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14 IN THE UNITED STATES DISTRICT COURT  
15 THE NORTHERN DISTRICT OF CALIFORNIA  
16 SAN FRANCISCO DIVISION

17 AIRBNB, INC. and HOMEAWAY.COM, INC.,

Case No. 3:16-cv-03615-JD

18 Plaintiffs,

**HOMEAWAY’S FIRST AMENDED  
COMPLAINT TO DECLARE INVALID  
AND ENJOIN ENFORCEMENT OF  
AMENDMENTS TO SAN FRANCISCO  
ADMINISTRATIVE CODE §§ 41A.5(e)  
AND 41A.5(g)(4)(C)-(E)**

19 v.

20 CITY AND COUNTY OF SAN FRANCISCO,

21 Defendant.  
22

23 For its Amended Complaint, Plaintiff HomeAway.com, Inc. (“HomeAway”) alleges as  
24 follows:

25 **1. INTRODUCTION**

26 1. Pursuant to 42 U.S.C. § 1983 and the Declaratory Judgment Act, 28 U.S.C. § 2201,  
27 HomeAway seeks to enjoin enforcement of a recently enacted San Francisco ordinance that  
28 impermissibly burdens speech on the Internet and threatens the privacy of online speakers, in

1 violation of the Communications Decency Act of 1996 (“CDA”), 47 U.S.C. § 230; the First and  
2 Fourteenth Amendments and Commerce Clause of the United States Constitution; and the Stored  
3 Communications Act (“SCA”), 18 U.S.C. § 2701 et seq.

4 2. Since February 2015, the City and County of San Francisco (“City”) has allowed  
5 permanent residents to rent out residential properties for short periods if they satisfy certain  
6 requirements, including registering their properties with the City, which assigns each property a  
7 registration number and lists the property on a registry. S.F. Admin. Code § 41A.5(g)(1)(E) &  
8 (3)(A). The law requires owners to include registration numbers in any “listing” on a “Hosting  
9 Platform,” the latter of which is defined as operating “an online platform that allows” owners to  
10 offer their unit for rent “through a website.” *Id.* § 41A.4.

11 3. Although the City’s prior law imposed liability only on owners who violated the  
12 short-term rental law, the Board of Supervisors in June 2016 adopted an ordinance that would  
13 have required Hosting Platforms to verify a residential property featured in a listing is on the  
14 registry and has a “valid registration number” (the “Original Ordinance”). After co-Plaintiff  
15 Airbnb, Inc. (“Airbnb”) and HomeAway filed this lawsuit, and in response to their claims, the  
16 Board adopted a different ordinance (the “Ordinance”), which forbids Hosting Platforms from  
17 providing “Booking Services” for short-term rentals that are not “lawfully registered” with the  
18 City. S.F. Admin. Code § 41A.5(g)(4)(c).<sup>1</sup> The Ordinance is preempted and invalid for the same  
19 reasons as the Original Ordinance.

20 4. The Ordinance violates Section 230 of the CDA. Designed to promote free speech  
21 and commerce on the Internet, Section 230 prohibits websites from being “treated as the publisher  
22 or speaker of any information” provided by a third party and expressly preempts inconsistent state  
23 laws. 47 U.S.C. § 230(c)(1) & (e)(3). The Ordinance violates Section 230 because it holds  
24 Hosting Platforms responsible for listings provided by third parties and, like the Original  
25 Ordinance, requires them to “verify” a listing is registered with the City.

26 5. The Ordinance also violates the First and Fourteenth Amendments to the United  
27 States Constitution. The Ordinance is a content-based restriction and therefore the City bears the

28 \_\_\_\_\_  
<sup>1</sup> A copy of the Ordinance is attached as Exhibit A.

1 burden of establishing, at a minimum, the Ordinance directly advances and is narrowly tailored to  
2 a substantial governmental interest. The Ordinance cannot satisfy First Amendment scrutiny  
3 because, as the City has acknowledged, it already has the means to enforce its short-term  
4 residential rental laws.

