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.	)	Case No.: 1:20-cv-02215
CONCESIONARIA VUELA COMPAÑÍA DE AVIACIÓN, S.A.P.I. DE C.V., a foreign corporation, d/b/a VOLARIS, *et al.*	)	Judge John Robert Blakey Magistrate Judge Jeffrey I. Cummings
Defendants.	)	

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

INTRODUCTION

This is a class action seeking relief for Plaintiff and others who booked flights on Volaris for travel from the United States to Mexico and whose flights were canceled by Volaris during the COVID-19 (novel coronavirus) pandemic without refunding the amounts these passengers paid for airfare and/or requiring them to pay a penalty to rebook their travel. *See* Class Action Complaint [1] ("Complaint" or "Compl't") ¶ 1.

As alleged in the Complaint, Volaris canceled many of its flights to Mexico from the United States in the wake of the COVID-19 (Novel Coronavirus) pandemic. *Id.* ¶ 2. Although the United States temporarily closed its border with Mexico due to the pandemic, this restriction did not apply to air travel. *Id.* When Volaris decided to cancel its flights to Mexico, without notice to its booked passengers, it offered no refunds and continues to deny the refunds and/or required these passenger to pay a penalty to rebook their travel, despite its contract of carriage and DOT rules requiring. *Id.*

Now Volaris seeks dismissal of the Complaint based largely on the declaration of an employee who says Plaintiff's flight was not canceled but, rather, was moved from Midway to O'Hare due to a tower closure at the former. *See* Mem. at 3. This is a disputed question of fact, and Plaintiff has submitted her Declaration along with a screenshot of Volaris' website taken by Plaintiff showing that, *after* Volaris sent Plaintiff an email stating the flight was changed to leave from O'Hare it updated its website to show the flight had in fact been canceled. *See* Declaration of Samantha Levey ("Levey Decl.") (Exhibit A). So, understandably, she did not go to O'Hare for a flight that Volaris canceled.

But all of this is an effort to distract the Court from the relatively straightforward nature of Plaintiff's claims and what is *undisputed*: airlines are required to provide passengers such as Plaintiff refunds when their flights are canceled. *See* Compl't ¶ 14 ("'The longstanding obligation

of carriers to provide refunds for flights that carriers cancel or significantly delay does not cease when the flight disruptions are outside of the carrier' control (*e.g.*, a result of government restrictions).'") (quoting *Enforcement Notice Regarding Refunds by Carriers Given the Unprecedented Impact of the Covid-19 Public Health Emergency on Air Travel*, at 1, https://www.transportation.gov/sites/dot.gov/files/2020-04/Enforcement%20Notice%20Final%20April%203%202020_0.pdf (last visited July 23, 2020) ("Enforcement Notice") (Exhibit B); *see also* Declaration in Support of Motion to Dismiss Class Action Complaint ("Abardía Decl.") [16] ¶ 11 ("[A]n airline could face an enforcement action if it did not offer refunds to passengers whose flight were canceled or significantly changed by the airline, regardless of whether the airline was at fault for the cancellation or delay.").

As the Department of Transportation recently explained, the failure of Volaris and other airlines to give refunds has become a common complaint of consumers like Plaintiff:

> The Department is receiving an increasing number of complaints and inquiries from ticketed passengers, including many with non-refundable tickets, who describe having been denied refunds for flights that were cancelled or significantly delayed. In many of these cases, the passengers stated that the carrier informed them that they would receive vouchers or credits for future travel. But many airlines are dramatically reducing their travel schedules in the wake of the COVID-19 public health emergency. As a result, passengers are left with cancelled or significantly delayed flights and vouchers and credits for future travel that are not readily usable.

When Volaris decided to steer passengers to credit toward future flights, it violated its contract of carriage with them, including its agreement to adhere to Department of Transportation rules. Further, it deceived them into accepting the flight credits with short (*e.g.*, 30-day) expirations or risk forfeiting the entire amount of fare paid. *See* Compl't ¶ 24. The pandemic, of course, continues and now passengers' whose flights were canceled due to COVID-19 restrictions have lost the entire value of their tickets. *See* Compl't ¶ 25.

Plaintiff's claims are far from moot, Volaris' argument notwithstanding. Nor are Plaintiff's claims preempted due to a well-recognized exception to the Airline Deregulation Act preemption doctrine that allows claims such as these based on the terms of the carrier's contract of carriage. As explained further herein, Plaintiff's well-pled claims for unjust enrichment, unconscionability and consumer fraud should also be allowed to proceed.

