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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

HOMEAWAY, INC., HOMEAWAY.COM, INC., Delaware corporations,

Plaintiffs,

vs.

CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation, JOHN RAHAIM, in his official capacity , DOES 1-10,

Defendants.

Case No. C14-04859 JCS

NOTICE OF MOTION AND MOTION TO DISMISS COMPLAINT UNDER RULES 12(b)(1) AND 12(b)(6); MEMORANDUM OF POINTS AND AUTHORITIES

Hearing Date: January 23, 2015
Time: 9:30 a.m.
Place: Ctrm. G, 15th Floor
Judge: Hon. Joseph C. Spero

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NOTICE AND MOTION

TO PLAINTIFFS AND THEIR COUNSEL OF RECORD: Please take notice that at 9:30 a.m. on January 23, 2015, or as soon thereafter as they may be heard, before the Hon. Joseph C. Spero, in Courtroom G, Fifteenth Floor, of the United States District Court for the Northern District of California, located at 450 Golden Gate Avenue, San Francisco, California 94102, Defendants CITY AND COUNTY OF SAN FRANCISCO and JOHN RAHAIM, in his official capacity as Director of City Planning, will and hereby do move to dismiss the complaint in this matter in its entirety under Fed. R. Civ. P. 12(b)(1) and 12(b)(6) on the grounds that the complaint fails to allege facts sufficient to state a claim for violation of the Commerce Clause of the United States Constitution, and that Plaintiffs lack standing.

The motion shall be based on this memorandum of points and authorities, the accompanying declaration of Jeremy M. Goldman, request for judicial notice and proposed order, the arguments of counsel at the hearing, if any, and any such further matters as the Court deems appropriate.

Dated: November 24, 2014

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By: /s/*Jeremy M. Goldman*
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STATEMENT OF ISSUES TO BE DECIDED

1. Plaintiffs contend that San Francisco's short-term residential rental ordinance ("Ordinance") violates the Commerce Clause on the ground that the Ordinance allegedly imposes a new obligation on Hosting Platforms to collect and remit the transient occupancy tax ("TOT") to the City.[1] Because Plaintiffs misread the Ordinance—in reality, it does not impose any new obligation with respect to the collection and remission of the TOT—does the complaint fail to state a claim upon which relief can be granted, and to establish Plaintiffs' standing, to the extent it is based on the alleged new obligation to collect and remit the TOT?

2. Even assuming that the Ordinance were to impose an obligation on Hosting Platforms to collect and remit the TOT on short-term residential transactions occurring in San Francisco, would such a requirement constitute discrimination against interstate commerce? Does the Commerce Clause protect a company's choice of a particular "business model" that allegedly renders it incapable of collecting a tax due on the transaction? Have Plaintiffs adequately alleged such a burden in any event where they allege that they collect their own revenue in certain transactions as a percentage of the booking amount?

3. Plaintiffs contend that the Ordinance violates the Commerce Clause on the additional ground that it limits short-term rentals to a primary residence that is occupied by a permanent resident for at least 275 days in the calendar year in which the unit is offered for rental. Plaintiffs, however, allege that they are an advertising platform, not that they own residential property in San Francisco that they wish to offer for short-term rental. Do Plaintiffs possess prudential standing to assert the rights of third parties who are not before the Court?

4. Assuming that Plaintiffs possess standing, do rules ensuring that residential units in San Francisco remain residential in use, in furtherance of the City's legitimate objectives of protecting the livability of residential neighborhoods, preserving the city's limited housing stock, and reducing

[1] The Ordinance is No. 218-4, File No. 140381, referred to in the complaint as Ordinance No. 140381. (*See* Compl. ¶ 1.) A copy of the Ordinance is attached as Exhibit A to the Declaration of Jeremy M. Goldman. "Hosting Platform" is defined as a "person or entity that provides a means through which an Owner may offer a Residential Unit for Tourist or Transient Use." Ordinance § 41A.4 Definitions.

1 negative effects on affordable housing, constitute discrimination against interstate commerce or
2 excessively burden interstate commerce?

3 **INTRODUCTION**

4 Plaintiffs HomeAway, Inc. and HomeAway.com, Inc. (collectively "Plaintiffs" or
5 "HomeAway") claim that the Ordinance, which will regulate short-term residential rentals in San
6 Francisco, violates the Commerce Clause of the United States Constitution, art. I, § 8, cl. 3 on two
7 separate grounds. ***First***, HomeAway asserts that the Ordinance imposes a new obligation on Hosting
8 Platforms to collect from renters, and to remit to the City, the TOT due on the rental transaction.
9 According to HomeAway, this purported requirement impermissibly discriminates against interstate
10 commerce (Claim 1), or excessively burdens interstate commerce (Claim 2), because HomeAway has
11 a "business model" that allegedly does not enable it to collect the TOT. ***Second***, HomeAway contends
12 that the Ordinance impermissibly discriminates against out-of-state property owners (Claim 1) or
13 excessively burdens interstate commerce (Claim 2) because it permits short-term rentals only of the
14 primary residence of a permanent resident who occupies the unit for at least 275 days of the calendar
15 year. The basis for dismissing each of these challenges is straightforward.

16 First—and perhaps Plaintiffs will welcome this news—HomeAway has misread the Ordinance.
17 The Ordinance does not impose any new obligation on Hosting Platforms to collect and remit the
18 TOT. With respect to such an obligation, the Ordinance provides that Hosting Platforms must comply
19 with the requirements of the Business and Tax Regulations Code. That means the law applicable to
20 the collection and remission of the TOT will continue as it is now: The applicable law is set forth in
21 provisions of the Business and Tax Regulations Code that have been in effect since well before any of
22 the events alleged in the complaint, and the Ordinance does not expand their reach. Because the
23 premise of HomeAway's claims is incorrect as a matter of law, both causes of action must be
24 dismissed to the extent they are based on it. As discussed below, the Commerce Clause does not
25 entitle corporations to a "business model" that avoids compliance with applicable tax laws in any
26 event, but HomeAway's challenge fails at the outset by misreading the Ordinance.

