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M. LINDA PIERCE
MUSCOGEE COUNTY
SUPERIOR COURT

IN THE SUPERIOR COURT OF MUSCOGEE COUNTY

STATE OF GEORGIA

COLUMBUS, GEORGIA,	)	
	)	
Plaintiffs,	)	CIVIL ACTION
	)	
vs.	)	FILE NO. SU-06-CV-1895-05
	)	
ORBITZ, LLC,	)	
	)	
Defendant.	)	

REPORT OF SPECIAL MASTER

On September 25, 2008, the Superior Court herein entered an order appointing the undersigned as "Special Master" to "conduct scheduling conferences, hold hearings, rule on discovery motions, and otherwise perform such acts necessary to expeditiously and efficiently move this case through the discovery process, including, but not limited to resolving disputes over discovery requests and responses thereto, resolving disputes over claims of privilege asserted by either of the parties, and ruling on any Motions to Compel or for Protective Orders already filed or to be filed." As an initial matter the Special Master was charged with the task of monitoring and enforcing compliance with the trial court's August 25, 2008 Order on the City's Motion to Compel. The undersigned reviewed the briefs and other materials submitted by the parties, conducted two hearings and heard arguments of counsel, conducted *in camera* review of the documents at issue and reached the findings and recommendations explained herein.

I.

FACTUAL BACKGROUND

Orbitz is an online travel company ("OTC"). Orbitz, like other OTCs such as Expedia or Hotels.com, sells, books, or rents hotel rooms through one of two basic business models – the "agency model" or the "merchant model." This case involves Orbitz merchant model

transactions and the calculation, collection and payment of hotel occupancy tax associated with those transactions. With the Orbitz "merchant model" transaction, which operates like other OTCs, the consumer goes online to the Orbitz.com website and selects a hotel, room type, and travel dates. Orbitz acts as the "merchant of record" and initiates a charge to the consumer's credit card for the price of the room shown online (Room Rate) plus "taxes and fees." Under the "merchant model," Orbitz enters contracts with hotels where the hotels agree to make hotel rooms available to Orbitz at a negotiated discount which Orbitz marks up and sells or makes available to its customers at the marked-up rate. The discounted or wholesale rate is never disclosed to Orbitz customers.

In Orbitz's transaction with the customer, the consumer pays the entire Subtotal (Room Rate) for the hotel room, despite the separate transaction involving Orbitz and its hotel supplier wherein Orbitz appears to pay the hotel (after check in and invoice) a separate smaller amount, i.e. a net, discounted, unpublished, agreed upon amount. In addition to the Room Rate, the consumer is charged an amount for "taxes and fees" which are bundled (not separately itemized) so that the consumer does not know the exact amount of either the taxes or fees. This case involves the questions of which transaction is taxable and to whom.

Plaintiff's claims herein are essentially the same as those made against Expedia and Hotels.com in the City's cases against those OTCs which are also pending before the Superior Court of Muscogee County, Georgia.[1] Plaintiff Columbus claims that under the facts here presented, the "Room Rate" (and other comparable terms) disclosed to, charged to and paid by the consumer to Orbitz constitutes the "lodging charges actually collected" and the "charge to the

[1] *Columbus, Georgia v. Expedia, Inc.*, Civil Action No. SU-06-CV-1794-7 ("Columbus v. Expedia") and *Columbus, Georgia v. Hotels.com, L.P.*, Civil Action No. SU-06-CV-1893-8 ("Columbus v. Hotels.com"). The core issues relating to Orbitz merchant model transactions are also similar to those in the *Atlanta* case against numerous OTCs (including Orbitz), which is currently on appeal to the Supreme Court of Georgia, as well as numerous cases in other jurisdictions.

public" per O.C.G.A. § 48-13-51(a)(1)(b) and Columbus Ordinance § 19-111. More specifically, Plaintiff Columbus contends that hotel occupancy taxes must be collected, and then remitted to Plaintiff Columbus, based on the amount Defendant Orbitz discloses to the consuming public as the charge for the room. Defendant Orbitz rejects the Plaintiff's contention, urging that the "lodging charges actually collected" and the "charge to the public" should be construed under the facts herein to mean the lesser discounted amount which Orbitz privately negotiates and pays to hotels in Columbus. *See* Order and Decree on Permanent Injunction entered in Columbus v. Expedia on 9/22/08; Hotels.com Order and Decree on Permanent Injunction entered in Columbus v. Hotels.com on 11/22/08.