ARGUMENT

I. Standard of Review

To survive a motion to dismiss under Rule 12(b)(6), a complaint must provide enough factual information to "state a claim to relief that is plausible on its face" and "raise a right to relief above the speculative level." *Thulin v. Shopko Stores Operating Co., LLC*, 771 F.3d 994, 997 (7th Cir. 2014) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007)). Whether a complaint states a claim upon which relief may be granted depends upon the context of the case and "requires the reviewing court to draw on its judicial experience and common sense." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). The complaint's well-pleaded facts are accepted as true and the allegations are construed in the light most favorable to Plaintiff. *See Thulin*, 771 F.3d at 997.

A pleading need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). "[T]he pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 556 U.S. at 678 (2009). It only needs "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570.

"A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. "The plausibility standard is not akin to a 'probability requirement,' but it

asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* Where the allegations "possess enough heft" to suggest a plausible entitlement to relief, the case may proceed. *See Twombly*, 550 U.S. at 557. "Asking for plausible grounds to infer [elements of a claim] does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of [such elements]." *Id.* at 556. "And, of course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.'" *Id.*

II. Volaris' Unaccepted Offer of "Electronic Credits" Does Not Moot Plaintiff's Claims.

Volaris' statement it "instituted a program to offer passengers whose flights had been canceled the option of refunds or electronic credits," Mem. at 5, is only half true as it was not offering refunds as illustrated by Plaintiff's experience. Further the option of credits, highlights the wrongheadedness of its response to class members' demands for the *refunds* which they are entitled to. *See* Compl't ¶¶ 23-25. The very essence of Plaintiff's claim is that she and others were only given *credit* toward future despite their demands that their money be refunded. *See* Compl't ¶ 7 (defining class as "persons who were not provided a *refund*") (emphasis added). While it may be Volaris' preference to issue credits toward future credit, it knew that many travelers would be unable or unwilling to travel to Mexico and other international destinations during the short, 90-day window Volaris provided. Thus, the "credit" was the very basis of its scheme and this lawsuit.

Further, as noted by the DOT, many airlines, including Volaris, dramatically reduced their schedules in the wake of the COVID-19 public health emergency. "As a result, passengers are left with cancelled or significantly delayed flights and vouchers and credits for future travel that are not readily usable." Enforcement Notice, at 1.

The declaration[1] submitted by Volaris in support of its motion, supports Plaintiff's allegations that Volaris pushed expiring travel credits on consumers despite knowing they were entitled to refunds. *See* Decl. ¶ 11 ("[A]n airline could face an enforcement action if it did not offer refunds to passengers whose flights were canceled or significantly changed by the airline, regardless if the airline was at fault for the cancellation or delay.").

This is in accord with Plaintiff's allegations Volaris pushed credits instead of refunds. *See* Compl't ¶ 19 ("Volaris has offered flight credits in lieu of refunds without informing Plaintiff and the Class of their right to a full refund and/or charged them a penalty to rebook their travel."); *see also id.* ¶ 52 ("Plaintiff and the members of the Class would not have accepted credits toward future travel in lieu of refunds and/or paid penalties to rebook had they been fully informed [of their right to a refund].").

The problem is that Volaris refused to give Plaintiff a refund and issued "electronic vouchers" to Plaintiff for future travel. Decl. ¶ 10. The electronic voucher's value is further illusory in light of the 90-day window to use it, especially in light of Volaris' post-pandemic reduced flight schedules. Regardless, an electronic voucher is not a refund.

Far from mooting Plaintiff's claims, Volaris' declaration only confirms the fact Plaintiff and other members of the class were issued not given cash refunds as they admit it is required to do. As Volaris explains, "[a] case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." Mem. at 5 (quoting *Knox v. Serv. Employees*

[1] Rule 12(b)(6) is a method of disposing cases that, on their face, fail to state a claim. *Ribando v. United Airlines, Inc.*, 200 F.3d 507, 509–10 (7th Cir. 1999). However, Rule 12(b)(6) provides that under certain circumstances, the motion to dismiss must be converted by the district court into a motion for summary judgment under Rule 56. *Id.* The rule requires such a conversion when "matters outside the pleading are presented to and not excluded by the court." *Id.* (quoting Fed. R. Civ. P. 12(b)). If the Court is inclined to treat Volaris' motion as one for summary judgment, Plaintiff respectfully requests notice and an opportunity to conduct discovery on any disputed questions of fact. *See Squires-Cannon v. White*, 864 F.3d 515, 517 (7th Cir. 2017) ("If matters outside the pleadings are presented to a court on a Rule 12(b)(6) motion, the court normally must treat the motion as one for summary judgment and give all parties a reasonable opportunity for discovery. Fed. R. Civ. P. 12(d)).

