Only the Westlaw citation is currently available.

United States District Court,
N.D. Georgia,
Rome Division.
CITY OF **ROME**, GEORGIA; et al., Plaintiffs,
v.
HOTELS.COM, LP; et al., Defendants.
Civil Action File No. 4:05-CV-249-HLM.

May 10, 2007.

West KeySummary
Innkeepers 213 **4**

213 Innkeepers
213k4 k. Licenses and Taxes. Most Cited Cases
A city was required to estimate, assess, and attempt to collect excise taxes from taxpayers before it could proceed with its claim that the taxpayers violated Georgia's Excise Tax Act. The city did not attempt to audit or assess the taxpayers because it believed that the taxpayers would not permit the assessments or audits, but this belief, without an affirmative refusal from the taxpayers, was insufficient to allow the city to pursue its hotel excise tax collection through litigation without exhausting its administrative remedies. West's Ga.Code Ann. § 48-13-51; O.C.G .A. § 48-13-53.3(b).

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ORDER

HAROLD L. MURPHY, District Judge.

***1** This case is before the Court on Defendants' Motion for Summary Judgment Based on Plaintiffs' Failure to Exhaust Administrative Procedures [181], and Plaintiffs' Notice of Objection to, or in the Alternative, Motion to Strike, the Affidavit and Testimony of J. Bryan Whitford [197].

I. Background

The Court adopts the lengthy background set forth in its Order of May 9, 2006. (Order of May 9, 2006.) Additionally, the Court observes that, when deciding a motion for summary judgment, the Court must view the evidence and all factual inferences in the light most favorable to the party opposing the motion, the Court provides the following statement of facts. *Harris v. Coweta County, Ga.,* 433 F.3d 807, 811 (11th Cir.2005), *rev'd on other grounds,* 550 U.S. 372, 127 S.Ct. 1769, 167 L.Ed.2d 686, 2007 WL 1237851 (U.S. Apr. 30, 2007). This statement does not represent actual findings of fact.

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Jones v. Am. Gen. Life Ins. Co., 370 F.3d 1065, 1069 n. 1 (11th Cir.2004) (citing *Wooden v. Bd. of Regents of Univ. Sys. of Ga.,* 247 F.3d 1262, 1271 n. 9 (11th Cir.2001)). Instead, the Court has provided the statement simply to place the Court's legal analysis in the context of this particular case or controversy.

A. Material Facts

As an initial matter, for the reasons stated below, the Court does not consider Exhibits three, five, seven and eight to Defendants' Motion for Summary Judgment in this Order. The Court observes, however, that the Court's consideration of those Exhibits would not change the outcome of this Order.

First, the Court does not consider Exhibits three and five, the excise t ax ordinances of Plaintiffs City of Cedartown and City of Alpharetta, respectively. The Court observes that the excise tax ordinance of Plaintiff City of Cedartown, Exhibit three, appears to be out of order, and that Plaintiff City of Alpharetta's ordinance, Exhibit five, is incomplete due to a missing portion of text along the right-hand margin of each page. (Defs.' Mot. Summ. J. Exs. 3, 5 .) The Court therefore does not consider Exhibits three and five in this Order.

Second, the Court does not consider Exhibit seven, the Georgia Department of Revenue Letter Ruling, dated April 13, 2004. The issue raised by Defendants' Motion is whether Plaintiffs must exhaust all available administrative remedies before filing suit for allegedly owed excise taxes. The Court observes that Exhibit seven does not discuss the above issue, but rather interprets the Excise Tax Act with regard to a specific set of facts presented to the Department of Revenue by an attorney from the law firm of Jones Day. Additionally, the Court observes that the parties have not yet participated in fact discovery and the Court cannot simply assume that the facts presented to the Georgia Department of Revenue and set forth in Exhibit seven are the same facts governing this case.

Third, the Court does not consider Exhibit eight, the Affidavit of J. Bryan Whitford, dated October 31, 2006. Like Exhibit seven, Exhibit eight does not address the issue raised by Defendants in the instant Motion for Summary Judgment-whether Plaintiffs must exhaust all available administrative remedies prior to filing suit for allegedly owed excise taxes. Rather, Exhibit eight also addresses the applicability of the Excise Tax Act to Internet companies and assumes a certain set of facts not clearly present in this case.

***2** For the above reasons, the Court does not consider Exhibits three, five, seven, and eight to Defendants' Motion for Summary Judgment in this Order. The Court next examines the relevant evidence submitted by the parties regarding the instant Motion for Summary Judgment.

1. Plaintiffs' Admissions

Plaintiffs admit that they have audit powers for hotel excise tax collection, as established by statute and ordinance. (Defs.' Statement of Material Facts (“DSMF”) ¶ 10; Pls.' Resp. to Defs.' Statement of Material Facts (“PRSMF”) ¶ 10.) Plaintiffs also admit that they did not request or conduct an audit or make an assessment of any Defendant before filing this lawsuit. (DSMF ¶¶ 10, 13, 15; PRSMF ¶¶ 10, 13, 15.) Plaintiffs, however, contend that such an audit is not feasible and would be futile. (PRSMF ¶ 10.)

2. Plaintiffs' Interrogatory Responses

In response to Defendants' First Set of Interrogatories numbers three and ten, referenced by the parties with regard to the instant Motion for Summary Judgment, Plaintiffs responded as follows:

Interrogatory No. 3

> Please identify all assessment notices, deficiency notices, audit requests, audit findings, demands

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for payments, certificates of authority or other similar documents sent by any of the Plaintiffs to any of the Defendants prior to November 18, 2005, which relate to alleged liability for and/or under-remittances of Hotel Excise Taxes.

Response to No. 3

None.

Interrogatory No. 10

Please describe the arrangements Plaintiffs have made with the attorneys and law firms that have made appearances on behalf of Plaintiffs in this Lawsuit regarding the manner and amounts of compensation such attorneys will receive as consideration for their services relating to this Lawsuit.

Response to No. 10

Plaintiffs object to this request to the extent it seeks communications, information, and material protected by the attorney-client privilege and work product doctrine. Notwithstanding this objection and the general objection stated above, the compensation to Plaintiffs' counsel will be determined by the Court in accordance with the law of the Eleventh Circuit applicable to class actions.
(DSMF ¶ 16; PRSMF ¶ 16; Defs.' Mot. Summ. J. Ex. 2 Interrogs. Nos. 3, 10.)

3. Excise Tax Ordinances

Plaintiff City of Rockmart enacted the following Ordinance, in relevant part, regarding excise taxes:

Section 19-61: Definitions.

The following words, terms, and phrases shall, for the purposes of this Chapter and except where the context clearly indicates a different meaning, be defined as follows:

(a) “Person.” An individual, firm, partnership, joint venture, association, social club, fraternal organization, joint stock company, corporation, nonprofit corporation or cooperative nonprofit membership, estate, trust, business trust, receiver, trustee, syndicate, or any other ground or combination acting as a unit the plural as well as the singular number, excepting the United States of America, the State of Georgia, and any of their political subdivisions upon which the City is without power to impose the tax herein provided.

***3** (b) “Operator.” Any person operating a motel in the city of Rockmart, Georgia, including, but not limited to, the owner or proprietor of such premises, the lessee, sublessee, lender in possession, licensee, or any other person otherwise operating such motel.

(c) “Occupant” or “Guest.” Any person who, for consideration, uses, possesses, or has the right to use or possess any room in a motel under any lease, concession, permit, right of access, license to use, or other agreement, or otherwise.

(d) “Occupancy.” The use of possession of the furnishings or to the services and accommodations accompanying the use and possession of the room.

(e) “Motel.” Any structure or any portion of a structure, including any motel, lodging house, rooming house, dormitory, hotel, motor hotel, auto court, inn, bed and breakfast inn, public club, or private club, containing guest rooms and which is occupied, or is intended or designated for occupancy by guests, whether rent is paid in money, goods, labor, or otherwise....

(f) “Guest Room.” A room occupied, or intended, arranged, or designed for occupancy, by one or more occupants in a motel for the temporary purposes of living quarters or residential use.

(g) “Rent.” The consideration received for oc-

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cupancy, valued in money, whether received in money or otherwise, including all receipts, cash, credits, and property or service of any kind or nature, and also the amount for which credit is allowed by the operator to the occupant, without any deduction therefrom whatsoever.

(h) "Clerk." The Clerk of the City Counsel of the City of Rockmart.

(j) "Return." Any return filed or required to be filed as herein provided.

(k) "Tax." The tax imposed by this Chapter.

(I) "Quarterly Period." A period of three calendar months.

(m) "Due date." The twentieth day after the end of the quarterly period for which tax is to be computed.

Section 19-62: Imposition and Rate of Tax.

(a) There is hereby levied and imposed, and there shall be paid to the Clerk of the City a tax of three *(3%) percent of the rent for every occupancy of a guest room in a motel in the City.*

...

Section 19-65: Registration of Operator.

(a) Every person engaging or about to engage in business as an operator of a motel in this City shall immediately register with the Clerk of the City Council on a form provided by said Clerk. Persons engaging in such business must so register not later than fifteen (15) days after the date this Chapter becomes effective, but such privilege of registration after the imposition of such tax shall not relieve any person from the obligation of payment or collection of tax on and after the date of imposition of payment or collection of tax on and after the date of imposition thereof....

...