II.

DOCUMENTS AT ISSUE

As an initial matter the undersigned was charged with the responsibility to monitor and enforce compliance with the Superior Court's Order of August 25, 2008 on the City's Motion to Compel. Judge Pullen's aforesaid order on Plaintiff's motion to compel identified six categories of documents at issue. At the October 2 hearing, the Special Master ruled that the documents in categories one through four should be turned over to Plaintiff, which was accomplished at the conclusion of the hearing.

The documents designated in categories 5 (Joint Defense Agreement, Common Interest Agreement, and related communications) and 6 (Atlanta and Columbus privilege logs) remained at issue and are the subject of these findings and recommendations. These categories include documents to which Orbitz asserts attorney/client, attorney work product and/or joint defense group claims of privilege.

With regard to the Category 5 documents, Orbitz consented to *in camera* review but maintains its claims of privilege. Orbitz also maintains its claims of privilege with regard to

Category 6 documents. In addition, Orbitz objects to *in camera* review of the Category 6 documents without a preliminary threshold showing by the City regarding the validity of the privilege claimed, citing *United States v. Zolin*, 491 U.S. 570 (1989); the *Zolin* issue is addressed below. Finally, Orbitz argues that, even though the document production from the City of Atlanta case has been incorporated into this case (see note 1, *supra*), the privilege log associated with those documents should not be at issue in this case. The Category 6 documents relate to the City's challenges associated with both the Atlanta and Columbus privilege logs. The subject Category 5 and Category 6 documents are specifically identified in Exhibit 5 submitted by the City during the October 2, 2008 hearing before the Special Master.

The City contends that the documents at issue are discoverable to show, among other things, that any pre-suit administrative procedures were futile, in that Orbitz and the other OTCs made a pre-suit decision never to pay occupancy taxes on the mark-up; that Orbitz and the other OTCs made a concerted effort to evade payment of these taxes; and that Orbitz and the other OTCs schemed to deny they sell hotel rooms, deny the terms of their contracts, and change words ("taxes" to "tax recovery charge") to obfuscate the mechanics of the merchant model (9/10/08 Hearing Transcript, pp. 65-67). Orbitz denies and disputes these contentions.

Orbitz also contends that log of Atlanta production (which had been incorporated by agreement of the parties and Order of the Court) was and is not appropriate for consideration by the Superior Court or Special Master.

III.

ATLANTA LOG PROPERLY BEFORE SPECIAL MASTER

Before turning to the issue of the adequacy of Orbitz's privilege logs, it is appropriate to first address Orbitz's contention that the Atlanta privilege log and the City's challenges relating thereto are not at issue in this case. Based on the prior dealings and agreements of the parties,

the prior ruling of the Superior Court in its August 25, 2008 Order, and the similarity of core issues and facts in the Atlanta and Columbus cases, the undersigned finds that this contention is without merit.

Because of the similarity of discovery and the core issues in the Atlanta and Columbus cases against Orbitz, relating to hotel occupancy tax, the parties agreed that the Atlanta discovery, including document production, would be incorporated into this case. Orbitz had previously submitted a privilege log with respect to the Atlanta production. In this case, Orbitz submitted a log relating to the Columbus production as well as amended Atlanta and Columbus logs. Orbitz also submitted amended legends to both logs. The City made specific challenges as to both the Atlanta and Columbus logs. In addition, although the Atlanta and Columbus cases involved similar claims, issues and discovery, the Atlanta log contained numerous document entries which were omitted from the Columbus log. The City also challenged these omissions. The subject Category 6 documents from Judge Pullen's August 25, 2008 Order are comprised of the aforesaid challenged documents.

During the period of time from the City's first notification to Orbitz of a challenge to the Atlanta log on November 17, 2007 until the August 14, 2008 hearing on the City's Motion to Compel, the parties engaged in negotiations (via email, letters and telephone calls) regarding the City's challenges to both the Atlanta and Columbus log entries. Pursuant to the City's challenges, Orbitz withdrew certain claims of privilege and produced numerous documents referenced on the Atlanta log. In addition, contemporaneously with the ordered production of the Category 6 documents, Orbitz withdrew its claim of privilege to an additional 78 entries from the Atlanta log and produced the referenced documents to the City and the Special Master in a separate binder (Binder 2). Orbitz also submitted a revised Atlanta log to the undersigned on

October 9, 2008 with its document production.

