IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

THEADORE KIRKPATRICK; CHRISTOPHER COLL; CHRISTOPHER O'KEEFE; AND MICHAEL AND DEBBIE POPRAWA H/W; INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, Plaintiffs,	§	A-16-CV-733-LY
V.	§	
HOMEAWAY.COM, INC. AND DOES 1-10, Defendants.	§	

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

TO THE HONORABLE LEE YEAKEL
UNITED STATES DISTRICT JUDGE:

Before the court is Defendant HomeAway's Motion to Dismiss Plaintiffs' First Amended Class Action Complaint (Dkt. #17) and all related briefing.[1] After reviewing the pleadings, the relevant case law, as well as the entire case file, and having heard the parties' oral arguments,[2] the undersigned issues the following Report and Recommendation to the District Court.

I. BACKGROUND

HomeAway.com, Inc. ("HomeAway") operates an online marketplace for vacation rental properties. Dkt. #35, Second Amended Complaint ("SAC") ¶ 28.[3] Property owners ("Owners")

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[1] The motion was referred by United States District Judge Lee Yeakel to the undersigned for a Report and Recommendation as to the merits pursuant to 28 U.S.C. § 636(b), Rule 72 of the Federal Rules of Civil Procedure, and Rule 1(d) of Appendix C of the Local Rules of the United States District Court for the Western District of Texas.

[2] At the parties' request, oral arguments were postponed from May 23, 2017 to June 22, 2017. This motion was heard at the same time as a similar motion in *Arnold v. HomeAway, Inc.*, 1:16-CV-374-LY.

[3] On June 8, 2017, the court allowed Plaintiffs to file their Second Amended Complaint, which only changed the name of the Defendant, and ordered that the pending Motion to Dismiss shall be deemed directed to the Second Amended Complaint. Dkt. #34.

can list their vacation rental properties for rental on HomeAway's websites after either buying a one-year subscription or agreeing to pay HomeAway for each booking ("pay-per-booking"). SAC ¶¶ 30, 76. Renters, referred to as travelers ("Travelers"), could search HomeAway's websites, locate a vacation property, communicate with the property's Owner, and rent the property. SAC ¶ 6. For years, HomeAway represented that its marketplace and services were, and would be, free to Travelers. SAC ¶¶ 2, 6, 9, 10, 36-41.

On November 4, 2015, HomeAway announced that it was being acquired by Expedia. Nov. 4, 2015 SEC filing (Dkt. #17-1).[4] HomeAway included a press release in its filing with the Securities and Exchange Commission ("SEC"), which announced the acquisition and the addition of a "traveler-service fee in mid-2016." Dkt. #17-1 at 7. The traveler-service fee ("Traveler Fee") was to "begin rolling out in Q2 of 2016 and [was] expected to add an average of roughly 6% to most transactions that run through [HomeAway's] online shopping cart." *Id.* Contrary to its previous business model, the Traveler Fee is a fee charged to Travelers each time they book a rental through HomeAway. SAC ¶ 51.

The Traveler Fee took effect February 9, 2016, and ranged between 4% and 10% of the total rental rate of Owners' properties. SAC ¶ 51. The fee had negative significant and immediate effect on the number and value of bookings. SAC ¶ 52.

Plaintiffs, who purchased one-year subscriptions to list their properties for rent on HomeAway's websites, bring this suit on behalf of themselves and others alleging they have been injured by HomeAway's Traveler Fee. With the exception of one named plaintiff, Christopher O'Keefe, Plaintiffs subscribed or renewed their previous 1-year subscriptions with HomeAway before the November 4, 2015 announcement. O'Keefe renewed his subscription on

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[4] In deciding a 12(b)(6) motion to dismiss, a court may permissibly refer to matters of public record. *Cinel v. Connick*, 15 F.3d 1338, 1343 n.6 (5th Cir. 1994).

January 11, 2016, after the announcement of the Traveler Fee but before it was implemented. Plaintiffs' subscriptions with HomeAway are detailed in agreements entitled "Terms and Conditions."[5] Dkt. #37.

Plaintiffs assert several causes of actions against HomeAway, all stemming from HomeAway's imposition of the Traveler Fee.[6] First, Plaintiffs allege HomeAway breached its contract with Plaintiffs because the Traveler Fee is contrary to the terms of the Terms and Conditions. Second, Plaintiffs allege HomeAway's imposition of the Traveler Fee constitutes fraud. Plaintiffs also contend HomeAway's imposition of the Traveler Fee violates the Texas Deceptive Trade Practices Act. Finally, Plaintiffs assert a claim for unjust enrichment.

