

NO. 07-04813-J

AMAZON TOURS, INC.,	§	IN THE DISTRICT COURT
	§	
Plaintiff,	§	
	§	
v.	§	191ST JUDICIAL DISTRICT
	§	
THOMAS RUSSELL CRADDICK and	§	
WILLIAM ALEXANDER MESSER III,	§	
	§	
Defendants.	§	DALLAS COUNTY, TEXAS

DEFENDANTS' FIRST AMENDED ANSWER AND ORIGINAL COUNTERCLAIM

Defendants Thomas Russell Craddick ("Craddick") and William Alexander Messer III ("Messer") file this First Amended Answer and Original Counterclaim as follows:

GENERAL DENIAL

1. Defendants generally deny each and every, all and singular, the allegations contained in Plaintiff's Third Amended Petition, and demand strict proof thereof by a preponderance of the evidence.

AFFIRMATIVE DEFENSES

2. Defendants affirmatively plead the following defenses:

- (1) Failure of consideration; and
- (2) No consideration; and
- (3) Waiver.

VERIFIED DEFENSES

3. Defendants affirmatively plead that the consideration for the contract sued upon by Plaintiff is without consideration.

4. Defendants affirmatively plead that the consideration for the contract sued upon by Plaintiff has failed in whole or in part.

WHEREFORE, PREMISES CONSIDERED, Defendants request that upon hearing, Plaintiff take nothing by reason of its lawsuit, that Defendants recover the costs associated with this case, and for such other and further relief, both at law and in equity, to which they may show themselves justly entitled.

DEFENDANTS' ORIGINAL COUNTERCLAIM

Counter-Plaintiffs Thomas Russell Craddick ("Craddick") and William Alexander Messer III ("Messer") file this original counterclaim complaining of Counter-Defendant Amazon Tours, Inc. ("Amazon Tours") as follows:

DISCOVERY CONTROL PLAN

1. Counter-Plaintiffs intend to conduct discovery under Level 1 of the Texas Rules of Civil Procedure, Rule 190.2 because this suit involves monetary relief totally \$50,000 or less, excluding court costs, pre-judgment interest, and attorneys' fees.

PARTIES

2. Counter-Plaintiff Craddick is an individual residing in Midland County, Texas.

3. Counter-Plaintiff Messer is an individual residing in Bell County, Texas.

4. Counter-Defendant Amazon Tours is a corporation organized under the laws of Texas with its principal place of business in Dallas County, Texas. Amazon Tours has already entered an appearance in this case and may be served with process by serving a copy of this pleading on its counsel of record.

JURISDICTION AND VENUE

5. Jurisdiction is proper in this Court because Counter-Plaintiffs seek damages in an amount within the jurisdictional limits of this Court.

6. Venue is proper in Dallas County, Texas pursuant to section 15.062 of the Texas Civil Practice and Remedies Code.

FACTUAL BACKGROUND

7. Craddick and Messer purchased a fishing trip in the Amazon Tours from Counter-Defendants scheduled for February 3-12, 2006. Amazon Tours holds itself out as being "far and away the best," providing "the World's Best Peacock Bass Fishing since 1992," and that is puts the "satisfaction of our guests above all else." Craddick and Messer signed the "client reservation form" proffered by Counter-Defendant, and paid \$10,600 in required deposits.

8. Days before the trip, Amazon canceled, claiming that high water conditions made the trip unfeasible. Craddick and Messer were unable to reschedule due to their schedules, and requested a refund. Amazon Tours led Craddick and Messer to believe that a refund would be issued, going so far as to advise them that the refund was being "processed," yet the refund was never received. Upon Messer and Craddick's continued inquiries requesting a conversation with the person in charge of the refund, they were given false phone numbers, and were subjected to the treatment generally reserved for unwanted creditors of on-the-run debtors.

9. The contract contains the following clause:

(a) No refunds are given for any unused pre-paid services included in the tour package or any changes made in the itinerary while enroute, including changes in hotel accommodations, excursions, and transportation services.

(b) Any request for a refund must be presented in writing within 30 days of your return. Requests for a refund based on a claim of exceptional circumstances will be considered by Amazon Tours, Inc. on a case-by-case basis. Amazon Tours, Inc. at its sole discretion will determine whether exceptional circumstances exist and determine the amount of the refund, if any.

10. Counter-Defendant apparently relies upon these provisions as the basis for its refusal to refund Counter-Plaintiffs' deposit. In fact, the paragraph does not apply to the situation at all. No cancelation was made "enroute." The trip was never begun. The limitation on a refund clearly contemplates a trip having been taken since it denotes the time period for the request as within 30 days "of your return." There was no return in this case, because there was no trip. Accordingly, Counter-Defendant has no basis, contractual or otherwise, for refusing to refund Counter-Plaintiffs' deposits.

