IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SAMANTHA LEVEY, individually and on behalf of all others similarly situated, Plaintiff, v. CONCESIONARIA VUELA COMPAÑÍA DE AVIACIÓN, S.A.P.I. DE C.V., and CONTROLADORA VUELA COMPAÑÍA DE AVIACIÓN, S.A.B. DE C.V., foreign corporations d/b/a/ "VOLARIS," Defendants.	)	Case No.: 1:20-cv-2215

DEFENDANT CONCESIONARIA VUELA COMPAÑÍA DE AVIACIÓN, S.A.P.I. DE C.V.'S MOTION TO DISMISS CLASS ACTION COMPLAINT AND MEMORANDUM OF LAW IN SUPPORT THEREOF

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PRELIMINARY STATEMENT

This putative class action complaint arises from the unprecedented impact that the COVID-19 global pandemic has had on the aviation industry. Airport closures, government travel bans and mass cancellations by passengers and airlines resulted in enormous tumult and confusion for air travelers and airlines. On April 3, 2020, the U.S. Department of Transportation issued an Enforcement Notice (DOT Notice) which stated that an airline could face an enforcement action if it does not offer a refund to passengers whose flights were canceled or significantly changed, regardless of whether the airline was at fault for the cancellation or delay.[1] DOT gave the airlines a grace period to make refund offers to affected passengers.

In response to the DOT Notice, Concesionaria Vuela Compañía de Aviación, S.A.P.I. de C.V. ("Volaris")[2] offered passengers whose flights has been canceled or significantly changed by the airline the option of refunds or future travel credits. Following the DOT Notice, many putative class action complaints (like this one) were filed against various airlines seeking the *exact relief* demanded by DOT – refunds for passengers whose flights were canceled or significantly changed by the airlines. Because Volaris has been offering its passengers the option of a refund, the claims

[1] *See Enforcement Notice Regarding Refunds by Carriers Give the Unprecedented Impact of the COVID-19 Public Health Emergency on Air Travel*, https://www.transportation.gov/sites/dot.gov/files/2020-04/Enforcement%20Notice%20Final%_20April_%203%202020.pdf On May 12, 2020, DOT issued *Frequently Asked Questions Regarding Airline Ticket Refunds Given the Unprecedented Impact of the COVID-19 Public Health Emergency on Air Travel* ("FAQs"), https://www.transportation.gov/sites/dot.gov/files/2020-05/Refunds %20 Second %20 Enforcement%20Notice%20%28May%2012%202020%29.pdf The Court may take judicial notice of the DOT's website. *See Pickett v. Sheridan Health Care Ctr.*, 664 F.3d 632, 648 (7th Cir. 2011); *Outley v. City of Chicago*, 407 F. Supp. 3d 752, 767 (N.D. Ill. 2019).

[2] Plaintiff has agreed to voluntarily discontinue the case against Controladora Vuela Compañía de Aviacion, S.A.B. de C.V., which has not appeared in the action.

of the putative class members are undeniably moot. A comparable remedy has already been offered to passengers and there is no other value this Court could add by means of this class action.

Even beyond mootness, all of the state-law claims asserted by Plaintiff, in her individual capacity and on behalf of those similarly situated, are expressly preempted by the Airline Deregulation Act of 1978, 49 U.S.C. § 41713(b)(1). It is well-settled that the ADA preempts state common law and statutory consumer protections claims that relate to an air carrier's "prices" and "services." Plaintiff's claims here − arising from airline ticket refund and cancellation policies − clearly relate to an airline's prices and services. Plaintiff's breach of contract action likewise faces preemption because it relies on alleged obligations outside the contract. Even if not preempted, the Complaint fails to state any viable claim for relief and must be dismissed as Volaris operated Plaintiff's flight and did not breach its contract, placing Plaintiff's standing to bring class claims into question as well. Accordingly, Volaris moves for an order, pursuant to Rule 12(b)(1) and (6), dismissing the Complaint in its entirety.

