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

ADRIAN BOMBIN and SAMANTHA ROOD, on behalf of themselves and all others similarly situated, Plaintiffs, 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, TO STRIKE CLASS ALLEGATIONS, OR TRANSFER

Todd A. Noteboom (PA I.D. 308557)
STINSON LLP
50 South Sixth Street, Suite 2600
Minneapolis, MD 55402
Telephone: (612) 335-1894
Todd.noteboom@stinson.com

James T. Moughan (PA I.D. 33045)
BENNETT BRICKLIN & SALTZBURG LLC
Centre Square West Tower, 32nd Floor
1500 Market Street
Philadelphia, PA 19102
Telephone: (215) 665-3402
Facsimile: (215) 561-6661
moughan@bbs-law.com

M. Roy Goldberg
STINSON LLP
1775 Pennsylvania Avenue, N.W., Suite 800
Washington, D.C. 20006
Telephone: (202) 728-3005
Roy.goldberg@stinson.com
(Admitted Pro Hac Vice)

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Counsel for Defendant Southwest Airlines Co.

TABLE OF CONTENTS

INTRODUCTION

The addition of new plaintiff Samantha Rood, who canceled her own nonrefundable ticket, does not save the First Amended Complaint ("FAC") from dismissal. Plaintiffs' arguments that they were entitled to a refund of their *nonrefundable* tickets ignores the plain language of Southwest's Contract of Carriage 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. Given what transpired with Plaintiffs' booked air travel, and the nature of their claims, the following two Southwest Contract of Carriage provisions govern this dispute: For Ms. Rood, it is Section 4(c)(3), titled "Nonrefundable Tickets," which states the general rule that the "fare paid for unused travel by Passengers who purchase restricted, **nonrefundable** Tickets are **not eligible for refunds**, except as provided in this Section and Section 9b" but "may be applied toward the purchase of future travel on Carrier . . . ." Section 4(c)(3), ECF 14, p. 40 of 74 (emphasis added). For Mr. Bombin, it is Section (4)(c)(4), which states that "[i]f a Passenger's scheduled transportation is canceled, terminated, or delayed before the Passenger has reached his/her final destination as a result of a flight cancellation, Carrier-caused missed connection, flight delay, or omission of a scheduled stop, 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**." ECF 14, p 40 of 74 (emphasis added).

By offering Plaintiffs a credit towards future travel for their *nonrefundable* tickets, Southwest met its contractual obligations under these Contract of Carriage provisions. Plaintiffs' breach of contract claims alleging contractual obligations beyond the parties' express written agreement are preempted by the Airline Deregulation Act of 1978, 49 U.S.C. § 41713(b) ("ADA") because they relate to an 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 either of Plaintiffs' nonrefundable airfares.

There is no contractual basis for Rood's argument that Southwest must refund a nonrefundable fare whenever it makes an insignificant change to a scheduled departure time. Ms. Rood canceled both her flight from Burbank to Phoenix and her return flight from Phoenix to Burbank more than a month before their scheduled departures. Southwest's minor changes to the scheduled flight times after she booked them (a 15 minute difference on one flight and approximately one hour difference on the other) did not convert Rood's nonrefundable fares into a different fare category under Southwest's Contract of Carriage.

Plaintiffs' 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") also 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 Plaintiffs' behalf. Only DOT, and not private parties, can enforce consumer protection rules against the airlines.[2]

Bombin'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

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

[2] Southwest has been communicating with DOT on the airfare refund issues and does not anticipate any DOT enforcement action. Following the DOT Notice and prior to this suit being filed, 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.

international air transportation and the FAC does not allege "complete nonperformance" of Southwest's contract with Bombin. In addition, Plaintiffs' class action request should be stricken as *non-ascertainable* because the proposed class definition – "[a]ll persons in the United States . . . whose flight(s) were canceled **or changed by Southwest**, and who were not provided a refund" or "transported . . . on the next available flight and **within a reasonable time** of the original ticketed departure" (FAC ¶¶ 76-77) (emphasis added) – fails to provide the requisite objective criteria for the highly subjective issue of whether a "**changed**" flight time was "**within a reasonable time**" of the original departure time.

