IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ADRIAN BOMBIN, on behalf of himself and all others similarly situated,

Plaintiff,

vs.

SOUTHWEST AIRLINES CO.,

Defendant.

CIVIL ACTION

No: 20-CV-01883

ORAL ARGUMENT REQUESTED

MEMORANDUM IN SUPPORT OF SOUTHWEST AIRLINES CO.'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO TRANSFER

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Dated: June 22, 2020

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INTRODUCTION

Section 4(c) of Southwest's Contract of Carriage expressly permits the airline to offer a credit towards the purchase of future travel for *nonrefundable* tickets for flights that Southwest cancels. ECF 1, p. 30 of 64. The Complaint and putative class action alleging breach of contract and seeking a refund to the original form of payment (as required by the Contract of Carriage for *refundable* tickets) for *nonrefundable* tickets for flights canceled because of the COVID-19 pandemic ignore the plain language of section 4(c) and should be dismissed under Rule 12(b)(6), Fed. R. Civ. P., for failure to state a claim for which relief may be granted. Plaintiff's arguments regarding the April 3, 2020 U.S. Department of Transportation ("DOT") "Notice Regarding Refunds by Carriers Given the Unprecedented Impact of the COVID-19 Public Health Emergency on Air Travel" ("DOT Notice") likewise fail to support a breach of contract claim.[1] Neither the DOT Notice nor the statute it is purportedly based on – 49 U.S.C. § 41712 (unfair and deceptive practices) – creates a private right of action on Plaintiff's behalf. Only DOT, and not private parties, can enforce consumer protection rules against the airlines.[2]

By offering Plaintiff a credit towards future travel for his *nonrefundable* ticket, Southwest met its contractual obligations under the Contract of Carriage. Thus, Plaintiff's breach of contract claim alleging contractual obligations beyond the parties' express written agreement is preempted by the Airline Deregulation Act of 1978, 49 U.S.C. § 41713(b) ("ADA"), because it relates to an

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[1] https://www.transportation.gov/airconsumer/enforcement_notice_refunds_apr_3_2020

[2] Southwest has been communicating with DOT on this issue and does not anticipate any DOT enforcement action. Following the DOT Notice and prior to Plaintiff filing this suit, in an effort to meet the airline's Customer Service goals and address any DOT concerns – **not** due to any contractual obligation – Southwest offered refunds and other flight credit options (further extended expiration period for the flight credit; ability to convert credit to loyalty program Rapid Rewards points with no expiration and ability to use to purchase a ticket for other individuals) to customers who purchased nonrefundable fares whose flights were canceled by Southwest during the pandemic.

air carrier "price." The narrow exception to ADA preemption for routine breach of contract claims, *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 232 (1995), does not apply here as Southwest did not contractually commit to refund nonrefundable airfare to the original form of payment. Plaintiff's claim is also preempted by the "Convention for the Unification of Certain Rules for International Carriage by Air" (1999) (the "Montreal Convention") because it relates to international air transportation and the Complaint does not allege "complete nonperformance" of Southwest's contract with Plaintiff.

Separately, dismissal of the Complaint is appropriate because Plaintiff agreed to pursue his breach of contract claim against Southwest in Texas when he assented to the Southwest.com terms and conditions (including a forum selection clause) applicable to his purchase of a Southwest ticket. Moreover, in that same forum selection clause, Plaintiff agreed not to pursue his claim as a class action, and, therefore, Plaintiff lacks standing to seek to represent a consumer class. Finally, if this case is not dismissed it should be transferred to the U.S. District Court for the Northern District of Texas pursuant to 28 U.S.C. § 1404.

STATEMENT OF FACTS

On February 27, 2020, Plaintiff used his Southwest Airlines mobile application to purchase two *nonrefundable* "Wanna Get Away" tickets on Southwest for Plaintiff and a companion to travel round-trip from Baltimore-Washington International Airport to Havana, Cuba. *See* Complaint, ECF 1, ¶ 24. On March 20, 2020, the Government of Cuba announced the closure of its borders to non-Cuban citizens.[3] As a result, Mr. Bombin's flight was canceled by Southwest and Southwest offered to provide a future travel credit to Plaintiff for his nonrefundable fare, instead of a refund. *Id.* ¶¶ 16-17, 27-28.

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[3] https://cu.usembassy.gov/covid-19-information/

Plaintiff contends that "Southwest's Contract of Carriage mandates refunds, not credits, in this situation."[4] *Id*. ¶ 17. On April 3, 2020, the DOT issued the DOT Notice, *supra,* Complaint ¶ 18, which implored airlines to offer refunds for flights canceled by an airline because of the pandemic. *Id.* Southwest, on May 5, 2020, refunded to Plaintiff's credit card the $345.35 he had paid for his nonrefundable airfare, and has made refunds available for other nonrefundable tickets purchased for flights canceled because of the COVID-19 pandemic.