STATEMENT OF RELEVANT FACTS

A. Plaintiff's Ticketing

Volaris is a commercial airline with its principal place of business in Mexico City, Mexico. *See* Declaration of Susana De la Torre Abardía ("Abardía Decl."), ¶ 1; *see also* Complaint, ¶ 8, 9. On or about June 19, 2019, Plaintiff purchased roundtrip airfare on Volaris flights from Midway International Airport (MDW) to Bajio International Airport (BJX) in Silao, Guanajuato, Mexico. Plaintiff was originally scheduled to depart on Flight 943 on October 3, 2019 and return on Flight 942 on October 7, 2019. *Id*., ¶ 3. Plaintiff requested a change of date for her flights on September 22, 2019, with her new flights scheduled to depart on March 20, 2020 and return on March 24, 2020. *See* Compl., ¶¶ 20, 21; Abardía Decl., ¶ 3. Plaintiff alleges that Volaris canceled the above flights on March 19, 2020, without notice or explanation. Compl., ¶ 22.

On March 17, 2020, the authorities closed Midway because of the spread of COVID-19. Abardía Decl., ¶ 7. On March 19, 2020, Volaris provided email notification to its passengers, including Plaintiff, that Flight 943 would operate from Chicago O'Hare International Airport. *Id.* at ¶¶ 7-9, Exhs. C and D. Plaintiff did not check-in or appear for her flight. *Id.,* ¶ 9. Volaris nevertheless provided her with two vouchers totaling $636.56. *Id.,* ¶ 10.

B. Volaris' Contract of Carriage and Terms and Conditions

Two documents govern Plaintiff's transportation with Volaris: (1) *Passenger International Air Transport Services Agreement* (the "Contract of Carriage" or "COC"); and (2) *Terms and Conditions of Scheduled International Air Passenger Services* (the "Terms and Conditions"). Both are incorporated by reference into every passenger's contract for transportation. *See* 14 C.F.R. §§ 253.4(a), 253.5 (a). Plaintiff also relies on the COC in her Complaint. *See* Compl., ¶ 40. The COC in effect on the date that Plaintiff purchased her ticket contains the following relevant terms:

> **Section 4. Tickets**. Tickets are not transferable and non-refundable. …. The Passenger has the right to cancel his/her flight and request the Ticket devolution only if they inform Volaris, in the 24 hours next to the purchase and only if the Passenger has not realized the check in of your flight by any of the possible manners. The right described above only applies in case that the reservation was made 7 days or more before the scheduled departure.
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> ***
>
> **Section 8. Overbooked or Cancelled Flights**
> **For flights having United States as origin**. For flights originating in the United States of America, alternate transportation or compensation will be provided to Passengers in accordance with rules issued by the U.S. Department of Transportation (DOT).

See Exh. A to Abardía Decl. (COC in effect in June 2019).

> **Changes and Cancellations.**
>
> I. Tickets are not refundable. If you fail to board your flight or if you fail to request a change within the time frame set out below, your flight, as well as its value, will be lost without responsibility to any of the operating airlines.

See Exh. B to Abardía Decl. (Terms and Conditions in effect in June 2019).

C. DOT Enforcement Notice and Frequently Asked Questions

Under the DOT Notice and FAQs, DOT stated that a failure to make a refund when the airline cancels or significantly changes a flight would be viewed as an "unfair and deceptive trade practice" prohibited by 49 U.S.C. § 41712. The DOT Notice is a *policy* "clarification," calling upon air carriers to offer passengers a refund of fares paid for flights that are cancelled or significantly changed, even if the tickets at issue were non-refundable and the airline was not at fault for the cancellation. In the Notice, DOT acknowledged that there was confusion on this point, and, therefore, gave carriers a grace period to review and update their policies and practices and to start offering refunds as an option for a cancelled or significantly changed flight by the airline.[3]

On May 12, 2020, DOT issued FAQs, acknowledging that its Notice *does not* have the "force and effect" of law, but provides a safeguard against an enforcement action for those airlines that implement the recommended actions in the Notice. DOT further stated that carriers may offer vouchers and credits to passengers, provided they also offer refunds as an alternative. Additionally, when it is the passenger who chooses to change or cancel a flight that is still being operated, DOT confirmed that the passenger is generally not entitled to a refund or travel voucher.