5 6. In addition, the First Amendment forbids the government from imposing criminal  
6 or civil liability on publishers for expressive content absent proof the publisher had knowledge the  
7 specific content was illegal. The Ordinance contains no *mens rea* requirement and seeks to  
8 impose strict liability on Hosting Platforms, in violation of the First Amendment.

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

12 8. The Ordinance also violates the SCA. Designed to protect the privacy of stored  
13 Internet communications, the SCA prohibits the government from compelling services like  
14 HomeAway to disclose customer information without a subpoena or other legal process. The  
15 Ordinance directly conflicts with this requirement because it requires no such process and yet  
16 appears to mandate that Hosting Platforms disclose such information to the City for the purpose of  
17 verifying that a rental is “lawfully registered.”

18 9. Finally, the Ordinance violates the Dormant Commerce Clause. It attempts to  
19 impose a regulation that would subject HomeAway and other online service providers to unique  
20 requirements in San Francisco, which if permissible, creates a risk of inconsistent legislation  
21 across all fifty states (and indeed, across different municipalities in this state).

22 10. Absent relief from this Court, HomeAway and other online providers will be faced  
23 with the burden of having to review all third-party listings to try to verify that they comply with  
24 San Francisco laws, or the Hobson’s choice of instead blocking most or all listings to avoid the  
25 risk of criminal charges and civil penalties. HomeAway and its users will incur irreparable harm  
26 if the Ordinance takes effect.

27

28

## I. PARTIES

11. 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.

12. Defendant City and County of San Francisco (“City”) is a municipal corporation.

## II. JURISDICTION AND VENUE

13. This Court has jurisdiction of this action under 28 U.S.C. § 1331 because HomeAway alleges a violation of 42 U.S.C. § 1983.

14. 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.

15. 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 California, and because a substantial part of the events giving rise to HomeAway’s claims occurred in this judicial district.

16. Pursuant to Local Rule 3-2, the Clerk has properly assigned this action to the San Francisco Division because the action arises in San Francisco. A substantial part of the events giving rise to HomeAway’s claims for relief occurred in San Francisco.

## III. FACTUAL ALLEGATIONS

### HomeAway

17. Since 2006, HomeAway has operated an online forum that allows owners to list their properties 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.

1 HomeAway’s websites bring together millions of travelers seeking short-term rentals with owners  
2 of more than one million properties in all 50 states and 190 countries.

3 20. Owners provide the content for the listings they post on the HomeAway websites,  
4 including information about the property, amenities, and rental rates and terms. Listings are  
5 posted to the HomeAway websites almost immediately after listing owners provide them.

6 21. Travelers arrange reservations directly with listing owners. Travelers who find a  
7 property that meets their requirements may contact owners directly by phone or through form-  
8 based communication tools on HomeAway’s websites. Owners decide to whom they rent, when  
9 they wish to rent, and how payments are made. Travelers pay listing owners directly or through  
10 third-party payment processors. HomeAway is not a party to any rental transaction between  
11 travelers and owners.

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

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

### 22 **The Original Ordinance**

23 24. Until February 2015, short-term residential rentals in San Francisco were unlawful.  
24 In the fall of 2014, the Board of Supervisors passed an ordinance that allows listing owners to rent  
25 out their primary residences for fewer than thirty days at a time so long as they satisfy certain  
26 requirements. S.F. Admin. Code § 41A.5(g). Owners must register their units on a registry  
27

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28 <sup>2</sup> See HomeAway Terms and Conditions ¶ 1, <https://www.homeaway.com/info/about-us/legal/terms-conditions> (last visited July 6, 2016).