Moreover, Orbitz contention is inconsistent with Judge Pullen's Order of August 25, 2008 relating to the Category 6 documents, which clearly included the challenged documents from both the Atlanta and Columbus logs.

IV.

ORBITZ'S CLAIMS OF PRIVILEGE NOT TIMELY OR ADEQUATE

It is well established that communications are not privileged simply because they were shared with or transmitted to an attorney. "[T]he privilege would never be available to allow a corporation to funnel its papers and documents into the hands of its lawyers for custodial purposes and thereby avoid disclosure" (*Southern Guaranty Insurance Company of Georgia v. Ash*, 192 Ga. App. 24 (1989), citing *Radiant Burners v. American Gas Assn.*, 320 F.2d 314, 324 (7th Cir.1963)). Rather, certain requirements must be satisfied before the privilege attaches. For example, the communications must concern the provision of *legal* advice by the attorney (*Southern Guaranty, supra,*, at 28; *Marriott Corporation v. American Academy of Psychotherapists, Inc.*, 157 Ga. App. 497, 505 (1981)). Also, the privilege is deemed to be waived under certain conditions, such as when the communication has been distributed beyond those in the corporate structure who have a need to know its contents (*Southern Guaranty, supra,* at 28, citing with approval *Diversified Industries v. Meredith*, 572 F. 2d 596 (8th Cir. 1977)) or to persons outside the corporation (*Georgia Cash America, Inc. v. Strong*, 286 Ga. App. 405, 412 (2007)). Finally, it should be noted that the corporation asserting the privilege bears the initial burden of demonstrating that the privilege applies (*Marriott, supra*, at 505; *Southern Guaranty, supra*, at 29).

Under Georgia law Orbitz is required to adequately and properly log each document regarding which it asserts a claim of privilege. As to the issue of the adequacy of the privilege

logs, Georgia case law does not provide specific guidance. However, there is a consistent theme in cases from other states and the federal courts, in that privilege logs should contain sufficient detail to enable opposing parties and reviewing courts to determine whether the claimed privilege applies, including an explanation of why the claimed privilege applies to each document listed. See, for example, *Williams v. Taser International, Inc.*, 2008 WL 192991 (N.D. Ga. 2008). A log containing only a cursory description of a document, together with information such as the dates of the communications and the names of the participants, is, as a general matter, not sufficient to serve this purpose. See, for example, *United States v. Construction Products Research, Inc.*, 73 F. 3d 464 (2d Cir. 1996). One court has even required the submission of a twenty-five to fifty word explanation of the parties involved and why the claimed privilege should apply (*Shou Fong Tam v. Metropolitan Life Insurance Company*, 2008 WL 2078676 (Sup. Ct. of NY Co. NY)).

In addition, such information should be provided in a sufficiently timely manner so as to be sure the logs function to move consideration of privilege issues along rather than becoming issues themselves. "We expressly disapprove of the practice of permitting the proponent of a privilege to rely on an initial conclusory assertion of a privilege and to gradually unveil the basis for her claims of privilege....This practice delays resolution of privilege issues and is unfair to the opponent of the privilege, who should not be forced to engage in costly motion practice in order to obtain basic information necessary to assess claims of privilege" (*Pia v. Espinoza*, 130 N.M. 661 (2001).

After review of the City of Columbus privilege log and the City of Atlanta privilege log, as to which Plaintiff's asserted challenges identified in Exhibit 5 to the October 2, 2008 hearing transcript, it is clear that Orbitz's privilege logs are both improper and inadequate. Numerous

examples exist of the failure by Orbitz to properly and adequately log documents regarding which claims of privilege were asserted. These include:

- Orbitz provided grossly inadequate descriptions/explanations for why the claimed privilege should attach. See, for example, Columbus Log Entry No. 4 ("In house counsel confidential comments on 1/29/03 terms and conditions").
- Many entries reflect no more than the cursory label that the document involved legal advice. However, a number of these were subsequently produced, thus rendering it virtually impossible to determine what basis for a claim of privilege would exist for the remaining documents bearing substantially similar descriptions. See, for example, Atlanta Log Entry No. 2.
- The entries do not properly identify Orbitz' employee's positions or properly disclose the purpose, function or individual employee names associated with Orbitz groups listed by group names. See, for example, Columbus Log Entry No. 18. This makes it virtually impossible for an opposing party or reviewing court to properly evaluate issues such as whether a claimed privilege may have been waived.
- Orbitz included non-Orbitz employees and attorneys in the log entries who have not been identified as being signatures to a Joint Defense Agreement, Common Interest Agreement, or otherwise shown to merit privileges protected status. See, for example, Atlanta Log Entry No. 67.