27 Second, because the Ordinance imposes no new obligation on HomeAway to collect and remit
28 the TOT, what remains of the complaint's two causes of action is an assertion of the rights of third

1 parties who are not before this Court. HomeAway brings this lawsuit as an alleged advertising
2 platform; it does not claim to own residential property in San Francisco that it wishes to offer for
3 short-term rental, but cannot because of the limits contained in the Ordinance. The prudential standing
4 doctrine prohibits a plaintiff from bringing suit to assert the rights of third parties, at least where the
5 plaintiff does not show that it has a close relationship to the third parties and that there is some
6 hindrance to their own ability to protect their rights—a factor that is completely lacking here. The
7 Commerce Clause does not, in any event, prohibit San Francisco from issuing regulations to prevent
8 the loss of its housing stock and the destruction of its residential neighborhoods, but under the doctrine
9 of constitutional avoidance, the preferred resolution is to dispose of Plaintiffs' claims on prudential
10 standing grounds.

11 **STATEMENT OF FACTS**

12 Historically, the rental of residential units for tourist or transient use—*i.e.*, for periods of less
13 than 30 days—has been prohibited in San Francisco. (Compl. ¶ 31.) The Ordinance that HomeAway
14 challenges begins by observing that "[t]he widespread conversion of residential housing to short-term
15 rentals, commonly referred to as hotelization, was prohibited by this Board because, when taken to
16 extremes, these conversions could result in the loss of housing for permanent residents." Ordinance §
17 1(c)(1). It further observes that new technology—such as Hosting Platforms operated by HomeAway
18 and its competitors—has contributed to allowing short-term rental activity to proliferate nonetheless.
19 *Id.* HomeAway's business, which provides "Listing Owners" a variety of websites on which to offer
20 their properties for short-term rental, has expanded with the increasing popularity of the short-term
21 rental market. (Compl. ¶¶ 22-25.) HomeAway states that most of its customers purchase a
22 "subscription" to advertise their properties on its websites, but any Listing Owner may instead choose
23 a "pay-per-booking" option in which HomeAway collects a percentage (up to 10%) of the value of a
24 confirmed booking for the listing. (Compl. ¶ 29.) According to HomeAway, the "market for online
25 travel and short-term rental services is highly competitive." (Compl. ¶ 5.)

26 When the Ordinance becomes operative on February 1, 2015, it will legalize some short-term
27 residential rental activity in San Francisco by means of an exception to the rule otherwise prohibiting
28 it. The Ordinance states that the goal of regulating the short-term rental market is to "ensure

compliance with all requirements of the Municipal Code . . . and accountability for neighborhood quality of life." (Compl. ¶ 53; Ordinance § 1(c)(1).) The exception it creates is available for a primary residence occupied by a permanent resident for at least 275 days out of the calendar year in which the unit is offered for short-term rental. (Compl. ¶¶ 47-48; Ordinance § 41A.5(g)(1); *see also* Ordinance § 41A.4 Definitions (providing that a person may have only one primary residence).) The purpose of these limits is to ensure that units rented on a short-term basis "remain truly residential in use." (Compl. ¶ 53; Ordinance § 1(c)(2).) The Ordinance incorporates findings by the San Francisco Planning Commission that its provisions will protect the livability of residential neighborhoods, preserve the city's housing stock, and reduce negative effects on affordable housing. (Compl. ¶¶ 52-53; *see* S.F. Planning Commission Resolution No. 19213 (Aug. 7, 2014) ("Resolution") at 3-6, Goldman Decl. Ex. B.)

The Ordinance also contains rules applicable to Hosting Platforms. For example, it requires Hosting Platforms to provide a notice with certain information "to any user listing a Residential Unit located within the City and County of San Francisco through the Hosting Platform's service." Ordinance § 41A(g)(4)(A). It also references existing obligations set forth in the Business and Tax Regulations Code. It states: "A Hosting Platform shall comply with the requirements of the Business and Tax Regulations Code by, among any other applicable requirements, collecting and remitting all required Transient Occupancy Taxes, and this provision shall not relieve a Hosting Platform of liability related to an occupant's, resident's, Business Entity's, or Owner's failure to comply with the requirements of the Business and Tax Regulations Code." Ordinance § 41A(g)(4)(B). HomeAway construes this provision to extend the existing obligation to collect and remit the TOT to ***all*** Hosting Platforms regardless of whether they would otherwise would be subject to it (Compl. ¶ 58), although as discussed below, that legal conclusion is incorrect. Based on its incorrect reading, HomeAway surmises that this provision was designed to favor Airbnb, a Hosting Platform based in San Francisco, because, according to HomeAway, Airbnb's "business model" more readily enables it to satisfy any obligation to collect and remit the TOT to the City. (Compl. ¶¶ 5, 64.) Because Airbnb is local and HomeAway is not, HomeAway discerns a protectionist motive for the new obligation HomeAway

believes the Ordinance imposes (Compl. ¶ 64), yet it also alleges that the hypothesized obligation equally burdens local business that do not use Airbnb's "business model." (Compl. ¶ 62.)