1 maintained by the City, collect transient occupancy taxes, and carry liability insurance. *Id.* §  
2 41A.5(g)(1)(B)-(D). Owners may rent their properties for up to 90 days in a calendar year if they  
3 are absent during the stay (“unhosted” rentals). *Id.* § 41A.5(g)(1)(A). There is no cap on the  
4 number of days listing owners may rent their properties for stays when they are present (“hosted”  
5 rentals). *See id.*

6 25. The February 2015 ordinance also imposed requirements on the listing of  
7 residential properties on “Hosting Platforms,” defined at that time as “[a] person or entity that  
8 provides a means through which an Owner may offer a Residential Unit for Tourist or Transient  
9 Use,” which is “usually, though not necessarily, provided through an online platform.” S.F.  
10 Admin. Code § 41A.4. Listing owners must “include[] the Department-issued registration number  
11 on any Hosting Platform listing or other listing offering the Residential Unit for use as a Short-  
12 Term Residential Rental.” *Id.* § 41A.5(g)(1)(F).

13 26. In May 2015, the Planning Department released a report indicating the City had  
14 received 455 applications to register residential units on the registry, even though there were an  
15 estimated 4,000 to 5,000 short-term rental listings on the website of Airbnb, HomeAway’s largest  
16 competitor in San Francisco.<sup>3</sup>

17 27. In July 2015, the Board of Supervisors considered two proposals to further regulate  
18 and restrict short-term residential rentals. One proposal, sponsored by Supervisor David Campos,  
19 would have, among other things, prohibited owners from renting their units for more than 75 days  
20 in a calendar year, regardless whether the stay was hosted; required Hosting Platforms to verify a  
21 residential unit is on the City registry and remove listings once a unit has been rented for more  
22 than 75 days in a calendar year; expanded a private right of action against Hosting Platforms; and  
23 imposed criminal penalties against Hosting Platforms that violate the short-term rental laws.<sup>4</sup> A  
24 second proposal, sponsored by Supervisor Mark Farrell and Mayor Ed Lee, sought to expand the  
25 private right of action to enforce Chapter 41A; require hosts to file quarterly reports with the  
26 Planning Department; and direct the Mayor to create an Office of Short-Term Residential Rental

27 <sup>3</sup> City and County of San Francisco Planning Department, Executive Summary, Amendments Relating to Short-Term  
28 Rentals (Apr. 16, 2015), <http://commissions.sfplanning.org/cpcpackets/2014-001033PCA.pdf>.

<sup>4</sup> San Francisco Ordinance No. 130-15, File No. 150295 (proposed July 14, 2015),  
<https://sfgov.legistar.com/View.ashx?M=F&ID=3864067&GUID=5E786999-BE03-4D6F-9757-2A44656074D6>.

1 Administration and Enforcement (“OSTR”).<sup>5</sup> The Board passed the Farrell-Lee proposal, and the  
 2 Mayor approved it July 30, 2015.<sup>6</sup>

3 28. The Mayor announced the establishment of the OSTR in July 2015, calling it a  
 4 “one-stop” shop for registration of properties to be used for short-term rentals and enforcement of  
 5 the City’s short-term rental ordinances.<sup>7</sup> The Mayor and Supervisor Farrell explained that short-  
 6 term rentals benefit residents by helping them “afford to stay in our City because they rent out  
 7 their home or spare bedroom occasionally,” but the City would pursue enforcement against “the  
 8 most egregious violators” of the law.<sup>8</sup>

9 29. To register their properties, owners must complete a two-step process. First, they  
 10 must obtain a San Francisco Business Registration Certificate from the Treasurer & Tax  
 11 Collector.<sup>9</sup> Second, they must schedule an in-person appointment with the OSTR and present a  
 12 completed application, proof of residency, their Business Registration Certificate, documentation  
 13 of liability insurance of at least \$500,000, and documentation that their property does not violate  
 14 any City code. Thereafter, they must submit quarterly reports of all stays in their units.<sup>10</sup> Listing  
 15 owners, unless exempted, must also obtain a Certificate of Authority from the Treasurer & Tax  
 16 Collector and file monthly reports documenting the amount of rent received and transient  
 17 occupancy tax due.<sup>11</sup> In addition, earlier this year, the City’s Assessor-Recorder announced that  
 18 owners must pay taxes on physical assets, meaning they must report the cost and acquisition year  
 19 of “each piece of furniture, equipment, and supplies used in renting your residence, including  
 20 kitchen appliances, laundry machines, entertainment units, linens, dishes, utensils, artwork, and  
 21 any other property that you provide to your renters as part of the rental activity,” as well as

22 \_\_\_\_\_  
 23 <sup>5</sup> San Francisco Ordinance No. 130-15, File No. 150653 (proposed July 14, 2015),  
<https://sfgov.legistar.com/View.ashx?M=F&ID=3891688&GUID=F126F2C4-7859-4999-A5D4-D606BEB9CF15>.

