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CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY
DEPUTY

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

THEODORE KIRKPATRICK AND CHRISTOPHER COLL, PLAINTIFFS,	§	
V.	§	CIVIL NO. 1:16-CV-733-LY
HOMEAWAY.COM INC. AND DOES 1-10, DEFENDANTS.	§	

ORDER

Before the court in the above-styled and number case are Plaintiffs Theodore Kirkpatrick and Christopher Coll's Motion for Class Certification filed June 21, 2019 (Dkt. No. 112), Defendant HomeAway.com Inc.'s Response to Plaintiffs' Motion for Class Certification filed August 21, 2019 (Dkt. No. 114), Defendant HomeAway.com Inc.'s Motion to Exclude Opinion of Arthur Olsen filed August 21, 2019 (Dkt. No. 116), Plaintiffs' response filed September 23, 2019 (Dkt. No. 122), and HomeAway's reply filed October 10, 2019 (Dkt. No. 125). Having considered the pleadings and the applicable law, the court will grant the motion to exclude Arthur Olsen's opinion and deny the motion for class certification.

Background

Plaintiffs seek damages for alleged violations of the Texas Deceptive Trade Practices Act, common-law fraud, and unjust enrichment against HomeAway. HomeAway operates several websites that facilitate individuals who own or manage vacation properties to list their properties for rent. Plaintiffs own properties and listed them on HomeAway's websites with yearly subscriptions.

Plaintiffs allege that before 2016, HomeAway distinguished itself from other similar websites by not charging traveler's fees. Traveler's fees are booking fees charged to the renter of the property. HomeAway, through marketing to property owners and representations on its websites, conveyed a promise to not charge traveler's fees. Plaintiffs claim the promise was relied upon by Plaintiffs in their decision to renew or create subscriptions with HomeAway. Finally, Plaintiffs allege that by implementing traveler's fees on February 9, 2016, HomeAway injured them by reducing their rental income.

Both Plaintiffs listed properties on at least one of HomeAway's websites. Kirkpatrick initially purchased a subscription in 2011 and renewed it annually until the traveler's fees were implemented in 2016. Coll purchased a subscription in 2014 and renewed in 2015 only. Neither Plaintiff renewed his subscription after the traveler's fees were implemented. Plaintiffs submit that the class is composed of HomeAway property owners who purchased or renewed listing subscriptions from February 9, 2016, to February 9, 2017.

Plaintiffs present the testimony of Arthur Olsen in support of their claim of class-wide damages. Olsen is the principal of Casis Technology, an information-technology firm. Olsen specializes in the areas of data analysis, database development, and database-administration support. Olsen testified as to a lost-income model and a subscription-devaluation model as candidates for models to determine class-wide damages. Olsen stated that, given the appropriate data, he could calculate the result of those two models. He did not offer an opinion as to whether the models are appropriate for the calculation of damages in this case.

Analysis

The court will first address the motion to exclude and then turn to the motion for class certification.

Rule 702 of the Federal Rules of Evidence governs expert testimony, which provides that:

> [i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

FED. R. EVID. 702. Rule 702 was amended to incorporate the principles first articulated by the United States Supreme Court in *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). *See* FED. R. CIV. P. 702, Adv. Comm. Notes (2000). Under *Daubert*, expert testimony is admissible only if the proponent demonstrates that: (1) the expert is qualified; (2) the evidence is relevant to the suit; and (3) the evidence is reliable. *See Moore v. Ashland Chem. Inc.*, 151 F.3d 269, 276 (5th Cir. 1998). Although true that rejecting expert testimony is the exception rather than the rule, this does not mean that the court will refrain from granting a motion to exclude expert testimony in an appropriate case, such as when the expert is not qualified to testify on a particular subject or the underlying methodology is unreliable. *See* FED. R. EVID. 702; *Daubert*, 509 U.S. at 592–93.