Section 19-68: Returns and Time of Filing: Remittance of Tax.

(a) On or before the twentieth day of the month following each quarterly period, a return for the preceding month period shall be filed with the Clerk in such form as the Clerk may prescribe, by every operator liable for the payment of tax hereunder.

***4** (b) All returns shall show the gross rent, exempt rent, tax able rent, amount of tax collected or otherwise due for the quarterly period for which filed, and such other information as may be required by the Clerk, and shall be accompanied when filed by remittance of the net amount of tax due.

...

Section 19-70: Deficiency Determinations.

(a) *Recomputation of Tax: Authority to Make: Basis of Recomputation.* If the Clerk is not satisfied with the return or returns of the tax or the amount of the tax required to be paid to the City by any operator, he or she may compute and determine the amount required to be paid upon the basis of any information which is or may come into his or her possession. One or more than one Deficiency Determination may be made of the amount due for one, or more than one, quarterly period.

(b) *Interest on Deficiency.* The amount of the unpaid tax found to be due shall bear interest at the rate of three-fourths (3/4) of one percent per month from and after the twentieth day of the month following the quarterly period for which the amount should have been returned until the

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date of payment of such tax and interest.

...

(d) *Notice of Determination; Service of.* The Clerk or any other agent of the City shall give to the operator written notice of any determination of deficiency. The notice may be served personally or by mail, or both ....

(e) *Time Within Which Notice of Deficiency Determination to be Mailed.* Except in the case of a failure to make a return, every notice of a deficiency determination shall be mailed within one (1) year after the twentieth day of the calendar month following the quarterly period for which the amount is proposed to be determined, or within one (1) year after the return is filed, whichever period shall last expire.

Section 19-71: Determination if No Return Made.

(a) *Estimate of Gross Receipt.* If any operator fails to make a return, the Clerk shall make an estimate of the amount of the gross receipts of the operator or, as the case may be, of the amount of the total rentals in this City which are subject to the tax. The estimate shall be made for the period or periods during which the person failed to make the return and shall be based upon any information which is or may come into the possession of the Clerk. Upon the basis of this estimate, the Clerk shall compute and determine the amount required to be paid the City, adding to the sum this [sic] determined a penalty equal to fifteen (15%) percent thereof. One or more determination may be made of the amount due for one or more than one quarterly period.

...

(c) *Interest on Amount Found Due.* The amount of the unpaid tax found to be due shall bear interest at the rate of three-fourths of one percent per month from and after the twentieth day of the month following the quarterly period for which the amount should have been returned until the date of payment of such tax, penalties, and interest.

***5** (d) *Notice of Determination: Service of.* Promptly after making [t]his determination, service of this notice shall be either by personal service or by mail, at the operator's address as it appears in the records of the Clerk.

Section 19-72: Collection of Tax and Enforcement.

(a) *Action for Tax: Time for.* When it is determined by a return filed, or by the Clerk having made a determination under the provisions of § 19-71 of this Chapter, that tax is due and payable to the City of Rockmart under the provisions of this Chapter, the City Manager may at any time within three (3) years after determination that such tax is due and payable bring an action in the court of this State, or any other state, or of the United States in the name of the City to collect the amount of tax payable to the City together with interest thereon and penalties, court costs, attorney's fees, and other legal fees incidents [sic] thereto. The bringing of such an action shall not be a prerequisite for the issuance of a Fi.Fa. under the provisions of subparagraph (d) hereof.

...

(d) *Issuance of Fi.Fa.* Taxes payable on rental fees for guest rooms hereunder shall constitute a lien against the real property on which the hotel or motel is located. The Clerk is hereby authorized to issue a Fi.Fa. for execution and levy to satisfy the amount of any tax, penalty or interest due but not paid under the provisions of this Chapter, whether as a result of a deficiency determination, failure to file returns, or any other reasons.

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Section 19-73: Administration of Chapter.

(a) *Authority of the Clerk.* The Clerk, under supervision of the City Manager, shall administer and enforce the provisions of this Chapter for the levy and collection of the tax imposed by this Chapter.

...

(c) *Examination of Records: Audits.* The Clerk or any person authorized in writing by the City, may enter on the hotel/motel premises and examine the books, papers, records, financial reports, equipment, and other facilities of any operator in order to verify the accuracy of any return made, or if no return in made by the operator, to ascertain and determine the amount of tax required to be paid.

(e) *Authority to Require Reports: Contents.* In administration of the provisions of this Chapter, the Clerk may require the filing of the report by any person or class of persons having in their possession or custody information relating to rentals of guest rooms which are subject to the tax. The reports shall be filed with the Clerk when required by the Clerk and shall set forth the rental charged for each occupancy, the date or dates of occupancy, and such other information as the Clerk may require.

(f) *Limitation on Disclosure of Business of Operators, etc.* The Clerk or any person having an administrative duty under this Chapter shall not make known in any manner the business affairs, operations, or information obtained by an audit of books, papers, records, financial reports, equipment and other facilities of any operator or any other person visited or examined in the discharge of official duty, or the amount or source of income, profits, losses, expenditures, or any particular thereof, set forth or disclosed in any return, or permit any return or copy thereof to be seen or examined by any person not having such administrative duty under this Chapter, except in case of Judicial proceedings or other proceedings necessary to collect tax hereby levied and assessed, or as required by the Georgia Open Records Act, O.C.GA § 50-18-70, et. seq., or any other laws of this State or United States. Successors, receivers, trustees, executors, administrators, assignees, and grantors, if directly interested, may be given information as to the items included in the measure and amount of unpaid tax or amounts of tax, interest and penalties required to be collected. If the City or its agents are required to disclose any such information described in this paragraph pursuant to Court Order or the Open Records Act of any similar such legal compulsion, the City shall not be liable to any operator or other person for damages claimed to have arisen due to such disclosure.

...

Section 19-75: Violation: Fines and Punishment.

***6** (a) Any person violating any of the provisions of this Chapter shall be deemed guilty of an offense and upon conviction thereof shall be punished as provided in Section 1-8 of the Code of the City of Rockmart. Each person shall be guilty of a separate offense for each and every day or portion thereof during which any violation of any provision of this Chapter is committed, continued, or permitted by such person, and shall be punished accordingly.

(b) It shall be unlawful and a violation of this Code Section for any operator or other person to fail to register as required herein, or [to fail] to furnish any return required to be made, or to fail or refuse to furnish a supplemental return or other date required by the Clerk, or to render a false or fraudulent return. It shall also be unlawful and a violation of this Code Section for any person who is required to make, render, sign, or verify any report to make any false or fraudulent report, with

intent to defeat or evade the determination of an amount due required by this Chapter to be made. Anyone who violates the provision of this Chapter shall be deemed guilty of an offense and upon convictions thereof shall be punished as aforesaid.

Section 3: Effective Date.

This Chapter shall become effective and be in force from and after the 1st day of October, 1999.

...

(Defs.' Mot. Summ. J. Ex. 4 (emphasis in original).)

Plaintiff City of Cartersviile enacted the following Ordinance, in relevant part, regarding excise taxes:

Sec. 10-41. Definitions.

The following words, terms and phrases, when used in this article, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

...

Guest room means a room occupied or intended, arranged, or designed for occupancy, by one (1) or more occupants for the purpose of living quarters or residential use.

Hotel or motel means any structure or any portion of a structure, including any lodginghouse, roominghouse, dormitory, Turkish bath, bachelor hotel, studio hotel, motor hotel, auto court, inn, public club, or private club, containing guest rooms and occupied, or intended or designed for occupancy, by guests, whether rent is paid in money, goods, labor, or otherwise ....

...

Occupancy means the use or possession, or the right to use or possession, of any room, space, or apartment in a hotel, motel, or travel trailer part, and the right to the use or possession of the furnishings or to the services and accommodations accompanying the use and possession of the room or travel trailer space.

Occupant means any person who for a consideration uses, possesses, or has the right to use or possess any room or travel trailer space in a hotel, motel, or travel trailer park under any lease, concession, permit, right of access, license to use or other agreement, or otherwise.

Operator means any person operating a hotel, motel or travel trailer park in the city, including, but not limited to, the owner, proprietor, lessee, sublessee, lender in possession, licensee, or any other person otherwise operating such hotel or travel trailer park.

...

***7** *Person* means an individual, firm, partnership, joint venture, association, social club, fraternal organization, joint stock company, corporation, nonprofit corporation or cooperative nonprofit membership, estate, trust, business trust, receiver, trustee, syndicate, or any other group or combination acting as a unit, the plural as well as the singular number, excepting the United States of America, the state, and any political subdivision of either thereof upon which the city is without power to impose the tax provided for in this article.

Rent means 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 the amount for which credit is allowed by the operator to the occupant, without any deduction therefrom whatsoever.

Return means any return filed or required to be

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filed as provided in this article.

Tax means tax imposed by this article.

...

Sec. 10-42. Intent.

The intent of this article is to impose a tax pursuant to authority granted by the general assembly of this state ....

Sec. 10-43. Imposition and rate of tax.

(a) There shall be paid a tax of five (5) percent for the rent for every occupancy of a guest room in a hotel or motel, or occupancy of accommodations for value including, but not limited to, travel trailer spaces in the city. The tax imposed by this article shall be paid upon any occupancy on and after December 1, 1999, although such occupancy is had pursuant to a contract, lease or other arrangement made prior to such date.