24 <sup>6</sup> San Francisco Ordinance No. 130-15 (passed July 30, 2015),  
<https://sfgov.legistar.com/LegislationDetail.aspx?ID=2262359&GUID=0AD10E60-D561-4738-A67D-97A628A22B94&Options=ID|Text|&Search=short-term>.

25 <sup>7</sup> News Release, Mayor Lee Announces New “One-Stop Shop” Office of Short-Term Rental Administration &  
 Enforcement (July 2, 2015), <http://www.sfmayor.org/index.aspx?recordid=911&page=846>.

26 <sup>8</sup> *Id.*

27 <sup>9</sup> City and County of San Francisco Planning Department, Office of Short-Term Rental Registry & FAQs, <http://sf-planning.org/office-short-term-rental-registry-faqs> (last visited July 6, 2016).

28 <sup>10</sup> *Id.*

<sup>11</sup> City and County of San Francisco Treasurer & Tax Collector, Transient Occupancy Tax (TOT) Frequently Asked  
 Questions for Hosts, Website Companies and Merchants of Record,  
[http://sftreasurer.org/tot\\_host\\_website\\_merchant\\_faq](http://sftreasurer.org/tot_host_website_merchant_faq) (last visited July 6, 2016).

1 physical assets used to operate the rental activity, “including cleaning supplies, computer  
2 equipment, and office equipment such as desks, chairs, and file cabinets.”<sup>12</sup>

3 30. Dissatisfied with the defeat of the Campos proposal, an organization called Share  
4 Better gathered enough signatures to place a similar measure on the San Francisco ballot in  
5 November 2015.<sup>13</sup> Like Campos’s proposal, Proposition F would have prohibited owners from  
6 renting their units for more than 75 days in a calendar year, allowed interested parties to sue  
7 Hosting Platforms, and made it a misdemeanor for a Hosting Platform to publish a listing that does  
8 not include the unit’s registration number. Voters overwhelmingly rejected the measure.<sup>14</sup>

9 31. A report requested by Supervisor Campos and issued April 7, 2016, by the Board  
10 of Supervisors’ Budget and Legislative Analyst’s Office stated the OSTR had received 1,647  
11 registration applications as of March 2016, up from 579 in May 2015, and estimated this  
12 represented 31 percent of owners.<sup>15</sup> The report also stated the OSTR had pursued 322  
13 enforcement cases, resulting in 79 notices of violations and \$680,000 in assessed penalties.  
14 According to the report, the OSTR had developed “new strategies to proactively identify non-  
15 compliant hosts,” including by reviewing listings of short-term rentals online.<sup>16</sup> Further, the report  
16 noted that there was a “significant increase” in the number of registration applications after  
17 November 2015.<sup>17</sup>

18 32. In June 2016, the Board of Supervisors passed an ordinance (the “Original  
19 Ordinance”) that, for the first time, attempted to impose liability on Hosting Platforms. The  
20 Original Ordinance provided that “[p]rior to providing reservation and payment services for a  
21 listing of a Residential Unit within the City to be rented for Tourist or Transient Use, a Hosting

22 \_\_\_\_\_  
23 <sup>12</sup> City and County of San Francisco Office of the Assessor-Recorder, Short-Term Rental Business Personal Property  
24 Taxation Frequently Asked Questions (FAQ),  
[http://www.sfassessor.org/sites/default/files/2016%20FAQ%20for%20Short%20Term%20Rentals\\_\\_FINAL%20%282016.3.17%29.pdf](http://www.sfassessor.org/sites/default/files/2016%20FAQ%20for%20Short%20Term%20Rentals__FINAL%20%282016.3.17%29.pdf).