Separately, dismissal is appropriate because Plaintiffs agreed to pursue their breach of contract claims against Southwest in Texas when they assented to the Southwest.com terms and conditions (including a forum selection clause) applicable to the purchase of a Southwest ticket. Moreover, in that same forum selection clause, Plaintiffs agreed not to pursue a class action, and, therefore, Plaintiffs lack 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 Bombin 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* FAC ¶ 26. 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. *Id.* ¶¶ 28-30.

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

On February 15, 2020, Plaintiff Rood booked nonrefundable tickets online at www.southwest.com to travel from Burbank, California to Phoenix, Arizona and back from May 13-16, 2020. FAC ¶ 31; Declaration of Elizabeth Behrens ("Behrens Decl.") (filed herewith) ¶ 2.

Prior to the dates of travel, Southwest made insignificant changes to Ms. Rood's departure times by placing Ms. Rood on flights at similar departure times. FAC ¶¶ 33-40. When Ms. Rood unilaterally canceled her trip on April 1, 2020, her 5.50 pm scheduled departure to Phoenix was within 10 minutes of the original departure time of 6.00 pm and the scheduled departure time for her return flight was only 50 minutes from the original departure time. Behrens Decl. ¶ 4. Ms. Rood proactively cancelled her own reservation on April 1, 2020. *Id*. ¶¶ 3-4

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).

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)). A factual 12(b)(1) challenge attacks allegations underlying the assertion of jurisdiction in the complaint and allows the defendant to present competing facts.

Constitution Party of Pa. v. Aichele, 757 F.3d 347, 358 (3d Cir. 2014). A motion to strike class action allegations implicates Federal Rules of Civil Procedure 12(f) and 23(c)(1)(A).

ARGUMENT

I. PLAINTIFFS' CLAIMS FOR BREACH OF CONTRACT SHOULD BE DISMISSED UNDER RULE 12(b)(6).

A. Southwest had the Contractual Option of Giving Plaintiffs a Fare Credit Rather than a Fare Refund for Their Nonrefundable Tickets 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,[4] 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 these three options. Southwest acted within the bounds of its discretion in issuing Bombin a fare credit in lieu of a fare refund.[5]

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

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

[5]The fact that Southwest ultimately refunded Bombin'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.

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).

Moreover, with regard to Rood, who cancelled her nonrefundable flights herself, Section 4(c)(3) of the Contract of Carriage provides, "[t]he fare paid for unused travel by Passengers who purchase restricted, **nonrefundable** Tickets are **not eligible for refunds**, except as provided in this Section and Section 9b" but "**may be applied toward the purchase of future travel on Carrier** for the originally ticketed Passenger only." ECF 14, p. 40 of 74 (emphasis added). There is nothing in the Contract of Carriage requiring a refund for Ms. Rood given that she canceled her own nonrefundable ticket.

Plaintiffs assert that Section 9(a)(1)(ii) of the Contract of Carriage required refunds of their nonrefundable airfares. FAC ¶ 42. In addition to conflicting with the more specific Sections 4(c)(3)-(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 14, at 66 (emphasis added). Section 4(c), in turn, makes a distinction between "refundable" and "non-refundable" fares and ***includes Section 4(c)(4)*****, which expressly permitted Southwest to elect a fare credit as Plaintiffs' remedy for Bombin.** Section 9 did not even apply to Ms. Rood because she was the one who canceled her nonrefundable flights, and she was therefore only eligible for a fare credit pursuant to Section 4(c)(3). Moreover, even if Section 9 applied to Ms. Rood's circumstances (which it does not), Southwest would still have had

the option to provide her a fare credit for her nonrefundable tickets under Section 4(c)(4), as it did with Mr. Bombin.

"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). In fact, Plaintiffs seek to rewrite and expand the rights available to passengers who purchase *nonrefundable* fares by ignoring Section 4(c)(3) and 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 Section 4(c)(4) or make a distinction between refundable and nonrefundable fares in Section 4(c)(1) and Section 4(c)(3).