For the log entries identified in Exhibit 5, paragraph (3) to the October 2, 2008 hearing transcript, in addition to the deficiencies noted herein, the log attached to Orbitz in camera production to the Special Master along with the Binders of attached documents, improperly identified and designated the privilege claims.

Orbitz took isolated, arguably privileged emails out of the document designated as privileged (an email thread including the isolated email) that if looked at as a whole would not merit privilege status. This seems to be an effort to present the isolated email out of context and mask the basis for Plaintiff's privilege challenge.

Orbitz sought to preserve its claim of privilege by submission of privilege logs. However, as set out above, the logs were inadequate and did not provide sufficient information to satisfy Orbitz's burden of establishing the propriety of its claims of privilege under applicable law. The fact that Orbitz found it necessary to revise the Atlanta log – which it did only after the issue of sanctions was raised at the October 2, 2008 hearing – serves to underscore the inadequacy of the logs.

V.

NECESSITY FOR IN CAMERA REVIEW

In evaluating the propriety of a claim of privilege the trial court should consider the totality of the circumstances. Southern Guaranty, *supra*, at 29. In certain circumstances the trial court may desire to conduct an *in camera* review of the documents at issue. *Id.* Based on the review of the totality of the circumstances relating to the nature of the subject documents, the manner of production, the inadequacy of the logs, and the conduct of the parties, the undersigned finds that *in camera* review was and is appropriate.

Orbitz did not satisfy its initial burden to establish the existence of a valid privilege. Orbitz failed to timely file an adequate privilege log with sufficient particularity and information to allow the Court and the City to make a determination as to the propriety of the privilege claimed. Orbitz withheld production of documents under these untimely and inadequate claims of privilege. Originally, no legend was provided, and subsequent legends were incomplete and inadequate. Many of the log entries suggest waiver of a claim of privilege by unwarranted

disclosure to third parties. The legends for both of the Columbus and Atlanta logs were likewise incomplete and did not provide sufficient information to identify the Orbitz employees as to job function and involvement in the subject transactions of the documents. Without this information, it is virtually impossible to properly evaluate the privilege claimed under the *Marriott* and/or *Southern Guaranty* test set out above.

The parties engaged and negotiated document production regarding both Atlanta and Columbus logs, and Orbitz produced numerous documents based on the City's challenge relating to both logs.

Orbitz did not comply with Judge Pullen's August 28, 2008 Order by not producing all "Category 6" documents as referenced therein until ordered to do by the Special Master.

Upon production of the "Category 6" documents to the Special Master as ordered, Orbitz advised Special Master that it was no longer claiming privilege to a large number of documents from the Atlanta and Columbus logs.

The "Category 6" documents for which Orbitz continued to claim privilege were produced in "Binder 1" (Atlanta Log) and "Binder 3" (Columbus Log). Orbitz subsequently disclosed to the Special Master that the "Binders 1 and 3" documents had been altered by purging from those documents the entries contained in "Binder 2".

Orbitz segregated those documents or parts of the documents from the documents which Orbitz maintained it's claims of privilege and produced them to the City and Special Master in "Binder 2".

VI.

SPECIAL MASTER'S AUTHORITY TO CONDUCT IN CAMERA REVIEW

Orbitz contends that *in camera* review should not be conducted because the conference requirement of URSC 6.4 has not been satisfied; that *in camera* review is prohibited here by

United States v. Zolin, 491 U.S. 554 (1989); and that *in camera* review would prejudice the trial judge. Each of these contentions will be addressed in turn.

First, with regard to the conference requirements of URSC 6.4 (B), Orbitz argues that a formal meeting and conference of some sort is required before any consideration of the dispute is appropriately before the Court. Orbitz cites no formal legal authority for this construction of the rule, nor would such an interpretation be warranted. It is readily apparent from the record in this case that these issues have been in contention literally for months now and that numerous communications and discussions have been conducted between counsel for the parties throughout this time, yet Orbitz continues to assert its claims of privilege regarding the documents in question. Thus, it strains the imagination to see how subjecting the parties and their counsel to any sort of "meet and confer" process at this point would lend any constructive purpose to resolving the issues that continue in need of resolution in order for this case to proceed.