ARGUMENT

On a motion to dismiss, a court accepts the material facts alleged in the complaint, together with reasonable inferences to be drawn from those facts, as true. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). However, this tenet "is inapplicable to threadbare recitals of a cause of action's elements, supported by mere conclusory statements." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Likewise, a court does not "assume the truth of legal conclusions merely because they are cast in the form of factual allegations. Therefore, conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss." *Fayer v. Vaughn*, 649 F.3d 1061, 1064 (9th Cir. 2011) (internal quotation marks and citation omitted).[2]

The United States Constitution gives Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States...." U.S. Const., art. I, § 8, cl. 3. Under the dormant Commerce Clause doctrine, state or local laws may violate the Commerce Clause in areas where Congress has not exercised its regulatory authority if they unnecessarily discriminate against interstate commerce, or if they incidentally and excessively burden interstate commerce. Where the law is discriminatory, the government must show that "a legitimate state interest unrelated to economic protectionism is served by the [law] that could not be served as well by less discriminatory alternatives." *Pac. Nw. Venison Producers v. Smitch*, 20 F.3d 1008, 1012 (9th Cir. 1994). Where the law is not discriminatory and only incidentally burdens interstate commerce, "the party challenging the regulations must establish that the incidental burdens … are clearly excessive in relation to the putative local benefits." *Id.*

[2] Although the court's review on a motion to dismiss is generally limited to the allegations in the complaint, *In re New Century*, 588 F.Supp.2d 1206, 1211 (C.D. Cal. 2008), the court may properly take judicial notice of material attached to the complaint, and of matters in the public record pursuant to Federal Rule of Evidence 201(b). *See, e.g.*, *Castillo–Villagra v. INS*, 972 F.2d 1017, 1026 (9th Cir. 1992). The "incorporation by reference" doctrine applies when a "plaintiff's claim depends on the contents of a document, the defendant attaches the document to its motion to dismiss, and the parties do not dispute the authenticity of the document, even though the plaintiff does not explicitly allege the contents of that document in the complaint." *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005).

I. HOMEAWAY'S CHALLENGE BASED ON THE ALLEGED OBLIGATION TO COLLECT AND REMIT THE TRANSIENT OCCUPANCY TAX FAILS TO STATE A CLAIM UNDER EITHER CAUSE OF ACTION

The first half of HomeAway's challenge is based on its legal conclusion—which is not entitled to a presumption of truth on a motion to dismiss—that the Ordinance requires all Hosting Platforms, regardless of their "business model," to collect and remit the TOT to the City and to maintain records demonstrating the remittance. (Compl. ¶ 58.)[3] According to HomeAway, this purported requirement discriminates against out-of-state interests (Claim 1) or excessively burdens interstate commerce (Claim 2) because HomeAway's business model—in which it allegedly serves only as an advertising platform and is not involved in the financial transaction between the owner and the renter—makes it infeasible for HomeAway to collect and remit the TOT due on the rental transaction. (Compl. ¶¶ 59-60.) HomeAway alleges that Airbnb, by contrast, acts as the "agent" for the owner and is "the merchant of record for the payment of the rental," presumably implying that Airbnb can more readily comply with any obligation to collect and remit the TOT. (Compl. ¶¶ 5, 64.)

This challenge fails for at least three reasons. First, and most fundamentally, its premise is mistaken, because the Ordinance does not impose a new obligation to collect and remit the TOT; second, such an obligation (if it existed) would not discriminate against interstate commerce in any event; and third, the imagined obligation likewise would not impose an excessive burden on interstate commerce.

A. Both Causes of Action Fail to State a Claim and Fail for Lack of Standing Because the Ordinance Does Not Impose a New Obligation to Collect and Remit the TOT on HomeAway or Any Other Hosting Platform

HomeAway's belief that the Ordinance imposes a new obligation to collect and remit the TOT is wrong and is based on a misreading of the Ordinance. The Ordinance states: "A Hosting Platform shall ***comply with the requirements of the Business and Tax Regulations Code*** by, among any other applicable requirements, collecting and remitting all ***required*** Transient Occupancy Taxes, and this provision shall not relieve a Hosting Platform of liability related to an occupant's, resident's, Business

[3] HomeAway characterizes this aspect of its complaint as a challenge to the "Hosting Platform Rules," but the only Hosting Platform rule actually challenged in the complaint is the one that HomeAway misconstrues to impose a new obligation to collect and remit the TOT.

Entity's, or Owner's failure to comply with the requirements of the Business and Tax Regulations Code." Ordinance § 41A(g)(4)(B) (emphasis added). While this provision affirms that the existing requirements set forth in the Business and Tax Regulations Code apply to the short-term rentals of residential units permitted by the Ordinance, it does not impose a new tax collection obligation on Hosting Platforms or expand any existing one. As now, Hosting Platforms will have to collect and remit the TOT only to the extent the Business and Tax Regulations Code requires it.

Under the relevant provisions of that Code, the obligation to collect and remit the TOT falls on "operators," defined as "[a]ny person operating a hotel in the City and County of San Francisco, including, but not limited to, the owner or proprietor of such premises, lessee, sublessee, mortgagee in possession, licensee or any other person otherwise operating such hotel." S.F. Bus. & Tax Regulations Code, Art. 7, §§ 501(a), 504; *see also id.*, Art. 6, § 6.2-13(a) ("operator" includes "[a]ny person conducting or controlling a business subject to the tax on transient occupancy of hotel rooms"). The applicability of these provisions to website companies (as well as to short-term residential rental transactions) was addressed in Tax Collector Regulation 2012-1, adopted long before the enactment of the Ordinance or any of the alleged efforts by Airbnb to spur legislative action. In relevant part, the regulation states: "A website company, or any other person acting as merchant of record who receives rent in connection with an occupancy transaction, is an 'operator' who is responsible for collecting the TOT owed by the occupant and for remitting the TOT to the City." Tax Collector Regulation 2012-1(e)(iii) (Goldman Decl. Ex. C).[4] While HomeAway apparently construes the Ordinance to make all Hosting Platforms "operators" for the purpose of Section 504 of the Business and Tax Regulations Code, that is not the case. Whether a Hosting Platform has an obligation to collect and remit the TOT—because it qualifies as an "operator" with respect to some or all of the transactions occurring