25 <sup>13</sup> Carolyn Said, *Prop. F: S.F. voters reject measure to restrict Airbnb rentals*, SFGate, Nov. 4, 2015,  
26 <http://www.sfgate.com/bayarea/article/Prop-F-Measure-to-restrict-Airbnb-rentals-6609176.php>. See also City and  
27 County of San Francisco Ordinance Amending the Administrative Code with respect to Short-Term Residential  
28 Rentals (May 6, 2015), [http://sfgov2.org/ftp/uploadedfiles/elections/candidates/Nov2015/ShortTermRentals\\_Text.pdf](http://sfgov2.org/ftp/uploadedfiles/elections/candidates/Nov2015/ShortTermRentals_Text.pdf)  
(text of Prop. F).

<sup>14</sup> *Id.*

<sup>15</sup> City and County of San Francisco Board of Supervisors, Budget and Legislative Analyst’s Office, “Short-Term  
Rentals 2016 Update,” at 17 (Apr. 7, 2016), <http://www.sfbos.org/Modules/ShowDocument.aspx?documentid=55575>.

<sup>16</sup> *Id.* at 21.

<sup>17</sup> *Id.* at 17.



1 Platform shall verify with the Office of Short-Term Residential Rental Administration and  
 2 Enforcement that the Residential Unit is listed on the Registry and has a valid registration  
 3 number.” The Original Ordinance required Hosting Platforms to either provide the “verified  
 4 registration number on each listing” or “send[] the verified registration number, Residential Unit  
 5 street address (including any unit number), and host name” to the OSTR.

6 33. Supervisor Campos stated in a Facebook post that the Original Ordinance would  
 7 “hold Airbnb and other hosting platforms accountable for advertising illegal short term rentals.”  
 8 Supervisor Aaron Peskin, another sponsor, stated that the purpose was to “hold[] the hosting  
 9 platforms accountable for the hundreds of units [rented by] unscrupulous individuals who have  
 10 taken multiple units of affordable housing off the rental market.”

11 34. On June 27, 2016, Airbnb filed this lawsuit to enjoin enforcement of the Original  
 12 Ordinance. On July 12, 2016, HomeAway filed a complaint in intervention. In response, on July  
 13 12, 2016, Supervisor Campos introduced the Ordinance, explaining that he had “read [Airbnb’s]  
 14 brief,” “said, you make a good point,” and therefore “decided we’re going to modify.”<sup>18</sup> The  
 15 Board of Supervisors passed the Ordinance on August 2, 2016.

### The Ordinance

16  
 17 35. The Ordinance, like the Original Ordinance, imposes liability on Hosting Platforms  
 18 for the failure of third parties who post listings on such platforms to comply with City laws. It  
 19 states that a “Hosting Platform may provide, and collect a fee for, Booking Services in connection  
 20 with short –term rentals for Residential Units ... only when those Residential Units are lawfully  
 21 registered” on the City’s registry. Ordinance § 41A.5(g)(4)(C). It defines “Hosting Platform” as  
 22 an entity that “participates in the short-term rental business by providing, and collecting or  
 23 receiving a fee for, Booking Services through which an Owner may offer a Residential Unit for  
 24 Tourist or Transient Use.” *Id.* § 41A.4. It defines “Booking Services” as “any reservation and/or  
 25 payment service provided by a person or entity that facilitates a short-term rental transaction  
 26 between an Owner or Business Entity and a prospective tourist or transient user, and for which the

27  
 28 <sup>18</sup> Caleb Pershan, Airbnb Again at the Center of Political Play This Election Year as Supervisors Fast-Track  
 Amendments, SFist Blog, July 26, 2016, [http://sfist.com/2016/07/26/supervisor\\_campos\\_airbnb\\_legislatio.php](http://sfist.com/2016/07/26/supervisor_campos_airbnb_legislatio.php) (last  
 visited August 29, 2016).