Int'l Union, 567 U.S. 298, 307 (2012). Under this standard, Plaintiff's case is not moot insofar as the Court could award damages and enter the injunctive relief sought in her Complaint. *Compare Chapman v. First Index, Inc.*, 796 F.3d 783, 786 (7th Cir. 2015) ("[Plaintiff] began this suit seeking damages and an injunction]; does not have the yet; the court could provide them.") (citing *Knox*, *supra*); *see also Campbell-Ewald Co. v. Gomez*, --- U.S. ---, 136 S. Ct. 663, 669 (2016) (unaccepted settlement offer does not moot plaintiff's claim; "defendant's continuing denial of liability [and] adversity between the parties persists."). The motion should be denied.

III. Plaintiff's State Common Law Claims Fall Within the Well-Recognized Exception to ADA Preemption Outlined in *Wolens*.

Volaris argues Plaintiff's claims are preempted by Section 41713(b) of the Airline Deregulation Act of 1978 ("ADA"), 49 U.S.C. § 41713(b) because they "undisputedly related to Volaris' 'prices' and 'services.'" Mem. at 6. Contrary to Volaris' assertion, Plaintiff does not seek to enforce any state law "'related to a price, route, or service of an air carrier.'" Id. (quoting 49 U.S.C. 41713(b)(1)). Indeed, Plaintiff's Complaint makes no mention of airline prices, routes or service or any state law pertaining to thereto, so there is nothing to preempt as explained below.

Indeed, the breach of contract and unjust enrichment claims asserted by Plaintiff are the very types of claims Volaris' own cited authorities said are not preempted by the ADA. As this Court explained in *Hughes v. Southwest Airlines Co.*, 409 F. Supp. 3d 653, 659–60 (N.D. Ill. 2019), aff'd, 961 F.3d 986 (7th Cir. 2020), "[i]n *American Airlines, Inc. v. Wolens*, the Supreme Court created an exception for "routine breach-of-contract claims" that seek to enforce an airline's "own, self-imposed undertakings."" (quoting *Wolens*, 513 U.S. 219, 220 (1995)). "The Court drew a distinction between imposing a State's "own substantive standards with respect to rates, routes, or services" onto an airline, as distinct from 'a party who claims and proves that an airline dishonored a term the airline itself stipulated.'" *Id.* (quoting Wolens at 232–33).

Here, Plaintiff alleges Volaris violated its own contract of carriage when it canceled Plaintiff's flight but did not refund her money:

> The airline tickets purchased by Plaintiff and the Class were subject to the terms and conditions of Volaris' contract of carriage, which provided in relevant part that, in the event a flight is cancelled, "alternate transportation or compensation will be provided to Passengers in accordance with rules issued by the U.S. Department of Transportation (DOT)." *See* Volaris International Contract of Carriage,https://cms.volaris.com/globalassets/pdfs/eng/contractofcarriageint.pdf (last visited April 8, 2020).

Compl't ¶ 40; *see also id.* ¶ 12 (same). As the Supreme Court made clear in *Wolens*, allegations such as these that a carrier violated its own terms are not preempted by the ADA. *See Wolens*, *supra*.

Volaris attempts to distinguish this case from cases like *Wolens* by arguing that Plaintiff seeks to impose an additional requirement on Volaris when she cites to the Department of Transportation's ("DOT") recent reiteration of the rule that carriers provide refunds (not a travel voucher). *See* Compl't ¶ 14. However, again, Volaris' "own, self-imposed undertaking[ ]" (*Wolens*, 513 U.S. 219, 220 (1995) in its terms of carriage say it will follow the DOT's rules, which include providing refunds for canceled flights. *See* Compl't ¶¶ 40. Moreover, the DOT's rules are federal agency rules, not the state rules that the ADA's preemption clause refers to. *See* 49 U.S.C. § 41713(b)(1).