Further, the *Daubert* analysis does not judge the expert conclusions themselves. *Daubert*, 509 U.S. at 594–95. The focus must be solely on principles and methodology rather than the conclusion generated. *Id.* at 995. However, conclusions and methodology are not entirely distinct from one another. *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997). Nothing in *Daubert* or the Federal Rules of Evidence requires a trial court to admit opinion evidence that is connected to

existing data only by the *ipse dixit* of the expert. *Id.* A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered. *Id.*

HomeAway contests the relevancy and reliability of Olsen's testimony. Olsen testifies as to two proposed damages models (lost-income and subscription-devaluation). Olsen states in his deposition that the two models were provided to him by Plaintiffs' lawyer. He also states that, "it's up to someone else, the judge, jury, whatever, to decide if that's an accurate reflection of damages. I'm not saying one way or the other." Olsen also states that the models do not consider, *inter alia*, any factors such as seasonality, construction status of the homes, and competing rental home markets. Olsen has no opinion as to what factors should be considered in an appropriate damages model for the potential class. "I'm just telling you this is the calculation that's being performed and here are the results. . . . As long as those results are accurate as described then that's the end of my role." When asked if it was correct that he did not have an opinion, "whether the output of the lost income model actually equates to homeowner's damages," he responded, "I think that's fair. Yeah." His opinion is not relevant to the availability of class-wide damages and is therefore not relevant to this case. Thus, the court will grant the motion to exclude the testimony of Arthur Olsen.

Turning to the motion for class certification, Federal Rule of Civil Procedure 23 sets forth the requirements for establishing a certifiable class in federal court. Subsection (a) provides:

> One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
>
> (1) the class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law or fact common to the class;
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

FED. R. CIV. P. 23(a).

Subsection (b) directs that a class action may only be maintained if one of the following is satisfied:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

FED. R. CIV. P. 23(b).

Accordingly, a class may be properly certified if it meets the requirements of Rule 23(a) and one or more of the provisions of Rule 23(b) are satisfied. The trial court "maintains substantial

discretion in determining whether to certify a class action." *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 408 (5th Cir. 1998) (citation omitted). "Implicit in this deferential standard is a recognition of the essentially factual basis of the certification inquiry and of the district court's inherent power to manage and control pending litigation." *Maldonado v. Ochsner Clinic Found.*, 493 F.3d 521, 523 (5th Cir. 2007).

Both Plaintiffs and HomeAway have agreed that this case is to be analyzed using Rule 23(a) and Rule 23(b)(3). HomeAway opposes class certification on a number of grounds. Specifically, HomeAway argues first that there are no common questions whose answers will resolve an issue that is central to the validity of each one of the class member's claims pursuant to Rule 23(a)(2). Second, that Plaintiffs are not typical of the proposed class members pursuant to Rule 23(a)(3). Third, that Plaintiffs cannot adequately represent the class pursuant to Rule 23(a)(4). Finally, HomeAway argues that the class cannot be certified because individualized reliance issues predominate under Rule 23(b)(3).

> The class action is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Califano v. Yamasaki,* 442 U.S. 682, 700–701 (1979). To come within the exception, a party seeking to maintain a class action "must affirmatively demonstrate his compliance" with Rule 23. *Wal–Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349 (2011). The Rule "does not set forth a mere pleading standard." *Ibid.* Rather, a party must not only "be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact," typicality of claims or defenses, and adequacy of representation, as required by Rule 23(a). *Ibid.* The party must also satisfy through evidentiary proof at least one of the provisions of Rule 23(b).

Comcast Corp. v. Behrend, 569 U.S. 27, 33 (2013). A district court should "look beyond the pleadings to understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues." *McManus v. Fleetwood Enters., Inc.*, 320 F.3d 545, 548 (5th Cir. 2003) (internal quotations omitted); *see also M.D. ex re. Stukenberg v. Perry*, 675 F.3d 832, 837 (5th Cir. 2012).

Federal Rule of Civil Procedure 23(a)

Numerosity

Under Rule 23(a)(1), a class may be certified only if "the class is so numerous that joinder of all members is impracticable." Plaintiffs contend that the class would compose of approximately 9,542 persons. HomeAway does not contest this contention. Given the vast number of potential members in the proposed class, the court finds that the proposed class meets the requirements of Rule 23(a)(1).

Commonality

Under Rule 23(a)(2), a class may be certified only if "there are questions of law or fact common to the class." To satisfy the commonality requirement, the class members' claims must "depend upon a common contention" that "is capable of class wide resolution–which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc.*, 564 U.S. at 350. These "common answers" may indeed relate to the injurious effects experienced by the class members, but they may also relate to the defendant's injurious conduct. "[E]ven a single common question will do." *In re Deepwater Horizon*, 739 F.3d 790, 811 (5th Cir. 2014).

