than as an employee, the managing agent shall also be deemed an operator and shall have the same duties and liabilities as its principal." (§ 2.12.005.050, italics added.)

The City argues that the ordinance thus takes a "functional approach" to the definition of the term operator. Further, the City argues, the ordinance points out three functions of the operator, all of which the OTCs perform. First, the operator is the one who charges the transient for the room accommodations. (§ 2.12.005.080 ["'Rent' means the consideration charged by an operator for accommodations"].) Second, the operator is the one who collects the TOT from the transient. (§ 2.12.020.010 ["Each operator shall collect the tax to the same extent and at the same time as rent is collected from every transient"].) And third, the operator is the one who provides a transaction receipt to the transient. (§ 2.12.020.010 ["[E]ach transient shall be tendered a receipt for payment from the operator with rent and tax separately stated thereon"].) The City reasons that because the OTCs perform each of these three operator functions, it stands to reason that the OTCs are entities that are intended to be encompassed by the definition of operator.[7]

The City's reasoning is flawed. First of all, the ordinance does not purport to set forth a complete list of the functions of a hotel operator. If the functions of the hotel operator were limited to the three actions listed above, no hotel could function. While the

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[7] In support of this argument, the city relies heavily on an out-of-state case, *City of Goodlettsville v. Priceline.com* (M.D.Tenn. 2009) 605 F.Supp.2d 982, 985.) The ruling in that case was on a motion to dismiss, and the court accepted the allegations as true. The Middle District of Tennessee has now granted summary judgment in favor of all the OTCs. (*City of Goodlettsville v. Priceline.com, Inc.* (M.D.Tenn., Feb. 21, 2011, No. 3:08-cv-00561) 2012 U.S. Dist. LEXIS 21195.) The Middle District of Tennessee ruled that OTCs were not liable for tax under a similar ordinance that imposed a tax on consideration charged by the operator, because OTCs are not hotel operators. (*Id.* at * 43, 45-46.)

ordinance does name certain functions that a hotel operator normally carries out, it does not suggest that one who carries out such actions must be considered a hotel operator. As the trial court correctly noted: "Principles of formal logic demonstrate that when the statement 'If A then B' is a true statement, it is incorrect to conclude that the converse, 'If B then A' must be true. Thus, 'If an entity is a hotel operator, then it must collect transient occupancy tax,' is a true statement; but it is a logical fallacy to conclude that the converse, 'If an entity collects transient occupancy tax, then it must be a hotel operator,' therefore is necessarily true."

Furthermore, the ordinance requires that the operator "file a return with the License Collector on forms provided by the License Collector stating the total rents charged and the amount of tax collected during the immediately preceding calendar month." The operator is also required to remit the full amount of the tax to the License Collector. (§2.12.030.010.) The City does not contend that the OTCs carry out these express functions of the operator. The definition of the term operator does not suggest that an entity that performs *some of* the functions of an operator should be considered to be the operator.

The City cites two cases which, it argues, supports the idea that a functional approach to statutory interpretation is appropriate. *Associated Beverage Co. v. Board of Equalization* (1990) 224 Cal.App.3d 192 (*Associated Beverage*), involved the interpretation of sales tax. The court analyzed the plaintiff's argument that it was not a "'dealer[], distributor[], supervisor[], or employer[]'" of certain of its vending machine customers. (*Id.* at p. 207.) The court began by looking up the dictionary definitions of the terms "distributor" and "dealer." (*Ibid.*) The court focused on the plain meaning of those terms in concluding: "Seven-Up usually acts as a dealer or distributor itself and most of those to whom it sells in the first instance act, in turn, as 'salesmen' in retailing the products to the ultimate consumer. The common dictionary meanings of the words 'dealer' and 'distributor' recognize this manner of doing business." (*Id*. at p. 208.)

Thus, contrary to the City's argument, *Associated Beverage* supports the use of the "usual, ordinary range of meaning" given to words in a statute. (*Associated Beverage*, *supra*, 224 Cal.App.3d at p. 207.)