[4] "The Tax Collector may promulgate regulations and issue rules, and issue determinations and interpretations consistent with the provisions of the Business and Tax Regulations Code as may be necessary or appropriate for the purpose of carrying out and enforcing the payment, collection and remittance of taxes and to apply such Code and any rules and regulations promulgated thereunder in a lawful manner. The Tax Collector shall hold a public hearing and allow public comment on any proposed rule or regulation prior to adoption thereof. The Tax Collector shall provide not less than 10 days' notice of such public hearing. A copy of such rules and regulations shall be on file and available for public examination in the Tax Collector's Office. Failure or refusal to comply with any rules and regulations promulgated by the Tax Collector shall be deemed a violation of the Business and Tax Regulations Code." S.F. Bus. & Tax Regulations Code Art. 6, § 6.16-1.

through its platform—will continue to be determined by the provisions of the Business and Tax Regulations Code, not the Ordinance.

It is irrelevant for the purposes of this motion whether, or to what extent, the transactions occurring through HomeAway's platform render it an "operator" under the Business and Tax Regulations Code; the critical point is that the Ordinance changes nothing in that respect. Because the Ordinance does not impose a new obligation to collect and remit the TOT, it does not, either directly or indirectly, require HomeAway to adopt an "Agency model" for its business. (*See* Compl. ¶ 60.) Accordingly both causes of action fail as a matter of law in so far as they are based on this presumed obligation. Fed. R. Civ. P. 12(b)(6).

For the same reason, the claims fail for lack of standing. Fed. R. Civ. P. 12(b)(1). To establish constitutional standing, a plaintiff must show: (1) a threatened or actual distinct and palpable injury; (2) a fairly traceable causal connection between the alleged injury and the defendant's challenged conduct; and (3) a substantial likelihood that the requested relief will redress or prevent the injury. *Fors v. Lehman*, 741 F.2d 1130, 1132 (9th Cir. 1984). Here, HomeAway's claim of injury rests on the anticipated imposition of a new obligation to collect and remit the TOT. But the Ordinance does not impose a new obligation, and HomeAway does not allege any injury under the existing law that it leaves in place. Moreover, existing law would remain unchanged by any ruling on the relief requested in the complaint. Accordingly, with respect to the collection and remission of the TOT, the complaint does not allege any injury, let alone one that could be redressed by the relief sought in the complaint.

B. HomeAway's First Cause of Action Also Fails Because the Presumed Obligation to Collect and Remit the TOT Would Not Discriminate Against Interstate Commerce In Any Event

Even apart from HomeAway's misreading of the Ordinance, its claim that an alleged obligation to collect the TOT is discriminatory fails as a matter of law. As HomeAway concedes, on its face the rule does not discriminate against out-of-state entities or interstate commerce. (*See* Compl. ¶ 2.) HomeAway's contention that the purported obligation nonetheless has a discriminatory effect by favoring one "business model" over another does not state a claim.

For example, in *Valley Bank of Nevada v. Plus Systems, Inc.*, 914 F.2d 1186 (9th Cir. 1990), the Plus ATM network brought a dormant Commerce Clause challenge to a Nevada statute providing

that ATM networks could not prohibit a Nevada bank from charging transaction fees to a cardholder who withdraws funds from the Nevada bank's ATM but whose account is with another bank. Plus had such a prohibition in place, whereas two other networks operating in Nevada, Star and In-Nevada, did not. *Id.* at 1190.[5]

The Ninth Circuit rejected Plus's contention that the statute was discriminatory. Not only was the statute evenhanded as to both Nevada and out-of-state cardholders, but it also did "not exempt Nevada shared ATM networks" from its application: "Any provision in In-Nevada's network agreement prohibiting member banks from charging transaction fees would not be enforceable in Nevada." *Id.* at 1193.

The same is true here. By allegedly imposing a tax collection obligation that favors one "business model" over another, the Ordinance would not discriminate against out-of-state interests. Indeed, according to HomeAway's own complaint, the purported obligation to collect the TOT would fall not only on HomeAway, but also on "a ***local*** newspaper selling classified ads for short-term rentals," which has a business model allegedly "similar to HomeAway's." (Compl. ¶ 62) (emphasis added). This allegation indicates that the rule is not discriminatory even under HomeAway's theory; local businesses with a similar business model would be equally burdened. Moreover, the complaint offers no details about the makeup of the market as a whole, or about particular other Hosting Platforms, what "business models" they use, and where they are located. The complaint thus fails to allege facts to support an inference that the alleged rule would have even a disproportionate impact on out-of-state businesses or burden the interstate market. *See Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127-28 (1978) (the commerce clause "protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations").