APPLICABLE STANDARD

In considering a motion to dismiss under Rule 12(b)(6), the court "accept[s] all factual allegations as true [and] construe[s] the complaint in the light most favorable to the plaintiff." *Warren Gen. Hosp. v. Amgen Inc.*, 643 F.3d 77, 84 (3d Cir. 2011) (internal quotation marks and citation marks omitted). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell. Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* (citing *Twombly*, at 555). A "plaintiff must" allege facts sufficient to "'nudge [his] claims across the line from conceivable to plausible.'" *Phillips v. County of Allegheny*, 515 F.3d 224, 234 (3d Cir. 2008) (quoting *Twombly*, at 570).

Under Rule 12(b)(1), Fed. R. Civ. P., "a court must grant a motion to dismiss if it lacks subject-matter jurisdiction to hear a claim." *In re Schering Plough Corp*., 678 F.3d 235, 243 (3d Cir. 2012). "'A motion to dismiss for want of standing is . . . properly brought pursuant to Rule 12(b)(1), because standing is a jurisdictional matter.'" *Id.* (quoting *Ballentine v. United States*, 486 F.3d 806, 810 (3d Cir. 2007)). "In evaluating a Rule 12(b)(1) motion, a court must first

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[4]The Southwest Contract of Carriage is attached to Plaintiff's Complaint as Exhibit A (ECF 1).

determine whether the movant presents a facial or factual attack." *Schering*, at 243. In reviewing a facial challenge, which contests the sufficiency of the pleadings, the court considers "the allegations of the complaint and the documents referenced therein and attached thereto, in the light most favorable to the plaintiff." *Gould Elec. Inc. v. United States*, 220 F.3d 169, 176 (3d Cir. 2000). By contrast, a factual 12(b)(1) challenge attacks allegations underlying the assertion of jurisdiction in the complaint, and it allows the defendant to present competing facts. *Constitution Party of Pa. v. Aichele*, 757 F.3d 347, 358 (3d Cir. 2014); *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977).

ARGUMENT

I. PLAINTIFF'S CLAIM FOR BREACH OF CONTRACT SHOULD BE DISMISSED UNDER RULE 12(b)(6).

A. There Was No Breach of Contract – Southwest had the Contractual Option of Giving a Fare Credit Rather than a Fare Refund for a Nonrefundable Ticket Under its Contract of Carriage.

Pursuant to the unambiguous language of section 4(c)(4) of the Southwest Contract of Carriage, if a passenger's scheduled transportation is canceled by Southwest and the passenger purchased a nonrefundable ticket,[5] the "Carrier will either **transport the passenger at no additional charge** on another of Carrier's flights, **refund the fare for the unused transportation** in accordance with the form of payment utilized for the Ticket, **or provide a credit for such amount toward the purchase of future travel**." (Emphasis added) In other words, for a flight canceled by Southwest, ***the airline has the choice*** of one of three options with respect to nonrefundable tickets: (1) accommodate the passenger on a different flight, (2) refund the airfare, ***or*** (3) "provide a credit . . . toward the purchase of future travel." It is undisputed that Southwest

[5]Sections 4(c)(1) and 4(c)(3) set forth the difference between refundable and nonrefundable fares.

acted within the bounds of its discretion in issuing Plaintiff a fare credit in lieu of a fare refund on March 27, 2020.[6] Complaint, ECF 1, ¶¶ 27-28.

As set forth in section 10(c)(1) of the Contract of Carriage, Texas law applies to this dispute. "When construing a contract" under Texas law, the court is to "give contract terms their plain, ordinary, and generally accepted meanings unless the contract itself shows them to be used in a technical or different sense." *Bennett v. Comm'n for Lawyer Disc*., 489 S.W.3d 58, 68 (Tex. App. 2016). In construing section 4(c)(4) of the Contract of Carriage, the use of the disjunctive "or" demonstrates that Southwest was able to choose which form of relief it wanted to offer for nonrefundable tickets. *Shell Petroleum Corp. v. Royal Petroleum Corp.*, 137 S.W.2d 753, 758 (Tex. Comm'n App. 1940) ("In its ordinary use the term 'or' is disjunctive, and alternative in its effect. Unless there is some impelling reason apparent in the context, it should be given its ordinary, rather than a conjunctive meaning") (internal citation omitted). In contrast, Southwest does not have this discretion for *refundable* tickets because of the requirements of section 4(c)(1).