II. STANDARD OF REVIEW

When evaluating a motion to dismiss for failure to state a claim under Rule 12(b)(6) the complaint must be liberally construed in favor of the plaintiff and all facts pleaded therein must be taken as true. *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993); *Baker v. Putnal*, 75 F.3d 190, 196 (5th Cir. 1996). Although Federal Rule of Civil Procedure 8 mandates only that a pleading contain a "short and plain statement of the claim showing that the pleader is entitled to relief," this standard demands more than unadorned accusations, "labels and conclusions," "a formulaic recitation of the elements of a cause of action," or "naked assertion[s]" devoid of "further factual enhancement." *Bell Atl. v. Twombly*, 550 U.S. 544, 555-57 (2007). Rather, a complaint must contain sufficient factual matter,

[5] Plaintiffs renewed their subscriptions at various times, and their subscriptions are subject to various iterations of the Terms and Conditions. However, the portions of the Terms and Conditions that are relevant to this suit are identical across all of Plaintiffs' Terms and Conditions. Thus, the court will not distinguish the iterations of the various Terms and Conditions.

[6] Plaintiffs also assert various non-Texas state law causes of action against HomeAway. HomeAway moves to dismiss these claims because the Terms and Conditions are governed by Texas law and therefore precludes these claims. Dkt. #17 at 16-18. Plaintiffs do not dispute the application of Texas law to all of their claims and do not oppose dismissal of these claims on that basis. Dkt. #18 at 6. HomeAway has also moved to dismiss Plaintiffs' claim for breach of the duty of good faith and fair dealing, and Plaintiffs do not oppose dismissal of that claim. Dkt. #17 at 7-11; Dkt. #18 at 6.

accepted as true, to "state a claim to relief that is plausible on its face." *Id*. at 570. The Supreme Court has made clear this plausibility standard is not simply a "probability requirement," but imposes a standard higher than "a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The standard is properly guided by "[t]wo working principles." *Id*. First, although "a court must 'accept as true all of the allegations contained in a complaint,' that tenet is inapplicable to legal conclusions" and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id*. at 678. Second, "[d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679. Thus, in considering a motion to dismiss, the court must initially identify pleadings that are no more than legal conclusions not entitled to the assumption of truth, then assume the veracity of well-pleaded factual allegations and determine whether those allegations plausibly give rise to an entitlement to relief. If not, "the complaint has alleged–but it has not 'show[n]'–'that the pleader is entitled to relief.'" *Id*. at 679 (quoting FED. R. CIV. P. 8(a)(2)).

III. ANALYSIS

A. Breach of Contract

Plaintiffs allege that HomeAway has breached the Terms and Conditions by "(a) unilaterally and without consent instituting new and additional rates and fees that were not in effect at the time Plaintiffs and Class members purchased or renewed their subscriptions; and (b) purporting to unilaterally make substantive, non-clerical changes to the contract." SAC ¶ 173.

The relevant passages of the Terms and Conditions state:

> [¶ 11] This version of the Terms became effective on the date set forth above and this version amends the version effective prior to such date. We reserve the right,

in our sole discretion, to amend these Terms, in whole or in part, at any time, with or without your consent and you acknowledge and agree that your consent to any such amendment is not required in the event the proposed amendment is clerical and/or non-substantive in nature. Notification of any amendment will be posted on the Site by the indication of the last amendment date at the top of these Terms and will be effective immediately. **If you disagree with any non-clerical and/or substantive amendment to these Terms, then (i) your sole remedy as a traveler, or any other user other than a member, is to discontinue your use of the Site, and (ii) your sole remedy as a member is to withhold your consent to the applicability of the proposed amendment to your use of the Site, in which case your use of the Site will continue to be governed by the terms and conditions that were applicable to your use of the Site during the then current term of your subscription as the same were in effect immediately prior to the proposed amendment and you agree that you are responsible for keeping a copy of such terms.** When members renew subscriptions, the terms in effect at the time of renewal will govern, provided that such terms may change as described above.

[¶ 12] We also reserve the right, in our sole discretion and from time to time, to offer programs, products or services with unique terms and conditions that are separate from and may supersede or supplement in certain respects these Terms. In such cases, your use of the Site with respect to such special program is governed by these Terms together with the terms and conditions of such program, product or service.

[¶ 13] We reserve the right, but assume no obligation, to agree to different or conflicting terms and conditions with respect to any user. Any such terms and conditions will not be enforceable unless specifically agreed to by us.

[¶ 15] Subscription rates and fees (including any commissions) charged for any listing that is not subscription based (such as pay-per-booking or pay-per-lead) are set at the time of a user or member's purchase of the subscription or renewal or sign up for the non-subscription based, listing, as applicable. Such rates and fees are subject to change without notice or approval. **For subscription listings, the rates in effect at the time of the member's next subscription renewal, new listing or a member's upgrade or any other additional or new order of any product or service will govern for such renewal or other order.** The fees and commissions applicable to pay-per-booking listings offered on one or more Sites will be displayed under the "List Your Property" tab when such product is generally made available on a Site or shall be otherwise set forth in a communication between us and the member.