Plaintiffs also assert that Sections 10 and 12 of the Southwest Customer Service Commitment provide for a "refund in the event that Southwest cancels a flight or changes the flight schedule." FAC 14, ¶ 50. However, this language merely mirrors the language in Section 9 of the Contract of Carriage and cannot override Section 4(c)(3) or 4(c)(4) for the same reasons set forth above. Black letter law of contract interpretation prohibits Plaintiffs from using the more general reference to "refund" in Section 9 and the Customer Service Commitment to render the language of sections 4(c)(3) and 4(c)(4) useless and to erase from the contract Southwest's right to refund *nonrefundable* tickets with a travel credit. Plaintiffs' 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 (FAC ¶ 50) ignores the plain language of the more-specific and unambiguous Section 4(c) 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."). In addition, the Customer Service Commitment expressly states that, "For detailed terms and conditions applicable to your transaction on Southwest refer to the Southwest Airlines Contract of Carriage." ECF 14, page 72 of 74 (emphasis in original).

In *Hughes v. Southwest Airlines Co*., No. 19-3001, 961 F.3d 986 (7th Cir. 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*. at 989 (emphasis added); *id*. ("Again, these options are not qualified or limited in any manner."); *id.* at 990 ("The alternate options in case of delay or cancelation as laid out in § 4 are **unqualified**.") (emphasis added). The plain language of Southwest's Contract of Carriage does not allow Plaintiffs to seek a cash refund of their nonrefundable tickets. As a result, the FAC should be dismissed.

B. Plaintiffs' Claims Alleging Contractual Obligations Beyond the Parties' Written Agreement in the Contract of Carriage are Preempted by the Airline Deregulation Act.

Plaintiffs' breach of contract claims alleging contractual obligations beyond the parties' written agreement should be dismissed because they are 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). Plaintiffs' claims against Southwest relate to an air carrier "price," namely the amount they paid for air transportation for which they did not receive a refund when they initially requested it. *See Howell v. Alaska Airlines, Inc.*, 994 P.2d 901, 905 (Wash. App. 2000) (claim for "refusal to refund the price of a nonrefundable ticket" preempted); *Buck v. Am. Airlines, Inc.*, 476 F.3d 29, 36 (1st Cir. 2007) (airfare refund claim related to an air carrier "price").

In *Wolens*, *supra*, 513 U.S. at 228, the 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).

The narrow exception to ADA preemption for self-imposed airline obligations does not apply here because Southwest did not agree in writing to refund Plaintiffs' airfare in the event that, Southwest was required to cancel the flight in the case of Bombin, or, in Rood's case, Rood canceled her own flight following insignificant departure time changes.

In order for Bombin to prevail on his claim for breach of contract and to avoid ADA preemption, he is asserting that the phrase "at the sole option of the passenger" needs to be added to Section 4(c)(4), so that it states that "Carrier will, ***at the sole option of the [p]assenger***, either

transport the [p]assenger at no additional charge, . . .refund the fare . . ., or provide [future travel] credit." However, the phrase "at the sole option of the passenger" is not in the Contract of Carriage.

C. Plaintiffs Cannot Predicate Their Breach-of-Contract Claim on the DOT Enforcement Guidance.

Plaintiffs assert that the lack of refunds "would violate federal statutory law and contravene accepted industry practice." FAC, ECF 14, ¶ 61. However, as a matter of law, Plaintiffs may not rely on the DOT Notice to make their 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 Plaintiffs' 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)). "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). 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. Even DOT Guidance Does Not Require Refunds for Insignificant Schedule Changes.

Even under DOT's guidance, Ms. Rood cannot claim entitlement to a refund merely because her flight times were altered in a non-significant way. See DOT's "Frequently Asked Questions Regarding Airline Ticket Refunds" (May 12, 2020) at 2 ("[p]assengers who purchase a non-refundable ticket on a flight to, within, or from the United States that is still being operated without a significant change, but would like to change or cancel their reservation, are generally not entitled to a refund . . . even if the passenger wishes to change or cancel due to concerns related to the

COVID-19 public health emergency").[6] Flight departure time changes of 10 minutes on the outbound and 50 minutes on the return are not unreasonable.

E. Bombin'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 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 the Southwest Contract of Carriage expressly references the Montreal Convention. ECF 14, p. 61 of 74.

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."

