



## City Attorney Dennis Herrera Statement

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For Immediate Release:  
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### **Herrera statement on HomeAway's challenge to short term rental ordinance**

*Federal lawsuit pushes 'dubious legal theory' that the U.S. Constitution's Commerce Clause prohibits local jurisdictions from making local land use decisions*

SAN FRANCISCO (Nov. 3, 2014)—HomeAway, Inc., an online platform for tourist rentals, filed suit against the City and County of San Francisco in federal court today, alleging that a newly enacted local ordinance that allows San Francisco residents to rent their homes on an occasional basis violates the Commerce Clause of the U.S. Constitution.

In response, City Attorney Dennis Herrera issued the following statement:

I intend to vigorously defend a law that offers San Francisco residents reasonable flexibility to rent their homes on an occasional basis. HomeAway's challenge pushes a dubious legal theory that the U.S. Constitution's Commerce Clause somehow prohibits local jurisdictions from making local land use decisions. San Francisco is well within its authority to ensure that scarce housing resources are used primarily for housing.

HomeAway's lawsuit is without merit, and I'm confident the City will prevail.

The case is: *HomeAway, Inc. v. City and County of San Francisco*, U.S. District Court for the Northern District of California, case no. 3:14-cv-04859, filed Nov. 3, 2014.

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

HOMEAWAY, INC.,  
HOMEAWAY.COM, INC., Delaware  
corporations,

Plaintiffs,

v.

CITY AND COUNTY OF SAN  
FRANCISCO, a municipal  
corporation, JOHN RAHAIM in his  
official capacity, DOES 1-10,

Defendants.

Case No. \_\_\_\_\_

**COMPLAINT FOR  
DECLARATORY AND  
INJUNCTIVE RELIEF FOR  
CONSTITUTIONAL VIOLATIONS**

1 Plaintiffs HomeAway, Inc. and HomeAway.com, Inc. (collectively “Plaintiffs or  
2 “HomeAway”), allege the following facts in support of this action.

3 **NATURE OF THE ACTION**

4 1. Plaintiffs seek a declaratory judgment that Defendant City and County of  
5 San Francisco’s (“San Francisco” or the “City”) Ordinance No. 140381 (the  
6 “Ordinance”) violates the Commerce Clause of the United States Constitution, art. I, §  
7 8, cl. 3. Plaintiffs also seek an injunction preliminarily and permanently enjoining  
8 Defendants from enforcing the Ordinance.

9 2. The Ordinance violates the Commerce Clause because it discriminates  
10 against interstate commerce through differential treatment of San Francisco-based and  
11 non-San Francisco-based interests that benefits the former and burdens the latter. This  
12 unconstitutional discrimination takes two forms. First, by its express terms, the  
13 Ordinance allows only permanent San Francisco residents to rent out on a short-term  
14 basis (which the Ordinance defines as thirty days or less) residential property they own  
15 or lease in San Francisco. Non-permanent residents of San Francisco who own or lease  
16 property in San Francisco are barred on the face of the Ordinance from renting out their  
17 property on a short-term basis. Second, the Ordinance requires entities that provide  
18 “Hosting Platforms,” on which owners and lessees of property may advertise their  
19 property for short-term rentals, to conform their business operations in San Francisco to  
20 one particular model, and no other, under pain of monetary penalties. This anti-  
21 competitive measure forces those seeking to rent property to turn over control of  
22 selecting short-term tenants to entities that operate the type of Hosting Platform model  
23 sanctioned by the Ordinance and to pay whatever fees those entities might charge today  
24 or in the future. While facially neutral, the Ordinance’s Hosting Platform rules have the  
25 purpose and effect of discriminating against non-San Francisco-based interests.

1           3.     The Ordinance also violates the Commerce Clause because both the  
2 residency restriction and Hosting Platform rules impose substantial burdens on interstate  
3 commerce in excess of any asserted local benefit.

4           4.     HomeAway is based in Austin, Texas. HomeAway, Inc., through  
5 HomeAway.com, Inc. and its other subsidiaries, operates the largest national online  
6 marketplace in the vacation rental industry. HomeAway allows an owner or lessee of an  
7 individual residential property, or that owner or lessee's designated and legal agent  
8 (each referred to herein as a "Listing Owner"), to advertise that property for rental on  
9 HomeAway's websites. HomeAway websites have approximately 1,000,000 listings  
10 worldwide. Persons seeking to rent residential properties ("Travelers") can access  
11 HomeAway's websites to look for a desired rental property. When a Traveler is  
12 interested in renting a property, the Traveler contacts that Listing Owner directly and  
13 makes an agreement directly with the Listing Owner to arrange the rental. Listing  
14 Owners control the transaction and choose to whom they will rent, when they wish to  
15 rent, and how and when they wish to be paid before the Traveler occupies the property.  
16 The majority of Listing Owners on HomeAway websites require full payment in  
17 advance of the Traveler taking occupancy.