Plaintiffs contend that the following questions are common to all class members: (1) the date on which HomeAway made decision to implement traveler's fees, (2) the date HomeAway began discussing whether to implement traveler's fees, (3) the date which HomeAway made decision to cease its "no fee" marketing campaign, (4) the date HomeAway made decision to remove representations that it did not charge traveler's fees, (5) the amount of traveler's fees applied across rental bookings of class members' properties, (6) whether representations about not charging traveler's fees was the value proposition the class members relied on when to purchasing

subscriptions, (7) whether the representation that HomeAway did not charge travelers fees on the subscription sign-up pages of its websites was a material misrepresentation, (8) whether the class experienced a downturn in bookings following the imposition of the fees, and (9) whether the class experienced a loss of revenue from their listed properties following the imposition of the fees. The court agrees that HomeAway's conduct is a common question across all class members. HomeAway argues that there are no common questions that will resolve a central issue and class members' claims "in one stroke." However, it is not a requirement that the common questions be dispositive of the entire claim. Therefore, because there are common questions that apply to all members of the class, the court finds that the proposed class meets the requirement of Rule 23(a)(2).

Typicality

Pursuant to Rule 23(a)(3), a class may be certified only if the "claims or defenses of the representative parties are typical of the claims or defenses of the class." The test "focuses on the similarity between the named plaintiffs' legal and remedial theories and the theories of those whom they purport to represent." *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 625 (5th Cir. 1999) (quotation omitted).

Plaintiffs contend that they are typical of the class because they were exposed to the same representations by HomeAway regarding traveler's fees as other class members, relied upon the representations by HomeAway when deciding whether to purchase or renew their subscriptions, and suffered economic damages because of that reliance. HomeAway disputes the typicality of Plaintiffs and submit that neither Plaintiff suffered actual damages, because their respective properties were owned by limited-liability companies, which absorbed the added fees. The court is unconvinced by this argument. The court finds that because Plaintiffs both listed properties

with HomeAway, relied on the promotion of no traveler's fees, and ended their relationship with HomeAway after the implementation of traveler's fees, they satisfy the typicality requirement of Rule 23(a)(3).

Adequacy

Rule 23(a)(4) of the Federal Rules of Civil Procedure requires that "the representative parties will fairly and adequately protect the interests of the class." The rule "mandates an inquiry into the zeal and competence of the representative's counsel and into the willingness and ability of the representative to take an active role in and control the litigation and to protect the interests of absentees." *Horton v. Goose Creek ISD*, 690 F.2d 470, 484 (5th Cir. 1982). The court must find that class counsel is "qualified, experienced, and generally able to conduct the proposed litigation." *N. Am. Acceptance Corp. v. Arnall, Golden & Gregory*, 593 F.2d 642, 644 (5th Cir. 1979) (quoting *Johnson v. Ga. Highway Express, Inc.*, 417 F.2d 1122, 1125 (5th Cir. 1969)). Additionally, "the class representatives [must] possess a sufficient level of knowledge and understanding to be capable of controlling or prosecuting the litigation." *Feder v. Elec. Data Sys. Corp*, 429 F.3d 125, 129–30 (5th Cir. 2005) (internal quotations omitted). "Differences between named plaintiffs and class members render the named plaintiffs inadequate representatives only if those differences create conflicts between the named plaintiffs' interests and the class members' interests." *Mullen*, 186 F.3d at 625–26 (citing *Jenkins v. Raymark Industries, Inc.*, 782 F.2d 468, 472 (5th Cir. 1986) (considering whether named plaintiffs have "an insufficient stake in the outcome or interests antagonistic to the unnamed members" in evaluating adequate-representation requirement)).

The court finds that because the interests of Plaintiffs are aligned with the proposed class members, and Plaintiffs' counsel is adequate to handle the case, the requirements of Rule 23(a)(4) are met.

Because of the vast number of potential members in the proposed class, common questions that apply to all members of the class exist, Plaintiffs are typical members of the class, and the Plaintiffs' counsel is adequate, the court concludes that the requirements of Rule 23(a) are met.

Federal Rule of Civil Procedure 23(b)(3)

To certify a class under Federal Rule of Civil Procedure 23(b)(3), the court must determine that "questions of law or fact common to class members predominate over any questions affecting only individuals members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." The purpose of Rule 23(b)(3) is to identify those actions in which certification of a class "would achieve economies of time, effort and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 615 (1997) (citation omitted an internal quotation marks omitted).