Orbitz continues to assert that many of the documents, particularly those listed on the Atlanta privilege log, have not been the subject of a motion to compel and that, therefore, any issues of privilege regarding those documents is not yet properly before the Court. As discussed at the October 2, 2008 hearing before the Special Master, such an interpretation appears at odds with a plain language reading of the Court's order on the motion to compel, and, therefore, this contention is without merit.

Orbitz further contends that *in camera* review is not appropriate because the requirements of *United States v. Zolin*, 491 U.S. 554 (1989) have not been satisfied. It is important to note that *Zolin* involved the application of the federal rules of evidence in the federal courts and in no way involved the application of Georgia case law or statutes. Specifically, *Zolin* addressed the

relatively narrow question of whether a threshold showing should be required prior to the court undertaking *in camera* review where an opposing party argued that a claimed attorney-client privilege fell under the crime-fraud exception. Nonetheless, assuming – without finding – the applicability of *Zolin* here, any requirements it would impose before proceeding to an *in camera* review have been satisfied.

Any impact of applying *Zolin* to the instant case would involve the showing to be made by Columbus in order to demonstrate the appropriateness of *in camera* review. It is apparent from the Supreme Court's discussion that such a showing – even if required here – would not be a particularly high hurdle. "We therefore conclude that a lesser evidentiary showing is needed to trigger *in camera* review than is required ultimately to overcome the privilege....The threshold we set, in other words, need not be a stringent one." The Court went on to explain that all that is required is "a showing of a factual basis adequate to support a good faith belief by a reasonable person...that *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies" (*Id.* at 572). There is certainly sufficient evidence in the record of this case to overcome such a modest hurdle.

Finally, Orbitz' contention that in camera review should not be conducted because it could prejudice the trial judge is without merit. The Georgia Supreme Court has recognized the trial court's responsibility to conduct an *in camera* review to determine issues such as whether a claimed privilege applies, whether it may have been waived, and whether materials should be turned over to the opposing party. See, for example, *Ford Motor Co. v. Gibson*, 283 Ga. 398 (2008) and *McKinnon v. Smock*, 264 Ga. 375 (1994).

VII.

FINDINGS FROM *IN CAMERA* REVIEW

The undersigned conducted an in camera review of the Category 5 and Category 6

documents produced to the Special Master pursuant to Judge Pullen's Order of August 25, 2008. These documents included the following:

Category 5: The Joint Defense Agreement ("JDA") dated January 1, 2005 and written communications concerning the JDA which included the corresponding Common Interest Agreement dated December 1, 2004.

The common interest agreement apparently began in September 2004 when Orbitz outside counsel began to work to coordinate the efforts of other travel companies, including, for example, Expedia.com and Travelocity.com, with regard to occupancy tax issues. It was through these efforts that the term "Hotel Occupancy Taxes" was deleted and, in an effort to avoid the term, transitioned into a discussion of "fees."

The common interest agreement became the joint defense agreement as of January 1, 2005 in response to growing litigation over the occupancy tax issue, including a suit filed by the City of Los Angeles, California, contending that Orbitz and the other OTCs were not properly calculating, collecting and remitting occupancy taxes on the room rates being charged to consumers. The basis of the agreement was the desire of the parties to avoid collection and payment of occupancy taxes on any markup charged by them in the room rates charged to and paid by consumers.

I find no merit for Orbitz in its assertion of the joint defense privilege. It appears that the primary goal of this arrangement was the avoidance of payment of hotel occupancy taxes on room markup, as evidenced by the eventual shift from a discussion of "hotel occupancy taxes" to a discussion of "taxes and fees" together with the obvious effort to avoid discussion of occupancy taxes.

Category 6: The documents referenced in the Columbus and Atlanta logs which were at

issue as identified in Exhibit 5 to the October 2, 2008 hearing before the Special Master as well as the "Exit Memo," which was added as Entry No. 46 on the Columbus Log. These challenged documents included emails and other documents by and between Orbitz' employees and/or representatives and documents by and between Orbitz' employees and/or representatives and employees and/or representatives of other OTCs or other third parties.

The attorney work product privilege is codified in O.C.G.A. § 9-11-26 (b)(3). This code section provides, in relevant part, as follows:

> Trial preparation; materials. Subject to paragraph (4) of this subsection, a party may obtain discovery of documents and tangible things otherwise discoverable under paragraph (1) of this subsection and prepared in anticipation of litigation or for trial or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation....