The First Amended 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. 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**

[6] https://www.transportation.gov/airconsumer/FAQ_refunds_may_12_2020

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

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.") In other words, Bombin's breach of contract claim must be pursued, if at all, pursuant to the Montreal Convention.[8]

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."[9] Bombin does not allege "complete nonperformance" of the contract by Southwest, *i.e.*, that Southwest refused to transport Bombin 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 Bombin's state law breach-of-contract claim against Southwest.

[8]*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).

[9]*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); *Chattopadhyay v. Aeroflot Russian Airlines*, No. CV 11-00443, 2011 WL 13220279, *10 (C.D. Cal. Aug. 17, 2011).

F. Plaintiffs' Claims Should be Dismissed Because of the Forum Selection Clause in the Southwest.com Terms and Conditions.

Dismissal of the First Amended Complaint and action also should occur under Rule 12(b)(6) because of the forum selection clause agreed to by Plaintiffs 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).

Bombin purchased his ticket using the Southwest mobile application, FAC, ECF 14, ¶ 26, and Rood bought her ticket online. The terms and conditions for use of the application and website 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 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," Plaintiffs agreed to the "below conditions," which included the promise that the "courts located within Dallas, TX" would have "exclusive jurisdiction" over the "relationship between [Plaintiffs] and Southwest." Plaintiffs assert that the forum selection clause

violates 14 C.F.R. § 259.5. FAC ¶ 47. However, for the reasons set forth above, DOT regulations do not create a private right of action enforceable by Plaintiffs. Furthermore, even assuming that § 259.5 authorized Bombin to file suit in this forum since he claims to reside here, it is undisputed that Ms. Rood has zero connection to this forum, as she resides in California and her Southwest flights were to occur between Burbank, California and Phoenix, Arizona.

II. THE PROPOSED CLASS ACTION SHOULD BE STRICKEN AS FAILING TO COMPLY WITH THE REQUIREMENT OF ASCERTAINABILITY.

Plaintiffs' proposed class should be stricken because it is not feasible to ascertain without extensive and individualized fact-finding the identity of the members of a class comprised of persons whose flights were changed to a time allegedly not "within a reasonable time" of the original departure. The requirement of class "ascertainability" "mandates a rigorous approach at the outset because of the key roles it plays as part of a Rule 23(b)(3) class action lawsuit." *Carrerra v. Bayer Corp*., 727 F.3d 300, 307 (3d Cir. 2013). "First, at the commencement of a class action, ascertainability and a clear class definition allow potential class members to identify themselves for purposes of opting out of a class. Second, it ensures that a defendant's rights are protected by the class action mechanism. Third, it ensures that the parties can identify class members in a manner consistent with the efficiencies of a class action." *Id*.; *see Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349, 354-55 (3d Cir. 2013); *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 593-94 (3d Cir. 2012). "The ascertainability inquiry is two-fold, requiring a plaintiff to show that: (1) the class is defined with reference to objective criteria; and (2) there is a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition." *Byrd v. Aaron's Inc*., 784 F.3d 154, 163 (3d Cir. 2015) (citation and internal quotation marks omitted); *Ascertainability in the Third Circuit: Name that Class Member*, 82 Fordham L. Rev. 2359 (April 2014).

Plaintiffs seek to represent a class of persons "whose flight(s) were canceled **or changed**," unless the passenger "was reaccommodated and transported to their ticketed destination by Defendant . . . on the next available flight and **within a reasonable time** of the original ticketed departure." FAC ¶¶ 76-77 (emphasis added). There is no objective way to know the identity of prospective class members because it is too uncertain to know whether a particular "**changed**" flight departure time was within a "**reasonable time**" of the original ticketed departure. District courts in the Third Circuit have not hesitated to grant motions to strike when it is clear that class action requirements cannot be met. *See*, *e.g.*, *Brennan v. Rite Aid Corp.*, 263 F.R.D. 176, 177 (E.D. Pa. 2009); *Panetta v. SAP Am., Inc.*, 2006 WL 924996, *1-5 (E.D. Pa. Apr. 6, 2006); *Thompson v. Merck & Co., Inc.*, 2004 WL 62710, *5 (E.D. Pa. Jan. 6, 2004); *see also Landsman & Funk PC v. Skinder-Strauss Assocs*., 640 F.3d 72, 93 n.30 (3d Cir. 2011) (class action allegations may be struck where the "complaint itself demonstrates that the requirements for maintaining a class action cannot be met"). Because the class definition fails the ascertainability test the class allegations should be stricken.