In *Bank of America Nat'l Trust & Sav. Assoc. v. State Board of Equalization* (1962) 209 Cal.App.2d 780, Bank of America allowed its customers to purchase checks manufactured by a non-California company called DeLuxe. Customers were able to order the checks through the bank, and the bank charged its customers for the cost of the checks plus an additional fee. (*Id.* at pp. 786-787.) The bank protested the imposition of sales and use tax, arguing, among other things, that it was not a retailer. (*Id.* at p. 790.) The court set forth the definition of "retailer," as a "'person engaged in the business of making sales.'" (*Id*. at p. 794.) It then discussed the meaning of the word "sale," and found that the bank's activities fit under this definition because "there was a sale from DeLuxe to the Bank and a resale from the Bank to its depositor." (*Id.* at p. 795.) After discussing whether the Bank was sufficiently "engaged in the business of" making such sales, the court concluded that "the Bank sold checks for the use of its customers in sufficient quantities to make it a person engaged in the business of selling such checks." (*Id.* at p. 797.) Throughout its analysis, the court remained focused on the words of the statute, concluding that "the Bank was a 'retailer' as . . . contemplated" by the statute. (*Ibid.*) Here, despite the City's arguments to the contrary, we cannot conclude that the OTCs are operators as contemplated by the TOT ordinance.

The plain language of the ordinance reveals that the tax is meant to be imposed on the consideration charged by an operator, meaning a proprietor, or the operator's managing agent. The OTCs are not operators of hotels, and the City's arguments regarding a functional approach do not convince us otherwise. We next address the City's arguments that the OTCs should be considered managing agents of the hotel operators.

C. OTCs are not "managing agents" of the hotels

The City argues that the trial court erred in finding that the drafters of the TOT ordinance intended to restrict the term "managing agent" to its court-interpreted meaning under Civil Code section 3294. The trial court stated:

> "In 1992 when the current Anaheim transient occupancy tax ordinance was enacted, the term 'managing agent' had an accepted meaning under California law. The California legislature had used the term 'managing agent' to define the type of agency relationship that was sufficient for attributing the consequences of an agent's wrongful conduct to a corporate employer for purposes of imposing punitive damages on the employer. (Cal. Civ. Code § 3294.) The California courts had explained that the 'critical inquiry' in determining whether an employee or agent is managerial is 'the degree of discretion [the agent] possesses in making decisions that will ultimately determine corporate policy.' (*Egan v. Mutual of Omaha Ins. Co.*[, *supra*,] 24 Cal.3d [at pp.] 822-823; *accord Hobbs v. Bateman Eichler, Hill Richards*[, *Inc., supra*,] 164 Cal.App.3d [at p.] 193.)"

The City points out that the ordinance does not incorporate the terms of Civil Code section 3294. Instead, the ordinance refers to managing agents "of any type or character" (§ 2.12.005.050), indicating that different types of managing agents may fall within the scope of the provision. Further, the City argues, the term "managing agent" did not receive a settled judicial interpretation until 1999. (See *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 566 (*White*).)

The City points to two older cases, arguing that they use the term managing agent to relate to any agent that exercises discretionary authority. The first is *Charles Erlich & Co. v. J. Ellis Slater Co.* (1920) 183 Cal. 709 (*Erlich*), which discussed whether an individual, H. J. Martin, could be considered a "managing or business agent" of the corporate defendant such that service of process upon Martin constituted service of the corporation. (*Id.* at p. 711.) In concluding that Martin was in fact a managing agent of the corporation, the court noted: "H. J. Martin[] was engaged in purchasing fruit in California for shipment to Chicago, Martin negotiating and making contracts for such purchases with the growers in the southern part of the state, the fruit to be accepted by him f.o.b. California points. He examined the fruit so purchased, and saw to it that it was

packed in accordance with the instructions of the defendant; he arranged with the railroad companies for its shipments; he fixed the wages of employees here; and for the purchase price of fruit, or any other indebtedness incurred here by him for the defendant, he drew sight drafts on the company signed with its name 'per' himself." (*Id.* at pp. 712-713.)

