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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

AT PORTLAND

HOMEAWAY.COM, INC.,

Plaintiff,

v.

CITY OF PORTLAND,

Defendant.

Case No. 3:17-cv-91

**COMPLAINT TO DECLARE INVALID
AND ENJOIN ENFORCEMENT OF
PORTLAND CITY CODE SECTIONS
6.04.040(B), 6.04.060, 6.04.130(A)-(D),
6.04.170(C), (E)-(H)**

DEMAND FOR JURY TRIAL

For its Complaint, Plaintiff HomeAway.com, Inc. (“HomeAway”) alleges against Defendant City of Portland (the “City”) as follows:

I. INTRODUCTION

1. Pursuant to 42 U.S.C. § 1983 and the Declaratory Judgment Act, 28 U.S.C.

§ 2201, HomeAway seeks to declare invalid and enjoin enforcement of certain amendments to Portland City Code Chapter 6.04, which are scheduled to take effect January 20, 2017 (the “Ordinance”).¹ As explained below, the Ordinance impermissibly burdens speech on the Internet and threatens the privacy of online speakers in violation of the Communications Decency Act of 1996 (“CDA”), 47 U.S.C. § 230, the First, Fourth, Fifth, and Fourteenth Amendments of the United States Constitution, and the Stored Communications Act (“SCA”), 18 U.S.C. § 2701, *et seq.*

2. HomeAway operates several vacation rental websites that allow individuals to search for and rent properties from listing owners. The Ordinance imposes numerous requirements and burdens on websites. For example, the Ordinance requires websites like HomeAway to register with the City before publishing listings; prohibits them from and penalizes them for publishing certain listings; and requires them to provide considerable information to the City about owners, listings, and rentals without a subpoena or other legal process. Violations of the Ordinance are punishable by large fines. And the Ordinance purports to require courts to award the City its fees and costs incurred in any litigation the City brings, without regard to whether the City actually prevails. The Ordinance violates federal law in numerous respects.

3. First, the Ordinance violates Section 230 of the CDA. Designed to promote free speech and commerce on the Internet, Section 230 prohibits websites from being “treated as the publisher or speaker of any information” provided by a third parties and expressly preempts inconsistent state laws. 47 U.S.C. §§ 230(c)(1) & (e)(3). The Ordinance violates Section 230 because it requires HomeAway and similar entities to register with the City as a condition to hosting third-party listings, and to ensure that such listings contain a permit or case file number and the properties listed comply with “applicable legal requirements.”

¹ A copy of the law is attached as Exhibit 1.

4. The Ordinance violates the First and Fourteenth Amendments to the United States Constitution. The Ordinance is a content-based restriction on speech and therefore the City bears the burden of establishing, at a minimum, that the Ordinance furthers a substantial governmental interest and is narrowly tailored to achieve its purpose. The Ordinance cannot satisfy First Amendment scrutiny because other means exist to encourage compliance with the City's short-term residential rental laws.

5. In addition, the First Amendment forbids the government from imposing liability on publishers for publishing content absent proof the publisher had knowledge that the specific content was illegal. The Ordinance contains no *mens rea* requirement and instead imposes strict liability on HomeAway and similar entities, in violation of the First Amendment.

6. Further, the Ordinance is stated in such broad and vague terms that it fails to adequately inform websites of their obligations or what speech or other conduct the Ordinance proscribes. The Ordinance is therefore unconstitutionally vague under the First Amendment.

7. The Ordinance violates the SCA, which was designed to protect the privacy of stored Internet communications, and prohibits the government from compelling services like HomeAway to disclose customer information without a subpoena or other legal process. The Ordinance directly conflicts with this requirement because it requires no such process and yet mandates that HomeAway and similar entities disclose such information to the City.

8. The Ordinance violates the Fourth Amendment to the United States Constitution because it permits the City to search HomeAway's customer records without providing HomeAway or the affected customer the opportunity to obtain review beforehand by a neutral decision-maker.

