

COMMITTEE OF THE WHOLE

12-0322R

RESOLUTION APPROVING SETTLEMENT IN THE MATTER OF CITY OF
DULUTH V. EXPEDIA, INC. IN THE AMOUNT OF \$60,000.

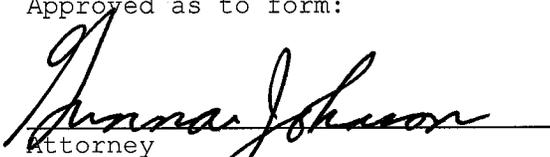
CITY PROPOSAL:

RESOLVED, that the city council approves settlement in the amount of \$60,000 of all claims or causes of actions asserted by the city of Duluth in that matter venued in the District Court of Minnesota, Sixth Judicial District, and identified as *City of Duluth v Expedia, Inc.*, File No.69DU-CV-11-1217, and further authorizes the proper city officials to execute all documents necessary to conclude this matter on a full, final and complete basis, funds to be deposited in Fund 258-030-4060-4062 (Tourism Taxes Fund, Hotel-Motel Taxes).

Approved for presentation to council:


Chief Administrative Officer

Approved as to form:


Attorney

Approved:


Auditor

ADM/ATTY GBJ:cjk 6/21/2012

STATEMENT OF PURPOSE: This resolution requests that the city council approve the settlement agreement between the City of Duluth and Expedia, Inc.

SETTLEMENT AGREEMENT

This Settlement Agreement (the "Agreement") is entered into this ___ day of ____, 2012, between, on the one hand, the City of Duluth ("Duluth") and, on the other hand, Expedia, Inc. ("Expedia") and two of its affiliates, Hotels.com, L.P. ("Hotels") and Hotwire, Inc. ("Hotwire") (collectively, the "Expedia Companies").

Whereas, Duluth and Expedia are parties to a lawsuit, *City of Duluth v. Expedia, Inc.*, Docket No. 69DU-CV-11-1217 (the "Lawsuit"), filed in Minnesota District Court, Sixth District; and

Whereas, the Lawsuit concerns allegations that Expedia should have collected sales and lodging taxes imposed by Duluth respecting hotel occupancy, which allegations are denied by Expedia; and

Whereas, Hotels and Hotwire operate hotel-related websites that are not at issue in the Lawsuit, but which the parties wish to address herein as part of a comprehensive settlement; and

Whereas, Duluth has had the opportunity to examine transactional data for the Expedia Companies, which data is based upon the United States Postal Service zip codes for Duluth; and

Whereas, Duluth and the Expedia Companies have resolved all issues among themselves and desire to settle their differences;

NOW, THEREFORE, IT IS MUTUALLY AGREED by and between Duluth and the Expedia Companies, acting through their duly authorized undersigned representatives and/or legal counsel, as follows:

1. Within fifteen (15) business days from the execution of this Agreement by all parties, the Expedia Companies will collectively pay \$60,000 in total to Duluth (the "Settlement Payment").

2. Duluth acknowledges that this sum is the only consideration to be paid by the Expedia Companies to Duluth in connection with this settlement and that this consideration fully satisfies any alleged obligations of the Expedia Companies relating in any manner to the “Released Claims” defined in paragraph 3.

3. Effective at the time the Settlement Payment is made, Duluth hereby completely and irrevocably releases and forever discharges the Expedia Companies and their present or former, successor, direct or indirect, parents, subsidiaries, affiliates, agents, legal representatives, insurers, employees, officers, directors and shareholders, of and from any and all past, present or future causes of action, assessments, claims, demands, expenses, damages or losses, of whatever kind or nature, known or unknown, asserted or unasserted, in law or in equity, including (without limitation) by audit or assessment, which existed, accrued or arose prior to and through the date of this Agreement, or which may exist, accrue or arise during or related to the Two-Year Period defined in paragraph 4, relating in any way to: (a) the Expedia Companies’ alleged failure to collect, pay and/or remit hotel accommodation or hospitality taxes or fees, including without limitation pursuant to the ordinances identified in paragraph 3 of the Complaint, and Section 54(D) of the Duluth Charter, Section 42A-2 of the Duluth Legislative Code, and Section 42A-49 of the Duluth Legislative Code, and any applicable penalties, interest and/or additions to such taxes (collectively, the “Hotel Lodging Taxes”); (b) the Expedia Companies’ alleged collection of the Hotel Lodging Taxes that were not remitted to Duluth; and (c) any other remaining claims as of the Settlement Date asserted by Duluth against Expedia in the Lawsuit (collectively, the “Released Claims”).

4. Duluth acknowledges, following sufficient discovery and investigation by counsel, and in consideration of the payment referenced in paragraph 1, that from the date of this

Agreement through March 31, 2014 (the "Two-Year Period"), no Hotel Lodging Taxes are or will be due and owing by the Expedia Companies under the ordinances or other laws in effect at the time of the Agreement ("Current Ordinances"), or any amended or different ordinance or law that may be enacted. Duluth agrees that it will not circumvent the release by seeking to enforce or apply any new tax or amended ordinance to the Expedia Companies that is, in form or substance, a Hotel Lodging Tax. Duluth shall not bring suit against the Expedia Companies, or otherwise attempt to collect, assess or offset any such Hotel Lodging Taxes during or relating to such Two-Year Period, and during such period the Expedia Companies shall have no obligation to register with Duluth to bill, collect or pay over the Hotel Lodging Tax. The execution and existence of this Agreement is not, and shall not be, used as evidence that a nexus exists between the Expedia Companies and Duluth. Duluth represents that this release of claims and this covenant not to sue the Expedia Companies relating to the Two-Year Period is and will be enforceable as against Duluth and any of its agencies, departments, representatives or successors.

