

# SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: CHARLES E. RAMOSPART 53Justice

TRILEGIANT CORPORATION

INDEX NO. 651850/11MOTION DATE                     

- V -

ORBITZ, LLC and TRIP NETWORK, INC.

MOTION SEQ. NO. 007MOTION CAL. NO.                     The following papers, numbered 1 to                     , were read on this motion to/for                     Notice of Motion/Order to Show Cause - Affidavits - Exhibits                      No(s)                     Answering Affidavits - Exhibits                      No(s)                     Replying Affidavits                      No(s)                     

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with  
accompanying memorandum decision and order.

DATED: 10/4/13

  
**CHARLES E. RAMOS** J.S.C.

1. CHECK ONE :

2. CHECK AS APPROPRIATE :

3. CHECK IF APPROPRIATE :

☐ CASE DISPOSED☒ NON-FINAL DISPOSITIONMOTION IS: ☐ GRANTED ☒ DENIED☐ GRANTED IN PART ☐ OTHER☐ SETTLE ORDER☐ SUBMIT ORDER☐ DO NOT POST☐ FIDUCIARY APPOINTMENT☐ REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 53

-----x  
TRILEGIANT CORPORATION,

Plaintiff,

Index No. 651850/2011

-against-

ORBITZ, LLC and TRIP NETWORK, INC.,

Defendants.  
-----x

**Hon. Charles E. Ramos, J.S.C.**

In motion sequence 007, the defendants Orbitz, LLC and the Trip Network, Inc. (collectively, "Orbitz") move for summary judgment to dismiss the plaintiff Trilegiant Corporation's ("Trilegiant") complaint, which alleges causes of action for breach of contract and declaratory judgment.

### **Background**

This action arises out of a master services agreement (the "MSA") executed between Trilegiant and Orbitz on October 17, 2005.

Pursuant to the relevant portions of the MSA, Trilegiant agreed to provide various marketing services to Orbitz until December 31, 2010 (Complaint, ¶ 18). The MSA further provided that Orbitz could terminate the marketing services prior to December 31, 2010 in exchange for the payment of a predetermined fee on a fixed quarterly installment payment schedule (the "Termination Payments"). The Termination Payments purportedly represented Trilegiant's future revenues from the marketing

service at issue in this action known as DataPass.

Under DataPass, a consumer who booked flights or hotels through Orbitz's website would be presented with an optional secondary transaction that could be purchased without requiring the consumer to re-enter their payment information. The secondary transactions usually involved subscriptions to travel related services and were processed by Trilegiant. Essentially, DataPass involved the practice of passing the consumer's payment information directly from Orbitz to Trilegiant absent any notification to the consumer.

On June 28, 2007, Orbitz provided notice that it would exercise its option to terminate the MSA early, effective December 31, 2007. Pursuant to the MSA, effective December 31, 2007, upon the early termination of the MSA, Orbitz was obligated to pay Trilegiant \$18,453,000 over 35 quarterly Termination Payments.

In 2010, criticism of DataPass arose when numerous consumers complained that they were unaware that they were participating in the secondary transaction because they were not prompted to re-enter their payment information. This led to investigations by the Federal government into DataPass and the enactment of the Restore Online Shopper's Confidence Act ("ROSCA"), which effectively banned DataPass and similar marketing practices (15 USC § 8401).

For this reason, Orbitz contends that it is no longer obligated to pay the Termination Payments. Orbitz argues that the payments amount to a windfall for Trilegiant because it would not have been able to continue generating revenue from DataPass after the enactment of ROSCA.

As of the filing of this motion, Orbitz has made Termination Payments for each of the four quarters in 2008 and 2009, and the first quarter for 2010, totaling \$6,218,875. On June 30, 2010, Orbitz defaulted under the MSA and remains in default due to its failure to make any additional Termination Payments.

Thereafter, Trilegiant commenced this action alleging breaches of the MSA and seeking a declaration that it is entitled to the remaining Termination Payments from Orbitz from June 30, 2011 until September 30, 2016.

### **Discussion**

Orbitz has raised the affirmative defense of illegality arguing that DataPass has been declared illegal, and as a result, Orbitz is no longer obligated to continue making the Termination Payments.