PROCEDURAL HISTORY

On April 8, 2020, five days *after* the DOT Notice, Plaintiff filed this Complaint. On April 9, 2020, a summons was issued. Service was attempted on Volaris' agent for service. Volaris' agent rejected the service on April 10, 2020. On June 6, 2020, Volaris waived service of process and the parties reached an agreement where Volaris would respond to the Complaint on or before June 22, 2020.

[3] A carrier must (1) promptly inform the affected passengers of their option to receive a refund, (2) update its policies on and contracts of carriage regarding refunds, and (3) review with its personnel the circumstances under which refunds should be made.

STANDARD FOR RULE 12(b) DISMISSAL

To survive a 12(b)(6) motion, the claim must provide enough factual information to state a claim for relief that is plausible on its face and "raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A claim is facially plausible "when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). At the 12(b)(6) stage, all of the "factual allegations contained in the complaint" must be "accepted as true." *Twombly*, 550 U.S. at 572. Furthermore, well-pled facts are viewed in the light most favorable to the plaintiff. *See United Cent. Bank v. Davenport Estate LLC*, 815 F.3d 315, 318 (7th Cir. 2016); *Lavalais v. Village of Melrose Park*, 734 F.3d 629, 632 (7th Cir. 2013). But "legal conclusions and conclusory allegations merely reciting the elements of a claim are not entitled to this presumption of truth." *McCauley v. City of Chi.*, 671 F.3d 611, 616 (7th Cir. 2011).

ARGUMENT

I. THE COMPLAINT ASSERTS CLAIMS THAT ARE MOOT

Volaris' diligent implementation of the policies in the DOT Notice moots any breach of contract (or other) claim in this case based on flight cancellations by Volaris. In response to the DOT Notice on April 3, 2020, Volaris instituted a program to offer passengers whose flights had been canceled the option of refunds or electronic travel credits. Abardía Decl., ¶ 12. The foregoing action by Volaris demonstrates that there is no basis for this class action and the claims of the unnamed class members should be dismissed as moot. *See Knox v. Serv. Employees Int'l Union,* 132 S. Ct. 2277, 2287 (2012) ("case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party"); *Equal Employment Opportunity Comm'n v. Flambeau, Inc.,* 846 F.3d 941, 946 (7th Cir. 2017) (the employer's voluntary cessation of its mandatory wellness program prior to the lawsuit mooted the EEOC's claim for injunctive

relief); *Winzler v. Toyota Motor Sales U.S.A., Inc.*, 681 F.3d 1208, 1210 (10th Cir. 2012) (finding claims moot where mandated recall process provided the relief sought by plaintiff and putative class, *i.e.*, notice of the defects and a fund to repair them).

II. PLAINTIFF'S CLAIMS ARE EXPRESSLY PREEMPTED BY THE AIRLINE DEREGULATION ACT

Plaintiff's state law claims are expressly preempted by federal law and must be dismissed. *See Morales v. Trans World Airlines, Inc*., 504 U.S. 374, 383 (1992); *Lagen v. United Cont'l Holdings, Inc*., 774 F.3d 1124 (7th Cir. 2014); *Statland v. Am. Airlines*, 998 F.2d 539 (7th Cir. 1993). Here, Plaintiff's state law claims seeking a ticket refund for a rescheduled flight are barred by the express preemption clause of the Airline Deregulation Act of 1978 ("ADA"), 49 U.S.C. § 41713(b)(1), because her claims undisputedly relate to Volaris' "prices" and "services."