Indeed, even a disproportionate impact would not establish a violation of the Commerce Clause. In *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987), cited by *Valley Bank*, the Supreme Court considered a challenge to an Indiana takeover act that applied only to corporations chartered in Indiana with a threshold number of Indiana shares or shareholders. Although the law did

[5] The court noted that Star was a national network, and In-Nevada consisted exclusively of Nevada banks with the exception of one Utah bank. *Id.* n.7.

not discriminate based on the residency of the offerors in a hostile takeover, Dynamics Corporation contended that the law would apply most often to out-of-state entities because most hostile tender offers "are launched by offerors outside Indiana." 481 U.S. at 88. The Court rejected the contention that a disproportionate impact on out-of-state entities rendered the law discriminatory under the Commerce Clause. *Id.* ("Because nothing in the Indiana Act imposes a greater burden on out-of-state offerors than it does on similarly situated Indiana offerors, we reject the contention that the Act discriminates against interstate commerce."); *see also Exxon Corp.*, 437 U.S. at 126. The same conclusion applies here: There is no impermissible discrimination under the Commerce Clause because similarly situated businesses—*i.e.*, those with a similar "business model"—would be equally affected by the rule regardless of where they are located.

C. HomeAway's Second Cause of Action Also Fails Because a Rule Requiring Collection of the TOT Would Not Burden Interstate Commerce

HomeAway's second cause of action contends that the purported requirement to collect and remit the TOT impermissibly burdens its "business model," which allegedly does not allow HomeAway to collect any TOT that may be due on the rental transaction. According to HomeAway, this requirement would force it to adopt an "agency" business model (Compl. ¶ 60), which it is apparently unwilling or unable to do, because HomeAway claims that it would instead be "driven out" of the San Francisco market. (Compl. ¶ 62.) Apart from the fact that the Ordinance does not impose the new obligation that HomeAway supposes it does, these allegations are insufficient as a matter of law.

First, the Commerce Clause does not protect HomeAway's choice of "business model"—here, one that HomeAway claims does not allow it to satisfy any TOT collection and remission obligations to the City. As the Supreme Court stated in *Exxon*: "We cannot, however, accept appellants' underlying notion that the Commerce Clause protects the particular structure or methods of operation in a retail market." 437 U.S. at 127. The Ninth Circuit's decision in *Valley Bank* is once again on point. Citing *Exxon*, the court wrote:

> Plus's argument is more a jealous defense of its own particular rules and its own concept of how it wants to do business than a serious attack on SB 404's chilling effect on interstate commerce. The commerce clause does not prevent

> states from taking action that may be inconsistent with Plus's concept of business efficiency; the Constitution does not protect any particular economic structure or approach. In particular, the commerce clause does not give an interstate business the right to conduct its business in what it considers the most efficient manner; the Constitution protects the interstate market, not particular interstate firms.

914 F.2d at 1193 (citations and internal quotation marks omitted).

Even if HomeAway would rather exit the San Francisco market than adjust its "business model" to comply with any TOT obligation, that possibility would not establish that the Ordinance burdens interstate commerce. Just as the complaint does not allege that all in-state Hosting Platforms use an "agency" model that allows them readily to collect the TOT (*see* Compl. ¶ 62), the complaint also does not allege that all out-of-state Hosting Platforms must or do have a business model that renders them incapable of doing so. HomeAway itself alleges that "the market for online travel and short-term rental services is highly competitive." (Compl. ¶ 5.) Thus, the allegations of the complaint do not support an inference that, if HomeAway were to exit the market, there are no other out-of-state Hosting Platforms willing or able to take its place. *See Exxon*, 437 U.S. at 127 ("Some refiners may choose to withdraw entirely from the Maryland market, but there is no reason to assume that their share of the entire supply will not be promptly replaced by other interstate refiners."); *cf. Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1198 (9th Cir. 2012) (explaining in Sherman Act case that "allegation of a practice that may or may not injure competition is insufficient to 'state a claim to relief that is plausible on its face.'") (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

Finally, HomeAway's allegation that the Ordinance would effectively exclude it from the San Francisco market if it had to collect and remit the TOT is conclusory in any event, and is not supported by the allegations of the complaint. Only well pleaded, as opposed to conclusory, allegations are entitled to a presumption of truth, and a court must further assess whether the well pleaded allegations plausibly give rise to an entitlement to relief. *Eclectic Properties E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 995 (9th Cir. 2014). Here, HomeAway alleges that its "business model" allows any Listing Owner to select a "pay-per-booking" option, in which HomeAway receives a particular percentage, up to 10%, of the value of the confirmed booking. (Compl. ¶ 29.) This allegation reveals that HomeAway has the ability to collect its own revenues as a percentage of the rental amount in

these transactions. The complaint does not explain why HomeAway could not also satisfy any obligation to collect the TOT, which is likewise a percentage of the rental amount. HomeAway's assertion that the Ordinance would effectively exclude it from the San Francisco market is as implausible as it is conclusory, not only unsupported by well pleaded factual allegations, but affirmatively undermined HomeAway's own allegations. *See, e.g.*, *In re Actimmune Mktg. Litig.*, No. C 08-02376 MHP, 2010 WL 3463491, at *10 (N.D. Cal. Sept. 1, 2010) *aff'd*, 464 F. App'x 651 (9th Cir. 2011) (complaint must allege a "plausible causal chain of injury").

II. HOMEAWAY'S CHALLENGE TO THE OCCUPANCY REQUIREMENT MUST BE DISMISSED FOR LACK OF STANDING AND FURTHER FAILS TO STATE A CLAIM UNDER EITHER CAUSE OF ACTION

HomeAway's second challenge to the Ordinance attacks the rule that a residence may be offered for short-term rental only where it is occupied by the permanent resident for at least 275 days out of the calendar year in which it is offered for rental. (Compl. ¶¶ 8, 48-49.) HomeAway lacks prudential standing to litigate this challenge, because it is an assertion of the rights of third parties who are not before this Court. Moreover, such a rule, which exists so that residences actually remain residential in use, is not discriminatory and serves what HomeAway does not dispute are legitimate governmental objectives. It thus does not run afoul of the Commerce Clause in any event.