Ignoring the express language in section 4(c)(4), Plaintiff asserts that section 9(a)(1)(ii) of the Contract of Carriage required refund of his nonrefundable airfare. Complaint, ECF 1, ¶ 30. In addition to conflicting with the more specific section 4(c)(4), this argument ignores the plain language of section 9(a)(1)(ii) which explains that Southwest will "refund the unused portion of the Passenger's fare ***in accordance with Section 4c***." ECF 1, at 56 (emphasis added). Section 4(c), in turn, makes a distinction between "refundable" and "non-refundable" fares and, to state the obvious, ***includes section 4(c)(4)*, which expressly allowed Southwest to elect a fare credit as Plaintiff's remedy**.

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[6]The fact that Southwest ultimately refunded Plaintiff's fare subsequent to the DOT Notice does not change the fact that Southwest did not breach the Contract of Carriage when it exercised its right to use a fare credit in lieu of cash for the refund.

"Courts are not authorized to rewrite agreements to insert provisions parties could have included or to imply terms for which they have not bargained." *Bennett, supra*, 489 S.W.3d at 68. "In other words, courts cannot make, or remake, contracts for the parties." *Id*. at 69; *see also id.* at 69-70 (plaintiff's "construction is not reasonable because it requires the insertion of additional language into the Agreement"); *Tenneco Inc. v. Enterprise Prods. Co.*, 925 S.W.2d 640, 646 (Tex. 1996) ("We have long held that courts will not rewrite agreements to insert provisions parties could have included"); *Cross Timbers Oil Co. v. Exxon Corp.*, 22 S.W.3d 24, 26 (Tex. App. 2000) ("we may not rewrite the agreement to mean something it did not. . . . Simply put, we cannot change the contract merely because we or one of the parties comes to dislike its provisions or thinks that something else is needed in it"); *id*. at 26-27 ("For a court to change the parties' agreement merely because the Court did not like the agreement, or because one of the parties subsequently found it distasteful, would be to undermine not only the sanctity afforded the contract but also the expectations of those who created and relied upon it"). In fact, Plaintiff seeks to rewrite and expand the rights available to passengers by eliminating section 4(c)(4)'s distinction between refund terms for refundable and nonrefundable fares, which are spelled out in sections 4(c)(1) and 4(c)(3). Had Southwest intended to provide cash refunds for *all* ticket types in the event of a flight cancellation, there would be no reason to include "or (3) provide a credit . . . toward the purchase of future travel" in 4(c)(4) or make a distinction between refundable and refundable fares in 4(c)(1) and 4(c)(3).

Plaintiff also asserts that section 12 of the Southwest Customer Service Commitment provides for a "refund of the unused portion of [the] Southwest ticket." Complaint, ECF 1, ¶ 32. However, this language merely mirrors the language in section 9 of the Contract of Carriage and cannot override section 4(c)(4) for the same reasons set forth above. Black letter law of contract

interpretation prohibits Plaintiff from using the more general reference to "refund" in section 9 and the Customer Service Commitment to render the language of section 4(c)(4) useless and to erase from the contract Southwest's right to refund *nonrefundable* tickets to a travel credit. Plaintiff's observation that neither section 9 of the Contract of Carriage nor section 12 of the Customer Service Commitment "provides for any 'credit' for use on a future Southwest flight" instead of a cash refund (Complaint, ECF 1, ¶ 33) simply ignores the plain language of the more-specific and unambiguous section (c)(4) of the Contract of Carriage. *See Lederer v. Lederer*, 561 S.W.3d 683, 693 (Tex. App. 2018) ("No one phrase, sentence, or section of a contract should be isolated from its setting and considered apart from the other provisions[,]" and "[t]o the extent of any conflict, specific provisions control over more general ones.") (citing *Forbau v. Aetna Life Ins. Co.*, 876 S.W.2d 132, 133-34 (Tex. 1994)); 11 Williston on Contracts § 32:10 (4th ed.) ("When general and specific clauses conflict, the specific clause governs the meaning of the contract").

In the recent *Hughes v. Southwest Airlines Co*., No. 19-3001, __ F.3d __, 2020 WL 3071992 (7th Cir. June 10, 2020), the court affirmed the dismissal of a breach of contract claim against Southwest relating to flight cancelations at Midway Airport. In considering the language in section 4(c)(4) of the Contract of Carriage, the Court determined that this provision permits Southwest to cancel a flight and "'either transport the [p]assenger at no additional charge on another of Carrier's flights, refund the fare for the unused transportation . . ., ***or provide a credit for such amount toward the purchase of future travel***[,]" and emphasized that "[t]hese options **are not qualified in any way** . . . .'" *Id*. *3 (emphasis added); *id*. ("Again, these options are not qualified or limited in any manner."); *id.* *4 ("The alternate options in case of delay or cancelation as laid out in § 4 are **unqualified**.") (emphasis added).