Dkt. #37-1 at 9, Terms and Conditions ("T&C") § 21 (emphasis added).[7]

A contract should be interpreted as a whole and in accordance with the plain meaning of its terms. *Great Am. Ins. Co. v. Primo*, 512 S.W.3d 890, 892–93 (Tex. 2017) (citing *Nat'l Union*

[7] For ease of reference, the court has inserted paragraph numbers into the Terms and Conditions.

Fire Ins. Co. v. Crocker, 246 S.W.3d 603, 606 (Tex. 2008); *Don's Bldg. Supply, Inc. v. OneBeacon Ins. Co.*, 267 S.W.3d 20, 23 (Tex. 2008)). Courts should not insert language or provisions the parties did not use or otherwise rewrite private agreements. *Id*. at 893.

The goal of contract interpretation is to ascertain the parties' true intent as expressed by the plain language they used. *Id*. "'Plain meaning' is a watchword for contract interpretation because word choice evinces intent." *Id*. A contract's plain language controls, not "what one side or the other alleges they intended to say but did not." *Id*. Courts assign terms their ordinary and generally accepted meaning unless the contract directs otherwise. *Id*.

If the language lends itself to a clear and definite legal meaning, the contract is not ambiguous and will be construed as a matter of law. *Id*. An ambiguity does not arise merely because a party offers an alternative conflicting interpretation, but only when the contract is actually "susceptible to two or more reasonable interpretations." *Id*. "'The fact that the parties may disagree about the policy's meaning does not create an ambiguity.'" *Id*. (quoting *State Farm Lloyds v. Page*, 315 S.W.3d 525, 527 (Tex. 2010)). "[W]hen a contract provision is worded so that it can be assigned a definite meaning, no ambiguity exists, and [courts] construe the contract as a matter of law." *Philadelphia Indem. Ins. Co. v. White*, 490 S.W.3d 468, 477 (Tex. 2016).

HomeAway argues Plaintiffs have failed to state a plausible breach of contract claim because the Terms and Conditions are a contract between the Owners and HomeAway and govern HomeAway's charges to the Owners and the services it provides. HomeAway argues the Terms and Conditions are silent as to any fees charged to Travelers, and to infer a prohibition of such a fee would violate the term that "We [HomeAway] reserve the right . . . to agree to different or conflicting terms and conditions with respect to any user," where user was earlier defined to include Travelers. *See* T&C § 21, ¶ 13.

Plaintiffs argue that Traveler Fees are not explicitly allowed by the Terms and Conditions and therefore such fees are prohibited because the parties are bound to the rate in effect at the time when the parties agreed to the Terms and Conditions. Plaintiffs also argue that where a contract is silent on an issue, courts will infer a reasonable term. Dkt. #18 at n.7. Finally, Plaintiffs argue that the Traveler Fee is a non-clerical change to the agreement to which they did not consent.

1. Rate In Effect Argument

The Terms and Conditions do not expressly refer to any fee that might be charged to a Traveler. Plaintiffs contend the passage "For subscription listings, the rates in effect at the time of the member's next subscription renewal, new listing or a member's upgrade or any other additional or new order of any product or service will govern for such renewal or other order" prohibits the imposition of a Traveler Fee during the term of the agreement. *See* T&C § 21, ¶ 15. Plaintiffs' argument seems to be, because there were no rates in effect with respect to Travelers, that zero-dollar rate must continue throughout the term of the contract.

Paragraph 15 addresses subscription rates and pay-per-booking fees (which are not at issue here). The subscription rates are the amounts Owners pay for the one-year right to list their property for rent on HomeAway's websites. Paragraph 15 states the rates are set at the time the Owner signs up for a subscription-based listing. According to paragraph 15, the rates can change without notice, but the rate that is in effect when an Owner renews the subscription, lists a new property, or upgrades the subscription will apply to the renewal, new listing, or upgraded subscription. Paragraph 15 only limits amounts HomeAway charges to Owners. Accordingly, it does not expressly limit HomeAway's ability to charge Travelers.