9. The Ordinance also violates the dormant commerce clause of the United States Constitution because it unreasonably burdens the interstate commerce of HomeAway and similar entities.

10. Finally, the Ordinance is invalid under the Fifth and Fourteenth Amendments to

the United States Constitution because it purports to require courts to impose attorneys' fees on entities sued by the City for alleged failure to comply with the requirements of the Ordinance, whether or not the City prevails in that litigation, and without regard to whether such entities are found by the court to have violated any provision in the Ordinance, thus imposing an unconstitutional burden on HomeAway's right to challenge application of the Ordinance to it, and denying HomeAway an adequate remedy.

11. Absent relief from the Court, HomeAway will be faced with the Hobson's choice of being forced to change the way it does business, including by revising its business model and the operation of its website, or instead blocking most or all listings to avoid risking significant liability and penalties. HomeAway and its users will incur irreparable harm if the Court does not enjoin enforcement of the Ordinance.

II. PARTIES

12. Plaintiff HomeAway.com, Inc. is a corporation organized and existing under the laws of the state of Delaware, with a principal place of business in Austin, Texas.

13. Defendant City of Portland is a municipal corporation.

III. JURISDICTION AND VENUE

14. This Court has jurisdiction over this action under 28 U.S.C. § 1331 because HomeAway asserts claims under 42 U.S.C. § 1983 for violation of rights under the United States Constitution and federal law.

15. This Court may declare the legal rights and obligations of the parties in this action pursuant to 28 U.S.C. § 2201 because the action presents an actual case or controversy within the Court's jurisdiction.

16. Venue is proper in this Court under 28 U.S.C. § 1391 because the defendant resides and is located in this judicial district and the State of Oregon, and because a substantial part of the events giving rise to HomeAway's claims occurred in this judicial district.

IV. FACTUAL ALLEGATIONS

A. HomeAway

17. Since 2006, HomeAway has operated an online forum that allows owners to list their properties available for short-term rental and allows travelers to search for and find available properties that meet their criteria.

18. HomeAway operates three short-term rental websites directed principally to individuals in the United States: HomeAway.com, VRBO.com, and VacationRentals.com. These websites together represent one of the largest vacation rental distribution networks in the world.

19. Through HomeAway's websites, travelers can search for fully furnished, privately owned residential properties, including homes, condominiums, villas, cabins, houseboats, and other properties that listing owners rent to the public on a nightly, weekly, or monthly basis. HomeAway's websites bring together millions of travelers seeking short-term rentals with owners of more than one million properties in all 50 states and 190 countries.

20. Owners provide the content for the listings they post on the HomeAway websites, including information about the property, amenities, and rental rates and terms, which they set. The process for listing properties on HomeAway is automated, so that a listing appears on the website almost immediately after it is posted by an owner, without prior review by HomeAway personnel. HomeAway retains rights to block or remove listings but does not manually review all listings when they are initially submitted because that would undermine the efficiencies and convenience the website offers and that are important to users.

21. Travelers arrange reservations directly with listing owners. Travelers who find a property that meets their requirements may contact owners directly by phone or through form-based communication tools on HomeAway's websites. Owners decide to whom they rent, when they wish to rent, and how payments are made. Travelers pay owners directly or through third-party payment processors.

22. Owners pay to advertise their properties on the HomeAway websites in one of two ways. First, owners can buy subscriptions to advertise their properties on HomeAway's websites for a specified period, such as a year. Second, owners may pay for their listings on a pay-per-booking basis, paying a percentage of the cost of a confirmed booking.

23. HomeAway users agree "they are responsible for and agree to abide by all laws, rules, ordinances, or regulations applicable to the listing of their rental property and the conduct of their rental business, including but not limited to any and all laws, rules, ordinances, regulations or other requirements relating to taxes, credit cards, data and privacy, permits or license requirements, zoning ordinances, safety compliance and compliance with all anti-discrimination and fair housing laws, as applicable."²

B. The City's Lawsuit Against HomeAway

24. On October 21, 2015, the City of Portland filed a lawsuit against HomeAway in this Court, *City of Portland, Plaintiff, v. HomeAway.com, Inc. and HomeAway, Inc., Defendants*, No. 3:15-cv-01984-MO, for alleged failure to comply with provisions of the Portland City Code known as the "Transient Lodgings Tax." The City claimed that HomeAway was liable for taxes allegedly due and unpaid in connection with rental of the properties that were listed on its websites.