18           5.     The market for online travel and short-term rental services is highly  
19 competitive. Airbnb, Inc. ("Airbnb"), a San Francisco-based company, is a more recent  
20 entrant into this market and uses an "Agency" business model. An Agency business  
21 model allows Listing Owners to post their properties on the Agency's website, but  
22 requires the Agency to be the merchant of record for the payment of the rental. The  
23 Agency also controls all communications between the Traveler and the Listing Owner  
24 and makes the Listing Owner come to an agreement with the Traveler only through the  
25 Agency, and sets policies to be followed by the Listing Owner and the Traveler.  
26 Furthermore, under the Agency model, the Agent, and not the Listing Owner, collects  
27 and holds the rental payment, deducts the Agency fees, and remits the net proceeds to

1 the Listing Owner only after the Traveler has taken occupancy of the property. In its  
2 use of the Agency model, Airbnb also charges the Traveler a fee.

3 6. Airbnb was actively involved in drafting the Ordinance and lobbied  
4 extensively for its passage. Indeed, two members of Airbnb's Board of Directors made  
5 financial contributions totaling \$674,000 benefitting at least one member of the San  
6 Francisco Board of Supervisors (the member who sponsored the Ordinance) through  
7 contributions to a political action group that attacked his opponent in the November  
8 2014 election.

9 7. The Ordinance essentially adopts the Agency business model as the sole  
10 business model available to Listing Owners in San Francisco. It makes illegal any  
11 competing business model, such as HomeAway's, that does not require the Listing  
12 Owner to act as an agent in the collection and holding of Listing Owner information,  
13 fees, and taxes and allows the Traveler to contract directly with the Listing Owner, who  
14 sets his or her own policies and leases the property to the Traveler.

15 8. The Ordinance's permanent residency restriction excludes from the San  
16 Francisco short-term rental market current and potential HomeAway customers who  
17 own or lease property in San Francisco but who do not reside there for 275 days per  
18 year, which is an arbitrary definition of permanent resident.

19 9. The Ordinance's Hosting Platform rules prevent HomeAway from doing  
20 business in San Francisco altogether, even with permanent San Francisco residents,  
21 because the Ordinance allows rentals by permanent San Francisco residents only  
22 through Hosting Platforms that use an Agency business model.

23 10. The asserted goal of the Ordinance is to increase the availability of  
24 affordable residential rental housing in San Francisco by limiting short-term rentals.  
25 Defendants have failed, however, to explain why the facially discriminatory permanent  
26 residency restriction, which allows some short-term rentals but impairs the rights of  
27 potential HomeAway customers who are not permanent San Francisco residents under  
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1 the Ordinance and who own or lease residential housing in San Francisco that they wish  
2 to rent out on a short-term basis, is necessary to achieve that purported objective. This  
3 renders the restriction unconstitutional under the Commerce Clause.

4 11. The asserted goal of the Ordinance's regulation of Hosting Platforms is to  
5 promote sound business practices in the short-term rental market. Defendants have  
6 failed, however, to explain why the Ordinance's rigid Hosting Platform rules, which  
7 have the purpose and effect of discriminating against non-San Francisco based interests  
8 and reflect naked economic protectionism for San Francisco-based Airbnb by effectively  
9 granting its Agency business model a local monopoly, are necessary to achieve that  
10 objective. This renders the Hosting Platform rules unconstitutional under the  
11 Commerce Clause.

12 12. In any event, any asserted local benefit of the Ordinance's residency  
13 restriction and Hosting Platform rules is outweighed by the substantial burdens they  
14 impose on interstate commerce and thus both the residency restriction and the Hosting  
15 Platform rules violate the Commerce Clause for this reason as well.

### 16 **JURISDICTION**

17 13. This case presents a federal question arising under the Commerce Clause  
18 of the Constitution of the United States, art. I, § 8, cl. 3, and 42 U.S.C. § 1983. This  
19 Court therefore has subject-matter jurisdiction under 28 U.S.C. §§ 1331 and 1343(a)(3).