A. The ADA's Broad Scope Mandates Dismissal of Plaintiff's State Law Claims

In 1978, Congress enacted the ADA to deregulate the domestic airline industry. As part of the legislation, Congress included a preemption provision to "ensure that the States would not undo federal deregulation with the regulation of their own." *Morales*, 504 U.S. at 378-79. Congress' intent was to "help[] ensure transportation rates, routes and services that reflect maximum reliance on competitive market forces, thereby stimulating efficiency, innovation, and low prices, as well as variety and quality."[4] *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 371 (2008) (citations omitted); *see Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 230 (1995) (same). The preemption clause prohibits States from

> enact[ing] or enforc[ing] a law, regulation, or other provision having the force and effect of law ***related to a price, route, or service of an air carrier*** that may provide transportation under this subpart.

49 U.S.C. § 41713(b)(1) (emphasis added).

[4] In *Rowe,* the Court applied *Morales* to a similarly-worded preemption provision applicable to motor carriers found in the Federal Aviation Administration Authorization Act of 1994. *See* 49 U.S.C. § 1450(c)(1).

The U.S. Supreme Court has expressly addressed the applicability and scope of the ADA's preemption clause in *Morales v. Trans World Airlines, Inc*., *Am. Airlines, Inc. v. Wolens*, and *Northwest, Inc. v. Ginsberg*, 134 S. Ct. 1422 (2014). In all three cases, the Supreme Court construed the clause's "related to" language as having a "broad preemptive purpose" such that state law claims "having a connection with or reference to airline '[prices], routes, or services' are preempted." *Morales*, 504 U.S. at 383-84; *see Wolens*, 513 U.S. at 223.

Preemption is construed so broadly that it may apply even where the connection with prices, routes, and services "is only indirect." *Morales,* 504 U.S. at 386 (recognizing "sweep" of "relating to" language). ADA preemption also extends to "laws of general applicability," to state laws that are "consistent" with federal laws, and to common law claims. *Id.* at 386-87; *Ginsberg,* 134 S. Ct. at 1430 ("[S]tate common-law rules fall comfortably within the language of the ADA pre-emption provision."); *United Airlines, Inc. v. Mesa Airlines, Inc*., 219 F.3d 605, 609 (7th Cir. 2000) (state law claims are "preempted if either the state rule expressly refers to air carriers' rates, routes, or services, or application of the state's rule would have a significant economic impact upon them"). It is only where federal law affects a price, route or service in a "tenuous, remote or peripheral … manner" that it may not preempt state law, such as state laws forbidding gambling. *Morales*, 504 U.S. at 390.

Morales and *Wolens* specifically addressed state consumer protection laws that would impose restrictions on fare-related matters and marketing practices by air carriers. In *Morales,* state attorney-generals had issued guidelines that set standards for airline advertising, fare advertisements, awarding of frequent flyer miles, payment of denied boarding compensation, and other fare-related matters. 504 U.S. at 385. The Court held that the states' efforts to enforce the guidelines through state consumer protection laws was preempted. *Id.* at 388.

Three years later in *Wolens*, the Court held that the ADA preempted plaintiffs' claim under the Illinois Consumer Fraud and Deceptive Practices Act (ICFA) challenging retroactive changes to the terms in the airline's frequent flyer program. 513 U.S. at 225. Specifically, the Court found the ICFA to be "prescriptive," "intrusive" and "serv[ing] as a means to guide and police the marketing practices of the airlines." 513 U.S. at 228. Although *Wolens* recognized a narrow exception from preemption where a state law claim seeks recovery for the airline's alleged breach of "its own, self-imposed undertaking," (*id.* at 228), that exception is confined to enforcing only "the parties' bargain, with no enlargement or enhancement based on state laws or policies external to the agreement." *Id*. at 233.