A. HomeAway Lacks Standing to Challenge the Occupancy Requirement

The inquiry into whether a plaintiff has standing involves prudential as well as constitutional limitations. To establish prudential standing, as opposed to constitutional standing (*see supra* Section I.A.), the plaintiff's complaint must (1) assert the plaintiff's own rights, rather than those of third parties; (2) allege an injury that is more than a generalized grievance; and (3) fall within the zone of interests protected by the law invoked. *Fors*, 741 F.2d at 1132.[6] Failure to establish any of the constitutional or prudential requirements defeats standing. *Id.*[7]

[6] In a recent decision, the Supreme Court observed that the second factor may properly be considered an element of constitutional standing, and that the "zone of interests" test may more aptly be described as a question of whether there is a right to sue. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 & n.3 (2014). However, it did not address the first requirement, which is at issue here.

[7] There is some uncertainty in the case law about whether challenges to prudential standing are properly addressed under Rule 12(b)(1) or Rule 12(b)(6). While some courts have treated both Article III and prudential standing together under Rule 12(b)(1), *e.g.*, *Malfatti v. Mortgage Elec. Registrations*

Under the doctrine of constitutional avoidance—which provides that a court should avoid deciding constitutional questions when it is possible to dispose of the case on some other ground—a court should first determine if standing can be decided on the basis of one of the prudential limitations. *McMichael v. Napa Cnty.*, 709 F.2d 1268, 1271 (9th Cir. 1983) (unnecessary to decide Article III standing where standing can be decided on prudential grounds); *see also City of Los Angeles v. Cnty. of Kern*, 581 F.3d 841, 846 (9th Cir. 2009) (preferable to resolve case on prudential standing grounds where it could obviate the need to rule on merits of dormant Commerce Clause challenge).

Here, HomeAway's challenge to the occupancy requirement fails under the threshold prudential inquiry, because it is an assertion of the rights of third parties—*i.e.*, those persons who wish to offer their San Francisco residences for short-term rental but do not occupy those properties for at least 275 days in the calendar year. While the rule against the assertion of the rights of third parties is not absolute, exceptions to the rule are disfavored, and plaintiffs who seek to avoid this prudential limitation are required to make two additional showings: First, they must show that they have a close relationship with third parties who possess the right; and second, they must show that there is some hindrance to the third parties' ability to protect their own interests. *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004); *Fleck & Associates, Inc. v. Phoenix, City of, an Arizona Mun. Corp.*, 471 F.3d 1100, 1105 n.3 (9th Cir. 2006).[8]

As an initial matter, it is unclear that HomeAway has a sufficiently close relationship with the third parties whose interests it seeks to represent—current or potential future customers who may use HomeAway's listing platforms. *See, e.g.*, *Fleck*, 471 F.3d at 1105 & n.3 (corporation that sought to

Sys., Inc., No. C 11-03142 LB, 2013 WL 3157868, at *2 (N.D. Cal. June 20, 2013), others have stated that prudential standing should be considered under Rule 12(b)(6), *e.g.*, *Gentges v. Trend Micro Inc.*, No. C 11-5574 SBA, 2012 WL 2792442, at *4 (N.D. Cal. July 9, 2012) (citing *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1174–75 (9th Cir. 2004)). *Cetacean* itself does not necessarily resolve the question, however, because it distinguished between Article III standing and *statutory* standing—*i.e.*, whether the statute at issue has conferred a right to sue on the plaintiff. In any event, the analysis and result are the same under either rule, at least where the moving party does not seek to controvert jurisdictional allegations with evidence outside the pleadings. *See Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004).

[8] In *Kowalski*, the Court assumed, without deciding, that the plaintiffs—lawyers who alleged that Michigan's procedure for appointing appellate counsel for indigent defendants who plead guilty limited the number of cases in which they could be appointed and paid as appellate counsel—sufficiently alleged an injury for the purpose of Article III standing, but held that the plaintiffs could not establish the first requirement of prudential standing. 543 U.S. at 129 & n.2, 132-33.

champion the liberty rights of its customers did not have close relationship for the purpose of the prudential standing limitation). But even where the relationship is sufficiently close, the plaintiff still must show some hindrance to the ability of the third parties to assert their own interests. *Singleton v. Wulff*, 428 U.S. 106, 116 (1976). Here, there is no hindrance—and HomeAway does not allege one—to the ability of owners affected by the occupancy requirement to sue on their own behalf if they are inclined to do so. *See, e.g.*, *Matter of Grand Jury Subpoena Issued to Chesnoff*, 62 F.3d 1144, 1146 (9th Cir. 1995) (attorney plaintiffs had sufficiently close relationship to the third party, their client, but there was no hindrance to the client protecting his own interests by suing on his own behalf). Because HomeAway therefore lacks prudential standing to challenge the occupancy requirement under either of its causes of action, the complaint must be dismissed. *See also, e.g.*, *Erdos v. S.E.C.*, 742 F.2d 507, 509 (9th Cir. 1984) (securities dealer lacked standing to argue that NASD regulations violated constitutional rights of his customers); *Wedges/Ledges of California, Inc. v. City of Phoenix, Ariz.*, 24 F.3d 56, 62 (9th Cir. 1994) (game manufacturer lacked standing to assert claims based on the property and liberty interests of the game operators).[9]

B. The Occupancy Requirement Does Not Discriminate Against Interstate Commerce

The Ordinance allows permanent residents to offer their primary residence as a short-term rental as long as they occupy the unit for no less than 275 days in the calendar year in which the unit is offered as a short-term rental. (Compl. ¶ 48; *see* Ordinance § 41A(g)(1)(A).) According to HomeAway, this occupancy requirement discriminates against interstate commerce because it impermissibly discriminates against people who are not permanent residents of San Francisco. (Compl. ¶ 49.) HomeAway is wrong.