25. On November 13, 2015, HomeAway moved to dismiss the City's Complaint. HomeAway alleged, among other things, that the Ordinance did not apply to it. On June 7, 2016, the Court granted the motion.

26. The City filed an Amended Complaint on July 11, 2016. HomeAway filed a motion to dismiss the Amended Complaint on August 12. That motion was argued on December 16, 2016, and remains pending before the Court.

² See HomeAway Terms and Conditions ¶ 1, <https://www.homeaway.com/info/about-us/legal/terms-conditions> (last visited August 31, 2016).

C. The Ordinance

27. On December 21, 2016, the City enacted the Ordinance, amending the Transient Lodgings Tax Code. A true and correct copy of the Ordinance, with the revisions to the prior Ordinance displayed in redline, and including the City Council’s findings and resolution, is attached as **Exhibit 1**.

28. The City has claimed that the Ordinance was amended in response to the June 2016 Order in the pending litigation to state “the City Council’s intent that certain definitions and other language should include the expectation that short-term rental operations in the ‘sharing economy’ such as HomeAway, Airbnb and others are subject to the City Code for regulatory and taxation purposes.”

29. The Ordinance imposes numerous requirements on “Operators,” defined as “[a]ny Person that facilitates the reservation of an accommodation and collects the payment for the Room reservation from the Transient;” “[a]ny Transient Lodging Provider, Transient Lodging Intermediary or Transient Lodging Tax Collector as defined in ORS 320.300³,” and “[a] Booking Agent as defined in this Chapter.” Ordinance § 6.04.010(J). “Booking Agent” is defined as “any Person that provides a means through which a Host may offer a Short-Term Rental for transient lodging occupancy,” including “[a]ny Person who lists commercial Hotel rooms or long-term rentals for transient lodging occupancy;” or “[a]ny Person who directly or indirectly accepts, receives or facilitates payment, whether or not they are the ultimate recipient of the payment, * * *.” Ordinance § 6.04.010(B).

30. The Ordinance imposes the following requirements on Operators:

a. “Operators must provide all physical addresses of transient lodging

³ Under ORS 320.300(12), (13) and (14), “Transient lodging intermediary means a person other than a transient lodging provider that facilitates the retail sale of transient lodging and charges for occupancy of the transient lodging”; “Transient lodging provider means a person that furnishes transient lodging”; and “Transient lodging tax collector means a transient lodging provider or a transient lodging intermediary.”

occupancy locations * * * and the related contact information, including the name and mailing address of the general manager, agent, owner, Host or other responsible Person for the location.” Ordinance § 6.04.040(B).

b. Operators “must register with the Division on a form provided by the Division,” after which, the Division will establish an account and issue a Certificate of Authority. “Certificates of Authority must be prominently displayed so as to be seen by all occupants and persons seeking occupancy. If the Rent transaction is facilitated online, the Certificate of Authority must be able to be viewed by the Transient by clicking on [a] link to the Certificate of Authority at a reasonable place during the payment transaction.” Ordinance §§ 6.040.60(A)-(B).

c. Operators must “prominently display their Type A Permit Number or Type B Conditional Use case file number, as applicable, in all advertising and other listing services. No Operator will advertise or otherwise represent that an accessory Short-Term Rental is available for Occupancy unless all applicable legal requirements allowing the Occupancy of a Short-Term Rental has [*sic*] been met and the Operator has registered with the Division as required above.” Ordinance § 6.04.060(D).

d. Operators must maintain extensive records, “including but not limited to registration forms or logs, accounting and bank records, supporting documentation for all deductions taken and any other documentation necessary to support the tax report filed or required to be filed.” The Division is entitled to “examine during normal business hours the books, papers and accounting records relating to tax returns” after notice “and may investigate the business of the Operator in order to verify the accuracy of any return made. Ordinance § 6.04.130(A)-(B).