...

Sec. 10-44 Collection of tax by operator.

Every operator maintaining a place of business in this city and renting guest rooms or travel trailer space in this city, not exempted, shall collect a tax of five (5) percent on the amount of rent from the occupant.

...

Sec. 10-46. Registration of operator; certification of authority .

Every person engaging or about to engage in business as an operator of a hotel, motel, or travel trailer park in this city shall immediately register with the city clerk on a form provided by the city clerk. Such registration shall set forth the name under which such person transacts business or intends to transact business, the location of his place or places of business, and such other information which would facilitate the collection of the tax as the city clerk may require. The registration shall be signed by the owner if a natural person; in case of ownership by an association or partnership, by a member or partner; and in case of ownership by a corporation, by an officer. The city clerk shall, after such registration, issue without charge a certificate of authority to each operator to collect the tax from the occupant. A separate registration shall be required for each place of business of an operator. Each certificate shall state the name and location of the business to which it is applicable.

Sec. 10-47. Determination, returns and payments.

***8** (a) *Due date of taxes.* The tax imposed in this article shall be due and payable to the city monthly on the twentieth day of the month next succeeding the monthly period in which it accrued.

(b) *Return; time of filing; persons required to file contents.* On or before the twentieth day of each month, a return for the preceding monthly period shall be filed with the city clerk showing the gross rent, rent from permanent residents, tax able rent, amount of tax collected or otherwise due, and such other information as may be required by the city clerk.

...

Sec. 10-48. Deficiency determinations.

(a) *Recomputation of tax; authority to make basis of recomputation.* If the city clerk is not satisfied with the return filed by any person pursuant to this article, he may compute and determine

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the amount required to be paid upon the basis of any information available to him. One (1) or more deficiency determinations may be made of the amount due for one (1) or more monthly periods.

(b) *Interest on deficiency.* The amount of any deficiency determination shall bear interest at the rate of three-fourths of one (1) percent per month or fraction thereof from the due date of the taxes.

(c) *Service of notice ofdetermination.* The city clerk or his designated representative shall give to the operator written notice of any deficiency determination. The notice may be served personally or by certified mail; if by certified mail such service shall be addressed to the operator at his address as it appears in the records of the city clerk. Service by certified mail is complete upon the signing by the addressee of the return receipt acknowledging delivery. Except in the case of failure to make a return, every notice of a deficiency determination shall be mailed within three (3) years after the twentieth day of the calendar month following the monthly period for which the amount is proposed to be determined, or within three (3) years after the return is filed, whichever is later.

Sec. 10-49. Determination if no return made.

(a) *Estimate of gross receipts.* If any person fails to make a return, the city clerk shall make an estimate of the amount of the gross receipts of the person, or as the case may be, of the amount of the total rentals of such person that are subject to the tax. The estimate shall be made for the period or periods in respect to which the person failed to make the return and shall be based upon any information which is or may come into the possession of the city. Written notice shall be given in the manner prescribed in section 10-48.

...

Sec. 10-50. Miscellaneous administrative provisions.

(a) *Authority of city clerk.* The city clerk shall administer and enforce the provisions of this article relating to the collection of the tax imposed by this article.

(b) *Records required from operators, etc.; form.* Every operator renting guest rooms or travel trailer spaces in this city to persons shall keep such records, receipts, invoices, and other pertinent papers, and in such form, as the city clerk may require.

***9** (c) *Examinations of records.* The city clerk or any person authorized in writing by the city clerk may examine the books, papers, records, financial reports, equipment and other facilities of any operator renting guest rooms or travel trailer space to persons and any operator liable for the tax, in order to verify the accuracy of any return made, or if no return is made by the operator, to ascertain and determine the amount required to be paid.

(d) *Authority to require reports.* In the administration of the provisions of this article, the city clerk may require the filing of records by any person having in his possession or custody information relating to rentals of guest rooms or travel trailer space subject to the tax. The reports shall be filed with the city clerk when required by the city clerk and shall set forth the rental charged for each occupancy, the dates of occupancy, and such other information as the city clerk may require.

Sec. 10-51. Violations.

Any person violating any of the provisions of this article shall be deemed guilty of an offense and upon conviction thereof shall be punished as provided in the ordinances of the city. Each such person shall be guilty of a separate offense for each day during any portion of which any viola-

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tion of any provision of this section is committed, continued, or permitted by such person, and shall be punished accordingly. Any operator or any other person who fails to register as required in ths article, or to furnish any return required to be made, or who fails or refuses to furnish a supplemental return or other data required by the city clerk or who renders a false or fraudulent return shall be deemed guilty of an offense.

Sec. 10-52. Collection of tax.

(a) *Action for tax.* At any time within three (3) years after any t ax or any amount of tax required to be collected under this article becomes due and payable and at any time within three (3) years after the delinquency of any tax or any amount of tax required to be collected, the city clerk may bring an action in a court of competent jurisdiction in the name of the city to collect the amount delinquent together with interest, court fees, filing fees, attorney's fees and other legal fees incident thereto.

...

(Defs.' Mot. Summ. J. Ex. 6 (emphasis in original and citations omitted).)

4. Plaintiffs' Affidavits

Plaintiffs have submitted seven affidavits from employees responsible for collecting excise taxes for their respective governmental authorities. The relevant portions of those affidavits are set forth below.

Plaintiffs have submitted the affidavit of Michael Bell, Director of the Finance Department for Plaintiff Dekalb County. (Aff. of Michael Bell ¶¶ 1-2.) Mr. Bell testifies, in relevant part, that:

As far as I know and believe, none of the above named Defendants have ever corresponded or communicated with Dekalb County regarding the imposition, collection or payment of the hotel/motel tax to Dekalb County.

4.

***10** None of the above named Defendant companies have ever made or tendered any payment of money or other funds as hotel/motel taxes to Dekalb County. Further, none of the Defendant companies have ever disclosed to the County that they are collecting hotel/motel excise taxes from occupants of hotel/motel rooms or other lodging located within Dekalb County.

5.

Of the various lodging establishments which collect hotel/motel excise t ax revenue for Dekalb County, none have ever disclosed the fact that the above named Defendant companies were collecting hotel/motel excise taxes from the occupants, either as taxes or fees and that were in excess of the amounts remitted to Dekalb County by said hotel/motels, for rooms located within the County.

6.

The above-named Defendants have never informed Dekalb County that monies were being collected by them either as “taxes or fees” (or other designations) in excess of the amounts being paid to hotels and remitted to Dekalb County for hotel/motel rooms located within Dekalb County.

7.

Prior to the receipt of information obtained through discovery in this case, no information was ever provided to Dekalb County for lodging and hotel rooms located within Dekalb County.

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8.

Prior to the receipt of information obtained through discovery in this case, no information was provided by the above-named Defendants to Dekalb County that would have enabled the County to determine the amounts paid by occupants for hotel rooms located within Dekalb County and upon which taxes are and were due.

9.

Prior to the receipt of information obtained through discovery in this case, no information was provided by the above-named Defendants to the County that would have enabled the County to determine the difference or "spread" between money remitted as hotel/motel excise taxes and the money that was actually collected or should have been collected as hotel/motel excise taxes by Defendants from individual occupants for hotel/motel rooms located in Dekalb County.

10.

Prior to the receipt of information obtained through discovery in this case, no information was ever provided to Dekalb County that would have enabled the County to determine the total difference or "spread" between money remitted as hotel/motel excise taxes and the money that was actually collected or should have been collected by the above-named Defendants as hotel/motel excise taxes from all occupants for hotel/motel rooms located within Dekalb County, the County had no ability to know of or know of [sic] or confirm a deficiency, to determine the amount of that deficiency, or to make an assessment against the Defendant Companies for that portion of the tax collected from the occupant but not paid to the County.

11.

Without obtaining the documents that have now been received in litigation discovery, it would have been impossible for Dekalb County to confirm a deficiency, to determine the amount of that deficiency, or to make an assessment against the Defendant Companies for that portion of the tax collected from the occupant but not paid to the County.

12.

***11** Neither the above-named Defendants nor our hotels and motels have furnished the County with contracts which concern or otherwise address the collection and/or payment of hotel/motel taxes.

13.

The above-named Defendants have neither initiated nor participated in administrative proceedings in the County regarding hotel/motel excise taxes, and none have requested guidance or advise [sic] from the County concerning their duty to collect and remit such taxes to the County based upon the total amount paid by the occupant.

14.

The Defendants have never notified Dekalb County that they were collecting "taxes and fees" from occupants for hotel rooms located within Dekalb County.

(Bell Aff. ffll 3-14.)

Plaintiffs have submitted the affidavit of Sandra Cline, City Clerk for Plaintiff City of Cartersville. (Aff. of Sandra Cline ¶¶ 1-2.) Portions of Ms. Cline's testimony are substantially similar to Mr. Bell's affidavit above. The Court therefore only includes those portions of Ms. Cline's affidavit that markedly differ from that of Mr. Bell. Ms. Cline testifies, in relevant part, that:

3.

I have no experience in auditing tax payers or tax collectors, and I depend upon the honesty of tax payers and tax collectors in the administration of the City of Cartersville hotel/motel tax ordinance.

4.

Without tax returns and other information truthfully provided by tax payers and tax collectors, efficient administration of the City of Cartersville tax ordinance is at least hindered, if not impossible.

