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IN THE SUPREME COURT OF FLORIDA

ALACHUA COUNTY, *et al.*,

Petitioners,

v.

EXPEDIA, INC., *et al.*,

Respondents.

CASE NO. SC13-838
DCA CASE NO. 1D12-2421
L.T. CASE NO. 2009-CA-4319

ON PETITION FOR DISCRETIONARY REVIEW OF A DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

RESPONDENTS' BRIEF ON JURISDICTION

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	1
I. THE DISTRICT COURT OF APPEAL'S DECISION IS IN ACCORD, NOT IN EXPRESS, DIRECT CONFLICT, WITH <i>MIAMI DOLPHINS</i>	1
II. PETITIONERS CANNOT MANUFACTURE A CONFLICT WITH <i>MIAMI DOLPHINS</i>	5
CONCLUSION	10
CERTIFICATE OF SERVICE	11
CERTIFICATE OF COMPLIANCE	13

TABLE OF AUTHORITIES

CASES

	<u>PAGE(S)</u>
<i>Dep't of Health and Rehabilitative Services v. Nat'l Adoption Counseling Service, Inc.</i> , 498 So. 2d 888 (Fla. 1986).....	6
<i>The Florida Star v. B.J.F.</i> , 530 So. 2d 286 (Fla. 1988).....	1
<i>Jenkins v. State of Florida</i> , 385 So. 2d 1356 (Fla. 1980).....	2, 8
<i>Miami Dolphins, Ltd. v. Metro. Dade County</i> , 394 So. 2d 981 (Fla. 1981).....	4, 5, 7, 8, 9
<i>Reaves v. State of Florida</i> , 485 So. 2d 829 (Fla. 1986).....	2, 8

CONSTITUTION

Fla. Const., Art. V, § 3(b)(3).....	1, 3, 5, 6, 10
-------------------------------------	----------------

STATUTES

Fla. Stat. § 125.0104(3)(a)	3
Fla. Stat. § 125.0104(3)(c)	3
Fla. Stat. § 125.0104(3)(d)	3
Fla. Stat. § 125.0104(3)(f).....	3
Fla. Stat. § 125.0104(4)(e)	3
Fla. Stat. § 125.0104(8)(a)	3
Fla. Stat. § 212.03(1)(a)	3

ADMINISTRATIVE CODE

Fla. Admin. Code R. 12A-1.061 4, 10
Fla. Admin. Code R. 12A-3.001 4

RULES

Fla. R. App. P. 9.030(a)(2)(A)(iv) 1

Petitioner Counties ask this Court to exercise discretionary jurisdiction to review the District Court of Appeal's decision affirming judgment in favor of Respondent Online Travel Companies ("OTCs"), holding the OTCs are not liable for Tourist Development Tax ("TDT").¹ Petitioners rely on Article V, section 3(b)(3) of the Florida Constitution, which grants this Court discretion to "review a[] decision of a district court of appeal" that "expressly and directly conflicts with a decision . . . of the supreme court on the same question of law." Art. V, § 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(iv) (same). However, Petitioners' brief confirms there is no such conflict between the District Court of Appeal's decision and any decision of this Court. Therefore, there is no basis for the exercise of discretionary jurisdiction under section 3(b)(3), and the petition for review should be denied. *The Florida Star v. B.J.F.*, 530 So. 2d 286, 289-90 (Fla. 1988) (Under section 3(b)(3), this Court should "refus[e] to exercise [] discretion where the opinion below establishes no point of law contrary to a decision of this Court.")

I. THE DISTRICT COURT OF APPEAL'S DECISION IS IN ACCORD, NOT IN EXPRESS, DIRECT CONFLICT, WITH MIAMI DOLPHINS

¹ Respondents are Expedia, Inc., Hotels.com, L.P., Hotwire, Inc., Orbitz, LLC, Orbitz, Inc., Trip Network, Inc. (d/b/a Cheaptickets.com), priceline.com Inc., Travelweb LLC, and Travelocity.com, LP.