31. Violations of the Ordinance are punishable by a fine of \$500 for each violation and for each day the violation continues. Ordinance § 6.04.170.

32. Under Section 6.04.130(c) of the Ordinance, “[s]hould the City institute legal

proceedings in any state or federal court to collect the taxes, penalties and interest assessed in accordance with this Chapter, the City shall be entitled to its reasonable costs and attorneys' fees."

33. The Ordinance is scheduled to take effect on January 20, 2017.

V. CLAIMS FOR RELIEF

CLAIM I: VIOLATION OF AND PREEMPTION UNDER THE COMMUNICATIONS DECENCY ACT, 47 U.S.C. § 230, PURSUANT TO 42 U.S.C. § 1983

34. HomeAway incorporates all previous paragraphs as if fully set forth herein.

35. HomeAway is an "interactive computer service" within the meaning of 47 U.S.C. § 230 because it operates interactive websites.

36. The Ordinance violates HomeAway's rights under 47 U.S.C. § 230(c)(1) because enforcement of the Ordinance would treat it as the publisher or speaker of information provided by other information content providers, *i.e.*, owners listing their properties for rental through HomeAway's websites.

37. The Ordinance is a "State * * * law that is inconsistent with" Section 230, in direct violation of 47 U.S.C. § 230(e)(3).

38. The Ordinance violates and is preempted by Section 230, and it therefore should be enjoined and declared invalid.

CLAIM II: VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION, PURSUANT TO 42 U.S.C. § 1983

39. HomeAway incorporates all previous paragraphs as if fully set forth herein.

40. The Ordinance is invalid under the First and Fourteenth Amendments because it is a content-based restriction that impermissibly chills a substantial amount of protected speech and is not narrowly tailored to achieve a substantial governmental interest of the City.

41. The Ordinance is invalid under the First and Fourteenth Amendments because it

purports to impose strict liability on websites for publishing speech without any requirement of scienter.

42. The Ordinance is invalid under the First and Fourteenth Amendments because it fails to give persons of ordinary intelligence adequate notice of what speech it proscribes and is therefore unconstitutionally vague.

**CLAIM III: VIOLATION OF AND PREEMPTION UNDER
THE STORED COMMUNICATIONS ACT,
18 U.S.C. § 2701 ET SEQ., PURSUANT TO 42 U.S.C. § 1983**

43. HomeAway incorporates all previous paragraphs as if fully set forth herein.

44. HomeAway is a provider of electronic communication services under the SCA because it provides users “the ability to send or receive wire or electronic communications.” 18 U.S.C. § 2510(15). HomeAway is also a provider of remote computing services because it provides users “computer storage or processing services by means of an electronic communications system.” *Id.* § 2711(2).

45. Under the SCA, “a provider of remote computing service or electronic communication service to the public shall not knowingly divulge a record or other information pertaining to a subscriber to or customer of such service * * * to any governmental entity,” without a subpoena or other legal process. *Id.* §§ 2702(a)(3), (c)(1); 2703(c).

46. The Ordinance violates, conflicts with, and is preempted by the SCA because it requires HomeAway to “divulge a record or other information pertaining to a subscriber to or customer of such service” to a “governmental entity,” without a subpoena or other legal process. *Id.* See Ordinance §§ 6.04.040(B), 6.04.060(A).

**CLAIM IV: VIOLATION OF THE
FOURTH AMENDMENT OF THE U.S. CONSTITUTION**

47. HomeAway incorporates all previous paragraphs as if fully set forth herein.

48. The Fourth Amendment to the United States Constitution protects “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable

searches and seizures.”