...

15.

To my knowledge there is no state administrative agency, and there is no local administrative agency, such as a "tax review board," having jurisdiction, exclusive or otherwise, to make determinations of tax ability, or to review other tax or tax ation issues.

16.

Because of the complete absence of returns and information from the above-named Defendants, any procedure, administrative or otherwise, state or local, would have been, and is, futile.

...

(*Id.* ¶¶ 3-4, 15-16.)

Plaintiffs also have submitted the affidavits of Lisa Y. Gordon, City Manager for Plaintiff City of East Point; Robert L. Hosack, Director of the Community Development Agency for Plaintiff Cobb County; Joan Hughes, City Finance Officer for Plaintiff City of Hartwell; Barbara Ludwig, Occupation Tax Clerk for Plaintiff City of College Park; and Joseph F. Smith. City Clerk for Plaintiff City of Rome. (Aff. of Lisa Y. Gordon ¶¶ 1-2; Aff. of Robert L. Hosack ¶¶ 1-2; Aff. of Joan Hughes ¶¶ 1-2; Aff. of Barbara Ludwig ¶¶ 1-2; Aff. of Joseph F. Smith ¶¶ 1-2.) The testimony of those affiants is substantially similar to that of Mr. Bell and Ms. Cline, as set forth above, with the exception of the following statement by Mr. Smith:

19.

On November 21, 2006, the City of [sic] Commission of the City of Rome provided the manner of collection of the tax by authorizing the filing of a class action lawsuit against the abovenamed Defendants, as evidenced by the minutes of the Commission meeting, a certified copy of which is attached hereto as Exhibit "A".

***12** (Smith Aff. ¶ 19.) The relevant portion of Exhibit A to Mr. Smith's affidavit, the minutes of the November 21, 2005, Rome City Commission meeting, states as follows:

Hotel/Motel Tax-Class Action Lawsuit

Commissioner Canada moved for the City Commission to ratify and authorize the filing of a class action lawsuit by the City of Rome against a number of internet travel agencies such as Hotels.com, Priceline.com, and Expedia.com for shortchanging the City of Rome and other similarly situated municipalities on the Hotel Occupancy Tax. Commissioner Wachsteter seconded the motion and the vote was unanimously in favor.

(*Id.* Ex. A at 5.)

B. Procedural Background

On May 8, 2006, the Court granted Defendants' Motion to Dismiss with regard to Plaintiffs' sales and use tax claim and denied that Motion with re-

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gard to Plaintiffs' excise tax claim. (Order of May 8, 2006.) Defendants did not directly oppose Plaintiffs' claims for conversion and unjust enrichment, or Plaintiffs' claims under Georgia's Uniform Deceptive and Unfair Trade Practices Act, in Defendants' Motion to Dismiss. (*Id.*)

On June 8, 2006, Plaintiffs filed their Amended and Recast Class Action Complaint asserting the following causes of action: (1) Violation of Georgia's Excise Tax on Rooms, Lodgings, and Accommodations (O.C.G.A. § 48-13-50 etseq.); (2) Violations of Georgia's Uniform Deceptive and Unfair Trade Practices Act; (3) Conversion; (4) Count IV: Unjust Enrichment; (5) Imposition of a Constructive Trust; and (6) Declaratory Judgment. (Docket Entry No. 88.) Plaintiffs also request damages and injunctive relief. (*Id.*)

On February 9, 2007, Defendants filed their Motion for Summary Judgment Based on Plaintiffs' Failure to Exhaust Mandatory Administrative Remedies, and request oral argument on that Motion. (Docket Entry No. 181.)[FN1]

> FN1. The Court observes that Defendants request oral argument associated with the instant Motion simply by including the phrase "Oral Argument Requested" in the title of their Motion. The Court observes that, pursuant to Local Rule 7.1E., "[m]otions will be decided by the court without oral hearing, unless a hearing is ordered by the court." N.D. Ga. R. 7.1E. The Court finds that a hearing would not materially assist the Court in resolving the instant Motion for Summary Judgment. The Court cautions the parties that, in the future, the Court will not rule on requests for oral hearings that are not presented as motions or do not comport with Local Rule 7.1A.(1), regarding the filing of motions.

On March 3, 2007, Plaintiffs filed their Notice of Objection to or in the Alternative, Motion to Strike, the Affidavit and Testimony of J. Bryan Whitford. (Docket Entry No. 197.)

On April 5, 2007, the Court denied without prejudice Defendants' Motion for Rule 16 Conference and denied as moot Defendants' Motion for Protective Order. (Order of Apr. 5, 2007.) The Court also stated that, in the event that the Court denied Defendants' instant Motion for Summary Judgment, the Court would schedule a Rule 16 conference with counsel. (*Id.*)

The briefing periods for Defendants' Motion for Summary Judgment and Plaintiffs' Motion to Strike are complete. The Court therefore finds that those Motions are ripe for resolution by the Court.

II. Summary Judgment Standard

Federal Rule of Civil Procedure 56 © authorizes summary judgment when "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56 ©. The party seeking summary judgment bears "the burden of demonstrating the satisfaction of this standard, by presenting 'pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any' that establish the absence of any genuine, material factual dispute." *Bochese v. Town of Ponce Inlet,* 405 F.3d 964, 975 (11th Cir.2005) (quoting Fed.R.Civ.P. 56©), *cert. denied,* 546 U.S. 872, 126 S.Ct. 377, 163 L.Ed.2d 164. Once the moving party has supported its motion adequately, the non-movant has the burden of showing summary judgment is improper by coming forward with specific facts that demonstrate the existence of a genuine issue for trial. *Castleberry v. Goldome Credit Corp.,* 408 F.3d 773, 786 (11th Cir.2005).

***13** When evaluating a motion for summary judgment, the Court must view the evidence and all factual inferences in the light most favorable to the party opposing the motion. *Harris,* 433 F.3d at 811. The Court also must "construe 'all reasonable doubts about the facts in favor of the nonmovant.' "

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Michael Linet, Inc. v. Vill. of Wellington, Fla., 408 F.3d 757, 761 (11th Cir.2005) (quoting *Browning v. Peyton,* 918 F.2d 1516, 1520 (11th Cir.1990)). Further, "[i]ssues of credibility and the weight afforded to certain evidence are determinations appropriately made by a finder of fact and not a court deciding summary judgment." *McCormick v. City of Fort Lauderdale,* 333 F.3d 1234, 1240 n. 7 (11th Cir.2003). Finally, the Court does not make factual determinations. *Jones,* 370 F.3d at 1069 n. 1 (citing *Wooden,* 247 F.3d at 271 n. 9).

Using this standard, the Court evaluates Defendants' Motion for Summary Judgment.

III. Discussion

Defendants argue that the Court must dismiss this case in its entirety for lack of subject matter jurisdiction due to Plaintiffs' failure to exhaust mandatory administrative procedures. Defendants also argue that the separation of powers doctrine and Georgia public policy prohibit Plaintiffs from burdening the Court with tax collection functions, and that Georgia public policy prohibits Plaintiffs from abdicating Plaintiffs' tax ing and assessment authority to contingent-fee contractors. The Court addresses those issues in turn below.

As an initial matter, the Court observes that Plaintiffs' response to Defendants' Motion for Summary Judgment is very broad. The Court has reviewed Plaintiffs' response in its entirety, but only specifically discusses certain cases cited by Plaintiffs' that are relevant to the instant Motion. The Court expresses no opinion concerning the remaining cases.

A. Plaintiffs Must Estimate, Assess, and Attempt to Collect Excise Taxes

Defendants argue that the Excise Tax Act expressly requires Plaintiffs, before pursuing litigation, to determine whether any of the Defendants are "innkeepers" doing business in Plaintiffs' respective jurisdictions, to estimate the amount of taxes allegedly due, and then to make and serve written assessments. Defendants also argue that Plaintiffs have failed to exhaust the above administrative steps. Defendants contend that Plaintiffs have left it up to the Court to perform Plaintiffs' executive branch duties of determining how Defendants conduct their businesses and whether Defendants are hotel operators that are required to file tax returns and collect and remit the excise taxes at issue. Defendants also contend that they did not receive written notices of assessments and thus were deprived of the opportunity to challenge those assessments and explain Defendants' respective business models to Plaintiffs. According to Defendants, the above steps likely would have resolved the instant dispute entirely or, at the least, would have narrowed the issues for the Court's consideration.

***14** Plaintiffs argue that the exhaustion of administrative remedies doctrine is not applicable to Plaintiffs and does not limit the use of judicial review, that the development of an administrative record will not be helpful to the Court, that the doctrine does not apply when no administrative remedies are available for exhaustion, and that exceptions to the doctrine apply in this case. Plaintiffs contend that, in most situations, the decision to require exhaustion comes after careful analysis and balancing of the interests for and against exhaustion.

Plaintiffs also argue that state law may not control or limit the diversity jurisdiction of the federal courts. Plaintiffs contend that the interpretation of a statute is a question of law reserved for the courts, that the heart of this case is based on statutory construction, and that Defendants cannot prove a complete absence of jurisdiction over any claim.