In interpreting this code section and the work product privilege, Georgia courts have generally applied an analysis involving whether the privilege applies, whether it has been waived, and whether the party seeking disclosure has made the requisite showing. *Lowe's of Georgia, Inc. v. Webb*, 180 Ga. App. 755 (1986); *Fulton DeKalb Hospital Authority v. Miller & Billups*, 293 Ga. App. 601 (1986). Perhaps the first threshold is that there must first exist at least the reasonable expectation of forthcoming litigation before the protection attaches. See, for example, *Lowe's of Georgia, Inc. v. Webb*, 180 Ga. App. 755 (1986). Work product protection does not extend to ordinary matters handled in a routine fashion (*Fulton DeKalb Hospital Authority v. Miller & Billups*, 293 Ga. App. 601 (2008)). Further, the involvement of an attorney

"...does not necessarily bring material within the work product protection" (*Miller & Billups*, 667 S.E. 2d at 458, citing *Atlantic Coast Line Railroad Co. v. Gause*, 116 Ga. App. 216 (1967).

Next, "[o]nce the documents falling within the scope of work-product protection are determined, the trial court must consider the issue of waiver" (*McKesson HBOC, Inc. v. Adler*, 254 Ga. App. 500, 502 (2002). While the analysis is different from claims of attorney-client privilege, work product protection can be waived. For example, the protection is deemed to be waived if documents are provided to a party where at least the potential for an adversarial relationship exists. See, for example, *McKesson HBOC v. Adler*, 254 Ga. App. 500 (2002) and *McKesson Corporation et. al. v. Green*, 266 Ga. App. 157 (2004).

Finally, production is still proper where work product protection applies if the party seeking disclosure has a substantial need for the documents in preparing its case and cannot otherwise obtain the information without undue hardship. In making this determination, it does not matter that the documents were prepared for prior litigation. See, for example, *Ford Motor Company v. Gibson*, 283 Ga. 398 (2008), which upheld the trial court's order requiring the production of crash-test documents from prior litigation because the plaintiff could not generate such tests.

Orbitz' inadequate production has undermined efforts by the Special Master to assess Orbitz's work product claims. This is illustrated by the following summary:

Orbitz Work Product Claims
Atlanta Log

Document	Comments
7	Produced
11	Emails re revised hotel agreement/meaning of tax recovery charge
13	Hotel participation agreement and related comments (including reference to tax indemnification language)

46	Emails re taxing at package level [Does not match log description]
72	Log says produced but not in Binder 2. Documents in Binder 1 include emails re multistate subscription service and Georgia legislation [Does not match log description]
86	Log says produced but not in Binder 2. Documents in Binder 1 include emails re transaction data and documents on status of various lawsuits [Does not match log description]
94	Emails re getting independent hotel to testify re Georgia legislation [Does not match log description]
122	Emails re answers to interrogatories (including attorney comments) re reserve/contingency funds for payment of taxes
124	Emails re transaction data/amounts paid to hotels [Does not match log description]

Columbus Log

Document	Comments
12	Not in Binder 2 or 3
26	Not in Binder 2 or 3
36	In Binder 2 (produced) but not so indicated on log (email re collecting taxes and fees)
38	Not in Binder 2 or 3
40	Not in Binder 2 or 3

As can be seen from the above summary it is impossible for the Special Master to meaningfully evaluate Orbitz's work product claim. Some of the documents referenced as work product in the privilege logs are not produced at all, and there appears to be different from what is described in the logs. I find that Orbitz has failed to make a sufficient showing to support its claims of work product privilege.

Furthermore, even assuming the documents otherwise fall within the gambit of the

attorney-client communications, it is well established that communications made in furtherance of a crime or fraud are not privileged. See, for example, *Both v. Frantz*, 278 Ga. App. 556 (2006). The crime-fraud exception posits that, while communications with an attorney after the completion of a crime or fraud can be subject to the privilege, "...those which occur before the perpetration of a fraud or commission of a crime and which relate thereto are not protected by the privilege" (*Both, supra,* at 564). Invoking the exception does not require proof of a crime or fraud but instead only requires a *prima facie* showing that the communication was made in furtherance of a crime or fraud, even though such a showing "can ultimately be rebutted or contradicted" (*Both, supra,* at 563). See also *Rose v. Commercial Factors of Atlanta, Inc.*, 262 Ga. App. 528, 529 (2003), where the trial court property required production of documents because there was evidence that Defendant was perpetuating a fraud. The purpose of the crime-fraud exception is to prevent the use of the privilege to conceal communications made in furtherance of proposed or contemplated frauds or offenses (*Atlanta Coca-Cola Bottling Co. v. Goss*, 50 Ga. App. 637 (1935), citing *Gebhardt v. United Railways Co.*, 720 S.W. 677).