20 14. The Ordinance harms HomeAway and its customers because Listing  
21 Owners of residential units in San Francisco who are not permanent San Francisco  
22 residents will be unable to rent their property through services that HomeAway could  
23 and would otherwise provide. Absent this discriminatory exclusion, HomeAway's San  
24 Francisco listings would include all Listing Owners who choose to exercise their  
25 property rights and rent out their homes, not just San Francisco residents.

26 15. HomeAway understands that the City will claim it is a "Hosting Platform"  
27 as defined in the Ordinance. Thus, if HomeAway advertises short-term rentals in San  
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1 Francisco, the City will subject it to the Ordinance's rigid rules governing Hosting  
2 Platforms. The Ordinance's Hosting Platform rules harm HomeAway because they  
3 make it impossible for HomeAway to conduct business in San Francisco. To comply  
4 with the Hosting Platform rules would require HomeAway to adopt an entirely different  
5 business model, which HomeAway believes to be unappealing to the Listing Owners  
6 with more than 1,000,000 listings on HomeAway websites who prefer to communicate  
7 and transact business directly with Travelers rather than hand-off those customers to an  
8 agent that controls the transaction, holds the customers' money, and charges them  
9 additional fees.

10 16. Venue is proper in this Court under 28 U.S.C. § 1391.

### 11 PARTIES

12 17. Plaintiff HomeAway, Inc. is a corporation organized and existing under the  
13 laws of the state of Delaware, with a principal place of business at 1011 W. Fifth Street,  
14 Austin, Texas. Plaintiff HomeAway.com, Inc. is a corporation organized under the laws  
15 of the State of Delaware and a wholly owned subsidiary of Plaintiff HomeAway, Inc.,  
16 with its principal place of business at 1011 W. Fifth Street, Austin, Texas. HomeAway  
17 does business within the Northern District of California.

18 18. Defendant City and County of San Francisco ("City") is a municipal  
19 corporation.

20 19. Defendant John Rahaim is the Director of the City Planning Department. It  
21 is his duty, and the duty of the employees he supervises, to enforce the Ordinance. Mr.  
22 Rahaim is sued in his official capacity.

23 20. HomeAway is unaware of the true names or capacities, whether individual,  
24 corporate, associate, or otherwise, of Defendants sued herein as DOES 1 through 10,  
25 inclusive, and therefore sues these Defendants by such fictitious names. HomeAway  
26 will seek leave of the Court to amend this pleading to set forth the true names and  
27 capacities of said Doe Defendants when the same are ascertained. HomeAway is  
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1 informed and believes, and on that basis alleges, that each of the fictitiously named  
2 Defendants is responsible in some manner for the occurrences herein alleged, or was  
3 acting in concert with, and with the permission, approval, and authorization of, the  
4 specifically named Defendants.

## 5 **FACTUAL ALLEGATIONS**

### 6 **HomeAway and Its Business**

7 21. Founded in 2005, HomeAway, Inc. operates an online vacation rental  
8 property marketplace that enables Listing Owners to advertise properties available for  
9 short-term rental to Travelers who use HomeAway's websites to search for and find  
10 available properties that meet their desired criteria, including location, size, and price.

11 22. HomeAway operates the world's largest online marketplace in the vacation  
12 rental industry, comprising a number of websites, including the following:

13 HomeAway.com, VRBO.com, VacationRentals.com, OwnersDirect.co.uk,  
14 HomeAway.de, Abritel.fr, Homelidays.com, BedandBreakfast.com, FeWo-Direkt.de  
15 (Germany), HomeAway.co.uk (UK) , HomeAway.es and TopRural.com (Spain),  
16 AlugueTemporada.com.br (Brazil), HomeAway.com.au (Australia), HomeAway.se  
17 (Sweden), HomeAway.pt (Portugal), HomeAway.ca (Canada), HomeAway.mx  
18 (Mexico), HomeAway.com.co (Colombia), HomeAway.com.ar (Argentina),  
19 HomeAway.at (Austria), HomeAway.dk (Denmark), HomeAway.no (Norway), and  
20 HomeAway.it (Italy).

21 23. HomeAway operates four online rental websites directed principally to  
22 Listing Owners and Travelers in the United States, including HomeAway.com,  
23 VRBO.com, VacationRentals.com, and BedandBreakfast.com. The combination of  
24 Homeaway.com, VRBO.com, and VacationRentals.com alone creates one of the largest  
25 vacation rental distribution networks in the world.