Superiority

HomeAway does not challenge the superiority of conducting the case as a class action. The court finds that because there are many proposed class members, potentially with negative-value suits, the superiority requirement of Rule 23(b)(3) is met.

Predominance

The predominance inquiry requires courts "to consider how a trial on the merits would be conducted if a class were certified." *Bell Atl. Corp. v. AT&T Corp.*, 339 F.3d 294, 302 (5th Cir.

2003) (internal quotations and citation omitted). The inquiry "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623–24.

Plaintiffs contend that the common questions regarding HomeAway's misrepresentation that it would not charge traveler's fees predominate the claim. HomeAway disputes this and argues that the proposed class fails the predominance requirement because individualized issues of reliance and damages predominate the case.

A claim under the Texas Deceptive Trade Practices Act (the "Act") requires, "(1) the plaintiff is a consumer; (2) the defendant engaged in false, misleading, or deceptive acts; and (3) these acts constituted a producing cause of the consumer's damages." *Chamrad v. Volvo Cars of North America,* 145 F.3d 671, 672 n. 3 (5th Cir.1998) (citing *Doe v. Boys Clubs of Greater Dallas, Inc.,* 907 S.W.2d 472 (Tex. 1995)); Tex. Bus. & Com. Code §17.46. The third element of a valid complaint under the Act requires that the class members prove that the alleged misrepresentations caused actual damages. This requires both an inquiry into the individual reliance on any statements HomeAway may have made or not made and an inquiry into whether any individual damages were suffered. These inquires would result in individual mini trials for each member of the class and defeat the purpose of forming a class. Because individual reliance is a central element under the Act and the court concludes that the proposed class fails to meet the requirements of Rule 23(b)(3) for a claim under the Act.

Individual reliance is also central to the claim of common-law fraud. A fraud class action cannot be certified when individual reliance will be an issue and the economies ordinarily associated the class-action device are defeated where proof of individual reliance is required. *Slade v. Progressive Sec. Ins. Co.*, 856 F.3d 408, 415 (5th Cir. 2017) (collecting cases) (internal citations and quotations omitted). Furthermore, fraud actions that require proof of individual

reliance cannot be certified as Rule 23(b)(3) class actions because individual, rather than common, issues will predominate. *Id.* Because individual reliance is a central element of fraud, the court concludes that proposed class fails to meet the requirements of Rule 23(b)(3) for a claim of common-law fraud.

Plaintiffs also allege unjust enrichment. "A party may recover under the unjust enrichment theory when one person has obtained a benefit from another by fraud, duress, or the taking of an undue advantage." *Heldenfels Bros., Inc. v. City of Corpus Christi*, 832 S.W.2d 39, 41 (Tex. 1992). Fraud or misrepresentation are the principal grounds for a claim of unjust enrichment. Restatement (Third) of Restitution and Unjust Enrichment §13 (2011). Reliance by Plaintiffs on HomeAway's statements is an element in all of the wrongdoing precedent to a claim of unjust enrichment. Because individual reliance is a required element for this claim of unjust enrichment, the court concludes that proposed class fails to meet the requirements of Rule 23(b)(3) a claim of unjust enrichment.

As individual reliance is an element in all of the claims brought by the Plaintiffs, the predominance requirement of Rule 23(b)(3) is not met.

Conclusion

IT IS ORDERED that HomeAway's Motion to Exclude Opinion of Arthur Olsen is filed on August 21, 2019 (Dkt. No. 116) is **GRANTED**.

IT IS FURTHER ORDERED that Plaintiffs' Motion for Class Certification Pursuant to Fed. R. Civ. P. 23(a) and (b)(3) filed June 21, 2019 (Dkt. No. 112) is **DENIED**. The case may proceed with the named Plaintiffs only.

IT IS FINALLY ORDERED that the parties are to submit to the court a Proposed Agreed Scheduling Order, in accordance with Federal Rule of Civil Procedure 26(f), that follows

the form scheduling order of this court located on the website for the United States District Court for the Western District of Texas (www.txwd.uscourts.gov), the "Forms" tab, "Civil," "Austin Division," "Proposed Scheduling Order for Judge Yeakel," **on or before May 15, 2020**.

SIGNED this 21st day of April, 2020.

LEE YEAKEL
U.S. DISTRICT JUDGE