1 person or entity collects or receives, directly or indirectly through an agent or intermediary, a fee  
2 in connection with the reservation and/or payment services provided for the short-term rental  
3 transaction.” *Id.* It does not define “lawfully registered,” “reservation service,” “payment  
4 service,” or “short-term rental transaction.” *Id.*

5 36. The Ordinance also mandates that starting November 5, 2016, Hosting Platforms  
6 must on the fifth day of each month, “provide a signed affidavit to the Office of Short Term  
7 Rentals verifying that the Hosting Platform has complied with subsection (g)(4)(C) of this Section  
8 41A.5 in the immediately preceding month.” Ordinance § 41A.5(g)(4)(D).

9 37. The Ordinance also requires that a Hosting Platform “maintain and be able, in  
10 response to a lawful request, to provide to [OSTR] for each short term transaction for which a  
11 Hosting Platform has provided a Booking Service” a host of information about the transaction,  
12 including the name of the unit’s owner, the address, the dates of the stay, and the registration  
13 number. Ordinance § 41A.5(g)(4)(E). The Hosting Platform must keep this information for “not  
14 less than three years following the end of the calendar year in which the short-term rental  
15 transaction occurred.” *Id.* The Ordinance grants OSTR the power to subpoena these records. *Id.*  
16 § 41A.7(b)(2).

17 38. The Ordinance imposes criminal and civil liability and penalties for violations of  
18 Hosting Platforms’ obligations. It states that “any Hosting Platform that provides a Booking  
19 Service for a Residential Unit to be used for Tourist or Transient Use in violation of the Hosting  
20 Platform’s obligations under this Chapter 41A shall be guilty of a misdemeanor,” punishable by a  
21 fine of \$1,000, six months in jail, or both. Ordinance § 41A.5(e). The Ordinance also assesses  
22 “administrative penalties” for the “failure of a Hosting Platform to comply with” the law, of up to  
23 \$484 for initial violations and \$968 for subsequent ones. *Id.* § 41A.6(d)(1). The Ordinance allows  
24 “civil penalties” against Hosting Platforms “of not more than \$1,000 per day for the period of  
25 unlawful activity.” S.F. Admin. Code § 41A.5(d)(3).

26 39. City officials have acknowledged that they have other means to boost compliance  
27 with short-term residential rental laws.

28

1           40.     For example, the City created the OSTR specifically to enforce the laws. In fiscal  
2 year 2015-16, the Office had a budget of \$880,106. It is staffed by six full-time employees tasked  
3 with identifying hosts who are out of compliance with existing regulations, conducting  
4 investigations of potential violations, issuing notices of violations, and holding hearings requested  
5 by hosts who have been issued notices of violations.<sup>19</sup>

6           41.     In addition, the Original Ordinance required the OSTR to “promulgate rules and  
7 regulations to simplify and streamline the application process and to minimize the time between  
8 the filing of applications and their final approval.” Ordinance § 41A.7(a). As the City admits, the  
9 current two-step process “might deter or confuse otherwise compliant short-term rental hosts” and  
10 streamlining the process “would remove what could be one of the most significant barriers to  
11 compliance” and free more OSTR staff time for identifying violations.<sup>20</sup>

12           42.     The Ordinance was scheduled to take effect September 11, 2016. The City has  
13 agreed to stay enforcement of the Ordinance pending this Court’s resolution of a motion for  
14 preliminary injunction filed concurrently by Airbnb and HomeAway.

15           43.     The Ordinance is vague. For example, it applies to Hosting Platforms that provide  
16 “reservation and payments services” but does not define those terms. The Ordinance also does not  
17 state what it means for a given unit to be “lawfully registered” on the registry, nor does it state  
18 what it means for a property to be registered “at the time it is rented.”

19           44.     The Ordinance imposes a significant burden on HomeAway. At a minimum, for  
20 each of thousands of listings posted by users, an employee must ensure that the listed unit is  
21 “lawfully registered,” although it is unclear how and when this is to be done. On information and  
22 belief, this would, at a minimum, require HomeAway to disclose its customers’ names, addresses,  
23 and potentially other information to the City. In addition, HomeAway must also determine the  
24 unit’s registration number and retain it for at least three years. This would significantly disrupt  
25 HomeAway’s business, as the process by which an owner posts a listing is generally automated.