26 24. Through HomeAway's online marketplace, Travelers can search and/or  
27 book fully furnished, privately owned residential properties, including homes,



1 condominiums, villas, cabins, houseboats, tee-pees, tree houses, and other unique  
2 properties, that Listing Owners rent to the public on a nightly, weekly, or monthly basis.  
3 HomeAway's online marketplace brings together millions of Travelers seeking short-  
4 term rentals online with the Listing Owners of over one million individually-controlled  
5 and managed vacation rental properties located in all 50 of the United States and 190  
6 countries around the world.

7 25. Short-term rentals are increasingly popular across the United States. The  
8 expansion of HomeAway's business reflects this. From 2006 to September 30, 2014,  
9 the number of listings on HomeAway's network of websites grew from a single site with  
10 60,000 listings to several sites with an aggregate of over 1,000,000 listings worldwide.

11 26. HomeAway and its online marketplace have received numerous accolades  
12 and awards, including Travel Weekly Magellan Awards Gold Winner (2013) (one of the  
13 best vacation rental services in the hospitality industry); Ernst & Young Entrepreneur of  
14 the Year (2012); Travel + Leisure Best Apps and Websites for Travelers (August 2012);  
15 Leisure and Tourism – Customer Service Department of the Year (February 2012);  
16 Deloitte Technology Fast 500 (2011) (HomeAway recognized as one of the fastest  
17 growing companies in North America); and Kiplinger's Personal Finance Best of  
18 Everything 2010 (HomeAway named best vacation rental site).

19 27. Travelers visit HomeAway's marketplace at no charge and are able to  
20 search and compare HomeAway's large and detailed inventory of listings to find  
21 vacation rentals meeting their requirements. HomeAway's decision not to charge fees to  
22 Travelers is a competitive advantage to HomeAway.

23 28. Travelers transact directly with Listing Owners to arrange their stay.  
24 Travelers who find a short-term property that meets their requirements through  
25 HomeAway's marketplace are able to contact Listing Owners directly by phone or  
26 through form-based communication tools on HomeAway's websites. Travelers pay the  
27 Listing Owners directly and are not charged a fee to use the HomeAway website.

1 Travelers may purchase guarantees, deposit insurance, and travel insurance through  
2 HomeAway, but these charges are at all times independent of the Listing Owner's  
3 charge to rent the property.

4 29. HomeAway derives its primary revenue from Listing Owners who  
5 advertise on its websites. There are two means by which Listing Owners compensate  
6 HomeAway. First, Listing Owners can pay for the listings by purchasing subscriptions,  
7 which are typically annual in nature, to provide detailed descriptions of their properties  
8 on HomeAway's websites and reach a broad audience of Travelers seeking vacation  
9 rentals. This is the most common form of HomeAway's compensation. Alternatively,  
10 Listing Owners may choose to pay for their listings via a HomeAway product called  
11 pay-per-booking launched in September 2013. Under this compensation mechanism,  
12 which is far less common, the Listing Owner agrees to pay up to 10% of the value of a  
13 confirmed booking for the listing. Under either approach, however, Listing Owners  
14 correspond directly with Travelers to arrange and contract for rentals and collect all  
15 rental fees (although some Listing Owners use third party payment services to collect  
16 fees).

17 30. HomeAway does not make agreements with Travelers to rent properties  
18 from Listing Owners or collect rental fees from Travelers for remittance to Listing  
19 Owners. HomeAway is not a party to the rental transaction. And Home Away does not  
20 receive any rental fees from Travelers.

### 21 **Pre-Ordinance Treatment of Short-Term Rentals in San Francisco**

22 31. From 1981 until adoption of the Ordinance, San Francisco prohibited the  
23 rental of residential units "for tourist or transient use," defined to mean "use of a  
24 residential unit for occupancy for less than a 30-day term . . . ." San Francisco  
25 Administrative Code, § 41A.

26 32. Under this law, no Listing Owners of property in San Francisco were able  
27 to rent their property for such a short-term rental.

1 33. While this law existed, however, the City did not enforce it. Instead, the  
2 City tacitly accepted the growing short-term rental marketplace and accepted hotel and  
3 occupancy taxes from Listing Owners who understood that the act of renting for less  
4 than 30 days was taxable under other laws on San Francisco's books.

