THE STATE OF NEW HAMPSHIRE
SUPREME COURT

NO. 2017-0674

The State of New Hampshire,

Appellant

v.

Priceline.com, Incorporated n/k/a The Priceline Group Inc., *et al.*,

Appellees.

Appeal Pursuant to Rule 7 From a Final Decision of the Merrimack County Superior Court

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BRIEF OF APPELLEES

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QUESTIONS PRESENTED FOR REVIEW

1. Did the trial court correctly conclude that Appellees online travel companies ("OTCs"),[1] which are technology companies who run websites publishing comparative information about hotels and facilitate on-line reservations, are not "operators" of hotels under New Hampshire's Meals & Room Tax ("M&R Tax")? *See* RSA 78-A:6, III; 78-A:7, I(b).

2. Can the trial court's judgment be affirmed on the alternative ground that the OTCs' compensation is not taxable under the M&R Tax because it is compensation for their online services, not "rent" charged for "occupancy"? *See* RSA 78-A:6, I; 78-A:3, VI(a) & VIII(a).

3. Can the trial court's judgment be affirmed on the alternative ground that even if the State offered a reasonable interpretation of the M&R Tax to compete with the OTCs' interpretation, the result would be an ambiguous tax statute that must be construed against the State?

4. Did the trial court correctly conclude that the OTCs' practices do not violate New Hampshire's Consumer Protection Act ("CPA")? *See* RSA 358-A:2.

STATEMENT OF THE CASE

After a 10-day trial at which it received over 260 exhibits and testimony of 28 witnesses, the trial court (McNamara, J) issued a well-reasoned judgment ("the judgment") finding for the OTCs on all claims. Jdgmt. 1-30.[2] The judgment is consistent with the State's own prior

[1] The OTCs are referred to in three groups: Priceline (The Priceline Group Inc. (f/k/a priceline.com Incorporated, n/k/a Booking Holdings Inc.), priceline.com LLC, and Travelweb LLC); Expedia (Trip Network, Inc. (d/b/a Cheaptickets.com), Orbitz, LLC, Internetwork Publishing Corp. (d/b/a Lodging.com), Hotels.com, L.P., Expedia, Inc., Hotwire, Inc., and Egencia, LLC); and Travelocity (TVL LP (f/k/a Travelocity.com LP) and Site59.com LLC).

[2] The citations in this brief are formatted as follows: "SB" citations are to the State's appellate brief. "T" citations are to the eScribers transcript. "Apx." citations are to the OTCs' separately bound Appendix, which includes exhibits, unpublished cases, relevant orders, transcript excerpts of video depositions that were played during trial (the eScribers transcript reflects that the video depositions were played, but did not record the substance of the video testimony), and excerpts of depositions that the trial court received outside of court as part of the trial record. *See* 6/18/18 Order; Apx. III at 468-83 (trial court orders allowing parties to submit deposition testimony out of court as part of trial record). "Jdgmt." citations are to the judgment. An unredacted copy of the judgment can be found at Apx. I at 7-37.

interpretation of applicable law, with case law across the country, and with the evidence at trial.

The plain language of the M&R Tax specifies who must collect the tax (only "operators" of hotels) and what amounts are subject to tax (only "rent" for "occupancy"). RSA 78-A:6, I & III. The OTCs could have tax liability if—and only if—the OTCs were the entities "who" must collect the tax ***and*** the OTCs' compensation is "what" is taxed. The State established neither at trial: the OTCs do not operate hotels, and the amounts the OTCs retain for their services are not "rent" for "occupancy." The trial court correctly rejected the State's effort to expand the M&R Tax beyond its terms through litigation rather than legislation, holding that such a step "is for the Legislature," not the courts. Jdgmt. 28.

The trial court also correctly rejected the State's theory—unsupported by evidence—that the OTCs violated the CPA. Jdgmt. 28. None of the OTCs' business practices at issue are deceptive because they all have been disclosed to consumers and/or are lawful. Indeed, the State itself engaged in the same business practices for many years.

On appeal, the State mischaracterizes the judgment as no more than a legal pronouncement subject to *de novo* review. *See* SB 10. The State ignores that the trial court made credibility determinations (*see, e.g.*, Jdgmt. 12), recited undisputed facts (*see, e.g.*, Jdgmt. 27), made findings about facts in dispute (*see, e.g.*, Jdgmt. 2), reached legal conclusions (*see, e.g.*, Jdgmt. 16-17), and applied the law to the facts (*see, e.g.*, Jdgmt. 17).[3] Based on its factual findings, the trial court concluded that "the State's allegations are, for the most part, based on either an inaccurate understanding of the OTCs' business model or an inaccurate characterization of the business model." Jdgmt. 3.[4] Applying the law to the facts, the trial court concluded that the "business

[3] At summary judgment, the State claimed the OTCs' supporting affidavits were "contrived," in response to which the trial court held a trial to make credibility determinations. *See* Apx. III at 149-51; Apx. III at 154-55.

[4] *See also* Apx. III at 161 n.1 (trial court's order on confidentiality, discounting that the State's allegations were based on an inaccurate understanding of the OTCs' business model since "[t]he State is represented by outside counsel with

practices of the OTCs do not subject them to the [M&R Tax] and their business practices do not violate the CPA." Jdgmt. 28. The State's mischaracterization of the appeal is critically important because it underscores the State's failure even to contest—let alone to justify a reversal of—the trial court's fact findings.

The State has not appealed the judgment against its M&R Tax and CPA claims with respect to the OTCs' rental-car transactions. *See* SB 1-2, Pts. I-IV, 32 (not identifying rental-car claims as an issue on appeal, nor briefing rental-car claims, nor requesting that this Court overrule the judgment concerning rental-car transactions). Accordingly, the State has waived any appeal of the judgment as to rental cars. *See, e.g.*, *Town of Londonberry v. Mesiti Dev.*, 168 N.H. 377, 379-80 (2015); *In re Ross & Ross*, 169 N.H. 299, 304 (2016).

The State urges this Court to become the first appellate court ever to find that the OTCs must collect and remit tax under a statute that imposes such obligations only on operators of hotels. *See infra* at 16, n.69. For the host of separate reasons explained below, this Court should decline to take such an unprecedented step.

STATEMENT OF THE FACTS

The trial court made detailed factual findings, which were supported by ample evidence.

I. OTCs and hotels.

The OTCs are not operators of hotels. Jdgmt. 22.[5] They are technology companies that run websites publishing comparative information about hotels and other traveler needs (such as flights) and help customers request and pay for reservations from such third-party travel providers. Jdgmt. 4 (citing Apx. II at 366).[6] OTCs enable travelers to identify hotels in a given area, compare

substantial experience in litigating against the OTC[s] throughout the United States, and who were doubtless well aware of the actual business practices of the OTCs before the trial in this case").

[5] T911, 940-41, 1276-77; Apx. I at 356-69; T682-84 (continuing testimony from Apx. I at 356-69); Apx. I at 372.

[6] T909-10, 938-39, 1179-80; Apx. I at 347.

rates and amenities, take virtual tours of properties, read verified customer reviews, and request reservations from hotels. Jdgmt. 11-12 (citing T937-40, 1195-1205).[7] OTCs also allow travelers to create their own travel packages by combining reservations for different travel products, often at reduced rates with non-party travel suppliers. Jdgmt. 11 (citing T1255-57). The OTCs spend significant time and money to develop and maintain the hardware and software needed to display this content and to facilitate reservations. Jdgmt. 13 (citing T1255-57).[8]

By contrast, hotels perform the functions necessary to provide accommodations to travelers, including granting the right of occupancy to the traveler. Jdgmt. 22. It is undisputed that it is the hotels that own or operate overnight lodging establishments and undertake the activities necessary to make travelers comfortable during their stay (*e.g.*, room service, housekeeping, concierge, etc.). *See* Jdgmt. 22.[9] The hotels establish the policies that govern occupancy, including age requirements, room capacity, and minimum length of stay.[10] As one hotel witness testified:

> "[W]e [the hotel] maintain the absolute control over that room, and we contract with the guests as they check into the hotel based on them signing a registration form saying that they are taking the room for whatever specified amount of time, and at no time is the OTC there on site in control of telling me which room to rent in that process. … The hotel actually controls which room, and all of the other details that surround the renting of that room; and at any point, the hotel doesn't even have to rent [the guest] a room." [11]

A. The OTCs' business relationship with the hotels: the merchant model.

To attract demand from travelers and fill rooms that might otherwise go unused, many hotels use third-party intermediaries, such as travel agents, wholesalers, tour operators, and OTCs.

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[7] T946-47, 962-63, 1179-80; Apx. III at 126-27; Apx. III at 133.

[8] T939-40, 984-85, 988-89, 1197-98; Apx. III at 133.

[9] T940-41, 1276-78; Apx. I at 372. Some contracts with hotels expressly state that hotels are the "operators" of the hotels. *See, e.g.*, Apx. I at 92, § 8; Apx. I at 103.

[10] T1222-23; Apx. II at 328-29, 337-38.

[11] Apx. I at 319-21.