"This Court may only review a decision of a district court of appeal that *expressly and directly conflicts* with a decision of . . . the Supreme Court on the *same question of law*." *Jenkins v. State of Florida*, 385 So. 2d 1356, 1359 (Fla. 1980).² The "conflict must be express and direct, i.e., it must appear within the four corners of the majority decision." *Reaves v. State of Florida*, 485 So. 2d 829, 830 (Fla. 1986).

As the District Court of Appeal in this case stated: "The question presented on appeal is whether the [TDT] applies to the entire amount [OTCs] collect from hotel customers who reserve their room through [OTCs]." (Op. at 2.)³

The District Court of Appeal answered that question, holding (i) OTCs are not hoteliers that possess, and "rent, lease or let" hotel rooms to tourists, but rather host websites "customers utilize . . . to obtain a hotel reservation;" and (ii) the TDT "applies only to the amount of money the [OTCs] send to hotels for the reserved rooms and not to the additional compensation retained by the [OTCs]" as consideration for their online

² All emphasis in quoted material is added, and all internal citations omitted, unless otherwise indicated.

³ The District Court of Appeal certified a question that mirrors the one presented to it. As Petitioners recognize, whether this Court should exercise its discretion to entertain that certified question is beyond the scope of the present briefing. (Pet. Br. at 3.)

services, including facilitating the booking of a room reservation with a hotel. (*Id.* at 3-4.)

The court looked to the TDT Statute itself, which authorizes counties to impose tax on the privilege of furnishing hotel rooms to tourists for consideration: "Every person who rents, leases, or lets for consideration . . . accommodations in any hotel . . . is *exercising a privilege* which is *subject to taxation . . .*" (Op. at 6, quoting § 125.0104(3)(a), Fla. Stat.) The TDT Statute requires the person "taxable hereunder" to charge and collect the tax from the "person paying any rental or lease." (*Id.* at 7-8, quoting § 125.0104(8)(a); *see also* § 125.0104(4)(e) (identifying the persons "*subject to the tax*" as "*owners or operators of motels, hotels.*").) Further, the TDT Statute authorizes imposing tax on the "total consideration charged for such lease or rental," which tax is to be charged by the "person receiving the consideration for the lease or rental." (*Id.* at 10, quoting §§ 125.0104(3)(c), (f).)

The court also looked to the TDT Statute's incorporation of the parallel state Transient Rentals Tax ("TRT") Statute. (*Id.* at 6, quoting § 125.0104(3)(d).) The TRT Statute provides: "[E]very person is exercising a *taxable privilege* who *engages in the business of renting, leasing, letting, or granting a license to use any . . . accommodations in . . .any hotel . . .*" (*Id.* at 7, quoting § 212.03(1)(a), Fla. Stat.)

The court identified no conflict between the TDT and TRT Statutes, but rather recognized "[b]oth the [TDT] and [TRT Statutes] impose a duty to charge, collect, and remit the bed tax." (*Id.* at 7.)

Logically, therefore, that *duty is imposed on hotels*, not the tourist. Thus, although the tourist is obligated to pay the tax when it is charged, the tourist is not obligated to charge himself the tax, collect it from himself, or remit it to the proper taxing authority. That *duty is imposed on hotels*, motels, and others for exercising the *privilege of engaging in the business of renting rooms to consumers*.

(*Id.* at 8.) The court concluded "[i]n both instances, the Legislature determined that operating a hotel in a county is a privilege subject to taxation." (*Id.* at 9.)⁴

In support of its conclusion, the court cited *Miami Dolphins, Ltd. v. Metro. Dade County*, 394 So. 2d 981 (Fla. 1981), which also did not identify any conflict between the two statutes. As the District Court of Appeal noted, *Miami Dolphins* "held the [TRT] statute is to be read together with the

⁴ This conclusion is further compelled by the Department of Revenue's ("DOR") Rules, which long made clear the same rule governs the administration of both the TRT and TDT. Fla. Admin. Code R. 12A-3.001(1) (the "provisions of Rule 12A-1.061 . . . govern the administration of the [TDT]"). Last month the DOR amended the Rules so that the provisions of Rule 12A-1.061 now directly "govern the administration of the taxes imposed on transient accommodations including sales tax imposed under Section 212.03, F.S., . . . [and] any [TDT] imposed under Section 125.0104, F.S." *Id.* R. 12A-1.061(1) (as amended). Thus, the amendments reaffirm the TRT and TDT are parallel taxes of the same nature, and are to be administered in a like manner.