Plaintiffs argue that since the agreement is silent as to an amount HomeAway charges to Travelers, the court can supply that as a reasonable term. Dkt. #18 at n.7 (citing *Lidawi v. Progressive County Mut. Ins. Co.*, 112 S.W.3d 725, 731 (Tex. App.—Houston [14th Dist.] 2003)). "When a contract is silent on an issue, Texas courts will infer reasonable terms." *Lidawi*, 112 S.W.3d at 731. However, courts should not insert language or provisions the parties did not use or otherwise rewrite private agreements. *Primo*, 512 S.W.3d at 892–93. In the *Lidawi* case, the insurance contract at issue provided for an "examination under oath" of a person seeking coverage for a claim. *Lidawi*, 112 S.W.3d at 728. Lidawi, a husband and his wife, both sought coverage following an automobile accident. *Id*. The contract was silent as to whether examinations of multiple claimants could be separate or joint. *Id.* at 731. Because the contract was silent, the court inferred the reasonable term permitting separate examinations. *Id.* at 732. The court cited several cases to support its reading in of a contract term; however, in those cases the court did not create a new contractual right or obligation but instead clarified how an express contractual right or obligation would be performed. *See id*. at 731 & n.2.[8]

Here, Plaintiffs are not asking the court to infer a reasonable term related to how HomeAway performs its express obligations. Instead, Plaintiffs are asking the court to infer a

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[8] *Lidawi* cites to the following cases for the following principles: *Med. Towers Ltd. v. St. Luke's Episcopal Hosp.*, 750 S.W.2d 820, 822–24 (Tex. App.—Houston [14th Dist.] 1988) (concluding lease agreement silent as to method of appraisal required; and inferring comparable sales approach the proper method for determining value of property using accepted rules of construction); *Thompson v. CPN Partners*, L.P., 23 S.W.3d 64, 72 (Tex. App.—Austin 2000, no pet.) (concluding security contract silent on issue of which areas of shopping center to be patrolled; and interpreting security contract as arranging for guards to patrol common areas of center, not inside leased premises); *Maxwell v. Lake*, 674 S.W.2d 795, 802–03 (Tex. App.—Dallas 1984, no writ) (concluding contract silent on method of exercising option; and therefore inferring option could be exercised by giving notice within option period and tendering performance within a reasonable time thereafter); *Price v. Horace Mann Life Ins. Co.*, 590 S.W.2d 644, 646 (Tex. Civ. App.—Amarillo 1979, no writ) (concluding contract silent regarding time within which insurer might require application for reinstatement; and inferring parties intended a reasonable time)). In contrast, one case cited by the *Lidawi* court declined to impose an additional requirement to pay prejudgment interest when the contract was silent on the issue. *See Lidawi,* 112 S.W.3d at 731 & n.2 (citing *Embrey v. Royal Indem. Co.*, 986 S.W.2d 729, 733 (Tex. App.—Dallas 1999) (concluding insurance policy supplementary payments provision silent on payment of prejudgment interest; and inferring provision did not require insurance company to pay such interest in excess of policy limits), aff'd, 22 S.W.3d 414 (Tex. 2000).

term that would limit HomeAway's separate contractual relationship with third-parties, the Travelers. Case law cited by Plaintiffs does not support such a stretch of contract interpretation. *See Primo*, 512 S.W.3d at 892–93 (warning that courts should not insert language or provisions the parties did not use or otherwise rewrite private agreements). The court declines to infer a term in the Terms and Conditions that limits HomeAway's relationship with the Travelers.

2. Non-Clerical Change Argument

Plaintiffs also argue that the imposition of a Traveler Fee is a non-clerical change to the Terms and Conditions to which they did not consent. At the hearing, Plaintiffs clarified that a new Paragraph 9 has been added to Section 21 of later versions of the Terms and Conditions and this new paragraph 9 imposes a Traveler Fee. Plaintiffs argue the terms of the new paragraph 9 are being imposed on the agreements in this case in violation of the non-clerical change provisions of paragraph 11.

As discussed above, the Terms and Conditions were entered into between each of the Plaintiffs and HomeAway. The fee charged to the Travelers is separate and unrelated to the subscription fee charged to the Owners. Because the relevant Terms and Conditions do not prohibit a Traveler Fee, charging such a fee does not alter the Terms and Conditions of the Plaintiffs' agreements with HomeAway. Therefore, the Traveler Fee does not implicate Paragraph 11 and does not require the Owners' approval. Simply because a new paragraph 9 was added to later Terms and Conditions does not mean that the rights given in that paragraph were previously prohibited in HomeAway's relationships with Owners.

3. Conclusion

The Terms and Conditions do not restrict HomeAway from charging Travelers any fees. Alternatively stated, the Terms and Conditions do not prevent HomeAway from imposing a fee

on Travelers. Because Plaintiffs have not identified a contract provision that limited HomeAway's ability to charge a Traveler Fee, Plaintiffs have not identified a contract provision that HomeAway has plausibly breached. Therefore, Plaintiffs have failed to state a claim for breach of contract.

B. Fraud/Fraudulent Concealment

Plaintiffs allege HomeAway fraudulently:

> represented that booking through its websites was and would remain free to travelers and/or did not conspicuously disclose to Plaintiffs . . . that [HomeAway} was adjusting its marketplace model. . . . [HomeAway] concealed and failed to disclose to Plaintiffs and Class members that, despite its affirmative representations that it would not charge renters a service fee, it was going to do so.

