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**In re: EXPEDIA HOTEL TAXES AND FEES
LITIGATION**

Case No.: 05-2-02060-1 SEA
**ORDER ON CROSS MOTIONS FOR
SUMMARY JUDGMENT**

I. Background

Plaintiffs on behalf of the certified class seek summary judgment against Expedia’s “merchant model” of stand-alone hotel reservations. They make two claims. first, a breach of contract, and second, violations of Washington’s Consumer Protection Act. RCW 19.86.020. Plaintiffs ‘SJ Mtn. Dkt. No. 401. Expedia in its cross-motion for summary judgment seeks dismissal of all of Plaintiffs’ claims. Expedia’s SJ Mtn. Dkt. No. 406.

Oral Argument was heard on May 22, 2009, wherein Plaintiff class conceded one theory of their CPA claim involving Expedia’s hotel parity agreements was subject to a genuine issue of material fact. The Court considered the remaining arguments, all relevant exhibits and declarations which inhere to these motions, together with the respective motions to strike certain portions of the declarations of Menenberg, Goldhaber, Maronick, Peterson and Kent.

II. Discussion

A. Standard of Review

Civil Rule 56(c) and Washington case law provide “summary judgment is appropriate 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.” *Locke v. City of Seattle*, 162 Wn.2d 474 (2007). In response to a properly supported motion for summary judgment, the opposing party must set forth specific facts showing that there is a genuine issue for trial. The inquiry performed by the trial court is whether there exist “any genuine factual issues that properly can be resolved only by a finder of

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1 fact because they may reasonably be resolved in favor of either party.” *Anderson v. Liberty*
2 *Lobby, Inc.*, 477 U.S. 242, 250, (1986). For an issue to be “genuine,” there must be evidence
3 such that a reasonable jury could reach a verdict in favor of the nonmoving party. *Id.* at 248.
4 Therefore, a mere “scintilla” of evidence will not be sufficient to defeat a properly supported
5 motion for summary judgment; rather, the nonmoving party must introduce some “significant
6 probative evidence tending to support the complaint.” *Id.* at 252, 249.

7 B. Breach of Contract Terms

8 The contractual language pertinent to this claim of contractual breach concerns the time
9 period of February 18, 2003 through December 11, 2006. Both phone and online reservations
10 are subject to this claim. Specifically, Plaintiffs argue the terms “Service Fee” are at issue. The
11 definition found in the contract is “service fee goes to covering costs.” However, the background
12 on the contract’s numerous iterations with the “Terms of Use” provision are found at Plaintiffs’
13 SJ Mtn. Dkt. No. 401 Ex. No. 11.

14 The parties agree that the Court should give terms their plain, ordinary and popular
15 meaning, looking to English language dictionaries. *W.m. Dickson Co. v. Peirce County*, 128 Wn.
16 App. 488 (2005). Further, Plaintiffs urge that “to cover” means “to defray the cost,” citing to
17 www.meriam-webster.com/dictionary/cover. Expedia does not seriously dispute this definition.
18 Thus, the plain meaning of “service fees” and “costs” in this contract pertain to the actual
19 expense to perform travel reservation services.

20 Expedia argues that the terms “covering costs” includes many things, a veritable laundry list
21 that it identifies as costs. Plaintiffs do not urge that no costs were included in the service fees
22 charged the consumer, rather that more than costs were included, that being profit. In none of
23 the myriad of declarations filed here, does Expedia show that profit, identified as markup, was
24 considered a cost of providing travel reservation services. Indeed, Michael Reichartz in his
25 deposition proffered no clear or otherwise intelligible explanation. Dkt. No. 403, Ex. 3 and 8.
26 The December 10, 2001 email exchange between Lloyd Frink to Greg Slynstad and others
27 states, “As a company this will add between \$2-3 million in our net profit (the bottom line) next
28 quarter.” Plaintiffs correctly conclude “Profits, not costs are the subject matter of these ‘service
29 fees.’” Dkt. No. 402, Ex. 15, and 26. Accordingly, Expedia’s contractual definition of service
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1 fees, found in its “terms of use”¹ was performed in the breach, by collecting profits along with
2 covering costs.

3 C. Voluntary Payment Defense

4 Expedia urges this Court to deny this claim as a matter of law by relying upon the voluntary
5 payment doctrine. Expedia has argued that the “essence” of each class members’ agreement was
6 not breached. Expedia SJ Mtn. at 20. Dkt. No. 406. Plaintiffs dispute this by pointing to the
7 analysis of the Commissioner’s decision when denying discretionary review of this Court’s
8 decision on class certification, wherein he wrote, “money voluntarily paid under a claim of right
9 to the payment and with full knowledge of the facts by the person making the payment cannot be
10 recovered on the ground that the claim was illegal, or that there was no liability to pay in the first
11 instance,” citing *Indoor Billboard/Wash., v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59
12 (2007). Even without the analysis of Court of Appeals Commissioner William Ellis, the
13 doctrine requires a knowing act. Admitted, undisclosed facts about the separate fee amounts and
14 the inclusion of a profit do not equate with full knowledge. Accordingly, this doctrine is not
15 applicable here.