5 34. Legalizing the short-term rental of residential units in San Francisco, a  
6 popular tourist destination, will facilitate travel to San Francisco, both by Californians  
7 and non-Californians, and thereby help promote the local economy

8 **Airbnb and its Role In The Adoption Of The Ordinance**

9 35. Airbnb, Inc. ("Airbnb") entered the market for online travel and short-term  
10 rental services after HomeAway. It describes its services as "the easiest way for people  
11 to monetize their extra space." Like HomeAway, Airbnb targets Travelers around the  
12 world, but, does so through a single Internet website -- airbnb.com.

13 36. The Ordinance was introduced on April 15, 2014. It was sponsored by  
14 Supervisor Chiu, a member of the San Francisco Board of Supervisors. Airbnb  
15 lobbyists met with Supervisor Chiu, as well as other members of the Board, urging the  
16 passage of a short-term rental law that became the Ordinance that is the subject of this  
17 action.

18 37. Public records show the many meetings between Airbnb lobbyists and  
19 Supervisor Chiu, as well as political contributions made by Airbnb board members that  
20 benefited Supervisor Chiu. They show that in the year leading up to the Ordinance's  
21 introduction, Airbnb lobbyists met with Supervisor Chiu more than thirty times.

22 38. In May 2014, within a month after the Ordinance was introduced, Reid  
23 Hoffman, a member of the Airbnb Board of Directors, contributed \$200,000 to a  
24 political action group that was dedicated to supporting Supervisor Chiu, who is running  
25 for the California Assembly. That same month, Gayle Conway, the wife of Airbnb  
26 Board member Ron Conway, contributed \$49,000 to the same political action group.

1 39. In September 2014, a lobbyist for Airbnb met with Supervisor Chiu four  
2 times. That same month, Mr. Hoffman contributed another \$300,000 to Supervisor  
3 Chiu's political action group, and Mr. Conway contributed \$49,900.

4 40. On October 7, 2014, the Ordinance came before the Board of Supervisors  
5 for an initial vote. It passed 7-4.

6 41. On October 14, 2014, after the Board of Supervisors' initial vote approving  
7 the Ordinance, Mr. Conway contributed \$25,000 more to Chiu's political action group,  
8 and the next day, Mr. Hoffman contributed \$100,000 more to that group. The total  
9 contributions from Mr. Hoffman and Mr. Conway to Supervisor Chiu's political action  
10 group from May through October 2014 amounted to \$674,000.

11 42. On October 21, 2014, the Board of Supervisors passed the final version of  
12 the Ordinance by a vote of 7-4.

13 43. HomeAway's input was neither solicited nor accepted by Supervisor Chiu's  
14 office, despite HomeAway's outreach to his office staff and its knowledge about short-  
15 term rental regulations adopted by other municipalities worldwide that it has gained as  
16 the oldest online marketplace in the short-term rental industry.

17 44. HomeAway also corresponded in writing and a phone conversation with  
18 the Office of the Treasurer and Tax Collector for the City and County of San Francisco  
19 explaining the value of HomeAway's business model and offering to have a dialogue  
20 with the City. The City requested that HomeAway supplement the phone conversation  
21 to explain its business model in writing, which HomeAway did via a letter. However,  
22 the City never responded to the letter and the dialogue ended.

23 45. On October 21, 2014, a group of San Francisco voters filed an ethics  
24 complaint alleging a conflict of interest between Supervisor Chiu and a political strategy  
25 firm working for Airbnb. The voters' complaint alleges that Nicole Derse, a consultant  
26 on Chiu's Assembly campaign and co-founder of 50+1 Strategies, organized a campaign  
27 to pressure members of the San Francisco Board of Supervisors to pass legislation

1 favorable to Airbnb. 50+1 Strategies is not registered as a lobbyist firm, nor are Derse’s  
2 visits to Chiu logged as lobbyist activity, which the voters’ complaint argues are clear  
3 ethical violations given that her firm dealt directly with Airbnb.

4 46. On October 27, 2014, San Francisco Mayor Ed Lee signed the Ordinance.  
5 By its terms, the Ordinance becomes effective on November 26, 2014, and becomes  
6 operative on February 1, 2015. Ordinance, § 4(a), (b).