III. BECAUSE PLAINTIFFS WAIVED ANY RIGHT TO PURSUE THEIR CLAIMS AS A CLASS ACTION THE COURT LACKS SUBJECT MATTER JURISDICTION TO CONSIDER PLAINTIFFS' CLAIMS.

The case also should be dismissed under Rule 12(b)(1) or 12(b)(6), Fed. R. Civ. P. because Plaintiffs waived any right to proceed as a class action. As set forth above, the forum selection clause in the terms and conditions to which Plaintiffs agreed when using the Southwest app or going online to purchase tickets 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) Plaintiffs' putative class action against Southwest relating to an airfare refund clearly is "related to" use of the web app and online "Service" because they purchased their tickets 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, 2018) (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, Plaintiffs agreed to waive a class action when they indicated agreement to the Southwest web app and website terms and conditions by purchasing their tickets on the app or online. 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). "Whether the user actually reads the terms to which she assents is immaterial." *Id.* (internal citation and quotation omitted).

Because Plaintiffs agreed to the website and application terms and conditions when clicking to purchase their tickets, their attempt to pursue their claims 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); *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). Plaintiffs' waiver of the right to pursue their claim as part of

a class action precludes them from having the requisite "standing" to represent the putative class, which is an additional ground for dismissal of the 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."). Plaintiffs lack standing because they 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 a lack of Bombin's standing without having to look beyond the FAC because the FAC (¶ 26) 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). In addition, if the class definition were revised to include only flights canceled by Southwest, Ms. Rood would clearly lack standing since she decided to cancel her flight to Phoenix.

IV. 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." The existence of the forum selection clause in the

southwest.com terms and conditions should be given controlling weight. *Atl. Marine Const.*, *supra*, 571 U.S. at 62. But even without consideration of the forum selection clause, 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). *See Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 879 (3d Cir. 1995), and the discussion of these factors in Southwest's brief in support of its Motion to Dismiss, ECF 12-1, at 17-18, which is incorporated herein. The arguments for transfer are even stronger with regard to Ms. Rood, given that she has absolutely no connection to this Forum. She resides in California and was booked to fly between California and Arizona.

CONCLUSION

For the reasons set forth above, Southwest Airlines respectfully requests that the First Amended Complaint 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: August 3, 2020

Respectfully submitted,

Todd A. Noteboom PA I.D. 308557
STINSON LLP
50 South Sixth Street, Suite 2600
Minneapolis, MD 55402
Telephone: (612) 335-1894
Todd.noteboom@stinson.com

James T. Moughan (PA I.D. 33045)
BENNETT BRICKLIN & SALTZBURG LLC
Centre Square West Tower, 32nd Floor
1500 Market Street
Philadelphia, PA 19102
Telephone: (215) 665-3402
Facsimile: (215) 561-6661
moughan@bbs-law.com

M. Roy Goldberg
STINSON LLP
1775 Pennsylvania Avenue, N.W., Suite 800
Washington, D.C. 20006
Telephone: (202) 728-3005
Roy.goldberg@stinson.com
(Admitted Pro Hac Vice)

Counsel for Defendant Southwest Airlines Co.

CERTIFICATE OF COMPLIANCE

I certify that on July 24, 2020, the parties met and conferred by telephone in a conversation between Jeff Ostrow and Melissa Weiner for Plaintiffs, and Roy Goldberg for Defendant, regarding the Defendant's legal arguments for why the Defendant maintains that the Plaintiffs' claims in the First Amended Complaint should be dismissed, stricken or transferred, as ultimately Defendant set forth in the Defendant's Memorandum of Points and Authorities after Plaintiffs did not unilaterally withdraw or transfer their claims.

Dated: August 3, 2020

/s/ M. Roy Goldberg

M. Roy Goldberg
STINSON LLP
1775 Pennsylvania Avenue, N.W., Suite 800
Washington, D.C. 20006
Telephone: (202) 728-3005
Roy.goldberg@stinson.com
(Admitted Pro Hac Vice)

Counsel for Defendant Southwest Airlines Co.

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.

Date: August 3, 2020

/s/ James T. Moughan
James T. Moughan (PA I.D. 33045)