Volaris' contends contract claims fall outside the *Wolens*' exception and are preempted "if they enlarge or enhance the parties [*sic*] bargain based on state laws or policies external to the agreement." Mem. at 10-11 (citation omitted). However, Plaintiff has not alleged incorporation of any state law or policy into the terms of the contract of carriage at all. Rather, Plaintiff's Complaint cites the express language of the contract of carriage incorporating DOT rules pertaining to flight cancellations. Further, the Department of Transportation is a federal Cabinet department of the

United States and is governed by the United States Secretary of Transportation. Volaris' assertion Plaintiff seeks to enhance the parties' bargain based on "state laws or policies" external to the agreement fails to recognize the DOT Rule is a federal and not state rule.

The facts of the cases cited by Volaris demonstrate their misapplication to this case. In *Alatortev v. JetBlue Airways, Inc.*, No. 3:17-CV-04859-WHO, 2018 WL 784434, at *6 (N.D. Cal. Feb. 7, 2018), the plaintiff sought to apply his own understanding of the terms of JetBlue's contract of carriage (specifically, the meaning of the terms "lost bag" and "delayed bag" when DOT regulations defined these terms differently. *See Id.* at *6 ("JetBlue emphasizes that a "lost bag" and a "delayed bag" are two separate concepts under both the DOT regulations and the [contract of carriage]."). Here, Plaintiff's breach of contract claim employs the "rules issued by the U.S. Department of Transportation (DOT)" incorporated by reference in Volaris' contract of carriage. *See* Compl't ¶ 40, *supra*. *Alatortev* is inapposite.

In *Volodarsky v. Delta Air Lines, Inc.*, No. 11 C 00782, 2012 WL 5342709 (N.D. Ill. Oct. 29, 2012), the plaintiff alleged Delta breached its international contract of carriage by failing to comply with a European Union ("EU") regulation pertaining to compensation for delayed international flights. However, the contract of carriage did not expressly mention or incorporate such regulations, and a hyperlink on Delta's electronic tickets linked to pages on its website unrelated to these regulations. *See Id.* at *5 ("There are several hyperlinks on the e-ticket to Delta's website—including links to Delta's conditions of carriage, limits on liability for personal injuries, right to change terms of the contract, check-in requirements, limits of liability for delay or failure to perform service, and policy on overbooking flights—but none of them links directly to the EU Notice."). Unlike the plaintiff in *Volodarsky*, Plaintiff makes no allegation that the entire contents

of Volaris' website are incorporated by reference into its contract of carriage. Volaris' reliance on *Volodarsky*, too, is misplaced.

Likewise, in *Schultz v. United Air Lines, Inc.*, 797 F. Supp. 23 1103 (W.D. Wash. 2011), a dispute over United's checked baggage fee, the plaintiff's breach of contract claim was premised on "language on Defendant's website expressing its aspirational intention to deliver baggage in a timely manner." *Id.* at 1107.

Finally, *Howell v. Alaska Airlines, Inc.*, 994 P.2d 901 (Wash. App. 2011), did not even involve a breach of contract claim but rather breach of the implied covenant of good faith and fair dealing such that the express terms of airline's contract of carriage were not at issue. See Id. at 902. *Howell*, as with Volaris' other above-cited authorities, does not provide a basis for dismissal.

IV. The Complaint States a Claim for Breach of Contract.

Whether Plaintiff states a claim for breach of contract boils down to a factual dispute, which is improper for a Rule 12b(6) motion to dismiss[2]. Here it is clear that Volaris first attempted to change the departing airport of Plaintiff's flight from Midway to O'Hare. *See* Mem. at 12. Putting aside that in itself equates to cancellation of the flight, Volaris' website subsequently clearly and conspicuously stated the flight had been canceled. *See* Levey Decl., Exh. 2.

A. Volaris' Website Showed the Flight Had Been Canceled.

In any event, Volaris' declarant is contradicted by Plaintiff's own testimony that after she was informed of a change of the departure airport for her flight to Mexico, Volaris' official website informed passengers that the flight had been canceled, giving her no reason to show for a flight from either Midway or O'Hare that day. *See* Levey Decl. ¶¶ 4-5.

[2] Again, if the Court is inclined to consider this testimony and treat Volaris' motion as a motion for summary judgment, Plaintiff respectfully requests an opportunity to depose Volaris' declarant so that she can be cross-examined regarding her statements. *See* n.1, *supra.* Alternatively, the Court should deny the motion to dismiss based on Plaintiff's own, unrefuted testimony that the flight was cancelled via the website.