7 **The Ordinance’s Discriminatory Residency Restriction**

8 47. The Ordinance amends the San Francisco Administrative Code to provide  
9 an exception to the previous prohibition on the short-term rental of residential units in  
10 San Francisco. As defined in the Ordinance, a “residential unit” is a building or any  
11 portion thereof that is “designed, built, rented, leased, let or hired out to be occupied.”  
12 Ordinance, § 41A.4. A rental is considered “short-term” when it is offered for “Tourist  
13 or Transient Use,” which means the use of a residential unit “for occupancy for less than  
14 a 30-day term . . . .” *Id.* The Ordinance does not regulate residential unit rentals for  
15 longer than 30 days -- such uses are not considered for “Tourist or Transient Use.”

16 48. By its express terms, the Ordinance allows only permanent residents of San  
17 Francisco to rent out their property on a short-term basis. Ordinance, § 1(c)(2). To be  
18 considered a “permanent resident,” an individual must state an intent to occupy the  
19 residential unit “for no less than 275 days out of the calendar year in which the  
20 Residential Unit is rented as a Short-Term Residential Rental . . . .” *Id.*,  
21 § 41A.5(g)(1)(A). If an individual meets this requirement, he or she may “offer a  
22 Residential Unit for rent for Tourist or Transient Use.”

23 49. The Ordinance thus distinguishes between individuals who are San  
24 Francisco permanent residents (those who live in San Francisco for approximately 9  
25 months of the year) and all other individuals in determining who may rent out  
26 residential units on a short-term basis. Based on this distinction, the Ordinance  
27 prohibits Listing Owners who are not California citizens and Listing Owners who are  
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1 California citizens but who are not permanent San Francisco residents (as defined in the  
2 Ordinance) from renting out their property on a short-term basis. This places such  
3 Listing Owners at a competitive disadvantage because they will be unable to participate  
4 in the San Francisco short-term rental market. In sum, on its face, the Ordinance favors  
5 San Francisco permanent residents and therefore discriminates against interstate  
6 commerce.

7 50. The Ordinance's permanent residency requirement substantially burdens  
8 interstate commerce by prohibiting short-term rentals of San Francisco residential units  
9 by non-San Francisco residents.

10 51. The San Francisco Planning Department's report on the Ordinance and the  
11 Board of Supervisors' legislative findings state certain objectives of the Ordinance's  
12 regulation of short-term residential rentals in San Francisco. But neither the Planning  
13 Department report nor the Board of Supervisors' findings demonstrates in the slightest  
14 why the discrimination against non-San Francisco residents (as defined under the  
15 Ordinance) is necessary to achieve the Ordinance's objectives.

16 52. The Planning Department report states that the purpose of regulating short-  
17 term rentals in San Francisco is "to preserve the City's housing stock, reduce negative  
18 effects on affordable housing, [] to protect the livability of residential neighborhoods"  
19 and to "protect the character of [San Francisco's] lowest intensity residential districts."  
20 Planning Department Resolution No. 19213, at pp. 3, 4 (Aug. 7, 2014). The report says  
21 absolutely nothing, however about the necessity of the Ordinance's discriminatory  
22 residency restriction.

23 53. The Board of Supervisors' findings state that "[t]he goal of regulation is to  
24 ensure compliance with all requirements of the Municipal Code" and to ensure that  
25 residential units rented on a short-term basis "remain truly residential in use."  
26 Ordinance, § 1(c)(1), (2). However, these findings, too, say absolutely nothing about  
27 the necessity for the Ordinance's discriminatory residency restriction.

1 54. In sum, the Defendants have provided no evidence at all that limiting short-  
2 term rentals to San Francisco residents will preserve the City’s residential rental housing  
3 stock and make affordable housing more available in the City.

4 55. Under the Commerce Clause, facially discriminatory laws are  
5 presumptively invalid. They will be upheld only if the body that adopts the law proves  
6 that the discrimination is necessary to achieve an important local purpose. The City has  
7 failed to make that showing here with respect to the Ordinance’s discriminatory  
8 residency restriction, and thus it is unconstitutional.

9 56. In any event, the Ordinance’s residency restriction imposes substantial  
10 burdens on interstate commerce in excess of any asserted local benefit.

11 **The Ordinance’s Rigid Hosting Platform Rules**

12 57. The Ordinance also amends the San Francisco Administrative Code to  
13 regulate Hosting Platforms. The Ordinance states that a Hosting Platform service “is  
14 usually, though not necessarily, provided through an online platform and generally  
15 allows a Listing Owner to advertise the Residential Unit through a website provided by  
16 the Hosting Platform and provides a means for potential tourist or transient users to  
17 arrange Tourist or Transient Use and payment, whether the tourist or transient pays rent  
18 directly to the Listing Owner or to the Hosting Platform.” Ordinance, § 41.A.4.