As discussed in the next section, the purpose of the occupancy requirement to ensure that any units that are offered for short-term rental in San Francisco "remain truly residential in use," Ordinance § 1(c)(2), protecting the livability of residential neighborhoods, preserving the city's

[9] HomeAway cannot claim to possess "associational" standing. HomeAway is a for-profit business with customers (*e.g.*, Compl. ¶¶ 4, 29), not an association of members who have come together to form an organization for their mutual aid and benefit. *See Fleck*, 471 F.3d at 1106 (business could not claim associational standing with its customers).

1 housing stock, and reducing negative effects on affordable housing. (Compl. ¶¶ 52-53; *see*
2 Resolution, pp. 3-6.) But as a threshold matter, HomeAway is wrong that the requirement
3 discriminates against persons from out-of-state. As the complaint itself acknowledges, the rule
4 constrains citizens of California as well as citizens of other states. (Compl. ¶ 49.) Thus, for example,
5 it constrains an Orinda resident, no less than a Boston resident, who owns a *pied-à-terre* on Russian
6 Hill. Moreover, the rule constrains residents of San Francisco itself—for example, a resident of
7 Pacific Heights who owns a second apartment in North Beach—because the only property they may
8 offer for short-term residential use is a primary residence that they occupy for at least 275 days in the
9 calendar year. Indeed, the complaint does not allege facts from which it could be inferred that the
10 majority of the people impacted by the rule—*i.e.*, those whom it leaves unable to offer their San
11 Francisco property for short-term residential rental—will be citizens of other states or will even reside
12 outside of San Francisco. The analysis above of the alleged obligation to collect the TOT and the
13 authorities discussed there (*see supra* Section I.B) thus apply equally here: Because the occupancy
14 requirement applies evenhandedly, it does not discriminate against interstate commerce. *See Valley*
15 *Bank*, 914 F.2d at 1193 ("An Act that applies evenhandedly certainly passes muster under the
16 commerce clause."); *CTS Corp.*, 481 U.S. at 88.
17
18 **C. The Occupancy Requirement Serves Legitimate Local Purposes and Does Not Excessively Burden Interstate Commerce**

19 A law that does not discriminate against interstate commerce will be upheld as long as the
20 government's interest in the law is legitimate and the law does not impose an excessive burden on
21 interstate commerce in relation to that interest. *Valley Bank*, 914 F.2d at 1194; *Pike v. Bruce Church,*
22 *Inc.*, 397 U.S. 137, 142 (1970). The Ordinance states that the goal of regulating the short-term rental
23 market is to "ensure compliance with all requirements of the Municipal Code . . . and accountability
24 for neighborhood quality of life." Ordinance § 1(c)(1). It explains that the exception to the
25 prohibition on short-term rentals "is only intended for residents who meet the definition of a
26 permanent resident ***so that these units remain truly residential in use. Thus,*** the exception is only for
27 primary residences in which permanent residents are present for a significant majority of the calendar
28 year." Ordinance § 1(c)(2) (emphasis added). The Ordinance also incorporates the findings of the San

1 Francisco Planning Commission (Ordinance § 1(a)(2)), which finds that the regulations will protect
2 the livability of residential neighborhoods, preserve the city's housing stock, and reduce negative
3 effects on affordable housing. (Compl. ¶ 52.)

4 HomeAway does not allege that any of these objectives are not legitimate governmental
5 interests. Rather, it claims that the Ordinance, and the Planning Commission findings it incorporates,
6 do not establish a connection between these objectives and the Ordinance's occupancy requirement.
7 (Compl. ¶¶ 51-53.) This claim disregards both the obvious and the explicit.

8 The findings of the Ordinance itself state that the widespread conversion of residential housing
9 to short-term rentals can result in the loss of housing for permanent residents, and indeed, that the
10 activity had been completely prohibited by the Board of Supervisors for this reason. Ordinance §
11 1(c)(1). By limiting the number of days in which a residence may be offered for whole-home rental—
12 *i.e.*, days in which the residence is not being used as a residence—the occupancy requirement reduces
13 the likelihood that permanent housing will be converted into tourist or transient use. (Resolution at 4
14 (Ordinance "would limit the number of days that a unit could be utilized as a short-term rental
15 reducing the likelihood that permeant [sic] housing would be converted into transient housing"), 5
16 (Ordinance "would help preserve rental units by ensur[ing] that they are not converted into full time
17 short-term rentals"), and 6 ("the Ordinance would help preserve the City's supply of affordable
18 housing, by ensuring that long term housing for permanent residents is maintained as long-term
19 housing.") Obviously, San Francisco's housing stock is finite, and when units are taken out of the
20 residential market, it diminishes supply and creates upward pressure on prices. *Cf. City of Oceanside*
21 *v. McKenna*, 215 Cal.App.3d 1420, 1427 (1989) (rules requiring owner occupancy and prohibiting
22 leasing in CC&Rs in publicly subsidized condominium project were reasonable and furthered
23 objectives of providing a stabilized community of owner-occupied units for low and moderate income
24 persons, avoiding artificial inflation of prices caused by resales by speculators, and to prevent scarcity
25 caused by vacant homes awaiting resale by speculators).