11. On March 8, 2007, Counter-Plaintiffs demanded a refund of their money, but Counter-Defendant has refused to refund the payment.

COUNT ONE - CONVERSION

12. Counter-Plaintiffs hereby incorporate paragraph 1 through 11 in this Count One as if fully set forth herein.

13. Counter-Plaintiffs own, possess, and have the right to immediately possess the sum of \$10,600.00.

14. Counter-Defendant, who legally acquired possession of Counter-Plaintiffs' personal property, wrongfully exercised dominion and control over the property when it refused to return the property upon Counter-Plaintiffs' demand. Counter-Defendant's wrongful acts proximately caused injury to Counter-Plaintiffs, which resulted in damages in the amount of \$10,600.00.

15. Counter-Defendants' actions were purposeful, done with malice, and with a conscious disregard for the rights of Counter-Plaintiffs. Counter-Plaintiffs seek damages in the amount of twice the amount of actual damages.

COUNT TWO – DECEPTIVE TRADE PRACTICES ACT

16. Counter-Plaintiffs hereby incorporate paragraph 1 through 15 in this Count Two as if fully set forth herein.

17. Counter-Plaintiffs are consumers under the DTPA because they are individuals who sought services by purchase.

18. Counter-Defendant is a corporation that can be sued under the DTPA.

19. Counter-Defendant violated DTPA § 17.46(b)(9), (12), and (24). Specifically, Amazon Tours advertised its trips with the intent not to sell them as advertised by representing that it would provide a trip when it did not and had no intention of doing so. Further, Amazon Tours represented that its reservation agreement and contract for the trip involved rights, remedies, or obligations which it does not, by failing to disclose to Counter-Plaintiffs that it could unilaterally cancel a trip and keep Counter-Plaintiffs' deposit. In fact, Amazon Tours' entire contract is similar to a bait-and-switch tactic in that they induced Counter-Plaintiffs to pay their money for a trip which they then canceled, ostensibly because of high water, but which were facts only verifiable by them and not by Counter-Plaintiffs. Counter-Defendants never intended to make the trip, and instead kept Counter-Plaintiffs' money and have had the use of it for two years. Counter-Defendants' conduct was a producing cause of injury to Counter-Plaintiffs resulting in damages in excess of the minimum jurisdictional limit of this court. Further, Counter-Defendant acted knowingly, entitling Counter-Plaintiffs to recover treble damages under DTPA § 17.50(b)(1). Counter-Plaintiffs further seek their attorneys' fees in prosecuting this action under DTPA § 17.50(d).

PRAYER

WHEREFORE, PREMISES CONSIDERED, Counter-Plaintiffs request that Counter-Defendant be cited to appear and answer, and that on final trial, Counter-Plaintiffs have judgment against Counter-Defendant for:

- (1) Actual damages as set forth in Counts One and Two;
- (2) Treble damages as set forth in Count Two;
- (3) Attorneys' fees as set forth in Count Two;
- (4) Costs of court;
- (5) Pre- and post-judgment interest; and
- (6) Such other an/d further relief, both at law or in equity, to which Counter-Plaintiffs may show themselves justly entitled.

Respectfully submitted,

THOMAS & BLACKWOOD LLP
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By: /s/ Beth Ann Blackwood

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ATTORNEYS FOR DEFENDANTS/
COUNTER-PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of March, 2008, a true and correct copy of the foregoing document was forwarded, via facsimile, to the following:

G. Kevin Buchanan, Esq.
Edmund Rugger Burke III, Esq.
Melissa J. Bellan, Esq.
BUCHANAN & BURKE, L.L.P.
200 Premier Place
5910 N. Central Expressway
Dallas, Texas 75206

/s/ Beth Ann Blackwood

Beth Ann Blackwood

VERIFICATION

THE STATE OF TEXAS §

COUNTY OF TRAVIS §

BEFORE ME, the undersigned authority, on this day personally appeared William Alexander Messer III, known to me to be the person duly authorized to make this affidavit, and who, being by me first duly sworn, on his oath states that he has read the above and foregoing Defendants' First Amended Original Answer and Counterclaim, and that the statements contained paragraph 3 of the Answer are true and correct.

William Alexander Messer III

William Alexander Messer III

SUBSCRIBED AND SWORN TO BEFORE ME on this 6th day of ^{March} ~~February~~, 2008, to certify which witness my hand and seal of office.

Angela C. Adams

Notary Public in and for the State of Texas