19 58. Under the Ordinance, however any Hosting Platform doing business in San  
20 Francisco must now collect and remit “all required Transient Occupancy Taxes” and  
21 “maintain a record demonstrating that the taxes have been remitted to the Tax Collector .  
22 . . .” *Id.*, §41A.5(g)(4). In effect, the Ordinance requires the Hosting Platform to be an  
23 Agency business model.

24 59. HomeAway is not an Agency business model. It does not conduct its  
25 operations in a manner that enables it to collect and hold rent from Travelers, calculate  
26 and collect Transient Occupancy Taxes from Travelers, nor definitively know whether a  
27 transaction has occurred between the Traveler and Listing Owner that would give rise to  
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1 Transient Occupancy Taxes. In short, HomeAway is not an agent of the Listing Owner.  
2 Rather, HomeAway supports the relationship between the Listing Owner who provides  
3 the service (*i.e.*, the accommodation) and the user of the service (*i.e.*, the Traveler),  
4 which has been standard practice in the vacation rental industry for over 70 years.  
5 Travelers arrange their stay directly with Listing Owners and HomeAway charges the  
6 Listing Owner only for the advertising services it provides. HomeAway's primary  
7 revenue comes from Listing Owner advertisements on its websites. Listing Owners  
8 maintain their own books and customer lists and are otherwise responsible for the rental  
9 of their properties.

10 60. To comply with the rigid Hosting Platform rules, HomeAway would need  
11 to stop being an advertising venue, and instead adopt the Agency model, effectively  
12 competing with its Listing Owners/advertisers, and to collect taxes from Listing Owners  
13 that the Listing Owners owe directly to the City under the Ordinance, and to do so in  
14 only one municipality out of the more than 19,000 locations where Listing Owners offer  
15 their properties for rent via HomeAway. None of HomeAway's websites is dedicated  
16 exclusively to San Francisco rentals. Rather, HomeAway uses the same websites  
17 throughout the country to attract Travelers to all markets. Further, the Hosting Platform  
18 rules transfer enforcement, and the cost of enforcement, of the Ordinance from the City  
19 to HomeAway even though a transaction that gives rise to such enforcement is between  
20 the Listing Owner and the Traveler, and HomeAway at no time is a party to that  
21 transaction.

22 61. HomeAway is a large company that has developed a sizeable customer base  
23 across the United States and around the world that uses its websites to search for short-  
24 term rentals. If there were no requirement that a Hosting Platform doing business in  
25 San Francisco collect and remit the Transient Occupancy Taxes, HomeAway would be  
26 able to list permanent San Francisco residents' short-term rentals on its website and thus  
27 direct a steady flow of interstate commerce to San Francisco. The exclusion of  
28



1 HomeAway from San Francisco by dint of the Hosting Platform rules that were  
2 specifically designed to match the business model of a company based on San Francisco  
3 thus discriminates against interstate commerce.

4 62. The Ordinance is also likely to prohibit other significant Hosting Platforms  
5 that have business models similar to HomeAway's from engaging in advertising short-  
6 term rentals in San Francisco. Indeed, as written, the Ordinance prohibits any  
7 advertising venue from advertising a short-term rental without collecting and remitting  
8 the Transient Occupancy taxes. Under the Ordinance, a local newspaper selling  
9 classified ads for short-term rentals would be required to collect Transient Occupancy  
10 taxes and remit them to the City on behalf of its advertiser.

11 63. By driving out major Hosting Platforms from participation in San  
12 Francisco's short-term rental market, the Ordinance has an anti-competitive effect that  
13 further substantially burdens interstate commerce. Without the participation of  
14 HomeAway and businesses with similar models in the San Francisco short-term rental  
15 market, interstate consumers of short-term rentals in San Francisco will have fewer  
16 choices of Hosting Platforms to utilize, and those businesses that use the Agency model  
17 thus can charge any fee they like without fear of competition.

18 64. The Hosting Platform rules memorialize into law the business model of  
19 Airbnb, a competitor of HomeAway that is based in San Francisco. The Hosting  
20 Platform rules thus have the purpose and effect of legalizing the business model of a  
21 large, local company, while banning the business model of HomeAway and other non-  
22 San Francisco-based Hosting Platforms. This naked economic protectionism essentially  
23 bestows on Airbnb an effective monopoly over the short-term rental market in San  
24 Francisco. Under the Commerce Clause, protecting local businesses, such as Airbnb,  
25 from competition arising from non-local business, such as such as HomeAway, is not a  
26 legitimate purpose that justifies discrimination.