Jdgmt. 13 (finding OTCs are "distribution channels" that "facilitate" hotel reservations).[12] Using multiple distribution channels, including their own hotel websites, hotels maintain control of availability and rates, which they adjust on an ongoing basis to manage demand and maximize revenue.[13] This means (not unlike seats on an airplane) that guests at the same hotel on the same night may pay different rates, depending on the channel used.[14]

At issue in this case are hotel reservations the OTCs facilitate using the so-called "merchant model." Jdgmt. 5.[15] To facilitate merchant model reservations, a hotel and an OTC document their business relationship in a negotiated contract, Jdgmt. 4, whereby the OTC agrees to display information about the hotel on the OTC's website, and the hotel agrees to receive travelers' reservation requests through the OTC's website. As explained further, *infra* at 8-9, in a merchant model transaction, if the hotel accepts the reservation request, the OTC charges the customer's credit card for payment. [16]

"[I]n the hotel industry, facilitating transfer of inventory through agencies is referred to as 'selling' rooms." Jdgmt. 3; *see also id.* at 6.[17] But despite that industry "shorthand," OTCs do not actually purchase blocks of rooms and then re-sell them to customers. Jdgmt. 3, 6 (citing Apx. I at 343).[18] Nor do the OTCs actually hold inventory of rooms. Jdgmt. 6 (citing Apx. III at 131-

[12] T919-23, 1012, 1239 (referring to Apx. I at 84); Apx. I at 331-32; Apx. I at 373; Apx. III at 126-27.

[13] T915-18, 920-23, 927, 1012 (explaining hotel's revenue management and use of distribution channels), 1027; Apx. I at 141-42 (providing hotel has control over room rates and availability); Apx. I at 344-45 (same).

[14] T916-19.

[15] Although the OTCs also facilitate reservations using an "agency model," Apx. II at 420, ¶ 59, in which the hotels charge the customers, the State never claimed M&R Tax is owed on agency model transactions.

[16] The details of the OTCs' merchant model transactions may vary among companies—as, for instance, in the "opaque model" used by Priceline's Name Your Own Price® or Hotwire's Hot Rate® "brand shielded" model. *See* Jdgmt. 10-11 (citing T937-40, 952-54, 964-66 (discussing Apx. II at 317-65)); T1014-15 (discussing Priceline's Express Deals model); T1185-86, 1227-30 (discussing Hotwire's Hot Rate® model and booking path, Apx. II at 250-90); Apx. III at 131-32 (merchant model has always operated the same). Neither the State nor the OTCs maintain that the variations are material to the fundamental workings of a merchant model transaction.

[17] Apx. I at 345-46; Apx. III at 131-32, 135.

[18] T941, 1188; Apx. I at 345-46; Apx. I at 357-58; Apx. III at 127; *see also* Apx. III at 161.

32).[19] In fact, the OTCs' contracts with hotels often expressly disclaim a sale or rental of rooms from the hotel to the OTC.[20] Rather, and as the trial court found, OTCs act only as "a distribution channel" relaying information and payment between the traveler and hotel. Jdgmt. 4 (citing Apx. I at 84 and Apx. I at 129), 13.[21]

OTCs do ***not*** purchase rooms, pay for them in advance, acquire the right to occupy rooms, or bear any risk of loss for rooms that go unreserved. Jdgmt. 6 (citing Apx. I at 341-42).[22] Hotels do not transfer to the OTC the legal right to grant occupancy of (or the right to occupy) any of their rooms. Jdgmt. 10, 13 ("the hotel … always maintains the right not to allow a consumer to use a room").[23] OTCs "do not lease rooms," Jdgmt. 5 (citing Apx. I at 334-35),[24] "do not control the hotels, do not rent rooms directly, and do not maintain or clean the rooms." Jdgmt. 6 (citing Apx. I at 348-49).[25] Hotel witnesses corroborated the OTCs' testimony: "[OTCs are] not purchasing rooms—they don't have rooms."[26]

Each OTC is independent from, and operates at arm's-length to, hotels. Jdgmt. 21. Most contracts between OTCs and hotels disclaim an agency or joint venture relationship, in part because the OTCs provide booking services for multiple hotels, including competing brands. Jdgmt. 21 (citing Apx. I at 219, § 17.b; Apx. I at 195, § 28(b); Apx. I at 117, § 7.1; Apx. I at 265-66, § 13.4).[27] The OTCs also compete directly with hotels, which have their own websites. Jdgmt.

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[19] T656, 929-30, 1188; Apx. I at 341.

[20] *See* Apx. I at 59, § 10; Apx. I at 140, § 2.2; Apx. I at 211, § III; Apx. I at 237; Apx. I at 362-65 (referring to Apx. I at 247, Apx. I at 271, and Apx. I at 294).

[21] T910, 938-39, 946-47, 1235; Apx. I at 103 (reciting description of Expedia's service); Apx. I at 330; Apx. I at 373.

[22] T928-29, 941-42, 1009, 1032-33, 1188; Apx. I at 40, § 4; Apx. I at 59, § 10; Apx. I at 140, § 2.2; Apx. I at 240-42; Apx. I at 357-58, 362-65.

[23] T77-78, 1224, 1290, 1292; Apx. I at 321; Apx. I at 373 (hotel controls room availability and may deny a booking even after OTC sends reservation request).

[24] Apx. III at 134.

[25] T940-41, 1276-78; Apx. I at 319-23; Apx. I at 358-59; Apx. I at 372; Apx. II at 337, § C.1.f.

[26] Apx. I at 335; *see also* Apx. I at 322.

[27] T942-43, 999, 1042-43, 1254-55; Apx. I at 93.

22.[28] The OTCs and hotels do not share profits or losses. Jdgmt. 21.[29]

B. The reservation request process.

When a traveler requests a reservation through an OTC, the OTC must communicate with the hotel to ask if a reservation is available and at what rate. Jdgmt. 6, 10, 12.[30] As part of the reservation request, the traveler agrees to abide by the hotel's terms and conditions for the reservation.[31] Then, the OTC's computer system communicates with the hotel's reservation system to submit a reservation request on behalf of the traveler. Jdgmt. 12 (citing T979-80), 13.[32] The hotel decides whether to accept the request. *See* Jdgmt. 13.[33]

If a hotel accepts a reservation request, the hotel makes the reservation in the traveler's name and issues a confirmation number that the OTC forwards to the traveler.[34] The OTC then processes the customer's payment and bears the risk of credit card fraud in that transaction. Jdgmt. 13 (citing T1297-98).[35] At this point, the traveler has only a prepaid reservation; additional steps are required (none of which involve the OTCs) to effectuate the actual rental.[36] For example, it is only when a traveler arrives at the hotel, meets the terms and conditions for occupancy, and when a room is available, that the hotel registers the guest, assigns a room, and grants a right to occupancy. Jdgmt. 6 (citing T645-46), 19, 22.[37] Although hotels are expected to honor reservations facilitated by the OTCs, the hotels do not do so in every instance. "[E]ven with a

[28] T942-43, 1255.

[29] T943; *see also* T1371 (distinguishing incentives from profit sharing).

[30] T979-80, 1195-97; Apx. I at 345, 348-49; Apx. I at 358-59.

[31] T975-76 (discussing Apx. II at 334, § 2), T1023-24 (discussing Apx. III at 56, § 2); Apx. II at 191-93.

[32] T1193-98; Apx. I at 358-59 ("All [Travelocity] can do is request a reservation from a hotel.").

[33] T979-84; Apx. I at 359.

[34] T990-91 (discussing confirmation page, Apx. II at 359).

[35] T945.

[36] T1222, 1290, 1292.

[37] T1222-24; Apx. I at 324 (guest signs registration at hotel before receiving access to room); Apx. I at 338-39.

reservation, whether a consumer gets a room at the hotel depends on the hotel," not the OTC. Jdgmt. 10.[38] For example, an Expedia senior executive's children were recently denied access to a hotel room they reserved through Expedia because they did not meet the hotel's minimum age for rental. Jdgmt. 13 (referring to T1223).

Even after the hotel makes a reservation, the reservation remains in that hotel's reservation system and within its control.[39] If a traveler needs to cancel a reservation, she must do so in accordance with the cancellation policy the hotel set for that reservation.[40]

C. Traveler payment.

If a hotel accepts a traveler's reservation request in a merchant model transaction, the OTC charges the traveler's credit card. The OTC's website displays the charges to the traveler in two line-items, followed by the combined total charge. The first line consists of (a) the daily rental rate set by the hotel (the "net rate"), plus (b) an amount charged by the OTC for facilitating the reservation (the "facilitation fee" or "margin"). Jdgmt. 8 (citing T623).[41] The second line, usually labeled "Taxes and Fees," consists of (a) a "tax recovery charge" to cover the taxes the hotel will owe on its net rate,[42] plus (b) a "service fee" to be retained by the OTC as additional compensation for its services. Jdgmt. 8 (citing T623).[43]

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[38] T754, 778-79; Apx. I at 321.

[39] T77-78; Apx. I at 321; Apx. II at 337, § C.1.f.

[40] T79, 1023; Apx. III at 37-38. Certain merchant model reservations, such as those made through Priceline's Name Your Own Price® or Hotwire's Hot Rate® service, are non-cancellable and non-refundable, a requirement necessary to keep the hotel's steep discounts opaque. T954, 991, 1200-02.

[41] For Priceline's Name Your Own Price® service, the first line item is "Offer Price" in which the traveler enters an offer price when requesting a hotel reservation. T953-55, 965-66; Apx. II at 359. Apx. II at 194 ("The room rate displayed on the Website is a combination of the pre-negotiated room rate for rooms reserved on your behalf by the Expedia Companies and the facilitation fee retained by the Expedia Companies for their services.").

[42] The OTCs calculate the tax recovery charge by multiplying the applicable tax rate percentage (generally provided by the hotel) by the net rate. Jdgmt. 7; T623, 995-96, 1013, 1211.

[43] T992-94, 947; Apx. II at 453. To calculate the service fee, each OTC has its own approach, which is not based solely on the tax rate. *See, e.g.*, T995 (tax rate has never been part of service fee calculation); T1211-13; Apx. I at 383-94; Apx. I at 405-06.