There is no dispute that ROSCA prohibits DataPass and similar marketing programs or that Trilegiant would be entitled to the Termination Payments, but for the enactment of ROSCA. Instead, the dispute in this motion relates to whether or not the enactment of ROSCA renders Orbitz's continuing obligations under

the MSA unenforceable.

This Court finds that it does not.

It should be noted that ROSCA was not effective until December 29, 2010, two days before the MSA would have expired if Orbitz did not exercise its option for early termination in 2007.

The law on illegal contracts is well settled. Illegal contracts may violate statutes that are either "malum prohibitum (evil because prohibited)" or "malum in se (evil in themselves)" (*Balbuena v IDR Realty LLC*, 6 NY3d 338, 366 [2006]). As a general rule, illegal contracts are unenforceable (*Lloyd Capital Corp. v Pat Henchar, Inc.*, 80 NY2d 124, 127 [1992]). "However, where contracts which violate statutory provisions are merely *malum prohibitum*, the general rule does not always apply" (*id.*).

"If the statute does not provide expressly that its violation will deprive the parties of their right to sue on the contract, and the denial of relief is wholly out of proportion to the requirements of public policy...the right to recover will not be denied" (*id.*).

"As a general rule also, forfeitures by operation of law are disfavored, particularly where a defaulting party seeks to raise illegality as a sword for personal gain rather than a shield for the public good" (*id.* at 128 [internal quotations omitted]).

"Allowing parties to avoid their contractual obligation is especially inappropriate where there are regulatory sanctions and

statutory penalties in place to redress violations of the law" (*id.*).

Despite Orbitz's contentions, enforcement of the MSA would not result in this Court compelling conduct in violation of ROSCA. The record is clear that any practices related to DataPass were terminated when Orbitz exercised its option to terminate the MSA early.

Orbitz's arguments that the violations of ROSCA are *malum in se* are unpersuasive. Orbitz fails to cite any binding authority to support its arguments. Therefore, the MSA is *malum prohibitum* and may be enforceable.

ROSCA does not provide that any violating contracts are rendered unenforceable or that its provisions were intended to apply retroactively (15 USC § 8401). In addition, ROSCA clearly provides regulatory sanctions and statutory penalties to address any further violations of its provisions (15 USC § 8404).

Furthermore, the enforcement of the MSA would not result in a violation of ROSCA because this Court is not compelling the continuing use of DataPass, rather it is enforcing the Termination Payments agreed upon by the parties. To impose a forfeiture on Trilegiant would allow Orbitz to have reaped the benefit of the MSA and avoid its corresponding obligations. It simply cannot be said that the enforcement of the Termination Payments equates to the promotion of DataPass.

"Past the point where the judgment of the Court would itself be enforcing the precise conduct made unlawful by the Act, the courts are to be guided by the overriding general policy...of preventing people from getting other people's property for nothing when they purport to be buying it" (*Lloyd* at 129).

Moreover, the primary purpose of ROSCA was to protect consumers (15 USC § 8401), not marketers that were using DataPass as a tool (*Lloyd* at 127-8). The sophisticated parties clearly had the ability to condition the Termination Payments on the legality of DataPass or related marketing practices, but failed to do so. No authority has been submitted by Orbitz that would allow this Court to rewrite the MSA to reach a more favorable result for Orbitz.

Therefore, this Court concludes that the terms of the MSA should be enforced.

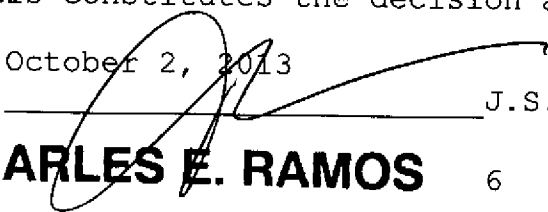
Accordingly it is,

ORDERED that the defendants Orbitz LLC and Trip Network, Inc.'s motion for summary judgment is denied in its entirety, and it is further,

ORDERED that the parties are to contact the Clerk of Part 53 to schedule a status conference within thirty (30) days of the entry of this decision.

This constitutes the decision and order of the Court.

Dated: October 2, 2013

  
J.S.C.

**CHARLES E. RAMOS**