26  
27  
28 <sup>19</sup> City and County of San Francisco Board of Supervisors, Budget and Legislative Analyst’s Office, “Short-Term  
Rentals 2016 Update,” at 17 (Apr. 7, 2016), <http://www.sfbos.org/Modules/ShowDocument.aspx?documentid=55575>.

<sup>20</sup> *Id.* at 26-27.

1 45. HomeAway and numerous other online service providers will suffer immediate and  
2 irreparable harm under the Ordinance because the threat of criminal prosecution under the law will  
3 require it to undertake the impossible task to review and censor third-party content or block content  
4 altogether.

5 **IV. CLAIMS FOR RELIEF**

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

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

10 47. HomeAway is an “interactive computer service” within the meaning of 47 U.S.C. §  
11 230 because it operates interactive websites.

12 48. The Ordinance violates Section 230 of the CDA, 47 U.S.C. § 230(c)(1), because it  
13 would impose liability on HomeAway for publishing information by third parties, i.e., owners  
14 listing their properties for rental through HomeAway’s websites.

15 49. The Ordinance is a “State ... law that is inconsistent with” Section 230, in direct  
16 violation of 47 U.S.C. § 230(e)(3).

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

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

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

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

25 53. The Ordinance is invalid under the First and Fourteenth Amendments of the United  
26 States Constitution because it purports to impose strict criminal and civil liability on websites for  
27 publishing speech without any requirement of scienter.  
28

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

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

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

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

12           57.     Under the SCA, “a provider of remote computing service or electronic  
13 communication service to the public shall not knowingly divulge a record or other information  
14 pertaining to a subscriber to or customer of such service ... to any governmental entity,” without a  
15 subpoena or other legal process. 18 U.S.C. §§ 2702(a)(3), (c)(1); 2703(c).

16           58.     The Ordinance violates, conflicts with, and is preempted by the SCA because it  
17 requires HomeAway to “divulge a record or other information pertaining to a subscriber to or  
18 customer of such service” to a “governmental entity,” without a subpoena or other legal process.  
19 18 U.S.C. §§ 2702(a)(3), (c)(1); 2703(c). *See* Ordinance §§ 41A.5(g)(4)(D).

20                   **CLAIM IV: VIOLATION OF THE COMMERCE CLAUSE OF THE UNITED STATES**  
21                   **CONSTITUTION, PURSUANT TO 42 U.S.C. § 1983**

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

23           60.     The Ordinance violates the Commerce Clause of the United States Constitution  
24 because it seeks to apply San Francisco law in a manner that constitutes an unreasonable and undue  
25 burden on interstate commerce that is excessive in relation to any local benefit conferred on the  
26 State of California and is likely to subject parties to inconsistent state regulations.

27                   **CLAIM V: DECLARATORY RELIEF PURSUANT TO 28 U.S.C. § 2201**

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

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

63. Because the Ordinance violates Section 230, 47 U.S.C. § 230, the First, Fourteenth Amendments, and Commerce Clause of the United States Constitution, and the Stored Communications Act, 18 U.S.C. § 2701 et seq., HomeAway asks for a declaration pursuant to 28 U.S.C. § 2201 that the law is invalid and unenforceable.

**V. PRAYER FOR RELIEF**

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

1. Declare that the portions of the Ordinance to be codified at San Francisco Administration Code §§ 41A.5(e) and 41A.5(g)(4)(C)-(E) are preempted by 47 U.S.C. § 230 and 18 U.S.C. § 2701 et seq., and unconstitutional under the First and Fourteenth Amendments to the United States Constitution, and 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 the portions of the Ordinance to be codified at San Francisco Administration Code §§ 41A.5(e) and 41A.5(g)(4)(C)-(E);

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 6th day of September, 2016.

Respectfully submitted,  
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