While Martin received some direction from the company, "his duties required the exercise of judgment and discretion." (*Erlich, supra*, 183 Cal. at p. 713.) The OTCs have far less discretion in relation to the hotels. The OTCs do not fix the wages of any of the hotel employees, nor do they draw on the hotels' credit for their own indebtedness. Further, as the trial court pointed out, the OTCs ability to re-price hotel rooms to sell to the public does not determine the hotels' policies with respect to pricing. "The hotels themselves determine how much revenue they will receive from the sale of hotel rooms, including hotel rooms marketed by the OTCs." The OTCs therefore have no discretion to determine the price at which any hotel will sell its product. Unlike Martin, the OTCs do not act as managing agents.

The second case that the City relies upon is *Roehl v. Texas Co.* (1930) 107 Cal.App. 691 (*Roehl*). The defendant corporation brought a motion to quash service on the ground that the individual served, Lorden, was not a managing agent of the corporation. (*Id.* at p. 693.) The motion was denied, and the sole question before the Court of Appeal was whether "delivery of copies of the summons and complaint to Lorden amounted to a valid service upon the appellant corporation." (*Ibid.*) In confirming the trial court's decision that Lorden was a managing agent for the corporation, the court focused on Lorden's management of the San Diego operations of the company, noting that the San Diego establishment was "extensive," reaching "all of San Diego County," and that "so far as can be determined by the public, Lorden is its manager, in full charge within all that area, and that . . . he had been allowed by appellant to go on and make contracts for it, . . . with what, to outward appearance, was the plenary authority which he claimed to have; besides which, in appellant's behalf, he hires and pays appellant's local employees." (*Id.* at pp. 706-707.) Again, the position of the OTCs is distinguishable. OTCs do not have plenary authority to make contracts on behalf of

hotels; instead, the hotels determine the amount they will receive for each hotel room. Further, OTCs do not hire or pay any hotel employees. In sum, neither *Erlich* nor *Roehl* supports the City's position that the OTCs fit under the accepted meaning of the term managing agent in 1992.

The City further contends that the OTCs exercise a degree of discretion that qualifies them as managing agents under any definition. The City advocates a transactional approach to determining the agent's role. The City argues that an agent's discretion should be measured with respect to the transactions at issue, not the operation of the corporation as a whole.

In support of this argument, the City discusses *White*, *supra*, 21 Cal.4th 563. The City points out that the *White* court found that significant management and supervision is enough to qualify an individual as a managing agent, even where the individual manages only a specific portion of the company's entire business.

The individual agent discussed in *White*, Salla, had a role in the corporation that is not comparable to the OTCs' role vis-a-vis any hotel. As the City points out, Salla was a "zone manager" for Ultramar, managing eight stores and "at least sixty-five employees." (*White, supra*, 21 Cal.4th at p. 577.) The court concluded that "[t]he supervision of eight retail stores and sixty-five employees is a significant aspect of Ultramar's business." (*Ibid.*)

The City has not pointed to any evidence showing what portion of the hotel rooms in the City are booked through OTCs. Therefore we have no comparable evidence of what percentage of bookings constitutes a "significant aspect" of any hotel's business. Even if we had such data, OTCs do not supervise any hotels or any hotel employees. *White* does not direct a conclusion that the OTCs are managing agents.

Finally, the City cites *Textron Financial Corp. v. National Union Fire Ins. Co.* (2004) 118 Cal.App.4th 1061 (*Textron*). Textron sued an insurance company and TRM International, Inc. (TRM), a company hired by the insurance company to "'solicit, bind, write, and administer'" policies for the insurance company's commercial bus program, as well as "'exercise [its] independent judgment as to the time, place and manner of

soliciting insurance and servicing policyholders.'" (*Id.* at p. 1080.) One of the issues on appeal was whether TRM was a managing agent of the insurance company under Civil Code section 3294. The court quoted extensively from *White*, then concluded that TRM was the insurance company's managing agent. The court explained that TRM had "broad discretion over defendant's bus insurance program." (*Textron*, at p. 1080.) This discretion included issuing coverage, verifying coverage, canceling coverage, and advising the insurance company as to whether to deny a certain claim.