SAC ¶¶ 148, 150.

The elements of a Texas common law fraud claim are: (1) a material representation was made; (2) the representation was false; (3) when the representation was made the speaker knew it was false or made it recklessly without any knowledge of its truth and as a positive assertion; (4) the speaker made the representation with the intent that it should be acted upon by the party; (5) the party acted in reliance upon the representation; and (6) the party thereby suffered injury. *Shakeri v. ADT Sec. Servs., Inc.*, 816 F.3d 283, 296 n.5 (5th Cir. 2016) (citing *Eagle Props., Ltd. v. Scharbauer*, 807 S.W.2d 714, 723 (Tex. 1990)).

Texas law permits a party alleging an actionable misrepresentation to attempt to prove that it was reasonably misled by a true but crucially incomplete statement that conveyed a false impression of the speaker's intentions. *Access Mediquip L.L.C. v. UnitedHealthcare Ins. Co.*, 662 F.3d 376, 381 (5th Cir. 2011), adhered to on reh'g en banc, 698 F.3d 229 (5th Cir. 2012), (citing *McCarthy v. Wani Venture, A.S.*, 251 S.W.3d 573, 585 (Tex. App.—Houston [1st Dist.] 2007, no pet.) ("[A] general duty to disclose information may arise in an arm's-length business

transaction when a party makes a partial disclosure that, although true, conveys a false impression.”)).

“A defendant’s failure to disclose information will support a claim for fraud only where the defendant has a duty to disclose.” *Shandong Yinguang Chem. Indus. Joint Stock Co. v. Potter*, 607 F.3d 1029, 1035 (5th Cir. 2010) (citing *Bradford v. Vento*, 48 S.W.3d 749, 755 (Tex. 2001)). While there is no general duty to disclose, a duty to speak arises between non-fiduciaries when “one party learns later that his previous affirmative statement was false or misleading.” *Id.* (quoting *Union Pac. Res. Group v. Rhone Poulenc*, 247 F.3d 574, 586 (5th Cir. 2001)); *Tempo Tamers, Inc. v. Crow–Houston Four, Ltd.*, 715 S.W.2d 658, 669 (Tex. App.—Dallas 1986, writ ref’d n.r.e.) (a duty to disclose arises when “a party later learns that previous affirmative representations are in fact false”)).

To the extent a complaint alleges claims sounding in fraud, Federal Rule of Civil Procedure 9(b) requires that plaintiffs go a step beyond the typical pleading standard: the underlying factual circumstances must be pleaded “with particularity.” FED. R. CIV. P. 9(b). “Put simply, Rule 9(b) requires ‘the who, what, when, where, and how’ to be laid out.” *Benchmark Elecs. v. J.M. Huber Corp.*, 343 F.3d 719, 724 (5th Cir. 2003) (citing *Williams v. WMX Techs., Inc.*, 112 F.3d 175, 179 (5th Cir. 1997)). Rule 9(b) requires that “[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person’s mind may be alleged generally.” While “particularity” varies with the circumstances of each case, Rule 9(b) generally requires specificity of the time, place, contents, and the identity of the person making false representations. *Benchmark Elecs., Inc.*, 343 F.3d at 724; *WMX Techs., Inc.*, 112 F.3d at 179 (requiring the “who, what, when, where, and how” of the alleged fraud be stated).

HomeAway argues that any present-tense statements it made that it did not charge Travelers Fees were not materially false when they were made. HomeAway argues that future promises—such as its statements that it would never charge a Traveler Fee—are only fraudulently actionable if they were made with the intention and purpose of deception and if the speaker had no intention of performing the promise. Plaintiffs contend HomeAway either made the statements falsely or without knowledge of their truth. Plaintiffs also contend HomeAway had a duty to disclose the Travelers Fee and the November 4, 2015 press release was insufficient because the projected start date and range of the fee was inaccurate.

1. Material Representations

Plaintiffs allege HomeAway made the following statements regarding Travelers Fees:

> "VRBO has no booking fees and is free for travelers." SAC ¶ 2; 44;
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> "No traveler fees. Free to book with no hidden costs." SAC ¶ 2; 44;
>
> "No fees for travelers. No online booking fees or hidden costs." SAC ¶ 2; 44;
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> "[T]ravelers can book vacation rentals without paying any fees to us" [screenshot from HomeAway website dated Oct. 20, 2016[9]] SAC ¶ 37;
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> "VRBO has no booking fees and is free for travelers" [screenshot from VRBO website dated Oct. 29, 2016] SAC ¶ 38;
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> "Find the perfect place to stay – with no booking fees" [screenshot from HomeAway website dated October 27, 2015] SAC ¶ 38;
>
> "[W]e'll never charge a fee to book your stay" [screenshot from HomeAway website dated Oct. 27, 2015] SAC ¶ 38[10];
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> "Brian Sharples (hereinafter 'Sharples'), HomeAway's co-founder and soon-to-be-former CEO, described the performance-based marketplace model as central to