As the trial court found, the tax recovery charge and service fee amounts are shown together to protect the hotel's net rate, the confidentiality of which is important to both hotels and the OTCs. Jdgmt. 9 (citing Apx. I at 377); Jdgmt. 25.[44] The OTCs explain to travelers that the "taxes and fees" line includes amounts to cover both (1) estimated taxes that the hotel will owe on its rental rate and (2) a fee for the OTCs' services. For example, Expedia's website explains:

> The tax recovery charges on prepaid hotel transactions are a recovery of the estimated taxes … that the Expedia Companies pay to the hotel supplier for taxes due on the hotel's rental rate for the room. The hotel suppliers invoice the Expedia Companies for tax amounts. The hotel suppliers are responsible for remitting applicable taxes to the applicable taxing jurisdictions. … Service fees retained by the Expedia Companies for their services vary based on the amount and type of hotel reservation.[45]

These disclosures are readily available on the OTCs' websites.[46] As the trial court found, "[b]ecause the OTCs disclose the fact that they charge fees for these services, consumers must find them valuable since they continue to pay for them." Jdgmt. 11-12 (citing T947). At trial, the State failed to offer ***a single consumer complaint*** related to displaying "taxes and fees" together despite hundreds of thousands of transactions. Jdgmt. 24.[47]

After the traveler checks out of the hotel, the hotel requests from the OTC the net rate and taxes on the net rate, which taxes the hotel remits to the taxing authorities. Jdgmt. 8-9 (citing Apx. III at 122-23).[48] As a hotel witness testified: "[The customer] pay[s] the OTC for the reservation. They're not paying the OTC for the room."[49]

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[44] T629, 666, 993-94, 1005, 1028, 1214-15, 1275, 1352-53; *see also* Apx. I at 181, § 13; Apx. I at 237; Apx. I at 41.

[45] Apx. II at 194; *see also* Apx. II at 231; Apx. II at 271; Apx. II at 305; Apx. II at 442-43; Apx. II at 450; Apx. II at 453.

[46] *See, e.g.*, Apx. II at 188, 194; Apx. II at 323, 338-39; Apx. II at 462; T626, 947, 977, 1207.

[47] Apx. III at 144, No. 20; Apx. III at 138-39, Nos. 60, 62-63.

[48] Apx. I at 311-14, 316; Apx. I at 324; Apx. I at 333 (explaining that hotels remit taxes); Apx. I at 352-55; T626-27, 1000-01, 1022, 1210, 1286. Even in instances of so-called "breakage," the hotels remit the taxes on their net rate to the taxing authorities. Apx. I at 315; Apx. I at 325.

[49] Apx. I at 336.

II. The State itself facilitated merchant model hotel reservations.

With the approval of the Attorney General's office, from 2006 through at least 2011, the State partnered with an OTC competitor, Advanced Reservations Systems, Inc., through its New Hampshire affiliate, Yankee Publishing, Inc. (collectively referred to as "Advanced Reservations") to provide online reservations on www.visitnh.gov. Jdgmt. 27.[50] As the trial court explained, the State's website displayed "their charges in the exact same manner as the OTCs; in two components, the second labeled 'taxes and fees.'" Jdgmt. 27.[51] Like the OTCs, Advanced Reservations (not the hotel) charged the consumer's credit card. Jdgmt. 27.[52]

III. New Hampshire DRA repeatedly took the position that OTCs are not "operators" under the M&R Tax.

In 2007, New Hampshire hotel operators asked the Department of Revenue Administration ("DRA") for guidance about their M&R Tax responsibilities for merchant model reservations made through www.visitnh.gov, as well as other OTC websites such as Expedia and Orbitz.[53] In response, the DRA issued a TIR ("2007 TIR"), stating:

> ***On-line booking companies are not "operators" within the meaning of the M&R statute. See, RSA 78-A:3, IV. They do not have an independent responsibility to collect and remit M&R taxes to New Hampshire***…Their role is to market the operator's product to a broader target audience than the New Hampshire operators may be able to achieve on their own. The New Hampshire licensed operator is the person responsible for collecting and remitting the correct amount of M&R tax.[54]

The DRA subsequently issued another TIR ("2008 TIR"), which did not reverse the DRA's

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[50] T437-38, 1591-93; Apx. II at 4-9; Apx. II at 11, 15; Apx. II at 161-69; Apx. II at 170-76.

[51] T437-40; Apx. II at 15 (showing combined taxes and fees charge); Apx. II at 3 (noting State website's similarity to Expedia and Travelocity); Apx. II at 4 (same).

[52] T437 (confirming the State used a merchant model, *i.e.* charged the customer's credit card); Apx. II at 11, 15; Apx. II at 171, § 9 ("Hotel shall invoice ARES for each Room consumed by a guest whose reservation was made through the ARES Service within 90 days of a guest's departure (the 'Invoice').").

[53] Apx. II at 141.

[54] Apx. II at 141. All emphasis is added, unless otherwise noted. Notably, when drafting the 2007 TIR, the DRA considered the OTCs agents of hotels, T464, and assumed that the OTCs "purchase blocks of rooms." Apx II at 141.

prior determination that OTCs are not "operators."[55] Indeed, the DRA has never published any guidance stating that OTCs are operators.

In 2009, the DRA suggested the legislature amend the M&R Tax to capture revenue from OTCs' services. In its proposal, the DRA (again) distinguished OTCs from operators, and proposed a rewrite of the M&R Tax to "creat[e] a new category of 'wholesaler'" that "may provide the necessary vehicle for taxing this group of OTCs."[56] This proposal did not become law.[57] Then, just months before trial in 2017, the DRA proposed another amendment to the M&R Tax that would have (1) expanded the definition of "operator" to include "room remarketer," expressly defined to "include[]… online travel companies,"[58] and (2) expanded the definition of "rent" to match the State's litigation position by including "the full amount of charges made by a room remarketer."[59] This proposal did not become law either.

SUMMARY OF THE ARGUMENT

This Court should affirm the judgment for four separate and independent reasons. ***First***, the trial court correctly concluded that the OTCs have no M&R Tax collection and remittance obligations because the Tax applies only to hotel operators, and the trial court's factual finding that the OTCs do not operate hotels is supported by the evidence at trial (which the State did not disprove). Jdgmt. 17. In reaching this conclusion, the trial court correctly rejected the State's many meritless efforts to expand liability under the M&R Tax to persons who do not actually

[55] *Compare* Apx. II at 141-42 *with* Apx. II at 143-44.

[56] Apx. II at 20; *see also* T443-44, 448-49. In 2009, the DRA also conceded that it was at least an open question as to whether the hotel's net rate or the total price paid by the consumer was "rent" under the M&R Tax, explaining in its M&R Tax proposal that "[t]he issue surrounds what room rate (the wholesale rate v. the actual paid-on amount) controls the amount of tax due." Apx. II at 20.

[57] T449.

[58] Apx. II at 53-54 (alterations and emphasis in original showing proposed amendments to language); *see generally* Apx. II at 34-140.

[59] Apx. II at 53.

operate hotels, including the State's attempts to insert words into the Tax that simply are not there, to shift the focus of the Tax from the hotel operator to the person who collects payment from the consumer, and to use administrative rules in an improper effort to expand the M&R Tax. Jdgmt. at 18-20. The trial court's sound judgment was consistent with the plain language of the statute, the evidence at trial, and the overwhelming weight of authority across the country. Jdgmt. at 17.

Second, this Court should affirm on the alternative ground that the M&R Tax applies only to rent charged for occupancy, and the evidence at trial established that the OTCs' compensation is not rent for occupancy.

Third, even if the State could offer a competing, reasonable interpretation of the M&R Tax as applying to the OTCs, this Court still should affirm. Under New Hampshire law, a tax statute is ambiguous if more than one reasonable interpretation exists, and ambiguous tax statues must be construed against the taxing authority. The OTCs' interpretation of the statute, shared by the trial court, is at least a reasonable one; accordingly, the Tax must be construed against the State.

Fourth, this Court should affirm the judgment because the trial court correctly concluded that the OTCs' business practices do not violate the CPA, which imposes liability only for deceptive business practices. Practices that are disclosed or lawful are, as a matter of law, not deceptive; the trial court found the undisputed existence of the OTCs' disclosures barred a claim of deception. Jdgmt. at 24-25. Further, because the State engaged in the same business practices it now attacks and offered no proof of injury, the trial court correctly concluded that those practices do not rise to the level of "rascality" prohibited under the CPA. Jdgmt. 26-28. Finally, the trial court correctly concluded that the State offered no evidence of the necessary elements of intent or causation. Jdgmt. at 27-28.

STANDARD OF REVIEW

This Court reviews a "trial court's interpretation of a statute *de novo*." *White Cliffs at Dover v. Bulman*, 151 N.H. 251, 254 (2004). It reviews mixed questions of law and fact for clear error. *Great Lakes Aircraft Co. v. City of Claremont*, 135 N.H. 270, 282 (1992). It reviews a trial court's findings of fact with great deference: "When there is conflicting testimony, [this Court] defer[s] to the findings of the trier of fact unless no reasonable person could have come to the same conclusion." *Barrows v. Boles*, 141 N.H. 382, 390 (1996). This Court may affirm on any ground supported by the record. *Sherryland, Inc. v. Snuffer*, 150 N.H. 262, 267 (2003). "Absent a complete record [from the appellant], [this Court] must assume that the evidence was sufficient to support the result reached by the trial court." *Stachulski v. Apple New England, LLC*, -- A.3d --, 2018 WL 3447678, at *1 (N.H. July 18, 2018).