26 The findings in the Planning Commission Resolution also state that regulation is necessary to
27 "protect the livability of residential neighborhoods." (Resolution at 3; *see also id.* at 5 ("the Ordinance
28 would minimize any effects that short-term rentals would have on existing housing and neighborhood

character").) It cannot be doubted that short-term rentals have the potential to undermine residential quality of life. Upholding the right of a California municipality to prohibit rentals for periods of less than 30 days in a residentially zoned district, one court explained:

> Short-term tenants have little interest in public agencies or in the welfare of the citizenry. They do not participate in local government, coach little league, or join the hospital guild. They do not lead a Scout troop, volunteer at the library, or keep an eye on an elderly neighbor. Literally, they are here today and gone tomorrow—without engaging in the sort of activities that weld and strengthen a community.

Ewing v. City of Carmel-By-The-Sea, 234 Cal.App.3d 1579, 1591 (1991). Once again, the role of the occupancy requirement is obvious: Units do not "remain truly residential in use," Ordinance § 1(c)(2), when they are not used as residences. *Cf. Mission Shores Ass'n v. Pheil*, 166 Cal.App.4th 789, 795-96 (2008) (upholding CC&R restricting rentals to 30 or more days, ensuring that "the property would not become akin to a hotel" and "preserving the residential character of the development"); *Anderson v. Provo City Corp.*, 108 P.3d 701, 708 (Utah 2005) ("The Owners have failed to persuade us that the distinction between an occupying owner who rents an accessory apartment to boarders, on the one hand, and an absentee owner who rents both the main dwelling and the accessory apartment, on the other, is meritless. Rather, the latter situation does appear, in effect, to transform a single-family residence into a duplex. In contrast, the presence on the property of the owner, who would maintain closer control over both the primary and the accessory dwelling units, would more likely mitigate this effect and tend to preserve the neighborhood's single-family residential character.").[10]

The objectives served by the occupancy requirement are among the highest priorities under state law, and municipalities have an affirmative obligation to pursue them. *See, e.g.*, Cal. Gov't Code § 65880(a) ("The availability of housing is of vital statewide importance, and the early attainment of decent housing and a suitable living environment for every and the early attainment of decent housing and a suitable living environment for every California family is a priority of the highest order."); *id.* §§ 65880(d), 65300, 65302(c), 65583(c); *Wilson v. City of Laguna Beach*, 6 Cal.App.4th 543, 545 (1992)

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[10] In cases involving goods produced out-of-state, courts have held that a law is not discriminatory when there is some reason, apart from their origin, to treat them differently from goods produced in-state. *See Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1089 (9th Cir. 2013). Analogously, the difference between individuals who occupy their property for a significant majority of the year and those who do not is that only the former are maintaining the property's residential use—using it as their home.

1 (“More than a decade ago the state Legislature declared the supply of housing in California was
2 insufficient to meet demand and the imbalance was likely to become worse in the foreseeable
3 future.”); *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 732-33 (1995) (“reserving land for
4 single-family residences preserves the character of neighborhoods, securing zones where family
5 values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for
6 people.”) (internal quotation marks and citation omitted). Apart from HomeAway’s legally incorrect
7 claim that there is no connection in the Ordinance and its incorporated findings between the
8 occupancy requirement and the governmental objectives it serves, there are no allegations supporting a
9 claim that any incidental burden on interstate commerce is “clearly excessive” in comparison to the
10 San Francisco’s interest in these objectives.[11]

11 Indeed, even if the occupancy requirement—which the complaint does not allege is motivated
12 by any kind of economic protectionism—were deemed to discriminate against interstate commerce,
13 the law must be upheld because the City’s objectives “could not be served as well by available
14 nondiscriminatory means.” *Maine v. Taylor*, 477 U.S. 131, 138 (1986) (upholding state’s ban on the
15 importation of live baitfish where it served legitimate local purposes that could not adequately be
16 served by available nondiscriminatory alternatives). The way to preserve residential property for
17 residential use is to limit its use for non-residential purposes. Everyone, of course, benefits when
18 cities around the nation are able to preserve their housing stock, promote affordability, and protect the
19 quality of life in their neighborhoods.

20 The power of a municipality to protect residential use has been recognized for almost a
21 century. *See Vill. of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926). The Commerce
22 Clause does not require San Francisco to sit on its hands as scarce residential units are taken off the
23

24 [11] HomeAway asserts that the 275-day requirement is “arbitrary.” (Compl. ¶ 8.) To the extent HomeAway means to quibble with the choice of 275 days rather than some other number, it ignores
25 the reality that the law could not be administered at all without drawing a line. Rejecting a similar argument that a city’s ordinance had drawn a line “arbitrarily” by allowing rentals for 30 days but not
26 29, the court in *Ewing* explained that “the line must be drawn, and the legislature must do it. Absent an arbitrary or unreasonable delineation, it is not the prerogative of the courts to second guess the
27 legislative decision.” *Ewing*, 234 Cal.App.3d at 1593. Two hundred and seventy five days is three quarters of the year, and it is indisputably a reasonable implementation of the Ordinance’s stated
28 objective of ensuring that the use of the units remains truly residential by requiring occupancy for a “significant majority” of the year.

1 market and converted to short-term rentals, pushing housing prices increasingly out of reach and
2 gradually turning residential neighborhoods into collections of house-shaped hotels. The allegations
3 of the complaint do not establish that the occupancy requirement imposes any burden on interstate
4 commerce that is "clearly excessive" in relation to the vital governmental purposes it serves.

5 **CONCLUSION**

6 For the foregoing reasons, Plaintiffs' complaint should be dismissed.

7

8 Dated: November 24, 2014

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17 "I hereby attest that I have on file all holographic signatures corresponding to any signatures indicated
18 by a conformed signature (/S/) within this e-filed document."

19 /s/*Wayne Snodgrass*
WAYNE SNODGRASS
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