5. Upon receipt of the Settlement Payment, Duluth shall cause the dismissal with prejudice of the Lawsuit by filing a Notice of Dismissal in the form attached hereto as Exhibit A. The dismissal with prejudice shall not be and is not a judgment on the merits of any claim brought, but is in furtherance of settlement only. Each party is to bear its own costs and attorneys' fees.

6. Duluth acknowledges that: (a) it has consulted with its legal counsel about the settlement; (b) it is entering into this Agreement voluntarily and with an understanding that it is releasing all of the Released Claims against the Expedia Companies; (c) it has the authority to enter into this Agreement; (d) no other persons or entities have or have had any interest in the

claims that are now being released; and (e) it has not sold, transferred or assigned its claims to any other person or entity.

7. The parties acknowledge that each side takes a different view of the facts and law related to the Lawsuit and any claims against Hotels and Hotwire. The parties agree that this Agreement is based on the parties' stated desire to compromise this dispute and is not an indication that either side has expressed agreement with the other side's view of the facts or law.

8. The parties, and their attorneys, agree not to characterize this settlement to anyone as any kind of admission by the Expedia Companies that the Hotel Lodging Tax is or was owed, or that the Settlement Payment is or was made by the Expedia Companies for the purpose of paying past or future taxes or to satisfy any asserted liability. The parties, and their attorneys, agree to describe the Settlement Payment as consideration for the compromise and release of disputed claims.

9. The parties, and their attorneys, agree that they will refrain from issuing any press releases and/or public statements regarding this Agreement unless required by law to do so. If a public statement or press release is required or made, in any communication with the media relating in any way to the terms of the settlement or otherwise intended for publication through the media, the parties, and their attorneys, shall state in words or in substance the following: (a) that the settlement is intended to compromise disputed claims; (b) that the Expedia Companies are not admitting any liability for Hotel Lodging Taxes; (c) that any payments made by the Expedia Companies are not for the purpose of paying past or future Hotel Lodging Taxes; but (d) that Duluth is not admitting that Hotel Accommodation Taxes were not due in the pending lawsuit or for the past or future.

10. Duluth and its attorneys will not produce, release or otherwise disseminate this Agreement, unless ordered or compelled by a court of competent jurisdiction. In the event this Agreement is requested from Duluth for any reason, Duluth agrees to notify the Expedia Companies of the request and not object to any actions made by the Defendants in opposing such production/disclosure. Such notification shall be made in writing to: Walter A. Pickhardt, Faegre & Benson LLP, Wells Fargo Center, 90 South Seventh Street, Minneapolis, MN 55402; and James P. Karen, Jones Day, 2727 N. Harwood, Dallas, Texas 75201.

11. The parties have agreed to enter into this Agreement in order to put to rest the uncertainty and expense of the Lawsuit and to resolve all disputed claims by Duluth against the Expedia Companies. The parties acknowledge, following sufficient discovery and investigation by counsel, that this Agreement resolves those disputed claims and that the settlement of such claims is not an admission of liability or responsibility by any party. This Agreement, as well as the terms or conditions thereof, or any draft thereof, or discussion, negotiation, documentation, or other part or aspect of the parties' settlement discussions, shall not be admissible in evidence except to enforce the terms of this Agreement.

12. This Agreement (including each of the rights and obligations set forth herein) shall be binding upon, and inure to the benefit of, the respective present or former or future successor, parents, subsidiaries, affiliates, agents, representatives, officials, insurers, employees, officers, directors and shareholders of the undersigned parties. Additionally, any reference in this Agreement to the Expedia Companies or Duluth shall be a reference to the present or former, successor, direct or indirect, parents, subsidiaries, affiliates, agents, legal representatives, insurers, employees, officers, directors and shareholders of those entities.

13. Each party has cooperated in the drafting and preparation of this Agreement, and it shall be construed according to the plain meaning of its language and not for or against any party.

14. This Agreement shall not be amended or revised except in a writing signed by all parties.

15. This Agreement may be executed in two or more counterparts, each of which shall be deemed to be an original but all which together shall constitute one and the same instrument. A signature page to this Agreement delivered by email or facsimile shall be considered as an original signature page.

Date: ___ day of _____, 2012

City of Duluth, Minnesota

By: _____
Title: _____

Date: 17th day of June, 2012

Bob Dzielak

Expedia, Inc.

By: Executive Vice President, General Counsel
Title: and Secretary

Date: 17th day of June, 2012

Bob Dzielak

Hotels.com L.P.

By: Bob Dzielak
Title: Executive Vice President, General Counsel and Secretary

Date: 17th day of June, 2012

Bob Dzielak

Hotwire, Inc.

By: Bob Dzielak
Title: Executive Vice President, General Counsel and Secretary

EXHIBIT A

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF ST. LOUIS

SIXTH JUDICIAL DISTRICT

CITY OF DULUTH,

Plaintiff,

Court File No. _____

v.

EXPEDIA, INC.,

Defendant.

NOTICE OF DISMISSAL WITH PREJUDICE

Comes now Plaintiff, pursuant to Rule 41.01(a) of the Minnesota Rules of Civil and the terms of the parties' Settlement Agreement, including but not limited to the "Released Claims" defined therein, and hereby enters this notice of dismissal in order to dismiss with prejudice the above referenced lawsuit, with the Court retaining jurisdiction to enforce the terms of the parties' Settlement Agreement.

DATED: _____, 2012

Respectfully submitted,

John H. Bray, #209922
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Hermantown, MN 55811
(218) 722-7722

Attorneys for Plaintiff City of Duluth