The City argues that the functions performed by the OTCs on behalf of the hotels are comparable to those performed by TRM for the insurance company. The OTCs have the power to solicit customers, bind hotels, and collect money. The City contends that the OTCs have near total autonomy in dealing with the transients prior to check-in. Again, we find the analogy flawed. First, issuing an insurance policy is more complex than making a hotel reservation. Presumably, there are a number of factors that must be weighed in determining whether to issue insurance to the particular customer -- factors that involve a great deal of discretion and judgment. Further, while TRM had the authority to cancel policies, the OTCs have no such authority. As the trial court noted, the hotels determine their own cancellation policies, which are incorporated into the contract between the OTC and the transient. In addition, the OTCs do not have unfettered authority to bind hotels. They may only sell the number of hotel rooms that the hotel makes available to them, and must honor the wholesale rate that the hotel decides upon. In sum, *Textron* does not suggest that any OTC should be considered managing agent of any hotel.

D. The City's arguments regarding the timing and means of collection do not change the result

The City attempts to show that the OTCs are avoiding paying TOT by restructuring the way that rent is collected from a transient. Below, we address the City's various arguments regarding the timing and means of collection of TOT.

The City explains that there are five models for the purchase of a hotel room rental, including the merchant model discussed in this case. The City describes the five basic models as follows:

1. The hotel direct transaction model: this is the traditional model in which the transient deals directly with the hotel. If the retail room rate were $100, then the transient would pay the hotel $100 plus an additional $15 in TOT. The transient has paid $115, the hotel keeps $100, and the City receives $15.

2. The traditional travel agency model: in a traditional travel agency model, the transient reserves a room through a traditional travel agent. The transient pays $100 for the hotel room plus $15 for TOT, directly to the hotel. The hotel then pays the travel agent a back-end commission of $20. The transient has paid $115, the hotel keeps $80, the travel agent receives a $20 commission, and the City receives $15.

3. The OTC agency model: here, the OTC acts as a travel agent. This model works exactly like a traditional travel agency model, with the transient paying $115 directly to the hotel, the hotel keeping $80, and paying the OTC a $20 commission. Again, the City receives $15.

4. OTC modified merchant model: the OTC modified merchant model is a model used by two major hotel chains. The transient contracts with the OTC and the OTC -- not the hotel -- serves as the merchant of record. The transient pays the OTC $115, which the OTC remits in full to the hotel. However, as with the traditional travel agency model, the hotel keeps $80, the OTC receives a $20 back-end commission, and the City gets $15.

5. The fifth model is the OTC merchant model, at issue in this lawsuit. Here, the OTC is the merchant of record. It collects the transient's entire payment at the time the transient's credit card is charged. However, rather than remitting the entire $115 to the hotel, the OTC deducts its profit prior to paying the hotel and prior to calculating the TOT. The OTC first deducts its $20, then calculates the TOT based on the $80 that the hotel will receive. Thus, the total TOT is $12 rather than $15. According to the City, the OTC then pockets the remaining $3 as an additional fee. Based on this example, the City

argues that the OTC merchant model results in significantly different tax results for the same retail transaction.

At the administrative hearing, Chris Soder, president of North American Travel for Priceline.com, Inc., testified regarding the various ways that OTCs do business. Mr. Soder's testimony suggested that the method of doing business between an OTC and a hotel is something that both entities agree upon prior to entering a contract. The City does not suggest that the merchant model structure is illegal on its face or that the hotels are deliberately assisting the OTCs to avoid paying taxes. Under the merchant model as explained in the five examples described above, the hotel receives a lower amount for the hotel room. There is no suggestion that the amount the hotel receives under the merchant model is anything less than what it agreed to charge as its wholesale room rate. Nor does the City argue that hotels are required to charge comparable prices for hotel rooms no matter what the structure of the transaction may be. Because the TOT is based on consideration charged and received by the hotel operator, in a transaction where the hotel charges and receives less rent, a lower total TOT is a rational result.