B. Plaintiff's Claim Alleging Contractual Obligations Beyond the Parties' Written Agreement in the Contract of Carriage is Preempted by the Airline Deregulation Act.

By offering Plaintiff credit towards future travel for his nonrefundable ticket, Southwest met its contractual obligations under the express terms of its Contract of Carriage. Plaintiff's breach of contract claim alleging contractual obligations beyond the parties' written agreement should be dismissed because it is preempted by the ADA.

Pursuant to the ADA, a state "may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier . . . ." 49 U.S.C. § 41713(b); *Morales v. TWA, Inc.*, 504 U.S. 374, 384 (1992). Plaintiff's claim against Southwest relates to an air carrier "price," namely the amount he paid for air transportation to and from Cuba, for which he did not receive a refund when he initially requested it. *See Howell v. Alaska Airlines, Inc.*, 994 P.2d 901, 905 (Wash. App. 2000) ("challenge to [airline's] refusal to refund the price of a nonrefundable ticket is preempted by the ADA"); *Buck v. Am. Airlines, Inc.*, 476 F.3d 29, 36 (1st Cir. 2007) (claim for refund of taxes and fees applicable to airfare was preempted because it related to an air carrier "price").

In *Wolens, supra*, 513 U.S. at 228, the Supreme Court held that the ADA's preemption clause does not "shelter airlines from suits alleging no violation of state-imposed obligations, but seeking recovery solely for the airline's alleged breach of its own, self-imposed undertakings." "The *Wolens* exception is a narrow one, however, allowing breach of contract claims based on the terms of the parties' bargain 'with no enlargement or enhancement based on state laws or policies external to the agreement.'" *See Onoh v. Northwest Airlines, Inc.*, No. 3:08-CV-1110-N, 2009 WL 10702913, *2 (N.D. Tex. Sept. 1, 2009), *aff'd*, 613 F.3d 596 (5th Cir. 2010) (quoting *Wolens*, at 233); *Buck, supra*, 476 F.3d at 35 (discussing the narrow scope of the *Wolens* exception).

The narrow exception to ADA preemption for self-imposed airline obligations does not apply here because Southwest did not agree in writing to refund Plaintiff's airfare in the event that Southwest was required to cancel the flight. In order to prevail on his claim for breach of contract and to avoid ADA preemption, Plaintiff is asserting that the phrase "at the sole option of the passenger" needs to be added to section 4(c)(4), such that it reads as follows:

> Carrier will, *<u>at the sole option of the [p]assenger,</u>* either transport the [p]assenger at no additional charge on another of Carrier's flights, refund the fare for the unused transportation in accordance with the form of payment utilized for the Ticket, or provide a credit for such amount toward the purchase of future travel.

However, this language does not appear in the Contract of Carriage, and Plaintiff cannot require the Court to revise the language of the Contract of Carriage to achieve his objective. Plaintiff's attempt to rewrite the Contract of Carriage runs squarely afoul of *Wolens'* prohibition on "enlargement or enhancement based on state laws or policies external to the agreement," and is for that reason preempted by the ADA. *Wolens*, 513 U.S. at 233.

C. Plaintiff Cannot Predicate his Breach-of-Contract Claim on the DOT Enforcement Guidance.

In an effort to shore up his claim that Southwest was contractually obligated to refund the airfare, Plaintiff asserts that the lack of "refunds for canceled flights violates . . . federal law" as reflected in the DOT Notice. Complaint, ECF 1, ¶¶ 18-19. However, as a matter of law, Plaintiff may not rely on the DOT Notice to make his case. This is because neither the DOT Notice, nor the statute it is purportedly based on – 49 U.S.C. § 41712 (unfair and deceptive practices) – creates a private right of action on Plaintiff's behalf. *See Bailey v. Rocky Mountain Holdings, LLC*, 889 F.3d 1259, 1268 n. 21 (11th Cir. 2018) ("The prohibition on unfair or deceptive practices in 49 U.S.C. § 41712 has been held not to create a private right of action.") (*citing Casas v. Am. Airlines, Inc.*, 304 F.3d 517, 519-20 (5th Cir. 2002); *Polansky v. TWA*, 523 F.2d 332, 340 (3d Cir. 1975)). Section 41712 "is 'a means of vindicating the public interest' and does not provide 'a remedy for