1. O.C.G.A. § 48-13-50, *et seq.*, and Cited Case Law

O.C.G.A. § 48-13-50, Excise Tax on Rooms, Lodgings, and Accommodations (the "Excise Tax Act"), authorizes each county and municipality in

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Georgia to levy excise taxes for the purposes of promoting, attracting, stimulating, and developing conventions and tourism in counties and municipalities. O.C.G.A. § 48-13-50. O.C.G.A. § 48-13-50.2 defines an "innkeeper" as "any person who is subject to tax ation under this article for furnishing for value to the public any rooms, lodgings, or accommodations." O.C.G A § 48-13-50.2.

Under O.C.G.A. § 48-13-51, municipalities may levy and collect an excise tax upon the furnishing for value to the public of any room or rooms furnished by any person or legal entity licensed by, or required to pay business or occupation taxes to, the municipality for operating a hotel or similar facility. O.C.G.A. § 48-13-51(a) (1)(A). Every person or entity subject to a tax levied as provided above shall be liable for the tax at the applicable rate on the lodging charges actually collected or, "if the amount of taxes collected from the hotel or motel guest is in excess of the total amount that should have been collected, the total amount actually collected must be remitted." O.C.G.A. § 48-13-51 (a)(1)(B)(I).

The excise tax levied is also imposed upon every person or entity who is a hotel or motel guest and who received a room, lodging, or accommodation that is subject to the tax. O.C.G.A. § 48-13-51(a)(1)(B)(ii). "The person or entity collecting the tax from the hotel or motel guest shall remit the tax to the governing authority imposing the tax, and the tax remitted shall be a credit against the tax imposed by [O.C.GA § 48-13-51(a)(1)(B)(I)] on the person or entity providing the room, lodging, or accommodation." O.C.G.A. § 48-13-51(a)(1)(B)(ii).

O.C.G.A. § 48-13-53, regarding procedures, states that, "[e]xcept as otherwise specifically provided in this article, the rate of tax ation, the manner of imposition, payment, and collection of the tax, and all other procedures relating to the tax shall be as provided by each county and municipality electing to exercise the powers conferred by this article." O.C.G.A. § 48-13-53. However, O .C.G.A. § 48-13-53.3, regarding the failure of an innkeeper to make a return, states that,

> ***15** in the event any innkeeper fails to make a return and pay the taxas provided by this article or makes a grossly incorrect return or a return that is false or fraudulent, the governing authority imposing a tax under this article shall make an estimate for the tax able period of tax able charges of the innkeeper. Based upon its estimate, the governing authority shall assess and collect the taxes, interest, and penalties, as accrued, on the basis of the assessments.

O.C.G.A. § 48-13-53.3(b).

Additionally, O.C.G.A. § 48-13-57 adopts O.C.G.A. § 48-2-49 with regard to periods of limitations for assessment of excise taxes and, as a result, the excise tax may be assessed at any time where a return or report is not filed, or where a false or fraudulent return was filed. O.C.G.A. § 48-13-57; O.C.G.A. § 48-2-49. O.C.G.A. §§ 48-13-57 through -63 provide various penalties for failure to file required returns, collect, and pay excise taxes, and for failure to keep records or open those records for inspection. O.C.G.A. §§ 48-13-57 to-63.

Defendants cite *City of Atlanta v. Hotels.com, L.P.,* No.2006-CV-114732, 2006 WL 3728957 (Ga.Super.Dec.11, 2006), and *City of Philadelphia v. Hotels.com,* No. 000860, 2006 WL 1520749 (Pa.Comm.PI. May 25, 2006), as examples of courts that have declined to assume tax assessment and collection duties. Those cases were filed by the cities of Atlanta and Philadelphia, respectively, against online travel companies, alleging that the companies were withholding hotel excise taxes. *City of Atlanta,* 2006 WL 3728957, at *1; *City of Philadelphia,* 2006 WL 1520749, at *1.

The *City of Atlanta* court found that, before a suit could be filed, Georgia's Excise tax Act requires the City of Atlanta to estimate the appropriate amount of taxes allegedly due and owing by the defendants prior to filing suit, and that the City of Atlanta's or-

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dinances also require certain administrative processes and procedures to be carried out prior to filing suit, even in situations where no return has been filed or taxes have not been paid. 2006 WL 3728957, at * 2. The *City of Atlanta* court also concluded that tax assessment and collection are executive branch functions and thus the public policy and the separation of powers doctrine requires tax questions to be resolved first through the appropriate administrative process before a court may obtain subject matter jurisdiction over the issue. (*Id.*)

Likewise, the *City of Philadelphia* court found that Pennsylvania's Hotel Tax Enabling Act sets forth how such taxes shall be imposed, collected and calculated and that the Philadelphia Tax Review Board has exclusive jurisdiction over disputes concerning local tax liability. 2006 WL 1520749, at * 1-2. The *City of Philadelphia* court was troubled by the lack of an audit upon the defendants prior to the lawsuit, and concluded that the court's function was to resolve legal disputes, not to levy or collect taxes. *Id.* at * 2. The court also determined that the case did not present a conversion tort claim because there was no determination that the t ax was actually owed by the defendants. *Id.*

***16** Plaintiffs cite multiple cases in support of their position that the doctrine of exhaustion of administrative remedies does not apply here, including *McKart v. United States,* 395 U.S. 185, 89 S.Ct. 1657, 23 L.Ed.2d 194 (1969); *Provident Indemnity Life Insurance v. James,* 234 Ga.App. 403, 506 S.E.2d 892 (1998); *Hunnicutt v. Georgia Power Co.,* 168 Ga.App. 525, 309 S.E.2d 862 (1983); *Aldridge v. Georgia Hospitality and Travel Assoc.,* 251 Ga. 234, 304 S.E.2d 708 (1983); *Department of Human Resources v. Carlton,* 174 Ga.App. 30, 329 S.E.2d 181 (1985); and *Patsy v. Florida International University,* 634 F.2d 900 (5th Cir.1981).[FN2]

> FN2. Opinions of the Fifth Circuit issued prior to October 1, 1981, the date marking the creation of the Eleventh Circuit, are binding precedent on this Court. *See Bonner v. City of Prichard,* 661 F.2d 1206, 1209-11 (11th Cir.1981) (en banc).

Plaintiffs cite *McKart* for the proposition that application of the doctrine of exhaustion of administrative remedies "to specific cases requires an understanding of its purposes and of the particular administrative scheme involved." 395 U.S. at 193. In *McKart.* the United States Supreme Court discussed the doctrine as follows:

> Perhaps the most common application of the exhaustion doctrine is in cases where the relevant statute provides that certain administrative procedures shall be exclusive. The reasons for making such procedures exclusive, and for the judicial application of the exhaustion doctrine in cases where the statutory requirement of exclusivity is not so explicit, are not difficult to understand. A primary purpose is, of course, the avoidance of premature interruption of the administrative process. The agency, like a trial court, is created for the purpose of applying a statute in the first instance. Accordingly, it is normally desirable to let the agency develop the necessary factual background upon which decisions should be based. And since agency decisions are frequently of a discretionary nature or frequently require expertise, the agency should be given the first chance to exercise that discretion or to apply that expertise. And of course it is generally more efficient for the administrative process to go forward without interruption than it is to permit the parties to seek aid from the courts at various intermediate stages.

Id. at 193-94 (citation omitted).

Plaintiffs cite *Provident Indemnity Life Insurance,* and *Hunnicutt,* respectively, for the propositions that whether a claims first must be brought through administrative channels depends upon the nature of the claim and requested relief, and that the existence of an administrative remedy alone does not afford a defendant an absolute defense to a legal action. The *Provident Indemnity Life Insurance* court quotes the following passage from *Hunnicutt:*

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> The mere existence of an ... administrative remedy does not, standing alone, afford a defendant an absolute defense to the institution of a legal action. Decisions to the effect that a failure to invoke administrative remedies precludes or renders premature a resort to the courts are based upon *statutes* which by *express terms or necessary implication* give to the administrative [agency] *exclusive jurisdiction* or which make the [pursuit or] exhaustion of administrative remedies a *condition precedent* to judicial action. A litigant is not required to [pursue] an *optional* administrative process before seeking redress to the courts.

***17** *Provident Indem. Life Ins.,* 234 Ga.App. at 407, 506 S.E.2d at 895 (citations and punctuation omitted, emphasis in original) (quoting *Hunnicutt,* 168 Ga.App. at 526, 309 S.E.2d at 864).

Plaintiffs cite *Aldridge* for the proposition that the doctrine of administrative remedies does not apply here. In *Aldridge,* the Georgia Supreme Court held that no administrative remedies or appeals were available to a hotel associate complaining of hotel inspection fees charged by county boards of health, where there were no proceedings or hearing conducted by such a board to which the association could have been a party and thus could have appealed. 251 Ga. at 237, 304 S.E.2d at 711. The *Aldridge* court concluded that because there were no administrative appeal procedures available to the association, the doctrine of exhaustion of administrative remedies did not apply. *Id.*

Plaintiffs cite *Carlton* for the proposition that the government may choose to bypass administrative procedures in favor of a lawsuit against a private party. In *Carlton,* the Georgia Court of Appeals held that the Georgia Department of Human Resources could bypass administrative paternity proceedings set forth in the Child Support Recovery Act because that Act specifically provides that its procedures are not exclusive but are in addition to all other proceedings provided by law. 174 Ga.App. at 30-31, 329 S.E.2d at 181-82.