The City sets forth another example of why the interpretation advanced by the OTCs leads to what it describes as "absurd results." The City refers to this as the "extended stay" example. As explained by the administrative hearing officer:

> "If the transient books through an OTC and then decides to extend his stay at the hotel by booking a second night directly from the hotel, the following is the result: Night one -- $80 net rate, $20 markup, $12 occupancy tax even though the transient paid $100 for the room. Night two -- $100 room rate, $15.00 transient occupancy tax. The OTCs' contention that they are not operators results in significantly different tax outcomes for the same $100 retail transaction for the same night in the same room and hotel."

Again, this hypothetical does not convince us that the plain language interpretation of the statute is absurd. As explained above, the net rate received by the hotel is different on the two nights. The first night, through its agreed-upon price negotiated with the

OTC, the hotel only receives $80. For the second night, the hotel charges and receives $100. Therefore, it makes sense that the TOT differs from the first night to the second.

The City further argues that the total amount of consideration charged *must* include the value of the OTCs' services, since the transient cannot purchase the right to occupy the room without paying the OTCs' service fees in a single, total payment. The City argues that the amount of consideration does not change merely because it is charged by the OTC and not the hotel. However, the TOT ordinance is drafted with a focus on the amount of consideration charged by the operator -- not the total amount of consideration paid out by the transient. If the transient pays money in addition to what is charged by the hotel, that additional amount it is not taxed under the ordinance.

In support of this argument, the City cites two cases, both of which we find distinguishable from the situation presented here. In *Groves v. Los Angeles* (1953) 40 Cal.2d 751, the Supreme Court discussed a tax on the gross receipts of every person in the business of furnishing bail bonds. The language of the statute mandated that every person in the business of """soliciting, negotiating, effecting, issuing, delivering, or furnishing bail bonds . . . shall pay for each calendar year . . . a license tax""" based on that person's gross receipts. (*Id.* at p. 753.) The question arose as to whether the gross amount received by an agent, who passed a portion back to the insurance company, was taxable. The court concluded that "the full sum received by [the agent] from the one desiring the bail bond is the gross premium for the bond." (*Id.* at p. 760.) However, the case is distinguishable because the statute at issue did not expressly limit the tax to the amount charged by the insurance company. The express limiting language in the City's TOT ordinance leads to a different result here.

In *Hospital Medical Collections, Inc. v. City of Los Angeles* (1976) 65 Cal.App.3d 46, corporate collection agencies brought an action against the City of Los Angeles to recover business taxes paid under protest. The collection agencies had a practice of deducting commissions retained by out-of-state independent collection agencies who collected certain debts on assignment in the area where the debtor was located. The court first discussed the meaning of the term "gross receipts" as used in the statute at issue.

The statute included language suggesting an intention "to include as 'gross receipts' the total amount charged for a particular business transaction, without limitation in the form of requiring actual collection by the taxpayer." (*Id.* at p. 51.) The court concluded that the essential inquiry was whether there was a "'taxable local event.'" (*Ibid.*) The court held that, because the contract of assignment between the local agency and the out-of-city agency occurred in the City of Los Angeles, and the ultimate conclusion of the collection transaction also occurred in the City of Los Angeles, the entire transaction was a local taxable event subject to the municipal business tax. (*Id.* at pp. 54-55.)

In both *Groves* and *Hospital Medical Collections*, the initial inquiry into the language of the statute led to a conclusion that the taxes at issue were not limited to the amount charged by the taxpaying entity. The ordinance at issue here is different, because it specifies that the taxable consideration is limited to that "charged by an operator." (§ 2.12.005.080.)

In sum, none of the City's arguments regarding the timing and means of collection can change the plain meaning of the statute. The OTCs' markups and service fees cannot be considered "consideration charged by an operator for accommodations" (§ 2.12.005.080). Therefore these fees are not within the scope of the ordinance.