1 residential units on a short-term basis. The City has failed to show that this facially  
2 discriminatory residency restriction is necessary to achieve an important local purpose.

3 69. San Francisco Ordinance No. 140381 discriminates against interstate  
4 commerce in violation of the Commerce Clause for the additional reason that the  
5 Ordinance’s Hosting Platform rules have the purpose and effect of favoring San  
6 Francisco-based Airbnb and disfavoring HomeAway and other non-San Francisco-based  
7 Hosting Platforms. The City has failed to show that the discrimination wrought by the  
8 Hosting Platform rules is necessary to achieve an important local purpose.

9 70. HomeAway is therefore entitled to a declaratory judgment that the  
10 Ordinance’s discriminatory residency restriction and Hosting Platform rules are  
11 unconstitutional under the Commerce Clause.

12 71. HomeAway will suffer irreparable harm if Defendants are permitted to  
13 enforce the Ordinance. If the unconstitutional discrimination were not part of the  
14 Ordinance, HomeAway would be able to advertise residential units of Listing Owners  
15 who are not San Francisco permanent residents and to San Francisco permanent  
16 residents as well.

17 72. HomeAway is thus entitled to an injunction (preliminary and permanent)  
18 prohibiting Defendants from enforcing the Ordinance’s discriminatory residency  
19 restriction.

20 **SECOND CLAIM FOR RELIEF**

21 **DORMANT COMMERCE CLAUSE**

22 **(Excessive Burden on Interstate Commerce)**

23 73. HomeAway realleges and incorporates by reference paragraphs 1 through  
24 72 of this Complaint into this Second Claim for Relief as if set forth here.

25 74. The discriminatory residency restriction and the Hosting Platform rules in  
26 San Francisco Ordinance No. 140381 impose a substantial burden on interstate  
27

1 commerce in excess of their putative benefits to the City, in violation of the Commerce  
2 Clause of the United States Constitution, art. I, § 8, cl. 3.

3 75. HomeAway is therefore entitled to a declaratory judgment that the  
4 Ordinance’s discriminatory residency restriction and Hosting Platform rules are  
5 unconstitutional under the Commerce Clause.

6 76. HomeAway will suffer irreparable harm if Defendants are permitted to  
7 enforce the Ordinance because the discriminatory residency restriction and the Hosting  
8 Platform Rules will effectively prohibit HomeAway from doing business in San  
9 Francisco.

10 77. HomeAway is thus entitled to an injunction (preliminary and permanent)  
11 prohibiting Defendants from enforcing the residency restriction and Hosting Platform  
12 rules.

13 **PRAYER FOR RELIEF**

14 HomeAway respectfully requests a judgment against Defendants on each and  
15 every Claim for Relief as follows:

16 (1) On an expedited basis, pursuant to Fed. R. Civ. P. 57, declaring that  
17 Ordinance No. 140381 violates the Commerce Clause of the United States Constitution,  
18 art. I, § 8, cl. 3, and is therefore unconstitutional to the extent that it (i) facially  
19 discriminates against those who are not permanent residents of San Francisco, and  
20 prevents anyone who is not a permanent resident of San Francisco from renting out a  
21 residential unit on a short-term basis; (ii) has the purpose and effect of discriminating  
22 against non-San-Francisco based Hosting Platforms; and (iii) imposes substantial  
23 burdens on interstate commerce in excess of asserted local benefits by precluding  
24 anyone who is not a permanent resident of San Francisco from renting out a residential  
25 unit on a short-term basis and preventing HomeAway and other non-San Francisco-  
26 based Hosting Platforms from conducting business in San Francisco;

1 (2) Enjoining Defendants (preliminarily and permanently) from enforcing the  
2 discriminatory residency restriction and Hosting Platform rules in Ordinance No.  
3 140381;

4 (3) Awarding HomeAway its costs and expenses, including reasonable attorneys'  
5 fees pursuant to 42 U.S.C. § 1988 and any other applicable laws; and

6 (4) Granting such other relief as this Court may deem just and proper.  
7

8 Dated: November 3, 2014

AKIN GUMP STRAUSS HAUER &  
FELD LLP

9  
10 By /s/ Rex S. Heinke

Rex S. Heinke

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12 Attorneys for HomeAway, Inc. and  
HomeAway.com, Inc.  
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