private wrongs.'" *Id.* (citing *Pan Am. World Airways, Inc. v. United States*, 371 U.S. 296, 306 (1963)). "DOT, not private parties, will enforce consumer protection rules against the airlines." *Statland v. Am. Airlines, Inc.*, 998 F.2d 539, 541 (7th Cir. 1993); *Star Marianas Air, Inc. v. Commonwealth Ports Authority*, No. 17-cv-00012, 2018 WL 4140780, *5 (D.N.M.I. Aug. 30, 2018) ("the Court finds that there is no private right of action under § 47129 and therefore, there cannot be a private right of action under the policy statement promulgated pursuant to this statute"). The lack of a private right of action forecloses the Plaintiff from attempting to argue that the parties implicitly agreed to make DOT compliance a contractual term. *See Buck, supra,* 476 F.3d at 36-37 ("The plaintiffs have not directed us to a single case holding that a federal regulation incapable of spawning an implied private right of action may be enforced between private parties as an implicit contractual term."). In addition, as DOT has acknowledged, DOT "[g]uidance documents cannot create binding requirements that do not already exist by statute or regulation." 84 Fed. Reg. 71,714, 71,731 (Dec. 27, 2019) (Final Rule).

D. Plaintiff's Claim is Preempted by the Montreal Convention.

Because the flight for which the Plaintiff purchased his ticket was international (USA to Cuba), the Montreal Convention apples to his claim. The Montreal Convention is a multilateral treaty that governs international air carrier liability. *Sompo Japan Ins., Inc. v. Nippon Cargo Airlines Co., Ltd.*, 522 F.3d 776, 780-81 (7th Cir. 2008).[7] The Convention was signed by the United States in 1999 and took effect in September 2003 after it was ratified by the United States Senate. The "Convention applies to all international carriage of persons, baggage or cargo performed by aircraft for reward." Article 1. Cuba is a signatory to the Convention. Section 8 of

[7]The Convention is at https://www.iata.org/contentassets/fb1137ff561a4819a2d38f3db7308758/mc99-full-text.pdf

the Southwest Contract of Carriage expressly references the Montreal Convention. ECF 1, at 51-53.

Article 19 of the Convention states that the "carrier is liable for damage occasioned by delay in the carriage by air of passengers . . . . Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures." Here, Southwest should not be liable for a delay in international air transportation if Southwest can prove that it "took all measures that could reasonably be required to avoid the damage," or that "it was impossible . . . to take such measures."

Notably, the Complaint does not even purport to allege violation of the Montreal Convention. Rather, it only contains a single claim under state law for breach of contract. Yet the Convention preempts a state law claim inconsistent with Article 19 of the Convention. In this manner, a plaintiff cannot escape application and preemption of the Montreal Convention through artful pleading. Pursuant to Article 29 of the Montreal Convention, "[i]n the carriage of passengers, baggage and cargo, **any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as set out in this Convention** . . . ." (Emphasis added). *See Fields v. BWIA Inter. Airways Ltd.*, No. 99-cv-2493 (JG), 2000 WL 1091129, *4 (E.D.N.Y. July 7, 2000) ("Plaintiff's attempt to make the claim sound in breach of contract terms does not change the fact that the claim, however founded, arose out of a delay in transportation.") (quoting *Sassouni v. Olympic Airways*, 769 F. Supp. 537, 540-41 (S.D.N.Y. 1991)). In other words, the Plaintiff's breach of contract claim must be pursued, if at all, pursuant to the Montreal Convention. *See Ratnaswamy v. Air Afrique*, No. 95 C 7670, 1998 WL 111652, *5 (N.D. Ill. March 3, 1998)

("since the Court concludes that Plaintiffs' claim which arises out of a delay in international air transportation is governed by Article 19 of the Warsaw Convention, Plaintiffs' state law claims . . . are preempted"); *Sanches-Naek v. TAP Portugal, Inc.*, 260 F. Supp. 3d 185, 191 (D. Conn. 2017) ("Under the scheme provided for by the Warsaw Convention and Montreal Convention . . ., passengers are 'denied access to the profusion of remedies that may exist under the laws of a particular country, **so that they must bring their claims under the terms of the Convention or not at all**'") (emphasis added) (quoting *King v. Am. Airlines, Inc.*, 284 F.3d 352, 357 (2d Cir. 2002)).