E. Application of the step transaction doctrine does not change the express meaning of the statute

The City urges this court to apply an analytical tool known as the "step transaction doctrine." (*Shuwa Investments Corp. v. County of Los Angeles* (1991) 1 Cal.App.4th 1635, 1648 (*Shuwa*).)[8] For the purposes of this argument, the City breaks down the merchant model into two transactions: the OTC/transient transaction, and the hotel/OTC transaction. The City urges us to look at these two "purportedly separate transactions" as

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[8] The trial court denied the City's motion for reconsideration addressing the step transaction doctrine. However, the City argues that the trial court's denial does not affect this court's consideration of the doctrine because we are reviewing undisputed facts de novo. We agree that where a new claim on appeal raises a purely legal question, we have discretion to consider it. (*Trackman v. Kenney* (2010) 187 Cal.App.4th 175, 182.) Accordingly, we elect to briefly address this new, purely legal theory.

a single transaction for the purposes of application of the TOT ordinance. (*Id.* at pp. 1650-1651.) As the *Shuwa* court explained: "In a case such as this, where the propriety and necessity for multiphase transactions is challenged, the 'step transaction doctrine' has been applied to determine whether the transaction should be treated as a whole or whether each step of the transaction may stand alone. The 'step transaction doctrine' is a corollary of the general tax principle the incidence of taxation depends upon the substance of a transaction rather than its form. [Citation.]" (*Id.* at p. 1648.)

In *Shuwa*, the court addressed a transfer of ownership of the ARCO Plaza in Los Angeles. Shuwa sought to acquire 100 percent ownership of the building, while limiting the legal "change in ownership" for property tax purposes to 50 percent. (*Shuwa, supra*, 1 Cal.App.4th at pp. 1640-1641.) The parties structured a three-step transaction to accomplish this goal. (*Id.* at pp. 1641-1643.) Applying the step transaction doctrine, the court found that "it appears the three steps were really component parts of a single transaction. The ultimate result intended from the outset was for Shuwa to acquire *all* of the ARCO Plaza from the present owner, a partnership." (*Id.* at p. 1651.) The court concluded that "the transactions in the case at bar should be stepped together to reveal what actually occurred -- the acquisition by Shuwa of 100 percent of the ARCO Plaza. (*Id.* at p. 1650.)

The *Shuwa* court quoted a leading United States Supreme Court case discussing this doctrine, *Gregory v. Helvering* (1935) 293 U.S. 465, which explained that the step transaction doctrine should be applied where "the transaction upon its face lies outside the plain intent of the statute." (*Id.* at p. 470.)

Unlike the parties in *Shuwa*, the hotels and OTCs have not structured the merchant model transactions for the purpose of avoiding tax liability. Nor do merchant model transactions lie "'outside the plain intent of the statute.'" (*Shuwa, supra*, 1 Cal.App.4th at p. 1650.) The ordinance reveals an intent to tax the amount of consideration charged by the hotel operator. The merchant model is not structured to avoid paying such TOT.

In sum, the merchant model does not consist of a series of sham transactions designed to avoid tax liability. There is no suggestion that any hotel or OTC participates

in the merchant model transactions as a means to avoid paying TOT to the City of Anaheim. Therefore, the step transaction doctrine is inapplicable.

IV. The City's common law and statutory claims against the OTCs

Following the proceedings on the OTCs' petition for writ of mandate, the trial court allowed the City to file an amended cross-complaint, asserting 11 causes of action against the OTCs. On August 30, 2010, the trial court sustained the OTCs' demurrer, dismissing the amended cross-complaint with prejudice. The City has appealed from this ruling. As set forth below, we find that these claims fail because all were premised on the OTCs owing TOT on the amounts they charge and retain.