The State's mischaracterization of this appeal as presenting a pure question of law is critically important because it highlights the State's failure to contest the trial court's factual findings, let alone carry its heavy burden to obtain a reversal of those findings. The State completely ignores its evidentiary burden and, as explained below, cannot meet it.

ARGUMENT

I. The trial court correctly concluded that the OTCs have no liability under the M&R Tax because they are not operators of hotels.

A. The plain language of the M&R Tax applies only to hotel "operators," and the trial court correctly found that the OTCs are not "operators."

This Court should affirm the judgment as to the M&R Tax because the trial court correctly concluded that the Tax applies only to operators of hotels and correctly found from the evidence at trial that the OTCs are not operators.

1. The M&R Tax applies only to "operators" of hotels.

The trial court correctly concluded that the plain language of the M&R Tax imposes collection and remittance obligations ***only*** on hotel "operators." *See* RSA 78-A:6, III ("The operator shall collect the taxes imposed by this section …."); RSA 78-A:7 I(b) ("The operator shall demand and collect the tax …."); Jdgmt. 16. The Tax defines "operator" as "any person operating a hotel … whether as owner or proprietor or lessee, sublessee, mortgagee, licensee, or otherwise." RSA 78-A:3, IV. Because the Tax does not define "operate," the trial court correctly gave the word its "plain and ordinary meaning," *In re Keelin B.*, 162 N.H. 38, 42 (2011), as set forth in a dictionary, *see, e.g.*, *Kelton v. Hollis Ranch*, 155 N.H. 666, 667-68 (2007); *McNeal v. Lebel*, 157 N.H. 458, 467-68 (2008). *See* Jdgmt. 18. When used as a transitive verb (as in "to operate a hotel"), "operate" means "to put or keep in action" or "to cause to function." *See* Jdgmt. 18. Thus, the trial court correctly concluded that the M&R Tax limits collection and remittance obligations to those who put or keep hotels in action, or who cause hotels to function. *See id.* As explained, *infra* at 16, n.69, this interpretation is consistent with decisions from across the country.

2. The trial court correctly found, on the basis of evidence adduced at trial, that the OTCs do not operate hotels.

Based on the overwhelming evidence at trial, the trial court correctly found that the OTCs do not operate hotels. As set forth in the Statement of Facts, *supra* at 3-11, the trial court made extensive fact findings about the OTCs' business. The OTCs relay information and payments between travelers and hotels. For each traveler's inquiry, the OTCs ask hotels for their rates and availability. Jdgmt. 12 (citing T979-80).[60] Only if a hotel has matching rates and availability for rooms does an OTC forward to a hotel a reservation request, which the hotel may accept or deny.[61]

[60] T1195-97.

[61] T979-80, 1196-97; Apx. I at 345, 349; Apx. I at 358-59.

OTCs are not responsible for front desk services; cleaning or readying rooms; furnishing keys; landscaping; risk management; food, beverage or concierge service; maintenance; or utilities.[62] The hotel operators perform all of these functions. Likewise, the hotels determine what rates to charge; what travel intermediaries (including OTCs) to use, if any; whether to make reservations available; and, once a traveler arrives, whether to extend the right of occupancy to that traveler.[63] The hotel also determines whether a room is assigned to a consumer; if so, the hotel contracts with the guests as they check into the hotel and assigns a room.[64] Testimony of non-party hotel witnesses supported these facts, as did testimony of the OTCs. The State's Brief is devoid of evidence (or argument) to meet its burden on appeal that no reasonable person could have reached the trial court's conclusion that the OTCs do not put or keep hotels in action, or cause them to function, and therefore are not operators within the meaning of the M&R Tax.

3. Undisputed evidence of the State's previous statements about the OTCs and the M&R Tax establishes that the OTCs are not operators.

Critically, undisputed evidence of the State's prior statements about the OTCs and the M&R Tax confirms the trial court's finding that the OTCs are not operators. The first such statement is the DRA's 2007 TIR, still available on the DRA's website as of the date of this filing.[65] There, the DRA expressly conceded that "on-line booking companies ***are not 'operators'*** within the meaning of the M&R statute" and "do not have an independent responsibility to collect and remit M&R Taxes."[66] Notably, the DRA reached this conclusion even after assuming that OTCs

[62] T940-41, 1276-78; Apx. I at 372.

[63] T754, 778-79, 1027, 1195, 1197, 1200, 1207, 1235; Apx. I at 321; Apx. I at 373.

[64] T971-72, 975-77, 1024, 1222-24; Apx. I at 324; Apx. I at 337-39.

[65] *See* https://www.revenue.nh.gov/tirs/technical-releases.htm (last visited 10/4/18).

[66] Apx. II at 141. The State erroneously asserts that the 2007 TIR was "superseded" by the 2008 TIR that the State described as "stat[ing] that the OTCs are liable for tax on the total amount they collect from the customer." *See* SB 26 n.39. Yet, as opposed to other TIRs deemed inapplicable, the DRA allowed the 2007 TIR to remain on its website. Apx. II at 145-60; T441. Moreover, what the 2008 TIR actually says is that "the amount the occupant pays to the on-line booking company for the room is the amount subject to M&R tax." Apx. II at 144. The 2008 TIR does not say

"contract with hotels to purchase blocks of rooms at reduced rates,"[67] a factual assertion the trial court rejected. *See supra* at 5-6, nn.18-20; *infra* at 24-25.

Further, in both 2009 and 2017, the State supported efforts to amend the M&R Tax to actually reach OTCs and their revenue, *see supra* at 11—efforts that would have been entirely unnecessary had the OTCs already been covered by the existing statutory definition of "operator." Indeed, the 2017 proposal sought to capture OTCs by expressly expanding the definition of "operator" to include "online travel companies."[68] The State's failed efforts to amend the M&R Tax to reach the OTCs fatally undercut its litigation position that the M&R Tax always has encompassed the OTCs.

In light of this evidence, which is not disputed by the State, *see* SB Pts. I-IV, there is no basis to find that no reasonable person could have reached the same conclusion as the trial court.

B. The trial court's conclusion is consistent with the overwhelming weight of authority from similar cases across the country.

The trial court was not the first to consider a taxing authority's effort to apply to the OTCs a tax statute that imposes collection and remittance obligations on operators. At least twenty courts nationwide have considered such efforts and reached the same conclusion as the trial court, finding that the OTCs have no collection and remittance obligations under such statutes.[69] For example,

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(nor could it, in light of the statutory language) that the OTC is the operator with the obligation to collect and remit the amount of tax that is due. S*ee* Apx. II at 143-44.

[67] Apx. II at 141.

[68] Apx. II at 53.

[69] *Vill. of Bedford Park v. Expedia, Inc.*, 876 F.3d 296, 304 (7th Cir. 2017); *City of Rome, Ga. v. Hotels.com, L.P.*, 549 F. App'x 896, 902 (11th Cir. 2013); *City of Columbus v. Hotels.com, L.P.*, 693 F.3d 642 (6th Cir. 2012); *Pitt Cty. v. Hotels.com, L.P.*, 553 F.3d 308, 313 (4th Cir. 2009); *In re Transient Occupancy Tax Cases (San Francisco)*, B253197, JCCP No. 4472, slip op. at *14 (Cal. App. 2d Dist. May 23, 2018); *City of Los Angeles v. Hotels.com, L.P.*, JCCP No. 4472 (Cal. Super. Ct. Jan. 22, 2014), *aff'd In re Transient Occupancy Tax Cases (Los Angeles)*, B255223, JCCP No.4472 (Cal. App. 2d Dist. Mar. 28, 2018); *Mont. DOR v. Priceline.com, Inc.*, 380 Mont. 352, 357 (Mont. 2015); *Travelocity.com, LP, et al. v. Dir. of Taxation, State of Haw.*, 346 P.3d 157 (Haw. 2015); *Atlanta v. Hotels.com, L.P.*, 710 S.E.2d 766, 770 (Ga. 2011); *St. Louis Cty. v. Prestige Travel, Inc.*, 344 S.W.3d 708, 714 n.3 (Mo. 2011); *City of Gallup v. Hotels.com, L.P.*, No. 06–0549–JC, 2007 WL 7212855, at *3-4 (D.N.M. Jan. 30, 2017); *In re Transient Occupancy Tax Cases (San Diego)*, 2 Cal. 5th 131, 134 (2016); *Wis. Dep't of Revenue v. Orbitz, LLC*, 877

the Seventh Circuit recently affirmed the district court's finding that OTCs are not hotel operators because "the OT[C]s do not perform the function of running a hotel." *Vill. of Bedford Park v. Expedia, Inc.*, 876 F.3d 296, 304 (7th Cir. 2017). The Sixth Circuit similarly affirmed dismissal for failure to state a claim, finding the online travel companies were not "vendors" (defined as "owners or operators" of hotels who "furnish[] lodging") or "operators" (defined as "proprietors" or "managing agents") or "hotels." *City of Columbus v. Hotels.com, L.P.*, 693 F.3d 642, 648-50 (6th Cir. 2012); *see also City of Goodlettsville v. Priceline.com Inc.*, 844 F. Supp. 2d 897, 912 (M.D. Tenn. 2012) (granting summary judgment and finding "the functions of the OTCs under the Merchant Model do not constitute 'operation' of the hotel").