After reviewing the subject documents it appears to the undersigned that the communications at issue arguably evidence a calculated effort by Orbitz, individually and in concert with other OTC's, to circumvent state and local statutes and ordinances in an effort to evade the payment of hotel occupancy tax on Orbitz' margin or markup associated with its "merchant model" transactions. The communications appear to have been made in furtherance of a concerted effort by Orbitz and other OTCs and/or third parties to misrepresent, obfuscate, and mislead taxing authorities as to the true nature of its "merchant model" in order to avoid application of occupancy tax statutes and ordinances. Further, it appears from the documents that Orbitz and other OTC's had determined and agreed, well in advance of this lawsuit, not to

agree to remit any occupancy tax on its margin or markup associated with "merchant model" transactions. Consequently, any administrative efforts or procedures by the City undertaken to access and collect the applicable occupancy tax would have been futile and arguably evidence efforts by Orbitz to mislead or defraud the court.

The subject documents reveal a concerted effort of Orbitz to circumvent State and Local statues and ordinances to evade payment of hotel occupancy taxes, to wit:

- Orbitz maintained not only an aggressive litigation posture but also an aggressive lobbying effort, both at the state and national levels, to seek favorable treatment with regard to the taxable nature of its markup (Columbus Log Entry No. 46).
- This posture was apparently motivated by the fact that Orbitz makes "considerably more" money on its merchant model bookings and thought itself to be at a disadvantage, relative to its competitors, on this front (Atlanta Log Entry No. 26).
- However, Orbitz recognized the potential downside of this posture. "It's always a risk that as we educate the regulators or elected officials that they are better able to cook our goose" (Atlanta Log Entry No. 54).
- Nonetheless, Orbitz continues to maintain that the markup is not subject to occupancy taxes (Atlanta Log Entry No. 26); "So long as the tax is paid to the operator on the net rate, the amount of the margin or the basis by which it is calculated is not material." (Atlanta Log Entry No. 63).
- Part of the response on the part of Orbitz and other OTCs to the occupancy tax issue has been to shift to terms like "tax recovery charge" because "this distinction helps in the argument that we do not 'collect' taxes, and that if you

'collect' taxes it is a slippery slope to being liable for taxes or subject to the taxing authority's jurisdiction" (Atlanta Log Entry No. 95).

- It also appears that Orbitz consciously tried to shield its internal discussions of the occupancy tax issue from discovery by routing any communications concerning the matter through counsel in an effort to assert attorney-client privilege (Atlanta Log Entry No. 76).

Based on this review, it is the conclusion of the undersigned that the documents from the Atlanta and Columbus privilege logs fall under the crime-fraud exception and, therefore, not appropriate for privileged or protected status.

VIII.

SUMMARY

After thorough consideration of the arguments and contentions of counsel, together with the materials submitted throughout this process on behalf of the parties, it is the recommendation of the Special Master that the Court enter an order finding the documents at issue are not covered by the various privileges asserted by Orbitz, granting the motion to compel discovery filed by the City of Columbus, and ordering the production of those documents referenced in the Court's August 25, 2008 order.

This recommendation is based on a number of factors, including the untimely, inadequate and improper privilege logs and the withholding of numerous documents addressed by the court's August 25, 2008 order until after threat of sanctions. Further, *in camera* inspection of the documents in question reveals what appears to be a conscious and systematic effort by Orbitz to avoid payment of occupancy taxes on their room rate markup. This effort is ongoing and is geared toward not only past but also present and future taxes, thus bringing the documents under the crime-fraud exception. In addition, Plaintiff has substantial need of the information

contained in the documents in preparing its case and cannot obtain the equivalent of such information in any other manner, with or without undue hardship, since Orbitz is the only possible source of the information necessary to determine how taxes have been calculated, collected and paid on the room rate markup charged to consumers.

This 3rd day of December, 2008.

MARION T. POPE, JR.
SPECIAL MASTER