For a breach of contract claim to successfully circumvent the Montreal Convention, the plaintiff must demonstrate ***complete*** nonperformance of the contract, *i.e.*, where an air carrier refuses to transport the plaintiff or provide any other form of relief. "[F]ederal courts have concluded that where the complaint alleges **complete nonperformance of a contract**, rather than delay in transportation, the Montreal Convention does not preempt a plaintiff's breach of contract claim." *Atia v. Delta Airlines, Inc*., 692 F. Supp. 2d 693, 699 (E.D. Ky. 2010) (emphasis added) (Montreal Convention did not apply because airline refused to transport plaintiff) (citing *Nankin v. Continental Airlines, Inc.*, No. CV-09-07851, 2010 WL 342632, at *7 (C.D. Cal. Jan. 29, 2010); *Mullaney v. Delta Air Lines, Inc.*, No. 08-cv-7324, 2009 WL 1584899, at *3 (S.D.N.Y. June 3, 2009) (holding plaintiff's breach of contract claim was not preempted by the Montreal Convention because plaintiff was "seeking damages resulting from Delta's refusal to provide him with *any* flight home after having taken his money for a ticket – in short, for failure to perform its obligation to provide carriage in exchange for money it had received"); *Chattopadhyay v. Aeroflot Russian Airlines*, No. CV 11-00443, 2011 WL 13220279, *10 (C.D. Cal. Aug. 17, 2011) ("it cannot be said that Aeroflot completely refused to perform its duties under its agreement with [plaintiff]. As a

result, [plaintiff's] argument that his claims are not preempted because Aeroflot was [sic] failed to perform its contract is unavailing, and provides no basis for escaping the preemptive effect of the Montreal Convention.").

The Complaint does not allege "complete nonperformance" of the contract by Southwest, *i.e.*, that Southwest refused to transport plaintiff eventually or to provide any other relief in the alternative to a refund (including a fare credit to be used on future Southwest flights). Therefore, the Montreal Convention applies and preempts Plaintiff's state law breach-of-contract claim against Southwest.

E. Plaintiff's Claim Should be Dismissed Because of the Forum Selection Clause in the Southwest.com Terms and Conditions.

Dismissal of the Complaint and action also should occur under Rule 12(b)(6) because of the forum selection clause agreed to by Plaintiff which designated Texas as the proper forum for this dispute. *See Podesta v. Hanzel*, 684 Fed. App'x 213, 216 (3d Cir. 2017) (non-precedential) (finding that while a party could move under section 1404(a) "to transfer a case to another federal court based on a valid forum selection clause, a Rule 12(b)(6) dismissal is also an acceptable means of enforcing such a clause when . . . the clause allows for suit in either a state or federal forum")); *Atl. Marine Constr. Co., Inc. v. U.S. Dist. Ct. for W.D. Tex.*, 571 U.S. 49, 61 & n. 4 (2013) (recognizing in dictum the possibility that Rule 12(b)(6) would be a valid mechanism for enforcing a forum selection clause).

Plaintiff purchased his ticket using the Southwest mobile application. Complaint, ECF 1, ¶ 24 ("Plaintiff purchased two tickets for travel from BWI to Havana, Cuba . . . through Southwest Airlines' owned and operated Mobile App"). The terms and conditions for use of the application are publicly available at https://www.southwest.com/html/about-southwest/terms-and-conditions/index.html (last modified April 4, 2017) At the very top, the terms and conditions

inform the user (Mr. Bombin) that "By using the Service or by clicking accept or agree to these Terms when this option is made available to you, you accept these Terms . . . ." The "Forum Selection" clause in the terms and conditions states:

> These Terms and the relationship between you and Southwest shall be governed by the laws of the State of Texas without regard to any conflict of law provisions. **You agree to the personal and exclusive jurisdiction of the courts located within Dallas, TX. You hereby consent to the exclusive jurisdiction and venue of the State and Federal courts in Dallas, Texas in all disputes.** You agree and understand that you will not bring against the Southwest Parties any class action lawsuit related to your access to, dealings with, or use of the Service. (Emphasis added) *Id.*

By tapping "Purchase," Plaintiff agreed to the "below conditions" on his application screen, which included the promise that the "courts located within Dallas, TX" would have "exclusive jurisdiction" over the "relationship between [Mr. Bombin] and Southwest." Accordingly, the Complaint and action should be dismissed.

II. BECAUSE PLAINTIFF WAIVED ANY RIGHT TO PURSUE HIS CLAIM AS A CLASS ACTION THE COURT LACKS SUBJECT MATTER JURISDICTION TO CONSIDER PLAINTIFF'S CLAIM.

The Complaint also should be dismissed under Rule 12(b)(1) or 12(b)(6), Fed. R. Civ. P. because Plaintiff waived any right to proceed as a class action. As set forth above, the forum selection clause in the terms and conditions to which Plaintiff agreed when using the Southwest app to purchase his ticket stated: "**You agree and understand that you will not bring against the Southwest Parties any class action lawsuit related to your access to, dealings with, or use of the Service**." (Emphasis in original) Plaintiff's putative class action against Southwest relating to an airfare refund clearly is "related to" use of the web app "Service" because he purchased his ticket through the "Service." The scope of the term "related to" as used in the terms and conditions should be construed broadly. *See Attain, LLC v. Workday, Inc.*, No. 5:17-cv-03499, 2018 WL 2688299, *4-5 (E.D. Pa. June 4, 20118) (Leeson, J.) ("'Where a forum-selection clause uses the

phrases "arising under," "arising out of," or similar language, the clause is construed narrowly to cover only disputes "relating to the interpretation and performance of the contract itself." . . . Where, however, the clause uses broader language, such as "relating to" and "in connection with," courts read the clause more broadly.'") (Citation omitted).