More recently, in *Ginsberg*, the Supreme Court again applied the ADA's broad preemptive scope in a class action. 134 S. Ct. at 1430. The *Ginsberg* Court found plaintiff's common law claim for breach of the implied covenant of good faith and fair dealing based on revocation of a customer's frequent flyer membership to be a "state-imposed obligation" and, therefore, preempted. *Id*. The foregoing cases—*Morales, Wolens,* and *Ginsberg*—collectively require dismissal of Plaintiff's claims based on ADA preemption.

B. Plaintiff's State Law Claims Are Preempted Because They Relate to Volaris' "Prices" and "Services"

Plaintiff asserts the common law claims of breach of contract, unjust enrichment, and unconscionability and a statutory claim under the ICFA. All of these claims directly challenge Volaris' ticket prices and services as Plaintiff claims she is entitled to a refund of her ticket following the airport change from Midway to O'Hare.

It is axiomatic that an airline's ticket refund, cancellation and reissuance policies directly relate to airline prices and services. In *Statland v. Am. Airlines, Inc.*, the Seventh Circuit found it "obvious" that the airline's ticket refund policy related to prices and held plainitff's state law

claims − breach of fiduciary duty, violation of the ICFA, conversion and breach of contract − *all* preempted by the ADA. As held by the court,

> [t]he conduct [plaintiff] complains of is the same for each claim…: she protests American's withholding 10 percent of the federal tax on canceled tickets. We think it obvious that canceled ticket refunds relate to rates. Under *Morales* and the [ADA], the state cannot regulate American's ticket refund practices either by common law or by statute. This sweeps aside Statland's state law claims.

998 F.3d at 541-42.

Similarly, in *Martin v. United Airlines, Inc.,* the court addressed an airline's refund policy and issuance of money-credits for cancelled flights, and concluded "there is no dispute that these claims relate to defendant's prices and services," and therefore are preempted. No. CIV-16-1042-F, 2017 WL 3687347, at *5 (W.D. Okla. Apr. 18, 2017), *aff'd on other grounds,* 727 Fed. App'x 459 (10th Cir. 2018).[5]

Courts also consistently find unjust enrichment and unconscionability claims preempted where, like here, they relate to the airline's prices and services. *See Levitt v. Sw. Airlines Co*., 846 F. Supp. 2d 956 (N.D. Ill. 2012) (holding ADA preempted unjust enrichment claim arising from alleged failure to honor coupons for free drinks); *see also Buck,* 476 F.3d at 38; *Alatortev v. JetBlue Airways, Inc.,* No. 3:17-cv-04859-WHO, 2018 WL 784434, at *6 (N.D. Cal. Feb. 7, 2018) (ADA preempted claims for breach of contract and unjust enrichment); *Martin*, 2017 WL 3687347, at *5 (finding unconscionability and related contract adhesion claims preempted); *Gordon v. United*

[5] *See also Sanchez v. Aerovias de Mexico, S.A. de C.V*., 590 F.3d 1027, 1030-31 (9th Cir. 2010) (ADA preempted claims based on airline's tourism fee as it related to "prices"); *Buck v. Am. Airlines, Inc.*, 476 F.3d 29, 34-35 (1st Cir. 2007) (ADA preempted state law claims that airline wrongfully retained fees and taxes on nonrefundable tickets); *Howell v. Alaska Airlines,* 99 Wash. App. 646, 994 P.2d 901 (2000) (state law claim contesting airline's refusal to refund the price of a non-refundable ticket is preempted).

Cont'l Holding, Inc., 73 F. Supp. 3d 472, 480 (D.N.J. 2014) (finding it "well-settled" that unjust enrichment claims fall with the ADA's preemption clause).