The trial court considered numerous decisions holding at the motion to dismiss or summary judgment stage that OTCs are not operators. *See* Jdgmt. 17. These opinions are highly persuasive as to the strength of the trial court's conclusion that the OTCs do not operate hotels, a conclusion that is even more robust here, after a trial.[70]

N.W.2d 372, 378 (Wis. Ct. App. 2016); *Wake Cty., et al. v. Hotels.com*, 762 S.E.2d 477, 484-85 (N.C. Ct. App. 2014); *City of Branson v. Hotels.com, L.P.*, 396 S.W.3d 378, 384 & n.7 (Mo. Ct. App. 2013); *In re Transient Occupancy Tax Cases (Anaheim)*, No. B230457, 2012 WL 5360907, at *6 (Cal. Ct. App. Nov. 1, 2012); *City of Phila. v. City of Phila. Tax Review Bd.*, 37 A.3d 15, 20 (Pa. Cmwlth. 2012), *appeal denied*, 616 Pa. 471 (Pa. 2012); *City of Goodlettsville v. Priceline.com Inc.*, 844 F. Supp. 2d 897, 912 (M.D. Tenn. 2012); *Hamilton Cty., OH v. Hotels.com, L.P.*, No. 3:11 CV 15, 2011 WL 3289274, at *2 (N.D. Ohio July 29, 2011); *Mayor of Baltimore v. Priceline.com Inc.*, No. MJG–08–3319, 2011 WL 9961251, at *4-5 (D. Md. Aug. 2, 2011); *City of Orange v. Hotels.com, L.P.*, No. 1:06-CV-00413, 2007 WL 2787985, at *6 (E.D. Tex. Sept. 21, 2007). *But see City of Chicago v. Expedia, Inc.*, No. 2005-L-051003 (Cook Cty. Cir. Ct., Ill. July 8, 2013), *reversed* No. 1-15-3402 (Ill. App. Ct. Apr. 26, 2017), *vacated* May 16, 2017 (Trial court found OTCs were operators; appellate court reversed without reaching operator issue, but vacated its decision due to parties' settlement agreement.); *Puerto Rico Tourism Co. v. Priceline.com, Inc.*, No. 3:14-CV-01318, 2015 WL 5098488 (D.P.R. Aug. 31, 2015) (no final ruling following denial of summary judgment); *see also* Apx. III at 186-89 (chart submitted by OTCs with summary judgment brief summarizing case law as of 12/21/15). All unpublished authorities are provided in the Appendix. *See* Apx. III at 190-467. The limited instances in which a court reached a contrary conclusion are true outliers.

[70] At times in this case, the State has referenced sales tax cases. Decisions involving dissimilar tax statutes have no persuasive value.

C. The trial court correctly rejected the State's attempt to expand the M&R Tax liability beyond operators of hotels.

Unable to demonstrate that the OTCs are operators under the plain language of the M&R Tax, the State seeks to disregard that language and impose liability on persons other than operators. The trial court correctly rejected the State's invitation to amend the statute.

1. The State attempts to insert language into the M&R Tax that is not there.

The State's first maneuver is simply to insert language in the M&R Tax that is not there. Whereas the M&R Tax defines operator as "***any person operating a hotel … whether as owner or proprietor or lessee, sublessee, mortgagee, licensee, or otherwise***," RSA 78-A:3, IV, the State asserts that "[t]he Legislature's statutory scheme covers all individuals or corporations, or combination of individuals, corporations[,] firms, partnerships, *etc*., including those acting in a fiduciary or representative capacity, ***that collect payment from a consumer*** for the consumer's right to occupy a hotel room." SB 19. Effectively, the State seeks to rewrite the M&R Tax to focus on who collects payment from consumers, instead of who operates hotels.

The State's rewrite flatly contravenes the New Hampshire legislature's decision to limit the M&R Tax to hotel operators.[71] The legislature could have defined "operator" as "persons collecting payment from a consumer," but it did not. Likewise, the legislature could have imposed tax collection and remittance obligations on whomever collects payment from a consumer, but it did not. Indeed, every time the legislature has been presented with a proposal to amend the M&R Tax to impose tax collection and remittance obligations on persons other than operators, the legislature has declined. *See supra* at 11.

[71] Courts in numerous other so-called "operator" jurisdictions have rejected similar attempts to shift the focus from who operates hotels to who collects payment from the consumer. *See, e.g.*, *City of Goodlettsville*, 844 F. Supp. 2d at 912-14; *City of Orange*, 2007 WL 2787985, at *5-8.

Settled New Hampshire law prevents courts from adopting a different version of the statute than the one the legislature chose to enact. "When examining the language of the statute, [this Court] ascribe[s] the plain and ordinary meaning to the words used. [It] interpret[s] legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include." *Fog Motorsports No. 3, Inc. v. Arctic Cat Sales, Inc.*, 159 N.H. 266, 268 (2009) (internal citations omitted). Accordingly, the trial court correctly rejected the State's request that it intrude in matters that are "for the Legislature," *see* Jdgmt. 28, and this Court should do the same.

2. The State wrongly asserts that the phrase "or otherwise" in the statutory definition of "operator" broadens the definition to include persons who do not actually operate hotels.

The State's next effort to expand the M&R Tax focuses on a single phrase, "or otherwise," at the end of the definition of "operator." SB 21-29; *see also* RSA 78-A:3, IV (defining "operator" as "any person operating a hotel … whether as owner or proprietor or lessee, sublessee, mortgagee, licensee, or otherwise"). This argument fails for two reasons. *First*, the phrase "or otherwise" still applies only to "any person operating a hotel." *See* RSA 78-A:3, IV. That is, there is a threshold requirement that the person is actually operating a hotel before "or otherwise" ever comes into play. Accordingly, "or otherwise" cannot expand the definition of "operator" to include persons who do not operate hotels.

Second, the doctrines of *ejusdem generis* and *noscitur a sociis* require the phrase "or otherwise" to be interpreted in light of the words that precede it.[72] *Ejusdem generis* dictates that "general words are construed to embrace only objects similar in nature to those enumerated by the

[72] The State erroneously refers to the doctrine of *ejusdem generis* as an "archaic rule of statutory construction." SB11. Notably, this Court applied this doctrine as recently as June 2018. *See Town of Pembroke v. Town of Allenstown*, 189 A.3d 309, 315 (N.H. 2018).

specific words," *In re Regan*, 164 N.H. 1, 8-9 (2012), and *noscitur a sociis* instructs that terms are "construed in light of their accompanying words," *Marachich v. Spears*, 133 S. Ct. 2191, 2201 (2013). All of the words that precede "or otherwise" are categories of persons whose interests—unlike the OTCs'—could allow them to take possession or control of the hotel itself: "owner or proprietor or lessee, sublessee, mortgagee, [and] licensee." The State does not dispute that owners, proprietors, lessees, and sublessees can have possessory interests in or control over the property, SB 29-30, nor could the State dispute that, under New Hampshire law. *See, e.g.*, *Gibson v. LaClair*, 135 N.H. 129, 132 (1991) (owner-lessor had possessory interest); *Echo Consulting Servs., Inv. v. N. Conway Bank*, 140 N.H. 566, 568 (1995) (describing lessee-tenant's possessory interest); *Dumont v. Town of Wolfeboro*, 137 N.H. 1, 6 (1993) (noting servient tenant's possessory interest).

Although the State disputes the possessory nature of the interests of licensees and mortgagees, New Hampshire law clearly connects the licensee's and mortgagee's interests to the possessor's interest. *See, e.g.*, *Hashim v. Chimiklis*, 91 N.H. 456 (1941), *overruled in part on other grounds by Dowd v. Portsmouth Hosp.*, 105 N.H. 53 (1963) ("A licensee is one who is privileged to enter or remain on and use the premises of another by virtue of the latter's consent, whether by invitation or permission[.]"); *Levensaler v. Batchelder*, 84 N.H. 192 (1929) (mortgagee "is deemed to be the owner, and the mortgagor as being in possession under him"). The structure of a mortgage is such that upon default, the mortgagee can take possession of the property. *See, e.g.*, *Case v. St. Mary's Bank*, 164 N.H. 649, 655 (2013) (describing possessory interests of mortgagee-in-possession). And the State correctly acknowledges that "license agreements … may include the right to control property." SB 30; *accord* BLACK'S LAW DICTIONARY (6th ed. 1990) (defining "licensee" as "[a] person who has a privilege to enter upon land arising from the permission or

consent … of the possessor of land").[73] In contrast, the OTCs' contracts with hotels do not provide any condition under which the OTCs can take control or possession of hotels. Accordingly, the trial court correctly concluded that the phrase "or otherwise" requires that a person can actually operate and have a possessory interest in a hotel. *See* Jdgmt. 16-17.

Moreover, the trial court's conclusion is consistent with other parts of the M&R Tax that also emphasize the possessory nature of a hotel operator. For example, RSA 78-A:4, I requires all operators to "register with the department the name and address of each place of business within the state where it operates a hotel," and that their business license be "posted in a public area upon the premises to which it relates." RSA 78-A:4, I. A possessory interest is necessary to have a place of business to register and in which to hang the license.

The evidence at trial conclusively established that the OTCs have no hotels in their possession, no possessory interests in hotels or hotel rooms, and nowhere in New Hampshire upon which to post a license related to the premises. *See supra* at 3-7. Accordingly, the trial court correctly concluded that under the doctrines of *ejusdem generis* and *noscitur a sociis*, the phrase "or otherwise" does not expand the definition of "operator" to include the OTCs.