[9] The court notes that the "last visited" dates cited in the Second Amended Complaint ¶¶ 37 and 38 appear to be typographical errors. In ¶ 38, the screenshot is attributed an October 29, 2016 date, but the citation link is to a Wayback Machine page of an October 29, 2015 webpage. Moreover, this paragraph, including the citation, is identical to the First Amended Complaint, which was filed on October 28, 2016. Therefore the October 29, 2016 date cannot be correct. In ¶ 37, the screenshot is attributed a last visited date of October 20, 2016. The website link provided does not take the user to the website displayed. Given the citation errors of ¶ 38, and given that Plaintiffs make no allegations in the Second Amended Complaint that HomeAway continued to promote that it did not charge Travelers any fees after the Traveler Fee went into effect, the court assumes this is another typographical error. If the court's assumption is incorrect, the parties may file Objections to this Report and Recommendation.

[10] Plaintiffs allege this is a representative statement consistently made by HomeAway. SAC ¶ 36.

> HomeAway's business plan, giving HomeAway a competitive advantage over other performance-based companies in the industry." SAC ¶ 39;
>
> "We are going to be free to travelers. Trip advisor [sic] and Airbnb have chosen to charge big fees to travelers. Well, we're going to have a pretty sizeable marketing budget in the next few years. And we're going to be letting everybody know, when you come to our platform and you don't pay a fee and we think that's a big deal, because if you look historically at the travel industry, those competitors who adopted no traveler fees first are the ones that ended up being the big winners in that business." SAC ¶ 40 (Nov. 2014 earnings call).

Rule 9(b) generally requires specificity of the time, place, contents, and the identity of the person making false representations. *Benchmark Elecs., Inc.*, 343 F.3d at 724; *WMX Techs., Inc.*, 112 F.3d at 179. The allegations in paragraphs 37-40 satisfy Rule 9b's specificity requirement. Plaintiffs have identified specific statements made by HomeAway or its representatives as well as where and when they were made.[11] In contrast, the allegations in paragraphs 2 and 44 lack the required specificity because Plaintiffs do not identify when or where these statements were made.

2. *Falsity/Speaker's Knowledge of Falsity*

HomeAway argues that the present-tense statements were not false when made and there is no allegation that HomeAway did not intend to keep the 2011 and 2014 promises described in the Second Amended Complaint, paragraphs 39-41.

A statement that is true but crucially incomplete is actionable under Texas law. *Access Mediquip L.L.C.*, 662 F.3d at 381. Additionally, "'[a] promise to do an act in the future is actionable fraud when made with the intention, design and purpose of deceiving, and with no intention of performing the act.'" *Shandong*, 607 F.3d at 1034 (quoting *Spoljaric v. Percival*

[11] The statements' materiality is not in question. Plaintiffs have pleaded the Traveler Fee is material because it "significantly deters renters from renting owners' vacation properties. It also causes (and has caused) owners to reduce their rental prices to offset the additional charges. In short, forcing travelers to pay additional rental fees unrelated to renting the vacation property itself caused owners to lose bookings and money. Of equal importance is the fact that these fees depressed the value of the service that owners purchased from Defendant (i.e., the value of the property listing subscriptions)." SAC ¶ 8.

Tours, Inc., 708 S.W.2d 432, 434 (Tex. 1986)). "While a party's intent is determined at the time the party made the representation, it may be inferred from the party's subsequent acts after the representation is made." *Id.* at 1033-34. However, "failure to perform, standing alone, is no evidence of the promissor's intent not to perform when the promise was made." *Id.* at 1034.

On November 4, 2015, HomeAway announced that it was being acquired by Expedia and would begin charging a Traveler Fee. Nov. 4, 2015 SEC filing (Dkt. #17-1). As pleaded, at least until October 29, 2015, HomeAway continued to state that it did not charge a Traveler Fee, and as late as October 27, 2015, HomeAway continued to state it would never charge a Traveler Fee. SAC ¶¶ 37, 38. Less than 10 days after these statements were made HomeAway announced a reversal of its longstanding policy in conjunction with a major business acquisition. Dkt. #17-1. Plaintiffs alleged that HomeAway "concealed and failed to disclose to Plaintiffs and Class members that, despite its affirmative representations that it would not charge renters a service fee, it was going to do so." SAC ¶ 150. Plaintiffs have stated a plausible claim that at least some of HomeAway's statements that it did not, and would never, charge a Traveler Fee were falsely made. *See Iqbal*, 556 U.S. at 678 ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."); *Benchmark Elecs., Inc.*, 343 F.3d at 724 ("Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.").