Significantly, the U.S. Supreme Court and Seventh Circuit uniformly find consumer protection laws preempted by the ADA because the DOT has plenary authority in this area. *See Wolens*, 513 U.S. at 233 (holding ICFA claim preempted as type of prohibited action that relies on state law to enlarge or enhance the carrier's obligations); *Morales*, 504 U.S. at 378, 391 (recognizing DOT's authority to regulate consumer protection claims). In *Lagen v. United Cont'l Holdings, Inc.*, the Seventh Circuit reiterated DOT's exclusive authority in the consumer protection arena, stating:

> Naturally, the ADA "does not give the airlines carte blanche to lie to and deceive consumers." What it does do, however, is channel grievances of this type to the [DOT], which is authorized to regulate such activities. That may not be as satisfying as a private right of action for the disappointed consumer, but that is the choice Congress made. … *If we were to sanction the transformation of consumer fraud claims into contract disputes in this way, we would fatally undermine the statutory scheme, which dictates that consumer fraud cases must be handled through the Department of Transportation*.

774 F.3d at 1128 (emphasis added) (citations omitted); *see also Statland,* 998 F.3d at 541 ("DOT, not private parties, will enforce consumer protection rules against the airlines"); *Levitt*, 846 F. Supp. 2d at 961 (holding ICFA claims preempted by the ADA); *Galieo Int'l, L.L.C. v. Ryanair, Ltd*., 01 C 2210, 2002 WL 314500, at *1 (N.D. Ill. Feb. 27, 2002) (same).

In sum, because all of Plaintiff's claims relate to Volaris' ticket prices and ticketing and refund services, the claims are preempted by the ADA.

C. Plaintiff's Breach Of Contract Claim Does Not Fall Within the Narrow *Wolens'* Exception

Wolens held that a breach of contract claim was not preempted if it arose from "the airline's alleged breach of its own, self-imposed undertaking." 513 U.S. at 229. Contract claims, however, remain preempted if they enlarge or enhance the parties bargain based on state laws or policies

external to the agreement. *See id.* at 233. In other words, where a court would need to insert terms or look outside the contract to enforce an alleged meaning, it is plainly relying on state law theories or policies to imply terms in the agreement and is not enforcing a "self-imposed obligation." *See, e.g., Alatortev,* 2018 WL 784434, at *5-6; *Volodarskiy v. Delta Air Lines, Inc.,* No. 11 C 00782, 2012 WL 5342709 (N.D. Ill. Oct. 29, 2012) (breach of contract claim preempted because conditions of carriage did not incorporate by reference EU 261 regulations); *Schultz v. United Air Lines, Inc.,* 797 F. Supp. 2d 1103, 1106-07 (W.D. Wash. 2011) (ADA preempted breach of contract claim where plaintiff relied on external state laws); *Howell*, 99 Wash. App. at 647 (claims seeking to collect refunds of nonrefundable tickets under state law theories preempted because they sought to enlarge parties' agreement).

Here, Plaintiff purports to rely on the DOT Notice for interpretation of Volaris' COC. The DOT Notice, however, is *not* part of the COC entered into by Plaintiff when she purchased her ticket in June 2019. It was not part of Volaris' self-imposed undertakings at that time, nor did it become part of it on April 3, 2020. Because Plaintiff relies on alleged obligations outside the four corners of the contract, she would be inserting terms not contained in the COC to bring this claim. This is inconsistent with the *Wolens* exception and calls for dismissal of Plaintiff's breach of contract claim. *See Alatortev,* 2018 WL 784434, at *5*; Schultz,* 797 F. Supp. 2d at 1103.

III. PLAINTIFF FAILS TO STATE A CLAIM AGAINST VOLARIS

A. Plaintiff Fails to State a Claim For Breach of Contract

To establish a breach of contract under Illinois law,[6] Plaintiff must show: "(1) the existence of a valid and enforceable contract; (2) performance by the plaintiff; (3) breach of contract by the

[6] Volaris does not concede that Illinois law would necessarily govern this contract.

defendant; and (4) resultant injury." *Asset Exchange II, LLC v. First Choice Bank*, 953 N.E.2d 446, 455 (Ill. App. Ct. 2011).