Finally, Plaintiffs cite *Patsy* for the following traditional exceptions to the exhaustion doctrine, as stated by the United States Court of Appeals for the Fifth Circuit: (1) when the proscribed administrative remedy is plainly inadequate because no remedy is available, the available remedy will not give relief commensurate with the claim, or the remedy would be so unreasonably delayed as to create a serious risk of irreparable injury; (2) when the claimant seeks to have a legislative act declared unconstitutional and, even after administrative action, that constitutional question will remain; (3) when the question of adequacy of the administrative remedy is coextensive with the merit s of the claim; or (4) when the administrative procedures would be futile because it is clear that the claim will be rejected. 634 F.2d at 903-04.

2. Analysis

For the following reasons, the Court finds that Plaintiffs must estimate, assess, and attempt to collect the excise taxes at issue from Defendants before proceeding further with their claims alleging violations of Georgia's Excise Tax Act.

First, Plaintiffs must comport with the Excise Tax Act's procedures regarding the failure to file returns or pay excise taxes. The Supreme Court's discussion of the exhaustion doctrine in *McKart* is relevant here because the power to impose the excise tax at issue was expressly granted by O.C.G.A. § 48-13-51, and O.C.G .A. § 48-13-53.3(b) specifically states that cities and counties levying the tax must estimate, assess, and collect tax es when returns are not filed and taxes are not paid. Although the Court recognizes that Plaintiffs are not agencies, the Court concludes that the Supreme Court's rationale in *McKart* is instructive in this case. Similar to the statute and agency discussed in *McKart.* the Excise Tax Act enables Georgia cities and counties to levy an excise tax on accommodations, and also sets forth specific procedures to be carried out by those governing authorities under the instant facts alleged by Plaintiffs-failure to make returns or

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to pay excise taxes. Indeed, O.C.GA § 48-13-53.3 (b) states that, "[i]n the event any innkeeper fails to make a return and pay the tax ... or makes a grossly incorrect return or a return that is false or fraudulent, the governing authority imposing a tax ... *shall* make an estimate for the tax able period of tax able charges of the innkeeper." O.C.GA § 48-13-53.3(b) (emphasis added).

***18** Plaintiffs have submitted affidavits stating that Defendants failed to file tax returns and paid no taxes to Plaintiffs. In *Aldridge,* the government boards of health failed to initiate administrative proceedings from which the private plaintiffs could appeal, leaving those plaintiffs with no avenue for administrative remedies or appeals. Here, however, the Excise Tax Act, and specifically O.C.G.A. § 48-13-53.3(b), regarding the failure to file a return or remit taxes, sets forth administrative procedures that Plaintiffs must initiate. The Court therefore concludes that *Aldridge* is not applicable to this case because Plaintiffs have statutory administrative remedies for Defendants' alleged failure to file returns or pay excise taxes.

Additionally, unlike the Child Support Recovery Act at issue in *Carlton,* the Excise Tax Act does not include a provision stating that the procedures set forth in O.C.G.A. § 48-13-53.3(b) are not exclusive or are in addition to all other procedures provided by law. Rather, O.C.G.A. § 43-13-53 grants Plaintiffs the authority to establish the manner in which Plaintiffs may collect the allegedly owed taxes, *"[e]xcept as otherwise specifically provided"* in Georgia's Excise Tax Act. O.C.G.A. § 43-13-53 (emphasis added). The Court is not persuaded that the above administrative process is optional. Instead, the Court finds that the administrative process is expressly required, and, under *Hunnicutt,* therefore may be a condition precedent to Plaintiffs' excise tax claim regardless of Plaintiffs' contentions that interpretation of the Excise Tax Act lies at the heart of this case. Likewise, the Court is not convinced that the lack of internal auditing capabilities by some Plaintiffs would excuse those Plaintiffs from the above requirements or similar requirements set forth in Plaintiffs' ordinances. The Court observes that Plaintiffs may hire persons able to complete such work.

The Court therefore is not convinced that Plaintiffs have no available administrative remedies with regard to their excise tax claims, that Plaintiffs are exempt from O.C.G.A. § 48-13-53.3(b)'s requirements, or that Plaintiffs may choose to collect the allegedly owed excise taxes via litigation only. This factor weighs in favor of requiring Plaintiffs to exhaust the above administrative remedies.

Second, although Plaintiffs contend that they only received information from Defendants as a result of this lawsuit and that there are no available administrative remedies, Plaintiffs' contention ignores the authority granted to Plaintiffs pursuant to O .C.G.A. § 48-13-53.4 to examine innkeepers' books, invoices, and other records. Additionally, O.C.G.A. §§ 48-12-58 through-63 provide penalties and sanctions for innkeepers that fail to file the required returns, collect taxes, or open their records for legally authorized inspection.

Plaintiffs admit that they have not attempted to assess or audit Defendants, but apparently contend that Defendants likely will not permit such assessments or audits. In the event that Defendants refuse Plaintiffs access to the information necessary for Plaintiffs to estimate, assess, and collect taxes, or refuse to pay properly assessed taxes, Plaintiffs may then have exhausted their administrative remedies and probably may return to the Court for recourse. This factor weighs in favor of requiring Plaintiffs to exhaust the above administrative remedies.

***19** Third, by assessing Defendants with regard to the allegedly owed taxes, Plaintiffs may narrow the issues before the Court. As discussed in *McKart,* where an entity is given an administrative process to carry out, as is the case here, it is desirable and efficient to allow that process to go forward without interruption. The Court observes that if Plaintiffs

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assess Defendants, Plaintiffs may find that one or more Defendants actually remitted all collected taxes to Plaintiffs through the contracting hotels and Plaintiffs therefore may determine that such Defendants may properly be dismissed from this case. Likewise, Defendants may find that they collected excise taxes that were not remitted and may choose to work with Plaintiffs to remit such taxes and resolve any associated issues. Plaintiffs may also determine that one or more Defendants simply are providing a service to customers when reserving and booking accommodations. Plaintiffs may find that such Defendants actually remitted the appropriate tax through the contracting hotel and thus may determine that those Defendants are not liable for additional excise tax. *See* 5 Walter Hellerstein, State Tax ation ¶¶ 19.03, 19.03 n. 246.23 (3rd ed.2007) (discussing Internet travel company business models and key issues in determining whether such companies will be subject to room occupancy tax, and noting that “[t]ypically, to avoid windfall to the seller, any amounts collected as ‘tax’ must be remitted to the tax ing authority, even if improperly calculated”).

To the extent that Plaintiffs and Defendants cooperate with each other to resolve issues such as those discussed above, the parties can then return to the Court with a more focused set of issues for resolution by the Court. The Court therefore concludes that, contrary to Plaintiffs' assertion, an assessment of Defendants and the corresponding possibility that the parties may be able to resolve their excise tax dispute, would be helpful to the Court. This factor weighs in favor of requiring Plaintiffs to exhaust the above administrative remedies.

Fourth, for the reasons set forth above, the Court is not convinced that the traditional exceptions to the exhaustion doctrine apply in this case. Given the sections of the Excise Tax Act discussed above, the Court is not convinced that no adequate remedy is available to Plaintiffs, that an attempt by Plaintiffs to assess Defendants will cause irreparable injury to Plaintiffs or unduly delay any potential recovery, or that Plaintiffs may simply announce that such a process would be futile or inadequate and turn immediately to litigation. Rather, the administrative procedures and remedies available may a help resolve the parties' excise tax dispute. Additionally, while Defendants may argue that the Excise Tax Act is not applicable to their businesses, Defendants do not seek to have that legislation declared unconstitutional. Rather, Defendants simply disagree with Plaintiffs' interpretation of the Excise tax Act.

***20** For the reasons stated above, the above factors weigh in favor of requiring Plaintiffs to exhaust the administrative procedures and remedies set forth in the Excise Tax Act. The Court therefore holds that Plaintiffs must estimate, assess, and attempt to collect the excise taxes at issue from Defendants before proceeding further with their claims alleging violations of Georgia's Excise Tax Act.

The Court next examines Defendants' contentions that dismissal of this case is appropriate.

B. Dismissal of Plaintiffs Additional Claims is not Appropriate

Defendants do not specifically address Plaintiffs' common law claims or claims asserted under the Georgia Uniform Deceptive and Unfair Trade Practices Act, except to assert that, regardless of how Plaintiffs posture their claims, Plaintiffs are seeking to recover hotel excise tax. Defendants argue that the separation of powers doctrine prohibits the judiciary from encroaching on or usurping executive branch functions, such as tax assessment. Defendants also assert that Plaintiffs may not burden the Court with such non-judicial functions or delegate to the Court the burden of investigating, administering, and enforcing tax assessment and collection.

Plaintiffs argue that, at most, a stay or dismissal without prejudice is warranted and that the separation of powers doctrine does not apply to municipal corporations and counties. Plaintiffs assert that they

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are simply exercising their right of access to the courts and that it is possible for Plaintiffs to lose on their argument that the occupancy tax code sections require Defendants to collect taxes, but for Plaintiffs to prevail on their conversion claim. Plaintiffs contend that Plaintiffs have conversion, unjust enrichment, and deceptive trade practices claims against Defendants because Defendants allegedly over-collected millions of dollars from hotel occupants as "tax" charges and retained those monies as Defendants' own, ratherthan remitting those taxes to Plaintiffs.