49. The Fourth Amendment prohibits the government from executing an administrative search unless the subject of the search has “an opportunity to obtain pre-compliance review before a neutral decisionmaker.” *City of Los Angeles, Calif. v. Patel*, 135 S. Ct. 2443, 2451-52 (2015).

50. The Ordinance permits the Division to “examine during normal business hours the books, papers and accounting records relating to tax returns” and does not afford the subject of the search any opportunity for pre-compliance review before a neutral decisionmaker. Ordinance § 6.04.130(B).

51. The Ordinance violates the Fourth Amendment to the United States Constitution.

**CLAIM V: VIOLATION OF THE
DORMANT COMMERCE CLAUSE OF THE U.S. CONSTITUTION**

52. HomeAway incorporates all previous paragraphs as if fully set forth herein.

53. Under the dormant Commerce Clause, Art. 1, § 8, cls. 1 and 3, the United States Constitution bars individual states from regulating interstate commerce in a manner that burdens interstate commerce or discriminates against instruments or transactions of interstate commerce.

54. The City’s enforcement of the Ordinance against HomeAway and similar entities unreasonably burdens those entities’ interstate commerce. The provisions of the Ordinance described above serve no rational purpose and, if allowed to take effect, would unreasonably burden HomeAway and similarly situated entities in their interstate commerce.

55. The City’s actions as described in this Complaint violate a well-established constitutional right against unreasonable regulation of interstate commerce, and the City enjoys no immunity from suit for such action.

56. Therefore, enforcement of the Ordinance against websites such as HomeAway violates the dormant Commerce Clause of the United States Constitution.

**CLAIM VI: VIOLATION OF THE FIFTH AND
FOURTEENTH AMENDMENTS TO THE CONSTITUTION,
PURSUANT TO 42 U.S.C. § 1983**

57. HomeAway incorporates all previous paragraphs as if fully set forth herein.

58. The Ordinance is invalid under the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution by purporting to require courts to impose attorneys' fees on entities who are sued by the City for alleged failure to comply with the requirements of the Ordinance, without regard to whether the City prevails in that litigation, or whether such entities are found by the court to have violated any provision in the Ordinance. *See* Ordinance § 6.04.130(C).

CLAIM VII: DECLARATORY RELIEF PURSUANT TO 28 U.S.C. § 2201

59. HomeAway incorporates all previous paragraphs as if fully set forth herein.

60. This action presents an actual case or controversy between HomeAway and the City concerning the validity and enforceability of the Ordinance.

61. Because the Ordinance violates Section 230, 47 U.S.C. § 230, the First, Fourth, Fifth and Fourteenth Amendments to the United States Constitution, and the Stored Communications Act, 18 U.S.C. § 2701 et seq., and because portions of the Ordinance are preempted by Oregon law, HomeAway asks for a declaration pursuant to 28 U.S.C. § 2201 that the law is invalid and unenforceable.

VI. PRAYER FOR RELIEF

WHEREFORE, Plaintiff HomeAway.com, Inc. respectfully requests that the Court:

1. Declare that Sections 6.04.040(B), 6.04.060, 6.04.130(A)-(D), and 6.04.170(C), (E)-(H) of the Ordinance, as applied to HomeAway and similar entities, is preempted and invalidated by 47 U.S.C. § 230, 18 U.S.C. § 2701, *et seq.*, and the First, Fourth, Fifth and Fourteenth Amendments to the United States Constitution, and is therefore invalid and unenforceable;

2. Preliminarily and permanently enjoin the City and its respective officers, agents,

servants, employees, and attorneys, and those persons in concert or participation with them, from taking any actions to enforce Sections 6.04.040(B), 6.04.060, 6.04.130(A)-(D), and 6.04.170(C), (E)-(H) of the Ordinance against HomeAway and other platforms;

3. Award HomeAway its reasonable costs and attorneys' fees under 42 U.S.C. § 1988; and

4. Award HomeAway other and further relief as the Court deems just and proper.

DATED this 19th day of January, 2017.

Respectfully submitted,

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