1. *Volaris Performed Its Contractual Obligations*

Plaintiff's contract for transportation is governed by Volaris' COC and Terms and Conditions in effect at the time that Plaintiff purchased her ticket. Plaintiff acknowledges this and references Volaris' cancellation policy in the COC for flights that originate from the U.S. Compl., ¶ 40. The COC provides that "alternate transportation *or* compensation" would be provided in accordance with rules issued by the DOT. *See* Exh. A to Abardía Decl. (emphasis added).

Upon Volaris' rescheduling of the flight from Midway (which had been shut down by the authorities), Volaris had offered Plaintiff – consistent with its COC – *alternate transportation* to Mexico but from O'Hare on the same date. Abardía Decl., ¶ 9. Plaintiff failed to show for this flight and Volaris offered travel vouchers valued at $636.56. *Id.* The COC and Terms and Conditions did not obligate Volaris to offer a refund, particularly as Plaintiff failed to check-in or appear for her flight. Additionally, Plaintiff's reliance on the DOT Notice is misplaced – this Notice is a guidance document that does not create a binding requirement on the airline. *See Admin. Rulemaking, Guidance and Enforcement Procedures (Final Rule)*, 84 Fed. Reg. 71714, 71732 (Dec. 27, 2019) (DOT "may not use its enforcement authority to convert agency guidance documents into binding rules").

Moreover, in order to be a lawful rule, the Notice would have required a prior public notice period and opportunity for comment pursuant to the Administrative Procedures Act (APA), 5 U.S.C. § 553. *See Bd. of Trustees of Knox Cty. Hosp. v. Shalala*, 135 F.3d 493, 500–01 (7th Cir. 1998) (APA requires notice and comment period when promulgating a substantive rule); *Hoctor v. U.S. Dep't of Agric.*, 82 F.3d 165, 167 (7th Cir. 1996) (legislative rule requires notice and comment period whereas agency guidance does not have the force of law because it is only an

interpretation of existing policy or regulation); *see also Mendoza v. Perez*, 754 F.3d 1002, 1021 (D.C. Cir. 2014) (substantive rules require notice and comment periods).[7] Clearly, these procedural steps and safeguards did not happen here.

2. *Because No Breach By Volaris Occurred, Plaintiff Lacks Standing*

The claim also should be dismissed for lack of subject matter jurisdiction due to lack of standing given that Plaintiff was sent notice of the airport change and did not check-in for the flight. The requirements of Article III case-or-controversy standing are: "(1) an injury in-fact; (2) fairly traceable to the defendant's action; and (3) capable of being redressed by a favorable decision from the court." *See Davidson v. Worldwide Asset Purchasing, LLC*, 914 F. Supp. 2d 918, 921–922 (N.D. Ill. 2012) (finding putative class lacked Article III standing action prior to class certification where consumer had no traceable injury). Here, the standing requirements are not met because any alleged injury is not traceable to Volaris, but rather to Plaintiff. Additionally, because Plaintiff had been given travel vouchers, her injury claim likewise is in doubt.[8]

B. Plaintiff Fails To State A Claim For Unjust Enrichment, Unconscionability and Consumer Fraud

1. *There Is No Unjust Enrichment*

To state a claim for unjust enrichment, "a plaintiff must allege that the defendant has unjustly retained a benefit to the plaintiff's detriment, and that [the] defendant's retention of the benefit violates the fundamental principles of justice, equity, and good conscience." *Cleary v. Philip Morris Inc.,* 656 F.3d 511, 518 (7th Cir. 2011) (citation omitted). Plaintiff's unjust

[7] The DOT Notice also does not create a private cause of action that allows consumers to pursue an action against the airline. *Cf. Statland*, 998 F.2d at 540 (no private cause of action created by Federal Aviation Act and its regulations); *Buck,* 476 F.3d at 33-34 (federal aviation regulations do not create a private right of action).