3. Intent

Like knowledge of falsity, intent may be generally alleged. *Benchmark Elecs., Inc.*, 343 F.3d at 724. Plaintiffs sufficiently pleaded that HomeAway intended property owners to rely on its statements that it did not and would not charge Travelers Fees:

> Defendant knew that Plaintiffs and other owners relied on Defendant's marketplace model, including its promise not to charge travelers fees. Defendant

> was aware of Plaintiffs' and other owners' reliance on Defendant's representations when they entered into year-long contracts with Defendant and paid annual subscription fees to Defendant.

SAC ¶ 12.

4. Reliance

Plaintiffs pleaded that up until the November 4, 2015 acquisition announcement HomeAway made statements that it would remain free for Travelers. Plaintiffs pleaded that they relied on HomeAway's statements that it did not and would not charge a Travelers Fee:

> "In reliance on Defendant's marketplace model, including Defendant's promise and reassurance that it would not charge additional fees to renters, Plaintiffs and thousands of other owners entered into year-long contracts with Defendant for the right to list their rental vacation properties on Defendant's websites." SAC ¶ 11.
>
> "Kirkpatrick saw and relied upon Defendant's advertisements and statements that it would not assess fees to renters." SAC ¶ 18.
>
> "Defendant never told Coll about the renter service fee prior to Coll renewing and/or purchasing his subscriptions, and Coll did not know that Defendant would charge renters service fees. Coll saw and relied upon advertisements and statements from Defendant that it would not assess these fees to renters." SAC ¶ 19.
>
> "Defendant never told O'Keefe about the renter service fees prior to O'Keefe renewing his subscription in January 2016, and O'Keefe did not know that Defendant would charge renter service fees. O'Keefe saw and relied upon advertisements and statements from Defendant that it would not assess these fees to renters." SAC ¶ 20.
>
> "Defendant never told the Poprawas that it would charge renters a service fee prior to the Poprawa's purchase of the subscription, and the Poprawas were not otherwise aware that Defendant would charge service fees to their prospective renters. The Poprawas decided to purchase a subscription with VRBO because of the fact that they did not charge renters service fees. The absence of these fees is why the Poprawas decided to use VRBO. The Poprawas saw and relied upon advertisements and statements from Defendant that it would not assess these fees to renters." SAC ¶ 21.

Plaintiffs initiated or renewed their subscriptions at various times between May 2015 and January 2016. Mr. Kirkpatrick renewed his subscription May 19, 2015. SAC ¶ 18. Mr. Coll renewed his subscription August 15, 2015. SAC ¶ 19. The Poprawas initially subscribed

November 3, 2015. SAC ¶ 21. Mr. O'Keefe renewed his subscription January 11, 2016. SAC ¶ 20. Thus, Mr. Kirkpatrick's renewal was six months before the acquisition announcement, while the Poprawas' initial subscription was the day before the announcement. Mr. O'Keefe's renewal was two months after the announcement.

The court recognizes that some Plaintiffs may have challenges proving reliance (given the timing of their renewals) and/or falsity (given the dates of the relied-upon statements). However, at this stage of the case, given the lack of discovery on when the allegedly false statements became false and the lack of discovery on what statements were actually relied upon, it is premature to address whether the allegedly relied upon statements were false when made or whether such reliance was reasonable. At this stage of the case, the court only evaluates the pleadings and accepts all factual allegations as true. *Iqbal*, 556 U.S. at 678. Accordingly, Plaintiffs have adequately *pleaded* that they relied upon HomeAway's statements that it would never charge Travelers fees. Whether Plaintiffs can *prove* reliance and falsity are issues for summary judgment or trial.

5. Injury

Plaintiffs sufficiently pleaded that they were injured by the Traveler Fee, which depressed the value of their subscriptions and decreased their bookings. *See e.g.*, SAC ¶¶ 8, 18, 19, 20, 21, 51, 52, 54.

C. Texas Deceptive Trade Practices

Plaintiffs allege HomeAway violated the Texas Deceptive Trade Practices Act ("DPTA"), TEX. BUS. & COM. CODE §§ 17.41, *et seq.*, by failing to disclose that it would charge fees to renters or Travelers. Plaintiffs allege violations under the DTPA's "laundry list," TEX. BUS. & COM. CODE § 17.46(b), and prohibition of unconscionable action, TEX. BUS. & COM.

CODE § 17.50(a)(3). The underlying facts that give rise to this claim are the same as those that form the basis of Plaintiffs' fraud claim. For the same reasons that HomeAway argues Plaintiffs' fraud claim should fail, HomeAway argues Plaintiffs have failed to state a violation of the DTPA. HomeAway also argues that its conduct was not unconscionable.