Defendants cite *Chatham County Board of Tax Assessors v. Jepson,* 261 Ga.App. 771, 584 S.E.2d 22 (2003), for the proposition that the separation of powers doctrine, public policy, and judicial economy mandate that "tax questions should be resolved first at the local level" through procedures specifically created for that purpose. 261 Ga.App. at 772, 523 S.E.2d at 23. The *Jepson* Court held that an appeal before the board of equalization provided an adequate remedy at law for tax payers alleging that the county board of assessors failed to provide a simple, nontechnical description of the basis for a property reassessment. 261 Ga.App. at 771-72, 523 S.E.2d at 23. The *Jepson* Court therefore found that the validity of a reassessment must be raised within the statutory scheme for tax appeals and that the tax payers were required to exhaust available administrative remedies before filing a lawsuit. 261 Ga.App. at 771-72, 523 S.E.2d at 23.

Defendants cite *M.T.V. v. Dekalb County School District,* 446 F.3d 1153 (11th Cir.2006), for the proposition that litigants may not bypass statutory administrative procedures simply by labeling their claims as "common law." 446 F.3d at 1157-58. In *M.T.V.,* a disabled student's parents asserted claims under the Individuals with Disabilities Education Act ("IDEA"), the American with Disabilities Act, the Rehabilitation Act, the First Amendment, and 42 U.S.C.A. § 1983. *Id.* The Eleventh Circuit observed that the "IDEA allows plaintiffs to seek 'remedies available under the Constitution, [the ADA ...], or other Federal laws protecting the rights of children with disabilities,' " but also subjects such claims to an exhaustion requirement before the filing of a civil action. *Id.* (citing 20 U.S.C.A § 1415(I).) The United States Court of Appeals for the Eleventh Circuit held that the *M.T.V.* plaintiffs were seeking relief available under the IDEA and therefore were required to exhaust state administrative proceedings before resorting to the courts for relief, even if the plaintiffs invoked a different statute. *Id.*

***21** Plaintiffs cite *Hansen v. Norfolk and Western Railway Co.,* 689 F.2d 707 (7th Cir.1982), in which the plaintiff alleged violations of the Interstate Commerce Act and thus could choose to complain to the Interstate Commerce Commission ("ICC") or file suit, for the proposition that a stay of court proceedings is more consonant with the exhaustion doctrine than is a dismissal of a complaint. 689 F.2d at 709-14. In *Hansen,* the United States Court of Appeals for the Seventh Circuit discusses the doctrine of primary jurisdiction as follows:

> The doctrine of primary jurisdiction is a reflection of the fact that when a court is confronted with a claim as to which it shares concurrent jurisdiction with an administrative agency, there may be sound reasons for the court to stay its hand until the agency has applied its expertise to the salient questions. The doctrine comes into play when a claim is cognizable in a court but adjudication of the claim "requires the resolution of issues which, under a regulatory scheme have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views."
>
> ...
>
> Because the primary jurisdiction doctrine is designed to govern timing of judicial consideration, and not to allocate ultimate powers between

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> courts and agencies, a stay of court proceedings is often more consonant with the doctrine than is a dismissal of a complaint. Dismissal of the complaint may be appropriate when all of the relief that is sought in court can be obtained in an administrative forum or in an easily initiated suit subsequent to the administrative proceeding. A stay of the court action pending administrative determinations, however, is in order when there is reason to believe that a party may be prejudiced by a dismissal.
>
> *Id.* at 710, 714 (citations omitted). The *Hansen* court determined that the ICC had primary jurisdiction over the case and that ICC disposition of the issues within its jurisdiction would aid the court in subsequently entertaining the plaintiff's antitrust claims. *Id.* at 713-14. The Seventh Circuit declined to dismiss the case, however, because the ICC might not have authority to entertain all of the issues regarding the plaintiff's claims and the statute of limitations for those claim might run by the time the ICC acted. *Id.*

The Court observes that the *City of Atlanta* court dismissed the City of Atlanta's complaint in its entirety, including a claim that "Defendants, regardless of whether they are sellers, resellers, or agents, are collecting taxes that should be remitted to the City of Atlanta." 2006 WL 3728957, at *1. The *City of Philadelphia* court dismissed a claim for conversion, stating as follows:

> The case is not an appeal from a tax assessment, nor can it be, as there has been no formal determination by the Tax Review Board or any other administrative body from which the Defendants can appeal. Nor is this case a tort claim, as the City contends. Conversion is ["]the deprivation of another's right of property in, or use or possession of, chattel, or other interference therewith, without the owner's consent and without lawful justification." *McKeeman v. Corestates Bank, N.A.,* 2000 Pa.Super. 117, 751 A.2d 655, 659 n. 3 (2000). Here, there has been no determination the Tax is actually owed by the Defendants and this court lacks jurisdiction to make such a pronouncement. Despite the artful pleading, what the City is actually seeking here is a declaration from this court that Defendants owe the Tax. Such an action is not permissible under Pennsylvania law, as it concerns a matter solely within the jurisdiction of the Tax Review Board. *See* 42 Pa.C.S. § 7541 (precludes declaratory judgment actions where the proceeding is within the exclusive jurisdiction of a tribunal other than a court).

***22** 2006 WL 1520749, at *2 (emphasis in original).

For the following reasons, the Court declines to dismiss this case, including Plaintiffs' common law claims and claims asserted under the Georgia Uniform Deceptive and Unfair Trade Practices Act.

First, Defendants' instant Motion and associated brief fail to address Plaintiffs' claim that Defendants violated Georgia's Uniform Deceptive and Unfair Trade Practices Act and Plaintiffs' common law claims of conversion and unjust enrichment. Viewing the evidence in a light most favorable to Plaintiffs, as the Court must, there is a genuine factual issue as to whether Defendants collected monies as "taxes" and did not remit those "taxes" to the proper governing authorities. If Georgia's Excise Tax Act is not applicable to Defendants, as Defendants contend, then, unlike the plaintiffs in *Jepson* and *M.T.V.,* and unlike the defendants in *City of Philadelphia,* administrative procedures and the Philadelphia Tax Review Board, respectively, are not available to provide Plaintiffs with relief or to resolve the instant dispute. Without an administrative forum, proceedings, or exclusive tribunal with jurisdiction over the tax dispute, Plaintiffs may be able to seek recourse in the Court through their common law and statutory claims for recoupment of monies improperly collected as "taxes" and never remitted. Indeed, in *Hotels.com, L.P., v. Canales,* 195 S.W.3d 147, 151-52 (Tex.App.2006), the Texas Court of Appeals held that a customer who claimed that Hotels.com misled her with regard to the amount of money collected as "taxes" on her hotel

room could maintain an action against Hotels.com to recover charges for “tax es” that were never owed or remitted to any taxing authority; because that money was not actually a tax. 195 S.W.3d at 151-52.

Additionally, it is not clear what information or evidence was presented to the *City of Atlanta* and *City of Philadelphia* courts. Plaintiffs have complained that Defendants freely cite the *City of Atlanta* case, in which the filings are sealed, but selectively submit portions of the record to the Court and refuse to permit Plaintiffs' counsel to examine the briefs and evidence upon which the *City of Atlanta* court acted. (Pls.' Resp. Mot. Rule 16 Conference at 2, 2 n. 1.) Plaintiffs also point out that only class action discovery has been conducted in this lawsuit.

The Court concludes that it does not have enough information to rule on or dismiss Plaintiffs' conversion, unjust enrichment and Georgia Uniform Deceptive and Unfair Trade Practices Act claims at this time. Consequently, the Court is not convinced that, under the above circumstances, the separation of powers doctrine prohibits the Court from ruling on those claims, that subject matter jurisdiction does not exist, or that Plaintiffs are improperly attempting to burden the Court with Plaintiffs' tax assessment and collection duties.

Second, diversity jurisdiction pursuant to 28 U.S.C.A. 1332 exists between Plaintiffs and Defendants regarding Plaintiffs' common law claims and Georgia's Uniform Deceptive and Unfair Trade Practices Act claim. The parties do not contend that they are not diverse or that the amount in controversy is insufficient. Consequently, even if the Court dismissed Plaintiffs' claims under the Excise Tax Act, the above claims could remain pending under this Court's diversity and subject matter jurisdiction.

***23** Third, the Court is not convinced that the continuation of this lawsuit is a waste of judicial resources. The Court observes, and Defendants are well aware, that only discovery regarding class certification has been conducted in this case. The Court notes that Plaintiffs contend that Defendants are not likely to cooperate with any assessment and collection efforts by Plaintiffs. Although the Court does not agree that futility excuses Plaintiffs from comporting with the Excise Tax Act provisions discussed *supra* Part III.A., the Court recognizes that, throughout this litigation, Defendants have maintained that they are not innkeepers or operators and are not subject to the excise tax at issue. To the extent that Defendants maintain that position, and refuse to open their records for auditing as required by the Excise Tax Act or Plaintiffs' ordinances, after Plaintiffs approach Defendants for an audit or with an assessment, Plaintiffs may then have exhausted their administrative remedies regarding their excise tax claim and the parties may then need to return to this litigation in order for the Court to determine whether the excise tax at issue is applicable to any given Defendant. The Court therefore has no facts before it with which to make a determination regarding Defendants' alleged liability in this case or to determine that a dismissal on the merit s of Plaintiffs' common law and Georgia Uniform Deceptive Practices Act claims is appropriate.