Accordingly, the Plaintiff agreed to waive a class action when he indicated his agreement to the Southwest web app terms and conditions by purchasing his ticket on the app. Such agreements are known as "clickwrap agreements." *See Noble v. Samsung Elec. Am., Inc.*, 682 Fed. App'x 113, 117 n.5 (3d Cir. 2017); *Zabokritsky v. Jetsmarter, Inc.*, No. 19-273, 2019 WL 2563738, *3 (E.D. Pa. June 20, 2019). A clickwrap agreement "presents the user with a message on his or her computer screen, requiring the user to manifest his or her assent to the terms of the . . . agreement by clicking on an icon." *Zabokritsky*, 2019 WL 256738 at *3 (citation omitted); *Noble*, 682 Fed. App'x at 117 n.5 ("Clickwrap agreements are terms that appear on a consumer's computer screen and to which a consumer can manifest assent by clicking on an icon indicating agreement.") (citation omitted). "The user is unable to access the product unless or until the icon is clicked. Whether the user actually reads the terms to which she assents is immaterial." *Zabokritsky*, 2019 WL 256738 at *3 (internal citation and quotation omitted) "Absent a showing of fraud, failure to read an enforceable clickwrap agreement, as with any binding contract, will not excuse compliance with its terms." *Feldman v. Google, Inc.*, 513 F. Supp. 2d 229, 236 (E.D. Pa. 2007) (citations omitted).

Because Plaintiff agreed to the web application terms and conditions when clicking to make his ticket purchase, his attempt to pursue his claim through a class action should be dismissed. *See Gamayo v. Match.com LLC*, Nos. C 11-00762 SBA, *et seq.*, 2011 WL 3739542, *7 (N.D. Cal. Aug. 24, 2011) (enforcing click-wrap forum selection clause in favor of litigation in Texas, against

California putative class action plaintiff who accepted agreement to subscribe to online dating service); *Covino v. Spirit Airlines, Inc.*, 406 F. Supp. 3d 147, 152-53 (D. Mass. 2019) (enforcing clickwrap agreement to which passenger agreed when buying ticket on airline's online booking page and which imposed a six-month limitation period for filing a claim). Plaintiff's waiver of the right to pursue his claim as part of a class action precludes him from having the requisite "standing" to represent the putative class, which is an additional ground for dismissal of the Complaint and action at the outset of the case. *See Rabin v. NASDAQ OMX PHLX LLC*, 182 F. Supp. 3d 220, 229 (E.D. Pa. 2016) (plaintiff must first satisfy the requirements of Article III standing prior to court engaging in Rule 23 class certification analysis since "[a] federal rule cannot alter a constitutional requirement") (citations omitted); *In re Franklin Mut. Funds Fee Litig.*, 388 F. Supp. 2d 451, 460 (D.N.J. 2005) ("Standing is a threshold inquiry, not a mere hurdle that can be cleared with the assistance of Rule 23."); *Polanco v. Omnicell, Inc.*, 988 F. Supp. 2d 451, 464 (D.N.J. 2013) ("Because Plaintiff's standing to bring a claim against [defendant] is a threshold jurisdictional requirement, the Court considers this argument at the outset.") (internal citation omitted). Plaintiff lacks standing because he waived the right to pursue a class action and cannot represent the other consumers in the proposed class. The absence of standing to pursue a class action deprives a court of subject matter jurisdiction. *Schering Plough, supra*, 678 F.3d at 243.

The Court can find no standing without having to look beyond the Complaint because the Complaint (¶ 24) refers to the Southwest app. However, under Rule 12(b)(1), the Court could separately consider the language of the southwest.com terms and conditions applicable to the mobile app in resolving this issue by treating the argument as a "factual attack." *Constitution Party of Pa.*, *supra*, 757 F.3d at 358; *Davis v. Wells Fargo*, 824 F.3d 333, 349 (3d Cir. 2016).

III. IF THIS CASE IS NOT DISMISSED, IT SHOULD BE TRANSFERRED TO THE U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS.