A. Standard of review

"On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, the standard of review is well settled. The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. [Citations.] The court does not, however, assume the truth of contentions, deductions or conclusions of law. [Citation.] The judgment must be affirmed 'if any one of the several grounds of demurrer is well taken. [Citations.]' [Citation.] However, it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. [Citation.] And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment. [Citation.]" (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966-967.) The legal sufficiency of the complaint is reviewed de novo. (*Montclair Parkowners Assn. v. City of Montclair* (1999) 76 Cal.App.4th 784, 790 (*Montclair*).)

B. Violation of Civil Code sections 2223 and 2224

The City's cross-complaint contained causes of action for violation of Civil Code sections 2223 and 2224. Civil Code section 2223 provides that "[o]ne who wrongfully detains a thing is an involuntary trustee thereof, for the benefit of the owner." Civil Code section 2224 provides: "One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he or she has some

other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it."

In its third cause of action for violation of Civil Code section 2223, the City alleged that the OTCs retained for their own use and benefit the difference between the amounts sufficient to pay TOT on the retail price and fees as collected by them and the amount of the TOT remitted by them based on the wholesale price. The City further argued that "the OTCs in fact collect [TOT] on the full amounts paid by the transients, but only remit taxes on the lesser wholesale amounts. Thus, the OTCs are 'involuntary trustees' of the monies wrongfully detained and said monies are held for the benefit of the City." The City made similar arguments in its fourth cause of action for violation of Civil Code section 2224. Under both causes of action, the City sought "appropriate legal or equitable remedies to prevent the unjust enrichment of the OTCs by causing payment to the City of all amounts wrongfully maintained in the possession of the OTCs as alleged in this cause of action, with appropriate interest, penalties, costs and fees, as allowed by law."

The City's argument is premised on its theory that TOT is owed to the City on the full amount paid by the transient to the OTCs. As we have discussed, this theory is not supported by the plain language of the ordinance. While the City contends that the OTCs collect TOT on the full amount paid by the transient -- and is wrongfully detaining such taxes -- the City has provided no facts showing that it is entitled to this money. Under the statute, the City is only entitled to TOT on the consideration charged by an operator for accommodations. The City is not entitled to any other money detained by the OTCs.

The City has added an argument on appeal based on Civil Code section 2322.[9] Civil Code Section 2322 provides that an agent may not "[v]iolate a duty to which a

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[9] It does not appear that a cause of action based on violation of Civil Code section 2322 was set forth in the amended cross-complaint or addressed by the trial court. Nor has the City argued that it should be granted the right to amend its complaint to assert this new cause of action. However, we will consider this argument because "[w]hen a demurrer is sustained without leave to amend the [plaintiff] may advance on appeal a new

trustee is subject under Section 16002, 16004, 16005, or 16009 of the Probate Code." (Civ. Code, § 2322, subd. (c).) Probate Code section 16002 imposes a duty of loyalty, meaning that agents must exercise their authority in the interest of the principal. Under these statutes, the City argues, the OTCs had a duty to refrain from structuring transactions in order to exclude otherwise taxable rent. The City further argues that damages under Probate Code section 16002, which is incorporated into Civil Code section 2322, are based on "what would have occurred if the trustee had complied with the duty of loyalty (i.e., but for the breach of the duty of loyalty)." (*Uzyel v. Kadisha* (2010) 188 Cal.App.4th 866, 907.)

The City has failed to set forth facts alleging a violation of any duty on the part of the OTCs. The OTCs did not structure the transactions to exclude taxable rent. The uncontested evidence shows that they paid the hotels the full consideration charged by the hotel, plus TOT on that amount. No hotel has brought any cause of action suggesting that an OTC has violated any duty towards the hotel.

Nor have the OTCs violated any duty towards the City. The City argues that with respect to tax collection, the OTCs are agents of the hotels and subagents of the City. Therefore, the City argues, the OTCs have the same duties and obligations as the hotels themselves in calculating and collecting TOT. (See Civ. Code § 2351 [subagent "represents the principal in like manner with the original agent"].) Again, the City has failed to allege any violation of any duty. The OTCs have collected TOT based on the full amount of consideration charged by the hotel operators for accommodations. Nothing further is required under the City's TOT ordinance. The City's statutory causes of action fail to state claims upon which relief can be granted.