[TDT] statute." (*Id.*)

Petitioners assert this Court should exercise its discretionary jurisdiction under section 3(b)(3) because the District Court of Appeal's decision conflicts with *Miami Dolphins*. But Petitioners do not identify an "express[] and direct[] conflict" between the two opinions on "the same question of law." Nor could they. The two courts addressed different questions of law.

Miami Dolphins involved a facial challenge to the validity of the TDT Statute, and addressed two questions of law: (1) whether "the county's referendum was void, and so the [TDT] ordinance passed thereby is invalid;" and (2) whether the TDT ordinance "violates both the privileges and immunities clause and the equal protection clause of the United States Constitution." *Miami Dolphins*, 394 So. 2d at 985, 988.

As the District Court of Appeal recognized, neither of those questions of law was presented to it in this case, and, *Miami Dolphins* did not address the question of law that was presented in this case. (Op. at 8-9.) Thus, there can be no express, direct conflict between the two decisions on the same question of law that is required for jurisdiction under section 3(b)(3).

II. PETITIONERS CANNOT MANUFACTURE A CONFLICT WITH *MIAMI DOLPHINS*.

Unable to identify an express, direct conflict, Petitioners instead

identify conflicts they assert would exist if this Court had addressed in *Miami Dolphins* the question of law presented here. But as this Court has made clear, an implied conflict is no basis for jurisdiction under section 3(b)(3). *Dep't of Health and Rehabilitative Services v. Nat'l Adoption Counseling Service, Inc.*, 498 So. 2d 888, 889 (Fla. 1986) (An "implied conflict may no longer serve as a basis for . . . jurisdiction.") In any event, none of the three supposed conflicts between the District Court of Appeal's opinion and *Miami Dolphins* proffered by Petitioners are conflicts at all.

First, Petitioners contend the District Court of Appeal's opinion conflicts with *Miami Dolphins* as to who exercises the taxable privilege under the TDT Statute. They assert this Court "expressly concluded that the statutory language, 'every person who rents, leases, or lets,' refers to the person renting the accommodation (i.e., the tourist), not the hotel." (Pet. Br. at 5.) But *Miami Dolphins* says nothing of the sort.

Miami Dolphins does not address, much less answer, who exercises the taxable privilege. Rather, it addressed the argument that the TDT Statute violated the privilege and immunities and equal protection clauses of the United States Constitution by discriminating against nonresidents. This Court concluded the TDT Statute did not because the tax is passed through to, and paid by, anyone who rents a room:

The tax imposed by Dade County does not distinguish between residents and nonresidents, rather, it is imposed, with certain exceptions, on *anyone* who rents certain kinds of living space for a term of six months or less. * * * * Appellant's assertions notwithstanding, the nonresident is not treated more onerously than the resident

Miami Dolphins, 394 So. 2d at 988-89.

Contrary to Petitioners' assertion, this Court did not address the privilege taxed.⁵ Thus, the District Court of Appeal properly rejected Petitioners' assertion that *Miami Dolphins* addressed who exercises the taxable privilege (Op. at 8-9):

The court did not hold, nor was it asked to address, whether the taxable privilege addressed in the [TDT Statute] is exercised by those renting rooms from hotels or by those renting rooms to tourists. It simply recognized the obvious – the tax is imposed on tourists and residents and collected by the hotels.

Second, Petitioners, assert the District Court of Appeal's opinion conflicts with *Miami Dolphins* as to the amount taxed. Quoting the dissent in this case, Petitioners assert "it is clear" that *Miami Dolphins* "dictates" the TDT is (i) a "tax due on funds paid by the tourist, not a tax due on money received by the hotel;" and (ii) due on the "gross amount of the hotel bill, not on the net amount the hotel may receive after payment of expenses or

⁵ The issue of taxable privilege is not inherent in this Court's reference to the tax being "imposed" on the renter. Indeed, this Court ruled the TDT Statute was not unconstitutionally vague as to "who is subject to the tax" when read together with the TRT Statute, under which Petitioners concede hotels are subject to tax. *Miami Dolphins*, 394 So. 2d at 987.

commissions to an online booking agent." (Pet. Br. at 5-6, quoting dissent at 15.)