If the case is not dismissed, transfer of this case to the Northern District of Texas alternatively should occur pursuant to 28 U.S.C. § 1404(a), which states that, "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented." In the typical case not involving a forum selection clause, a district court considering a section 1404(a) motion "must evaluate both the convenience of the parties and various public-interest considerations." *Atl. Marine Const., supra*, 571 U.S. at 62. "The calculus changes, however, when the parties' contract contains a valid forum-selection clause, which 'represents the parties' agreement as to the most proper forum.'" *Id.* (quoting *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 31 (1988)). In such cases, "'***a valid forum-selection clause [should be] given controlling weight in all but the most exceptional cases***.'" *Id.* (quoting *Stewart*, at 33) (emphasis added); *see also Attain, LLC, supra*, 2018 WL 2688299, at *3.

Even without consideration of the forum selection clause in the Southwest.com terms and conditions, transfer of venue is appropriate in the circumstances presented here. Although there is no definitive formula or list of factors for courts to consider in ruling on § 1404(a) motions, courts consider variants of public and private interests protected by § 1404(a). Private interest factors that the Court may consider include: (1) plaintiff's forum preference as manifested by his original choice; (2) the defendants' forum preference; (3) whether the claim arose elsewhere; (4) the convenience of the parties as indicated by their relative physical and financial condition; (5) the convenience of the witnesses but only to the extent that they may actually be unavailable for trial in one of the fora; (6) the location of the books and records similarly limited to the extent that the files could not be produced in the alternative forum; and (7) practical considerations that could

make the trial easy, expeditious, or inexpensive. *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 879 (3d Cir. 1995). Public interest factors to be considered include: (1) the enforceability of the judgment; (2) court congestion of the different fora; (3) local interest in deciding local controversies at home; (4) public policies of the fora; and (5) familiarity of the trial judge with the applicable law in state diversity cases. *Id*.

Application of these factors supports transfer of the case to the Northern District of Texas. First, Southwest's headquarters and its relevant personnel and documents are located in the Northern District of Texas, and that is where the claim arose (*i.e.,* where Southwest determines flight cancelations and Southwest's Passenger refund policies are implemented, monitored, and enforces). It was in Dallas where Southwest decision-makers cancelled international flights in response to COVID-19 restrictions and issued any applicable policies and guidance related to flight cancellations, and where Southwest initially denied Mr. Bombin's refund request. *See Theresa Ayling v. Travelers Prop. Cas. Corp.*, No. 99-3243, 1999 WL 994403, *5 (E.D. Pa. Oct. 28, 1999). Second, Texas law applies to this dispute and the Northern District of Texas has more experience with applying Texas law. Third, while Southwest believes Plaintiff should not be able to pursue a class action (as explained above), transfer is appropriate because Plaintiff seeks to represent a class of plaintiffs located throughout the United States. *See Koster v. (Am.) Lumbermens Mut. Cas. Co*., 330 U.S. 518, 524 (1947) ("where there are hundreds of potential plaintiffs . . . the claim of any one plaintiff that a forum is appropriate merely because it is his home forum is considerably weakened"); *Smith v. HireRight Sols, Inc*., No. 09-6007, 2010 WL 2270541, *3 (E.D. Pa. June 7, 2010) ("the choice of forum of a named plaintiff in a class action suit should be given less deference since any member of the putative class could potentially bring suit in his or her own forum"); *Howell v. Shaw Indust.*, Nos. CIV. 93-2068, *et seq.*, 1993 WL 387901, at *3-4, 8 (E.D.

Pa. Oct. 1, 1993) (transferring class action to Georgia – where defendants were located – despite the fact that six plaintiffs resided in Pennsylvania). Finally, Dallas is not only more convenient for Southwest but is equally convenient as Pennsylvania for Plaintiff's counsel, who are largely based in Minneapolis, California and Washington, D.C.

CONCLUSION

For the reasons set forth above, Southwest respectfully requests that the Complaint and action be dismissed; that the class allegations be stricken; or the case be transferred to the U.S. District Court for the Northern District of Texas.

Dated: June 22, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that on June 3, 2020, the parties met and conferred by telephone in a conversation between Jeff Ostrow and Melissa Weiner for Plaintiffs, and Todd Noteboom and Roy Goldberg for Defendant, regarding the Defendant's legal arguments for why the Defendant maintains that the Plaintiff's claim should be dismissed or transferred, as ultimately Defendant set forth in the above brief after Plaintiffs did not unilaterally withdraw or transfer their claim.

Date: June 22, 2020

/s/ M. Roy Goldberg

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CERTIFICATE OF SERVICE

I, James T. Moughan, hereby certify that a true and correct copy of the foregoing was filed electronically and was made available for viewing and downloading via the Court's CM/ECF system, and all counsel of record was served via the court's CM/ECF system notification. A courtesy copy of the foregoing was emailed to Chambers_of_Judge_John_Gallagher @paed.uscourts.gov.

Date: June 22, 2020

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