Fourth, the Court concludes that a stay of this action pending Plaintiffs' assessment of Defendants' tax liability, if any, is warranted under the above circumstances. For the reasons stated *supra* Part III.A.2., the Court recognizes that here, unlike the plaintiffs in *Hansen,* Plaintiffs may not simply elect to collect excise taxes by filing a lawsuit in lieu of assessing Defendants. However, viewing the facts in a light most favorable to Plaintiffs, as the Court must, if the Excise Tax Act is not applicable to Defendants, as Defendants contend, then the Excise Tax Act may not provide Plaintiffs with relief regarding Defendants' alleged collection of monies as “taxes,” and Plaintiffs may not be required to comport with the Excise Tax Act before seeking recourse in the courts. Additionally, Defendants assert the defenses of statute of limitations and laches in their Answers. Under the above circumstances,

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Plaintiffs may not be able to reinstate their common law and Georgia Uniform Deceptive Practices Act claims if Plaintiffs must refile this action at a later time. The Court therefore concludes that Plaintiffs may not be able to obtain all the relief they seek simply by assessing Defendants, and that there is reason to believe that Plaintiffs may be prejudiced by a dismissal.

The Court therefore finds that a genuine factual issue remains as to whether Defendants collected monies as "taxes" and did not remit those "taxes" to the proper governing authorities, and also concludes that diversity and subject matter jurisdiction exist between the parties regarding the above claims. For the reasons stated above, the Court concludes that Plaintiffs' assessment of Defendants may not provide Plaintiffs with all the relief Plaintiffs seek, and that this assessment may aid the Court in resolving Plaintiffs' common law and Georgia Uniform Deceptive Practices Act claims. Consequently, given the dual nature of Plaintiffs' claims and the overlap of information necessary to resolve those claims, the Court concludes that it is appropriate to stay the lawsuit at this time.

***24** The Court next addresses Defendants' concern as to Plaintiffs' use of counsel with regard to their excise tax claims.

C. The Court Will Not Prohibit Plaintiffs' Use of Counsel

Defendants argue that Georgia's public policy and the separation of powers doctrine prohibit Plaintiffs from abdicating tax assessment and collection functions to contingent-fee contractors. Defendants assert that "a handful of private law firms-who, although not accountable to the public, are nevertheless impermissibly armed with governmental power to administer and enforce tax ordinances on behalf of 19 Georgia counties and municipalities-will get paid if, but only if, they can force the Defendants to pay Hotel Excise Taxes, without regard to whether Defendants are actually subject to the tax." (Defs.' Mot. Summ. J. at 19.) Defendants contend that Plaintiffs' counsel are contingent-fee tax "bounty hunters," and assert that Georgia public policy and case law does not allow tax ing authorities to enter into contingent-fee contracts for private auditing and tax recoupment services.

Plaintiffs argue that any award of attorneys' fees in a class action is a matter for the Court's determination. Plaintiffs also assert that some of the attorneys appearing for Plaintiffs in this action are county or municipal officials and that the Court or jury may fashion remedies whereby Plaintiff counties and municipalities are awarded compensatory damages and penalties and separately awarded attorneys' fees.

Defendants cite *Sears, Roebuck & Co. v. Parsons,* 260 Ga. 824, 402 S.E.2d 4 (1991), to support their argument. In *Sears, Roebuck & Co.,* the Chatham County Board of Tax Assessors entered into a contract with a private auditing corporation whereby the private corporation would audit personal property returns and the private corporation would receive thirty-five percent of any resulting increased valuation plus all first-year penalties collected. 260 Ga. at 824, 402 S.E.2d at 4. The Supreme Court of Georgia held that Georgia law allowed the Board to contract with entities for appraisal services, but that public policy prohibited a contingency compensation scheme for those services. *Id.,* 402 S.E.2d at 4. The Supreme Court of Georgia concluded that "[f]airness and impartiality are threatened where a private organization has a financial stake in the amount of tax collected as a result of the assessment it recommends." *Id.,* 402 S.E.2d at 5.

For the following reasons, the Court is not convinced that summary judgment is warranted as a result of Plaintiffs' retention of counsel in this litigation.

First, the Court observes that the instant case differs from the contingency-fee assessment contract in *Sears, Roebuck & Co.* Unlike the above case, Plaintiffs have not hired counsel to reassess De-

fendants and profit as a result of a higher reassessment. Here, the parties agree that Defendants have not been audited and assessed, and Plaintiffs simply state that “the compensation to Plaintiffs' counsel will be determined by the Court in accordance with the law of the Eleventh Circuit applicable to class actions.” (Defs.' Mot. Summ. J. Ex. 2 Interrog. Resp. No. 10.) The Court observes that Defendants' comparison of Plaintiffs' contract with counsel to the contract in *Sears, Roebuck & Co.* is not supported by the above interrogatory response and is premature at this point.

***25** Second, the Court observes that it is common in Georgia for counties and municipalities to contract with private attorneys and law firms for legal services. Defendants fail to recognize that such private attorneys and law firms actually serve as the city or county attorneys and that some of Plaintiffs' counsel may be acting in that capacity in this case.

Third, the Court is not persuaded that the holding in *Sears, Roebuck & Co.* would prevent Plaintiffs from retaining counsel to assist with enforcement efforts if Defendants refuse to be audited regarding the allegedly owed excise taxes at issue, or are assessed and refuse to pay those alleged owed taxes. Once Defendants refuse to be audited or refuse to pay assessed excise taxes, it would be reasonable for Plaintiffs to retain counsel to assist in resolving those disputes.

For the above reasons, the Court is not persuaded that Plaintiffs are prohibited from retaining counsel to assist Plaintiffs in this case. The Court therefore declines to grant Defendants' summary judgment as a result of Plaintiffs' retention of counsel in this litigation.

D. Summary

In sum, for the reasons set forth *supra* Part III.A.2., the Court concludes that Plaintiffs must at least comport with the estimation, assessment, and collection requirements of O.C.G.A. § 48-13-53.3(b) before continuing to litigate their claims asserted under Georgia's Excise Tax Act. The Court observes that Defendants have failed to address Plaintiffs' common law claims and claims asserted under Georgia's Uniform Deceptive and Unfair Trade Practices Act and, for the reasons set forth *supra* Part III.B., the Court therefore declines to dismiss those claims at this time. The Court, however, recognizes that there likely may be an overlap in the information necessary to estimate and assess Defendants' alleged excise tax liabilities and the information necessary to determine the amount of monies allegedly collected by Defendants as “taxes” and not remitted to the appropriate governing authority. The Court therefore concludes that it is appropriate to stay this litigation, with the exception of a Rule 16 conference, which is necessary to address the above issues and to determine the best way to proceed in this litigation. Consequently, the Court denies Defendants' Motion for Summary Judgment without prejudice, and stays this litigation, with the exception of a Rule 16 conference to be conducted between the Court and the parties' counsel in the near future.

IV. Plaintiffs' Motion to Strike Affidavit

Plaintiffs object to the affidavit of J. Bryan Whitford, which was submitted by Defendants in support of the instant Motion for Summary Judgment. Plaintiffs argue that Defendants did not identify Mr. Whitford as an expert and that the affidavit contains hearsay, refers to evidence which is not in the record or otherwise identified or attached to the affidavit, and does not establish that Mr. Whitford is competent to testify on the matters discussed. Plaintiffs also argue that Mr. Whitford improperly offers legal conclusions regarding the applicability and legal interpretations of statutes and local ordinances.

***26** Defendants argue that Mr. Whitford's affidavit was not offered as an expert report or affidavit, but rather to demonstrate the information that was readily available to Plaintiffs if Plaintiffs had complied

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with the Excise T ax Act's administrative process. Defendants contend that, if Plaintiffs' had conducted any due diligence, Plaintiffs would have discovered at least two independent professionals in Georgia, Mr. Whitford and the Georgia Department of Revenue, that would have informed Plaintiffs that their intended claims against Defendants might be legally and factually unjustified. Defendants assert that Plaintiffs have no factual basis or personal knowledge for asserting the instant allegations, other than the fact that other local governments have filed suit.

For the reasons set forth *supra* Part I.A, the Court does not consider Mr. Whitford's affidavit in this Order. The Court therefore finds Plaintiffs' Motion to Strike moot at this point in the litigation. Consequently, the Court denies as moot and without prejudice Plaintiffs' Notice of Objection to, or in the Alterative, Motion to Strike, the Affidavit and Testimony of J. Bryan Whitford.

V. Conclusion

ACCORDINGLY, the Court **DENIES WITHOUT PREJUDICE** Defendants' Motion for Summary Judgment Based on Plaintiffs' Failure to Exhaust Administrative Procedures [181]. The Court **STAYS** this case, with the exception of a Rule 16 conference to be conducted between the Court and parties in the near future. The Court also **DENIES** Defendants' request for oral argument associated with Defendants' Motion for Summary Judgment.

The Court also **DENIES AS MOOT AND WITHOUT PREJUDICE** Plaintiffs' Notice of Objection to, or in the Alternative, Motion to Strike, the Affidavit and Testimony of J. Bryan Whitford [197].

IT IS SO ORDERED.

N.D.Ga.,2007.
City of Rome, Ga. v. Hotels.com, LP
Slip Copy, 2007 WL 6887932 (N.D.Ga.)

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