The State asserts that the trial court should not have conducted an *ejusdem generis* analysis because the M&R Tax is not ambiguous, and that an *ejusdem generis* analysis cannot be conclusive because the doctrine is not a cast-iron rule. *See* SB 27-28. However, the trial court's *ejusdem generis* analysis is not the sole basis of the judgment, SB 29; it was simply one reason why the OTCs are not operators. The trial court also ruled that the OTCs do not operate hotels under the plain meaning of "operate," that the "evidence conclusively establishes" that the OTCs do not buy

[73] A copy of this reference can be found at Apx. III at 169.

and sell hotel rooms, and that the State's assertion that the OTCs "exercise significant control" over hotel operations was "untenable" based on the evidence. Jdgmt. 18-20.

3. The State wrongly argues that the OTCs may be considered operators, even if they do not actually operate hotels, because the OTCs allegedly partner with hotels.

In a similar word game, the State erroneously asserts that the statutory definition of "person" captures "partners," and because the OTCs "refer to themselves and the hotels" as "partners," the OTCs are operators. SB 16, 18. The State's argument is an association fallacy: All "operators" are "persons" under the statute, but not all "persons" are "operators." As the trial court correctly held, the only way a "person" is an "operator" under the Tax is if the person "operat[es] a hotel." *See* Jdgmt. 21; RSA 78-A:3 (defining "operator" as "any person operating a hotel … whether as owner or proprietor or lessee, sublessee, mortgagee, licensee, or otherwise").

The trial court also correctly rejected the State's "partner"-means-"operator" assertion as factually unsupported. New Hampshire law provides that ***all*** of the following circumstances are necessary for a partnership or joint venture: "the contribution of assets to a common undertaking, a joint property interest in the subject of the venture, a shared right to participate in its management, an expectation of and a right to share in profits, and a duty to share in losses." *Rockwood v. SKF USA Inc.*, 758 F. Supp. 2d 44, 66 (D.N.H. 2010); *Johnson v. Shaines & McEachern*, 835 F. Supp. 685, 689 (D.N.H. 1993) (explaining that under New Hampshire law, "the same legal rules apply to both joint ventures and partnerships"). At trial, there was "no evidence" that the parties share profits or losses, and "the testimony … established that the OTCs and the hotels are not partners, but rather competitors." Jdgmt. 22. Accordingly, the trial court correctly applied the law to the facts (and did not clearly err) in concluding that neither the occasional use of the term "partner," nor the fact that the OTCs and hotels at times work together, turns the OTCs' competitive business relations with hotels into a "partnership" or "joint venture" to operate hotels. *See* Jdgmt. 22.

Further, the State acknowledges (as it must) that the evidence at trial was uncontroverted that the OTCs and hotels expressly agree in their contracts that they do ***not*** enter into a "joint venture" or "partnership." SB 18-19; *supra* at 6 n.27 (collecting contractual provisions). The State is wrong that those express agreements "matter[] not." SB 18-19. Under settled New Hampshire law, "whether [a joint venture] has been created depends upon the intent of the parties, to be determined by the usual rules of construction." *Lefebvre v. Waldstein*, 101 N.H. 451, 455-56 (1958); *accord Rockwood*, 758 F. Supp. 2d at 65-66. Accordingly, the unambiguous contractual disclaimers foreclose as a matter of law a finding that the OTCs and hotels have a joint venture, let alone a finding that, therefore, the OTCs operate hotels.

4. The State inaccurately insists that the OTCs may be considered operators as a result of their involvement in the reservation process.

The State next asserts that the OTCs should be considered operators, even if they do not actually operate hotels, because they "exert significant control over many aspects of day-to-day hotel operations" by "access[ing] central reservations systems," "provid[ing] reservation confirmation numbers," and "rat[ing] properties." SB 17. But as the trial court correctly held, the OTCs' involvement in those functions is "entirely consistent with the OTCs' role as a distribution channel." *See* Jdgmt. 19. The State ignores the evidence—including from the hotels—establishing that the hotels, not the OTCs, are the hotel operators, *supra* at 14-17, and the State offers no basis to conclude that the trial court erred (let alone clearly erred). *See* SB 17.

The State asserts for the first time on appeal that "those passively involved in an operator are liable" under the M&R Tax because RSA 78-A:21 ("Taxes as Property Lien") expands the definition of "operator." SB 30. This Court should ignore this argument under its rule that it will not consider arguments raised for the first time on appeal—the State never cited RSA 78-A:21 in the trial court. *See, e.g.*, *In re Ross & Ross*, 169 N.H. at 304. In any event, the argument fails:

RSA 78-A:21 specifically provides that its definition of operator applies "for the purposes of [that] section." RSA 78-A:21 expands enforcement authority against natural persons directly associated with the corporation or limited liability company acknowledged as an operator against whom payment has been demanded by permitting liens against those individuals' property as well. That section has no bearing on whether the OTCs are operators for purposes of who is required to collect and remit M&R Tax.

5. The State inaccurately insists that the OTCs may be considered operators, even if they do not actually operate hotels, because they allegedly purchase and sell hotel rooms.

The State's next tactic is to assert that the OTCs should be considered hotel operators, even if they do not actually operate hotels, because the OTCs allegedly purchase and sell blocks of hotel rooms. *See* SB 17-18. This assertion fails both legally and factually. The M&R Tax says nothing about collection and remittance obligations for selling hotel rooms. *See* RSA 78-A:6. Even if the assertion were legally relevant, the trial court correctly rejected it on factual grounds, expressly finding that the "evidence conclusively establishes that the actual business practices of the OTCs do not involve buying or selling hotel rooms." *See* Jdgmt. 18-19. The State ignores the trial court's lengthy findings of fact, leaving unchallenged on appeal the testimony of witnesses and volumes of records that support those findings. Instead, the State simply rehashes its trial presentation on this issue. Accordingly, the State fails to provide any basis for a conclusion that the trial court erred. For example, the State asserts that the "OTCs' own documents confirm that they obtain room inventory, allotments, and blocks," (*see* SB 18), but the State provided this Court no evidentiary basis whatsoever for such a finding. Accordingly, "[this Court] must assume that the

evidence was sufficient to support the result reached by the trial court." *Stachulski, LLC*, 2018 WL 3447678, at *1.[74]

Further, the State fails to mention (let alone rebut) the vast body of evidence that led to the trial court's conclusion that the OTCs do not buy or sell rooms:

- Evidence that when the OTCs' contracts with hotels use the word "sale," "it is understood by all parties to the contract, and in the industry, that 'sale' really means taking reservations on behalf of the hotel chain." Jdgmt. 6-7.[75]
- Evidence that when the OTCs' contracts with hotels refer to "accessing inventory," that means accessing the hotel operators' rate and availability information. Jdgmt. 6 (citing Apx. III at 131-32).[76]
- Evidence that under the OTCs' contracts with hotels, the OTCs have no risk of loss for rooms that remain vacant (no "inventory risk"). Jdgmt. 6 (citing Apx. I at 341-43).[77]
- Evidence establishing that under the OTCs' contracts with hotels, the hotels have sole control over room rates and availability. Jdgmt. 11 (citing T937-40, 952-54, 964-66).[78]

Likewise, the State ignores the uncontroverted evidence from the non-party hotels that OTCs do not purchase, control, or sell hotel rooms.[79] Accordingly, even if the Court were inclined to consider the State's irrelevant and baseless argument on appeal, the argument would fail because the State has failed to establish that the only reasonable conclusion from the evidence is its own.

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[74] At a minimum, as explained in the OTCs' Motion to Strike (filed contemporaneously with this brief), the Court should strike the portions of the State's appeal brief that attempt to place the trial court in error on the basis of evidence that the State has not put before this Court.

[75] T941, 1188; Apx. I at 140, § 2.2; Apx. I at 211, § 1; Apx. I at 237; Apx. I at 345-46; Apx. III at 131-32, 134-35.

[76] T656, 929-30, 1188; Apx. I at 341.

[77] T928-29, 941-42, 1009, 1032-33, 1188; Apx. I at 40, § 4; Apx. I at 59, § 10; Apx. I at 140, § 2.2; Apx. I at 240-42; Apx. I at 357-58, 362-65.

[78] T927; Apx. I at 141-42; Apx. I at 321.

[79] *See, e.g.*, Apx. I at 319-21; Apx. I at 328-29, 334-35. As the Seventh Circuit explained, "[c]ontracts between hotels and the OT[C]s confirm that the OT[C]s do not actually buy, and never acquire the right to enter or grant possession of, hotel rooms. Instead, the OT[C]s take reservation requests from customers and transmit those to the hotels." *Vill. of Bedford Park*, 876 F.3d at 300; *see also, e.g.*, *City of Phila.*, 37 A.3d at 21 n.11 ("[U]se of language that [Expedia] 'sells' hotel rooms in older filings with the Securities and Exchange Commission and in advertisements is not controlling and does not reflect the reality of how Expedia actually conducts its business.").

6. The State wrongly argues that the OTCs have M&R Tax liability under administrative regulations.

The State further erroneously asserts that OTCs are subject to the M&R Tax because they are operators under New Hampshire Administrative Rule, Revenue 701.15. This Court should reject the State's argument about Rule 701.15 for the same two reasons as the trial court: the rule is irrelevant, and even if the rule could be relevant, it does not make the OTCs operators.

The principal reason why the State's reliance on Rule 701.15 fails is that (as the trial court recognized, *see* Jdgmt. 20-21) the Rule is not relevant. Under settled New Hampshire law, "administrative officials do not possess the power to contravene a statute," so "administrative rules may not add to, detract from, or modify the statute which they are intended to implement." *In re Anderson*, 147 N.H. 181, 183 (2001) (quoting *Petition of Strandell*, 132 N.H. 110, 119 (1989)). Rather, "[t]he authority to promulgate rules and regulations 'is designed only to permit the board to fill in the details to effectuate the purpose of the statute.'" *Id.* (quoting *Reno v. Town of Hopkinton*, 115 N.H. 706, 707 (1975)). Thus, because the plain language of the M&R Tax compels the conclusion that the OTCs are not operators, *see supra* at 13-17, as a matter of law Rule 701.15 may not compel a different conclusion.