16 D. Extrinsic Evidence

17 Expedia has urged in painstaking detail that this Court consider the subjective understanding
18 of the contracting parties. This is simply legal error. *Scott Galvanizing Ins. v. Northwest Enviro*
19 *Servs., Inc.*, 120 Wn.2d 573 (1993).

20 E. Damages

21 Plaintiff class seeks the full amount of the “services fees” collected during the relevant
22 period, February 18, 2003 through December 11, 2006. Its expert Robert Peterson calculated a
23 total damage amount as \$184,470,451.² Plaintiff’s SJ Mtn. Dkt. No. 401. Ex. A at 7 and Ex. B at
24 22-23. Dkt.No. 403. Expedia refutes the calculation or methodology used to reach this sum,
25 through its own expert, Todd D. Menenberg. Expedia’s SJ Mtn. Dkt. No. 406. Expedia argues
26 that the Plaintiffs’ expert made flawed calculations without analysis or consideration as to the
27 whether other servicing costs should have been included. (Dkt. No. 393 at 15-16.) Plaintiffs

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29 ¹ *Citoli v City of Seattle*, 115 Wn. App 459 (2002) sets forth the elements of a valid enforceable contract.
See Plaintiffs SJ Mtn. at 18. Dkt. No. 401

30 ² Peterson reviewed all booking and transactions databases for January 20, 2001 through June 11, 2008.
31 “By May 18, 2002, all amounts previously collected as taxes on the difference between room cost and
32 room price were then in effect being collected as part of the service fee.” He quantified damages as “the
difference between the tax on the price the consumer or retail rate and the cost to Expedia of the tax
remitted to the hotels based on the wholesale or net rate. Dkt. No. 403 at 3-4.

1 correctly argue that this criticism does not address the “costs incurred in servicing each particular
2 [consumer’s] reservation,” but rather, only in servicing the “merchant hotel business” which is
3 not sufficiently germane to the liability or allegations raised here.

4 Peterson presents four scenarios for consideration of damages. Plaintiff class seeks the
5 first scenario based upon the total service fees. The second scenario applies the service fees
6 minus the variable costs. The third scenario structures services fees minus variable costs and
7 semi-variable costs. The fourth and last scenario contemplates service fees minus variable and
8 semi-variable costs and fixed costs. Absent any meaningful challenge to any of these
9 approached, the Court finds accordingly, that the sum of \$184,470,451.00, representing the full
10 amount of the service fees collected based upon Expedia’s breach of contract, is warranted.

11 12 III. Washington Consumer Protection Act

13 A. Plaintiff’s Bundling Theory

14 Relying upon the language of RCW 19.86.020 and case law interpreting it found at
15 *Hangman Ridge Training Stable, Inc.*, 105 Wash. 2d 778 (1986),³ *Leingang v. Pierce County*
16 *Med, Bureau, Inc.*, 131 Wn.2d 133 (1197) and *Testo v. Russ Dunmire Oldsmobile, Inc.*, 16 Wash
17 App 391 (1976), plaintiff class argues that Expedia’s practice for stand-alone hotel reservations,
18 whether by phone or online, of bundling tax and service fees and failing to disclose the true
19 nature or separate amounts of its fees and taxes has the tendency or capacity to mislead, which is
20 unfair and deceptive under Washington consumer protection statues. Plaintiffs’ SJ Mtn. at 9.
21 Dkt. No. 401. Under Washington law, both affirmative conduct and failures to disclose material
22 information are actionable. *Potter v. Wilbur-Ellis Co.* 62 Wn. App. 318 (1991).

23 The time period alleged begins at the start of the Class period through May 17, 2002 and
24 then again from May18, 2002 (excepting December 20 through 27, 2002) onward through June
25 11, 2008. Plaintiffs’ theory is that Expedia’s bundled “tax and service fee” charges fail to
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27 ³ The CPA's citizen suit provision states that “[a]ny person who is injured in his or
28 her business or property” by a violation of the act may bring a civil suit for injunctive
29 relief, damages, attorney fees and costs, and treble damages. RCW 19.86.090. To prevail in a private
30 CPA claim, the plaintiff must prove (1) an unfair or deceptive act or practice, (2) occurring in trade or
31 causation. *Hangman Ridge Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 784, 719 P.2d 531
32 (1986). *Panag v. Farmers Ins. Co. of Wash.*, 204 P.3d 885. (April 2, 2009).