The DTPA was enacted to "protect consumers against false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty" and to provide consumers with a means to redress deceptive practices "without the burden of proof and numerous defenses encountered in a common law fraud or breach of warranty suit." *Miller v. Keyser*, 90 S.W.3d 712, 716 (Tex. 2002). Misrepresentations that may not be actionable under common law fraud may be actionable under the DTPA. *Id*. The DTPA makes actionable "[f]alse, misleading, or deceptive acts or practices in the conduct of any trade or commerce," including unconscionable conduct. *Shakeri*, 816 F.3d at 295; TEX. BUS. & COM. CODE § 17.46(a). Unconscionable conduct exists where "an act or practice which, to a consumer's detriment, takes advantage of the lack of knowledge, ability, experience, or capacity of the consumer to a grossly unfair degree." *Shakeri*, 816 F.3d at 295; TEX. BUS. & COM. CODE § 17.45(5).

A DTPA claim does not require that the consumer prove the employee acted knowingly or intentionally. *Miller*, 90 S.W.3d at 716. The DTPA requires that the consumer show that the misrepresentation was false and that the false misrepresentation was the producing cause of the consumer's damages. *Id*. A consumer is not required to prove intent to make a misrepresentation to recover under the DTPA. *Id*. However, DTPA claims that are based on fraudulent misrepresentations or omissions are still subject to the Rule 9(b) pleading standard. *Shakeri*, 816 F.3d at 288 (noting a district court's dismissal of DTPA fraud claims for failing to meet the heightened pleading standards of Rule 9(b)).

HomeAway argues that Plaintiffs' DTPA claim should fail for many of the same reasons it argued Plaintiffs' fraud claim should fail. For the same reasons the court has found that Plaintiffs adequately pleaded a fraud claim, they have also pleaded a claim under the DTPA. HomeAway also argues its conduct was not unconscionable, but, taking Plaintiffs' pleading as true, Plaintiffs have adequately alleged HomeAway took advantage of Plaintiffs' lack of knowledge regarding upcoming changes to HomeAway's Traveler Fee policy. *See e.g.*, SAC ¶¶ 54(a) ("Had Defendant been honest and revealed the fees to travelers when Plaintiffs and other owners subscribed, Plaintiffs and other owners would not have subscribed to, or would have paid less for their subscriptions."); 165.

D. Unjust Enrichment

The parties primarily argue whether unjust enrichment is a standalone claim or merely a theory of recovery. HomeAway argues "to recover under unjust enrichment, a plaintiff must show that the defendant obtained a benefit from another by fraud, duress, or the taking of an undue advantage. . . . Because Plaintiffs fail to plead a viable fraud claim, their unjust-enrichment claim likewise fails." Dkt. #28, Reply Br. at 10. As the court has found that Plaintiffs have stated a claim for fraud, the court will recommend that HomeAway's motion to dismiss be denied as to this claim.

IV. RECOMMENDATIONS

For the reasons given above, the undersigned **RECOMMENDS** the District Court **GRANT** the motion **IN PART** and **DENY** the motion **IN PART**. Specifically, the undersigned recommends the District Court:

GRANT the motion and dismiss without prejudice the non-Texas state law claims in the First through Seventh Causes of Action[12];

GRANT the motion and dismiss without prejudice the Breach of Duty of Good Faith and Fair Dealing claim in the Eighth Cause of Action[13];

DENY the motion as to the Fraud/Fraudulent Concealment claim in the Ninth Cause of Action;

DENY the motion as to the Unjust Enrichment claim in the Tenth Cause of Action;

DENY the motion as to the Texas Deceptive Trade Practices Act claim in the Eleventh Cause of Action; and

GRANT the motion without prejudice as to the Breach of Contract claim in the Twelfth Cause of Action.

The undersigned recommends dismissal without prejudice because a deadline to amend pleadings has not been set.

V. OBJECTIONS

The parties may file objections to this Report and Recommendation. A party filing objections must specifically identify those findings or recommendations to which objections are being made. The District Court need not consider frivolous, conclusive, or general objections. *See Battles v. United States Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987).

A party's failure to file written objections to the proposed findings and recommendations contained in this Report within fourteen (14) days after the party is served with a copy of the Report shall bar that party from de novo review by the District Court of the proposed findings and recommendations in the Report and, except upon grounds of plain error, shall bar the party

[12] Plaintiffs consented to this relief. Dkt. #18 at 6.

[13] Plaintiffs also consented to this relief. Dkt. #18 at 6.

from appellate review of unobjected-to proposed factual findings and legal conclusions accepted by the District Court. *See* 28 U.S.C. § 636(b)(1)(C); *Thomas v. Arn*, 474 U.S. 140, 150-53 (1985); *Douglass v. United Services Automobile Ass'n*, 79 F.3d 1415 (5th Cir. 1996)(en banc).

SIGNED August 1, 2017.

MARK LANE
UNITED STATES MAGISTRATE JUDGE