Separately, the State's reliance on Rule 701.15 fails because "[a]dministrative gloss is placed upon an ambiguous clause" only "when those responsible for its implementation interpret the clause in a consistent manner and apply it to similarly situated applicants over a period of years without legislative interference." *In re Stewart*, 164 N.H. 772, 776 (2013). But here, the M&R Tax is not ambiguous.[80] *See* Jdgmt. 20. And in any event, the State has not consistently interpreted the definition of "operator": in the 2007 TIR, the State expressly stated that the OTCs are not operators under the M&R Tax; in both 2009 and 2017 the State unsuccessfully undertook to amend

[80] Even if the M&R Tax is ambiguous, the result still is an affirmance. *See infra* at 31-32.

the M&R Tax to cover the OTCs, which would not have been necessary if the OTCs already were covered; and since 2013, the State has been insisting in this litigation that the OTCs are operators under the plain language of the M&R Tax. *See supra* at 10-11. Given the State's change in position, there is no basis for any reference to Rule 701.15.

Even if Rule 701.15 were relevant (and it is not), the trial court correctly concluded that the Rule does not make the OTCs operators. *See* Jdgmt. 20-21. The State's Brief repeatedly avoids quoting the Rule in full, *see* SB Pt. II, leaving out the critical introductory phrase: "'***Operator' means 'operator' as defined in RSA 78-A:3, IV*** and includes a person (a) offering sleeping accommodations for rent to the general public, including owners of private homes who offer sleeping accommodations for rent to the general public; … (d) Who acts in the capacity of an agent, whether as lessee, sublessee, mortgagee, licensee, or otherwise, for an owner in renting sleeping accommodations …." N.H. Admin. R., Rev. 701.15.

The Rule does not make the OTCs operators for five reasons. *First*—and critically—the Rule expressly incorporates the M&R Tax's definition of "operator." *See id.* Accordingly, as the trial court explained, the Rule applies only to persons who satisfy the statutory definition of "operator." Jdgmt. 21.[81]

Second, New Hampshire law is settled that administrative rules cannot add to, detract from, or modify the statute they are intended to implement. *In re Anderson*, 147 N.H. at 183. Accordingly, the trial court correctly rejected any interpretation of the Rule that would expand the definition of operator found in the Tax.

[81] This holding of the trial court belies the State's erroneous and misleading assertion that "[e]ven the Trial Court seemed to acknowledge in its decision below that such language [in the administrative rule], if considered, would make the OTCs 'operators' and subject the OTCs to tax liability." SB 24.

Third, the OTCs are not covered by the Rule because they do not offer sleeping accommodations for rent to the public. The OTCs, unlike the owners of private homes in the Rule, have no sleeping accommodations to offer for rent. *See* supra at 3-7. As the trial court found, the "OTCs are merely acting as a distribution channel to facilitate reservations for the hotel," and the hotels "do not give [them] any control over which room a consumer will be assigned to" with the hotel "always maintain[ing] the right to not allow a consumer to use a room." Jdgmt. at 13.

Fourth, the State wrongly insists the OTCs should be considered operators under the Rule because the OTCs are agents or partners of hotels. As already explained, *see supra* at 6-7, n.27, the OTCs and hotels expressly disclaim a partnership, and none exists under New Hampshire law. For similar reasons, the OTCs are not agents of hotels. An agency relationship requires factors absent here: mutual consent of the parties and the principal's right to control the agent, sufficient to support the imposition of a fiduciary duty that accompanies the agency relationship. *Dent v. Exeter Hosp., Inc*., 155 N.H. 787, 792 (2007); *Singh v. Therrien Mgmt. Corp.*, 140 N.H. 355, 358 (1995). As undisputed evidence established at trial, the OTCs' contracts with hotels provide that each OTC is independent from the hotels, and many contracts between OTCs and hotels go further to expressly disclaim an agency relationship. *See* Jdgmt. 21; *see supra* at 6-7, n.27. Further, no agency or fiduciary relationship could possibly exist between OTCs and hotels, given that the OTCs not only compete with the hotels, but also facilitate reservations for many different, competing hotel companies. *See supra* at 6-7, n.28; *Restatement (Third) of Agency* § 8.04 (explaining that an agent's fiduciary duty of loyalty includes "a duty to refrain from competing with the principal and from taking action on behalf of or otherwise assisting the principal's competitors.").[82] The trial court was not alone in finding no agency relationship. *See Orange Cty.*

[82] A copy of this reference can be found at Apx. III at 171.

v. Expedia, Inc., No. 48-2006-CA-2104, slip op. at 27 (Fla. Cir. Ct. June 22, 2012) ("The facts are undisputed that such an 'agency' relationship is regularly disavowed by Orbitz and the hotels in their contracts and is not otherwise supported by summary judgment proof."); *Wis. Dep't of Revenue*, 877 N.W.2d at 375 ("DOR misconstrues the relationship between Orbitz and the hotels. Orbitz does not make reservations on behalf of the hotels, but rather makes reservations with the hotels *on behalf of the travelers*. We are not persuaded that Orbitz is an agent of the hotels and, therefore, reject this argument.").

Fifth, the State's own previous statements completely defeat its insistence that an "agent" of an operator is an operator: the State's 2007 TIR assumed (incorrectly) OTCs were "agents of the hotel operators with whom they contract" but nevertheless concluded that OTCs are not operators subject to the M&R Tax. *See supra* at 10-11, n.54; Jdgmt. 20 n. 11.

II. This Court may affirm the judgment on the alternative ground that the OTCs' compensation is not "rent" charged "for occupancy" under the plain language of the M&R Tax.

This Court also may affirm on the alternative ground that the OTCs' compensation is not taxable under the M&R Tax because their fees are not "rent" charged for "occupancy." In addition to imposing collection and remittance obligations only on hotel "operators," the M&R Tax taxes only "rent" for "occupancy." RSA 78-A:6, I. "Rent" is "[t]he consideration received for occupancy … and also any amount for which the occupant is liable for the occupancy without any deduction of any kind." RSA 78-A:3, VIII(1). "Occupancy" is "the use or possession, or the right to the use or possession, of any room in a hotel for any purpose, or the right to the use or possession of the furnishings or to the services and accommodations accompanying the use and possession of a room." RSA 78-A:3, VI(a).

Yet the State ignores the Tax in favor of its own litigation-created definitions of "rent," each of which omits the requirement that the consideration be received for occupancy.

M&R Tax Definition of Rent	Terms The State Substitutes for "Rent"
"'Rent' means (a) the consideration ***received for occupancy*** valued in money, whether received in money or otherwise, including all receipts, cash, credits, and property, or services of any kind or nature, and also any amount for which the occupant is liable ***for occupancy*** without any deduction of any kind." RSA 78-A:3, VIII(a).	"retail amounts consumers pay for hotel rooms" SB 6.
	"full price paid by the consumer" SB 14.
	"total 'consideration' paid by consumers for their bookings" SB 16.
	"full value of hotel room transactions" SB 15.
	"taxpaying consumers pay a gross amount as occupants of rooms, and the M&R Tax is assessed upon that gross payment amount" SB 21.

Even the State's requested relief on appeal strays from the statutory definition of "rent," asking that this Court declare the OTCs liable for M&R Tax "based upon the gross amounts they receive from hotel room consumers, without deduction of any kind." SB 32.

Uncontroverted evidence demonstrated that the OTCs' fees are not "consideration received for occupancy." The fees are for the OTCs' online services, including enabling travelers to search for reservations, compare prices, read reviews, reserve other travel products, and book vacation packages. *See* Jdgmt. 11-12 (citing T947). The OTCs' website disclosures so indicate, and as one hotel witness testified: "[The customer] pay[s] the OTC for the reservation. They're not paying the OTC for the room."[83] As the trial court found, "[b]ecause the OTCs disclose the fact that they charge fees for their services, consumers must find them valuable since they continue to pay for them." Jdgmt. 11-12.

The State's assertion that the OTCs charge an amount for occupancy is totally divorced from the record—the evidence at trial established that the OTCs do ***not*** have occupancy or the right to grant occupancy of hotel rooms. *See supra* at 6, n.23.[84] The judgment specifically refers

[83] Apx. I at 336.

[84] *See Vill. of Bedford Park*, 876 F.3d at 305 ("The OTCs do not rent rooms."); *Orbitz v. Ind. DOR*, No. 49T10-0903-TA-00010, slip op. at *8 (Ind. Tax Ct. Dec. 20, 2016) ("[T]he Hotel Listing Agreements merely provided Orbitz with the right to confirm a pre-paid reservation for a hotel room.").

to a noteworthy example of the fact that the OTCs do not have occupancy to grant: the teenage children of an Expedia executive were recently denied check-in at a hotel because they did not meet the hotel's minimum-age requirements, and the executive had no way of granting them occupancy. *See* Jdgmt. 13.

For the separate reason that the OTCs' compensation is not "rent" for "occupancy," this Court may affirm the trial court's judgment that the OTCs are not subject to the M&R Tax.[85]

III. This Court may affirm the judgment on the alternative ground that even if the State's interpretation of the M&R Tax were reasonable (and it is not), the result would be an ambiguous tax statute that must be construed against the State.