1 disclose 1) that the taxes paid by consumers are for the retail rate of the reservations, rather than
2 the wholesale rate which Expedia actually remits to the hotel and 2) the service fee which
3 Expedia collects with every room reservation does not disclose how the fee is calculated for
4 standalone room reservations.⁴

5 Expedia urges that the hotel wholesale rate disclosure would affect their "bottom line"
6 and that consumers "know" that the service fees include their markup and can choose whether to
7 pay their price or not. Each of these arguments implicates the "reasonableness" standard which
8 exists in Washington consumer protection law. RCW 19.86.920.⁵ As considered below, the
9 issue of reasonableness is a factual one. Accordingly, Expedia has raised genuine issues of
10 material fact regarding whether Expedia's actions were deceptive or reasonable within the
11 meaning of the Act.

12 B. Causation

13 Expedia's argument that Plaintiff class must show that its members relied upon their
14 bundling actions (or omissions) is, in part, at the heart of this litigation, in this Court's view. The
15 federal law and Washington case law cited by Plaintiff hold that where the alleged deceptive act
16 is a material omission, reliance is not necessary. *Binder v. Gillespie*, 184 F.3d 1059 (9th Cir.
17 1999) and *Morris v. International Yogurt Co.*, 107 Wn.2d 314 (1986). Indeed, the *Morris* court
18 recognized that it is virtually impossible to prove reliance. See also, *Panag, supra* at 900 ¶ 63
19 fn. 15.

20 While Expedia urges this court to apply a "but for" standard of causation or inducement
21 as applied in *Indoor Billboard, supra* and *Panag supra*, this Court is disinclined. To apply the
22 "but for" test where the deceptive act is committed by omission leads to an unjust result,
23 requiring Plaintiffs to prove causation upon "the unknowable," non-disclosed material facts.⁶
24 *Morris, supra*.

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26 ⁴ Expedia argues that the Plaintiff's members do not find the non-disclosure "material." Rather they
27 restate the deposition testimony from plaintiffs that "the bottom line" price really matters. Plaintiffs
28 retort that by analogy *Indoor Billboard* applies. Therein the offending party imposed a bogus charge that
deemed deceptive. The court here accepts the same argument that a failure to disclose the full extent of
service fees and the differences between cost and profit is a material omission.

29 ⁵ "[T]his act shall not be construed to prohibit acts or practices which are reasonable in relation to the
30 development and preservation of business or which are not injurious to the public interest," RCW
19.86.920.

31 ⁶ Washington's CPA provides that "[u]nfair methods of competition and unfair or
32 deceptive acts or practices in the conduct of any trade or commerce are hereby declared
unlawful." RCW 19.86.020. The purpose of the CPA is to "complement the body of
federal law governing restraints of trade, unfair competition and unfair, deceptive and

1 C. RCW 19.86.920 Expedia's Reasonableness Claim

2 Expedia argues that under this statute there is no violation of the CPA and that its
3 practices are reasonable in relation to the development and preservation of business. RCW
4 19.86.920. They cite to *Boeing Co., v. Sierracin Corp.*, 108 Wash. 2d 38 (1987). *Boeing* was
5 alleged to have violated the anti-trust provisions of the Washington consumer protection act by
6 engaging in an unlawful tying arrangement trade secrets case. There the court said that the
7 "statute requires courts to weigh the public interest against the recognition that businesses need
8 some latitude within which to conduct their trade, citing *State v. Black*, 100 Wash. 2d 793
9 (1984)."

10 Plaintiff class urges this Court to find as a matter of law that Expedia's actions were
11 taken in bad faith as part of the court's rejection of the reasonable business necessity. Plaintiff's
12 Response in Opp. Dkt. No. 476. Expedia asserts that its conduct is motivated by legitimate
13 business concerns, one, that its need for confidentiality of hotel pricing is a "norm within the
14 online travel industry," and two, that "bundling taxes and services" retains their competitiveness.
15 To weigh the public interest against the reasonable business needs requires a factual assessment
16 and cannot be answered here as matter of law. Thus, this dispute raises a genuine issue of fact.
17 "For an issue to be "genuine," there must be evidence such that a reasonable jury could reach a
18 verdict in favor of the nonmoving party. *Anderson, supra* at 248. Accordingly, summary
19 judgment for Plaintiff class is not dispositive on their "bundling theory" claim.

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21 IV. Conclusion

22 The Court finds a breach of contract in Expedia's "Terms of Use" provision by its
23 collection of tax and service fees. Accordingly, Plaintiff class's motion for summary judgment
24 on this issue is GRANTED.

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30 fraudulent acts and practices in order to protect the public and foster fair and honest
31 competition." RCW 19.86.920; *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 3.
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1 Plaintiffs' Motion for Summary Judgment on the Washington Consumer Protection Act claims
2 (both theories) is DENIED. Expedia's Cross Motions for Summary Judgment is also DENIED
3 on the breach of contract claim, and DENIED on the consumer protection act claims.

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5 DATED this 28th day of May, 2009.

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9 MONICA J. BENTON
10 SUPERIOR COURT JUDGE
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