IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

JEANNE MARSHALL, an individual, and CRAIG KNIGHT , an individual, on behalf of themselves and all other similarly situated,	)	
Plaintiffs,	)	
v.	)	C.A. No. 05C-02-195 WCC
PRICELINE.COM INCORPORATED,	)	
Defendant.	)	

Submitted: May 7, 2008
Decided: August 28, 2008

MEMORANDUM OPINION

On Plaintiffs' Motion for Leave to Amend Their First Amended Complaint Granted

Jeffrey S. Goddess, Rosenthal, Monhait & Goddess, P.A., Suite 1401, 919 Market Street, P.O. Box 1070, Wilmington, Delaware. Attorney for Plaintiffs.

Karen L. Valihura; Skadden, Arps, Slate, Meagher & Flom LLP; One Rodney Square; P.O. Box 636; Wilmington, Delaware. Attorney for Defendant.

CARPENTER, J.

Introduction

Before this Court is Plaintiffs' Jeanne Marshall's and Craig Knight's ("Plaintiffs") Motion for Leave to Amend Their First Amended Complaint filed against Priceline.com ("Priceline" or "Defendant"). Upon review of the record and briefs filed in this matter, this Court hereby grants the Motion.

Factual Background

The Plaintiffs' complaint arises out of separate hotel reservation contracts entered into by Defendant and each Plaintiff, the details of which are fully set out in the Court's previous opinion in this case.[1] In the present Motion before the Court, Plaintiffs seek leave to amend their First Amended Complaint pursuant to Superior Court Civil Rule 15(a).[2] Namely, Plaintiffs wish to add a new allegation that Priceline charges customers an additional fee hidden in the "Offer Price Per Room, Per Night" charge ("Offer Price"), which Priceline retains for itself.[3] Plaintiffs claim this allegation adds to their breach of contract and breach of good faith and fair dealing claims because Defendant represents in its contracts that all fees are disclosed within the "taxes and service fees" line item charge.

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[1] *See Marshall v. Priceline.com, Inc.*, 2006 WL 3175318 (Del. Super. Oct. 31, 2006).

[2] A party may amend its pleading "only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Super. Ct. Civ. R. 15(a). Defendant did not consent to Plaintiffs' proposed amendments.

[3] *See* Pl.'s Motion for Leave to Amend Their First Amended Complaint (hereinafter, "Pl.'s Motion") at 2.

Defendant opposes the Motion and argues in response that Plaintiffs' "new theory" ignores the plain language of the customer agreement, which allows Defendant to charge its customers the full "offer price" and does not prevent Defendant from retaining a margin on that amount. Priceline's "Name Your Own Price" business model allows customers to name an Offer Price for a hotel room, and if that Offer Price is greater than the actual cost to Priceline for obtaining the room, then Priceline can retain the difference as a margin.[4] Plaintiffs claim that this price difference should be disclosed to consumers because Priceline has referred to this amount as a "service fee" in discovery.[5] Defendant maintains that the Motion should be denied because (1) the amendments proposed by Plaintiffs are futile, (2)Plaintiffs were dilatory in raising the claim, and (3)Plaintiffs' new claim unduly prejudices Defendants. The Court heard oral argument and has reviewed again the transcript of the hearing and the briefs submitted by counsel, and the following represents the Court's opinion on the matter.

Standard of Review

A motion for leave to amend is within the sound discretion of the court[6] and leave "shall be freely given when justice so requires."[7] However, a motion to amend

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[4]Def.'s Br. at 11.

[5]Pl.'s Reply Br. at 1-3.

[6]*See E.I. duPont de Nemours & Co. v. Allstate Insurance Co.*, 2008 WL 555919 at *1 (Del. Super. Feb 29, 2008)(citing *Wilson v. Wilson*, 2005 WL 147942 (Del. Super. Jan 14, 2005).

[7]Super. Ct. Civ. R. 15(a).

must be denied if the amendment would not survive a motion to dismiss under Rule 12(b)(6).[8] The Superior Court has denied motions to amend where "the insufficiency of the amendment is obvious on its face."[9]

Discussion

While the Court has significant concerns regarding the legal sufficiency of the amendment and the legal theories upon which it is based, it has decided to grant Plaintiffs leave to file a second amended complaint. The Court does so primarily because the arguments presented by the parties are at this juncture simply that, counsel's arguments without factual support through depositions, interrogatories or other similar discovery material. While the Court is confident that the issue will reappear as a motion for summary judgment, the Court believes that fairness requires it to grant the Motion and allow the parties an opportunity to undertake reasonable discovery to generate support for their positions. While it appears that the December 18, 2007 interrogatory language of "compensation for the services it provides" is an unfortunate use of the term "services," it has opened the door to prevent the Court at this point from finding the Plaintiff's argument to be totally futile or baseless or to

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[8] *Cartanza v. Lebeau*, 2006 WL 903541 at *2 (Del. Ch. April 3, 2006).

[9] *Atamian v. Gorkin*, 1999 WL 459202 at *2 (Del. Super. June 9, 1999). "[I]f there is no set of facts which could be proved under the amendment which would constitute a viable claim or defense, as the case may be, leave should be denied." *Id.*

find there are no disputed facts. The Court will allow the parties to create a proper record upon which a subsequently filed motion for summary judgment can be ruled upon.

Finally, the Court does not find the Defendant's arguments regarding inexcusable delay or undue prejudice to have merit. To a large extent this issue has been created by the terms used by the Defendant in its response to interrogatories in late 2007 and with additional time for discovery and a trial date now in February of 2009, there is no prejudice to the Defendant by the amendment.

As a result, Plaintiffs' Motion for Leave to Amend Their First Amended Complaint is hereby GRANTED.[10]

IT IS SO ORDERED.

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Judge William C. Carpenter, Jr.

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[10] There was a serious allegation made by the Plaintiff during oral argument that the Defendant changes its characterization of the "margin" or "service" depending upon the particular judicial forum they are litigating. Counsel for the Defendant has denied this assertion and has represented that their client's position has been consistent regardless of the litigation forum. As a respected member of the Delaware bar, the Court accepts this representation and would expect if their belief is subsequently found to be incorrect, counsel will immediately notify the Court, as the firm's reputation for candor and professionalism is clearly more important than retaining a client who is attempting to gain an advantage by the semantic use of terms. On the other hand, the Plaintiff is also directed to stop making this assertion unless it can in the future factually clearly support their claims. Calling into question the candor of a member of this bar by innuendo and rumor will not be tolerated and could lead to the revocation of one's privilege to litigate in this matter.