Even if the State's interpretation of the M&R Tax were a reasonable competitor of the OTCs' interpretation (and it is not), the result would remain an affirmance. This is so because New Hampshire law provides both that a statute is ambiguous if "more than one reasonable interpretation exists," *Vector Mktg. Corp. v. N.H. Dep't of Revenue Admin.*, 156 N.H. 781, 784 (2008), and that an ambiguous tax statute must be "construed against the taxing authority rather than the taxpayer." *Appeal of Denman*, 120 N.H. 568, 571 (1980).

There can be no question that the OTCs' interpretation of the M&R Tax is reasonable. *First*, the trial court's acceptance of the OTCs' interpretation is proof that it is reasonable. *Second*, the State's own public statements about the M&R Tax (*see supra* at 10-11), as well as the State's own use of the merchant model (*see supra* at 10), confirm that the OTCs' interpretation is reasonable. Indeed, the State's 2007 statement that "[o]n-line booking companies are not

[85] This Court would not be breaking new ground by finding that the OTCs' compensation is not for occupancy. *See City of San Antonio v. Hotels.com, L.P.*, 876 F.3d 717, 723 (5th Cir. 2017); *City of Columbus*, 693 F.3d at 651; *In re Transient Occupancy Tax Cases (San Francisco)*, B253197, slip op. at *19-20 ("The money the OTCs retain is not 'consideration received for occupancy,' but is consideration received by the OTCs in exchange for their services."); *Cty. of Nassau v. Expedia.*, No. 13818-2011, slip op. at *5 (N.Y. Sup. Ct. Mar. 29, 2017) (same); *In re Transient Occupancy Tax Cases (Los Angeles)*, B255223, slip op. at *19 (same).

'operators' within the meaning of the M&R statute" and "do not have an independent responsibility to collect and remit M&R taxes to New Hampshire" remains on the State's website to this day. *See supra* at 15, n.65. *Third*, the State's efforts to amend the M&R Tax (explained above, *see supra* at 11) compel the conclusion that a reasonable interpretation of the existing Tax is that it does not impose collection responsibility on the OTCs. The State's efforts to amend the Tax to cover OTCs acknowledge the reality that the State's litigation tactics have sought to escape: the Tax does not impose collection and remittance obligations on OTCs. *Finally*, more than twenty courts have interpreted similar tax statutes and have concluded that OTCs are not operators. *See supra* at 16 n.69.

Put simply, the State is wrong that the M&R Tax requires the OTCs to collect and remit as operators. But even if the State's position could be described as reasonable (which it is not), the Court should still affirm. If more than one reasonable interpretation of the M&R Tax exists, New Hampshire law requires this Court to construe any ambiguity in favor of the OTCs and affirm. Affirmance is required here, where the State's position is at odds with the reasonable interpretations of the OTCs, the trial court, and many trial and appellate courts across the country.

IV. The trial court correctly concluded that the OTCs' business practices do not violate the CPA.

Finally, the trial court correctly concluded that the OTCs' business practices do not violate the CPA. For three reasons, the trial court correctly rejected the State's CPA claim that the OTCs "bundle" taxes and fees into one charge, "conceal[ing] the amount of tax they are collecting." Jdgmt. at 31.[86] Indeed, the State appears to tacitly acknowledge this reality, devoting very little

[86] In the trial court and in passing in its opening brief, the State wrongly asserted that "the OTCs purposefully hide from consumers and the State the tax amounts collected, and they improperly retain as profit a portion of taxes owed to the State." SB 31. But at trial, the State offered no evidence that the OTCs ever collected tax recovery charges on their own fees. Instead, as already explained, *see supra* nn. 42, 48, the evidence established that the OTCs calculated tax recovery charges only on the hotel's net rate, and that the hotels remitted taxes on their net rates. For this reason, other courts have rejected the similar baseless collect-but-not-remit allegations. *See, e.g.*, *City of Columbus*, 693 F.3d

attention to its appeal of the judgment against its CPA claim and failing to dispute the evidentiary basis for any of the trial court's conclusions. *See* SB 31-32.

A. The OTCs' disclosures bar CPA liability.

The trial court's principal reason for rejecting the State's CPA claim is that the OTCs' disclosures to consumers bar CPA liability. New Hampshire's CPA prohibits unfair or deceptive business practices, and a practice is not deceptive if it is disclosed. *See, e.g.*, RSA 358-A:2; *Davis Frame Co. v. Reilly*, No. Civ. 05–CV–160–SM, 2006 WL 435454, at *6-7 (D.N.H. Feb. 22, 2006). There is no dispute that the OTCs disclose in a line labeled "taxes and fees" a "bundled" charge for amounts covering taxes and fees. *See* Jdgmt. 25; SB 31. Nor is there any dispute that the OTCs' disclosures (available on their websites and admitted into evidence at trial) specifically state that the charge to consumers includes amounts to cover both (1) estimated taxes that the hotel will owe on its rental rate and (2) a fee for the OTCs' services. *See supra* at 9.[87] Because these disclosures preclude a finding that the OTCs' practices are deceptive, the trial court correctly entered judgment against the CPA claim.

B. The OTCs' alleged practices do not satisfy the rascality test.

A second and independent reason why the trial court correctly rejected the State's CPA claim is that the OTCs' alleged business practices do not satisfy the rascality test. When, as here, the challenged practice is not specifically prohibited by the CPA, *see* RSA 358-A:2, I–XVI, the test to determine whether the CPA prohibits the practice is whether it "attain[s] a level of rascality

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at 653-54 ("The localities have not come forward with evidence suggesting that the [OTCs] labeled charges as taxes when, in fact, the money collected was not remitted as a tax."); *see also City of Rome*, 549 F. App'x at 901; *City of Gallup*, L.P. No. 2:07-CV-00644, slip op. at *13.

[87] The State does not challenge on appeal the trial court's well-reasoned ruling that it is not a violation of the CPA for the OTCs not to disclose how much of the bundled charge is to cover estimated taxes that the hotel will owe, because the consumer could use that information to calculate the hotel's net rate, an amount that is important to be kept confidential under the merchant model and whose confidentiality is typically mandated by the hotels' contracts with the OTCs. *See* Jdgmt. 25, 27; *see, e.g.*, Apx. I at 237 (requiring confidentiality of net rate); Apx. I at 181, § 13 (same); Apx. I at 41, § 7 (same).

that would raise an eyebrow of someone inured to the rough and tumble of the world of commerce.'" *Reilly*, 2006 WL 435454, at *6 (quoting *Barrows*, 141 N.H. at 390). This test requires a showing that the practice "offends established public policy," "is immoral, unethical, oppressive, or unscrupulous," or "causes substantial injury" to consumers. *Fat Bullies Farm v. Devenport*, 170 N.H. 17, 28 (2017).

The State has made no such showing. *First*, as the trial court correctly concluded—and as the State conspicuously ignores, *see* SB Pt. IV—there can be no question that the OTCs' practices are legal and do not violate public policy. The trial court correctly recognized that because the OTCs had no obligation under the M&R Tax to separately state any charges, their practices were lawful. Jdgmt. 25.[88] Further, the State itself engaged in "precisely the same business practice[s]" from 2006 to 2011, with the knowledge and approval of the Attorney General's Office. *See* Jdgmt. 27-28. This fact alone defeats the State's claim of rascality. And *second*, as the trial court correctly found—and again, as the State ignores on appeal, *see* SB Pt. IV—the State adduced no evidence that the OTCs' business model causes any injury to consumers. *See* Jdgmt. 24, 28. Without evidence of any injury, the State cannot possibly prove the required "substantial injury" to consumers.

C. The State adduced no evidence of intent and causation.

The trial court's rejection of the State's CPA claim should also be affirmed because the State offered no evidence of the required elements of intent and causation. "The plain language of the [CPA] … indicates that some element of knowledge on the part of the defendant is required," *Kelton*, 155 N.H. at 668, and the causation requirement arises from the CPA's proscription of

[88] The State's allegation that the OTCs' combined taxes and fees was improper is an effort to recast an M&R Tax claim as one under the CPA. But, the trial court's finding that the OTCs are not operators confirms that under the M&R Tax they do not have any obligation to separately state their charges. *See* RSA 78-A:7, I(a) ("[T]he operator shall either state the amount of the tax to each occupant ….").

deceptive acts. *See State v. Moran*, 151 N.H. 450, 454 (2004) (relying on case holding that an act is deceptive if it can "reasonably be found to have caused an individual to act differently from the way he otherwise would have acted"). The trial court correctly concluded that "there is no evidence of fraudulent intent." Jdgmt. 27. In contrast, the ***only*** intent evidence is the OTCs' disclosures, *see supra* at 9, which negate even a speculative inference of nefarious intent. Further, the trial court found that the OTCs bundle the charges for a legitimate business reason (to prevent consumers from calculating the hotel's net rate), not to deceive consumers. Jdgmt. 27. As for causation, the State offered "no persuasive evidence that ***any*** consumer had been induced to visit ***any*** OTC website" by any alleged deception. *See* Jdgmt. 24. These are fatal deficits of proof, and the trial court's CPA judgment should be affirmed.

CONCLUSION

The State's appeal rests on unsupported factual allegations and legal assertions that are inconsistent with the M&R Tax and controlling precedents. The trial court correctly ruled against the State, the State has not carried its heavy burden on appeal, and this Court should **AFFIRM**.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is unlikely to assist the Court in applying settled law to the facts as the trial court correctly found them based on the evidence at trial. The trial court's judgment may be affirmed exclusively on the basis of legal conclusions and evidence the State failed to disprove. If the Court orders oral argument, Anne Marie Seibel will argue on the OTCs' behalf.

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Respectfully submitted,

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