[8] Plaintiff also would not be an appropriate class representative because she lacks standing to sue. *Gilmore v. Sw. Bell Mobile Sys., L.L.C.*, 01 C 2900, 2002 WL 548704, at *3 (N.D. Ill. Apr. 8, 2002).

enrichment claim fails here as Volaris rescheduled her flight to depart from O'Hare and Plaintiff chose not to travel. Volaris nonetheless issued travel vouchers to Plaintiff. Lastly, because this claim is tied to Plaintiff's failed breach of contract claim, it must be dismissed. *Cleary,* 656 F.3d at 517 (7th Cir. 2011) ("unjust enrichment will stand or fall with the related claim").

2. *Volaris' Contract Terms Are Not Unconscionable*

"Under Illinois law, a contract may be found to be unconscionable as a matter of law on either a 'procedural' or 'substantive' basis, or both." *Estate of Davis v. Wells Fargo Bank*, 633 F.3d 529, 535 (7th Cir. 2011) (citation omitted). Procedural unconscionability arises where a term is "so difficult to find, read, or understand that the party could not fairly be said to have been aware she was agreeing to it." *Estate of Davis*, 633 F.3d at 535. Substantive unconscionability, on the other hand, concerns the actual terms of the contract and examines the relative fairness of the obligations assumed, asking whether the terms are so one-sided as to oppress or unfairly surprise an innocent party. *Cannon v. Burge*, 752 F.3d 1079, 1102 (7th Cir. 2014) (citation omitted).

For the reasons stated, the COC is neither procedurally nor substantively unconscionable. The terms in an airline's COC are consistently enforced by courts and claims of unconscionability rejected. *See, e.g.*, *Martin v. United Airlines, Inc.*, 727 Fed. Appx. 459, 463-64 (10th Cir. 2018). Here, Volaris' terms were not oppressive or one-sided as they resulted in the offer of alternate transportation, and included travel vouchers for the value of her ticket.

3. *Plaintiff Cannot Establish Violation of the ICFA*

The ICFA makes it illegal for a defendant to engage in any deceptive or unfair act or practice in the course of commerce. 815 ILCS 505/2; *Totz v. Continental Du Page Acura*, 236 Ill. App. 3d 891, 900 (2d Dist. 1992). The elements of a claim under ICFA are: (1) deceptive conduct; (2) that the defendant intended the plaintiff rely on that conduct; (3) that the deception occurred in

the course of conduct involving a trade or commerce; and (4) damages proximately resulting from the deception. *Capiccioni v. Brennan Naperville, Inc.*, 339 Ill. App. 3d 927, 933 (2d Dist. 2003). This consumer protection claim is undisputedly preempted. Plaintiff, in any event, cannot establish deceptive conduct by Volaris. Plaintiff, in fact, sought to cancel her flight and failed to perform the contract by not showing for the rescheduled flight from O'Hare. Despite this, Volaris still provided her with vouchers for future travel pursuant to the terms of the COC.

CONCLUSION

The Court should grant the motion in all respects and dismiss Plaintiff's claims in their entirety.

Dated: June 22, 2020

Concesionaria Vuela Compañía de Aviación, S.A.P.I. de C.V.

s/ Robert E. Tonn
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CERTIFICATE OF SERVICE

Under penalties as provided by law, the undersigned, an attorney, hereby certifies and states that he caused a true and an accurate copy of the foregoing **DEFENDANT CONCESIONARIA VUELA COMPAÑÍA DE AVIACIÓN, S.A.P.I. DE C.V.'S MOTION TO DISMISS CLASS ACTION COMPLAINT AND MEMORANDUM OF LAW IN SUPPORT THEREOF** to be served this 22nd day of June, 2020**,** upon the counsel listed below by delivery via the United States District Court for the Northern District of Illinois CM/ECF electronic filing system.

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