However, "the language and expressions found in a dissenting or concurring opinion cannot support jurisdiction under section 3(b)(3) because they are not the decision of the district court of appeal." *Jenkins*, 385 So. 2d at 1359. Rather, the conflict "must appear within the four corners of the majority decision." *Reaves*, 485 So. 2d at 830.

In any event, *Miami Dolphins* includes neither holding the dissent here ascribes to it. *Miami Dolphins* does not address, much less answer, what amount is subject to TDT; that question was not before the Court.

Third, Petitioners assert the District Court of Appeal's opinion conflicts with *Miami Dolphins* because it "misapplied" this Court's instruction that the TDT Statute's express terms govern if and where there is a "conflict" with the TRT Statute. (Pet. Br. at 6.)

In so stating, this Court in *Miami Dolphins* did not identify any conflict between the two statutes. This Court upheld the TDT Statute as "pass[ing] muster for completeness, certainty and reviewability" only "[i]f read in conjunction with [the TRT Statute]." *Miami Dolphins*, 394 So. 2d at 988. Indeed, this Court stated the TRT Statute is "the base on which the [TDT Statute] rests." *Id.*

The District Court of Appeal here examined the language of the two statutes and determined no conflict existed between the relevant provisions because each imposes tax on a privilege exercised by hotels, not tourists. (Op. at 7-8). Thus, that court did not "misapply" this Court's instruction for how to resolve a "conflict" between the two statutes; rather, it recognized the instruction was not implicated because no such conflict existed.

Unable to identify an express conflict between the two statutes, Petitioners merely assert the language of the two is "different" because the TDT Statute does not include the phrase "engages in the business of." (Pet. Br. at 7.) But this Court's instruction in *Miami Dolphins* applies only to actual "conflicts," not mere "differences" in the language of the two statutes. *Miami Dolphins*, 394 So. 2d at 988.

Petitioners assert the absence of "engages in the business of" in the TDT Statute shows the Legislature "intended to tax a different privilege." (Pet. Br. at 7.) But that conjecture is unsupported by any language in the TDT Statute or *Miami Dolphins*.

Again, this Court in *Miami Dolphins* did not identify any conflict between the two statutes. Rather, this Court concluded that "[w]ith the [TRT Statute] as its base, the [TDT Statute] appears constitutionally firm." *Miami Dolphins*, 394 So. 2d at 989. Indeed, this Court spent six pages making

clear the TDT and TRT Statutes are upon the same subject, *i.e., in pari materia*. This mandate – that the two statutes be read together – would be nonsensical if the two statutes taxed different privileges, imposed obligations and liability on different persons, and taxed different amounts.⁶

Finally, Petitioners assert this Court "should" nonetheless exercise jurisdiction because it supposedly has "statewide impact." (Pet. Br. at 4, 10-11.) But alleged "statewide impact" is not a basis for jurisdiction under section 3(b)(3), the sole jurisdictional ground asserted.⁷

CONCLUSION

For the above reasons, the petition for review pursuant to section 3(b)(3) is without basis, and should be denied. Nothing within the "four corners" of the District Court of Appeal's opinion "expressly and directly conflicts" with any ruling of this Court on "the same question of law."

⁶ Petitioner's assertion is further refuted by DOR Rule 12A-1.061, which provides "every person is *exercising a taxable privilege* when *engaging in the business of renting, leasing, letting . . . transient accommodations*." Thus, the DOR has long recognized that the TDT Statute imposes tax on the same privilege as the TRT Statute.

⁷ Again, quoting the dissent, Petitioners contend the court's opinion would invite imagined horrors, including a hypothetical tax "scheme," which Petitioners admit would not involve OTCs. (Pet. Br. at 10.) Again, the dissent's view of the facts, law, or hypotheticals is not a basis for jurisdiction under section 3(b)(3). *Supra* at 8.

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy hereof has been furnished this 17th day of June 2013, by electronic mail and United States Mail, postage prepaid and affixed, to:

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