C. Money had and received/conversion

"'Conversion is the wrongful exercise of dominion over the property of another. The elements of a conversion claim are: (1) the plaintiff's ownership or right to possession of the property; (2) the defendant's conversion by a wrongful act or

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legal theory why the allegations of the petition state a cause of action. [Citation.]" (*20th Century Ins. Co. v. Quackenbush* (1998) 64 Cal.App.4th 135, 139, fn. 3.)

disposition of property rights; and (3) damages.' [Citation.]" (*Hernandez v. Lopez* (2009) 180 Cal.App.4th 932, 939-940.) In its second cause of action for conversion, the City alleged that it is the sole and rightful owner of the difference between the amounts sufficient to pay TOT on the retail price and fees as collected by the OTCs and the amount of the TOT remitted by the OTCs to the hotels based on the wholesale price. Again, this theory of common law liability is premised on the theory that the OTCs were required to collect TOT on the entire amount paid by the transient -- not the amount of consideration charged by the hotel operator for accommodations. The City has alleged no facts suggesting that it has any right to possession of any converted property that the OTCs wrongfully possess.

Similarly, in its eighth cause of action for money had and received, the City alleged that "[w]hen the OTCs collected [TOT] from transients based upon retail prices charged to transients for hotel rooms, but then remitted [TOT] based only upon wholesale prices paid to hotels, they received money from transients that was intended to benefit the City." In order to properly allege a cause of action for money had and received, the City must allege that the OTCs are indebted to the City in a certain sum for money had and received by the OTCs for the use of the City. (See *Gutierrez v. Girardi* (2011) 194 Cal.App.4th 925, 937.) The City has failed to allege any facts supporting such indebtedness on the part of the OTCs. The OTCs had no obligation to remit to the hotel or the City TOT based on the retail amount paid by the transient. They were only required to remit TOT based on the amount of consideration charged by the hotel operator. Having received this TOT, the City is not entitled to any further amount.

The City has failed to allege facts sufficient to support its causes of action based on conversion and money had and received.

D. Fraud/breach of fiduciary duty

In its sixth cause of action for breach of fiduciary duty, the City alleged that "[t]he OTCs expressly and implicitly assumed a fiduciary duty to hold all moneys collected from transients for [TOT] for the City." The City alleged no facts suggesting that the OTCs stood in a fiduciary relationship with the City. The lack of any such allegations is

fatal to the City's breach of fiduciary duty cause of action. (*Pierce v. Lyman* (1991) 1 Cal.App.4th 1093, 1101 ["In order to plead a cause of action for breach of fiduciary duty, there must be shown the existence of a fiduciary relationship, its breach, and damage proximately caused by that breach"].) Further, the City has failed to allege facts showing that the OTCs or any other entity breached any obligation to remit TOT to the City. The City admits that it has received from hotel operators all TOT on consideration charged by the hotel operator. The City is not entitled to TOT based on any other amounts collected from the transients.

Finally, the City argues that its seventh cause of action for fraudulent concealment should have survived. The City alleged that the OTCs "intentionally concealed and omitted the total amounts of money that they collected and continue to collect from transients for [TOT] purposes." The City further alleged that the OTCs "intentionally concealed and omitted" the fact that they "collected and continue to collect [TOT] based upon retail prices charged to transients, remitting [TOT] based upon wholesale prices paid to hotels, and failing to remit the difference." This cause of action fails for the same reasons explained above regarding the City's other causes of action. First, the City alleges no facts suggesting that the OTCs had an obligation to provide information to the City regarding the total amount of money they collected from transients. Second, to the extent the City alleges that it is owed any money above the TOT remitted on the wholesale price of the hotel room, that argument is legally incorrect under the plain language of the ordinance.

DISPOSITION

The judgment is affirmed. Respondents are awarded their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
BOREN

_____, J.
ASHMANN-GERST