B. Volaris' Assertion that It Offered Travel Vouchers to Plaintiff Is Factually Inconsistent with Its Claim that the Flight Was Not Canceled.

Once again the factual allegations from the Complaint allege the flight was cancelled. That should be the end of this issue. Yet even if the Court were to look at Volaris' factual assertions and ignore Volaris' website showing the flight was cancelled, the underlying actions contradict its argument that the flight was not canceled.

First, Volaris admits it does not offer refunds or credits for missed flights. *See* Mem. at 12 ("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.").

Second, Volaris asserts it offered Plaintiff a credit for the flight, which would only make sense if the flight was cancelled as alleged in the Complaint.

Along this line, Volaris' declaration does not address the fact that its website listed the flight as cancelled *after* it sent the e-mail attempting to move the departure airport, A reasonable trier of fact could find that the flight was indeed canceled based on the inconsistencies in Ms. Abardía's declaration and evidence that Volaris' website showed that the flight had been canceled, not changed. *See* Levey Decl. ¶¶ 4-5. The motion should be denied.

C. Volaris Is Subject to Carriers' "Longstanding Obligation to Provide a Prompt Refund to a Ticketed Passenger When the Carrier Cancels the Passenger's Flight."

Volaris like any other carrier operating in the United States is bound by the longstanding rule that airlines issue refunds for canceled flights. *See* Compl't ¶ 40 and Section III, supra. In addition, Volaris' contract of carriage creates a *contractual* obligation to provide "alternate transportation or compensation . . . in accordance with rules issued by the U.S. Department of Transportation (DOT)." Id. (quoting Volaris International Contract of Carriage,https://cms.volaris.com/globalassets/pdfs/eng/contractofcarriageint.pdf (last visited

April 8, 2020). Thus, whether or not the DOT's Enforcement Notice cited in the Complaint (¶¶ 13-14 and 40) is binding is beside the point; Volaris promised its customers it would act in accordance with the DOT's rules when it came to canceled flights.

Nor does it matter whether the DOT's Enforcement Notice complied with the Administrative Procedures Act ("APA"), 5 U.S.C. § 553, *see* Mem. at 12, because the notice was based on a "*longstanding obligation* to provide a prompt refund to a ticketed passenger when the carrier cancels the passenger's flight or makes a significant change in the flight schedule and the passenger chooses not to accept the alternative offered by the carrier." Compl't ¶ 13 (quoting Enforcement Notice) (emphasis added). Volaris' contention the DOT did not comply with the so-called public notice and comment requirements of the APA is a red herring.

D. Plaintiff Does Not Assert a Private Right of Action Under the Federal Aviation Act.

Plaintiff is not attempting to pursue a private right of action under Federal Aviation Act, as Volaris suggests. *See* Mem. n.7. There is nothing in the DOT Enforcement Notice or in Plaintiff's Complaint referring to the Federal Aviation Act. Instead, Plaintiff is pursuing state law causes of action, including a breach of contract claim based on Volaris' contract of carriage that, in turn, obligates it to comply with DOT rules pertaining to refunds for canceled flights. This argument, too, should be rejected.

E. Plaintiff Has Standing to Sue.

Plaintiff has standing to sue because there was a breach of the contract. Defendant's merit argument is 1) wrong and 2) does not impact standing as it conflates a defense with standing. As the Seventh Circuit made clear, "when a defense defeats a claim, it does so on the merits, not by displacing jurisdiction." *Our Country Home Enters. v. Comm'r*, 855 F.3d 773, 783 (7th Cir. 2017); *see also Carlson v. U.S.*, 837 F.3d 753 at 759 (2016) ("To hold otherwise would amount to denying

standing to everyone who cannot prevail on the merits, an outcome that fundamentally misunderstands what standing is."); *Bruggeman v. Blagojevich*, 324 F.3d 906, 909 (7th Cir. 2003) ("if the consequence were that he lacked standing, then every decision in favor of a defendant would be a decision that the court lacked jurisdiction, entitling the plaintiff to start over in another court.").

Thus, dismissal on grounds of lack of standing would not be appropriate. As alleged in the Complaint, Volaris had a contractual obligation to issue Plaintiff a refund, not provide her with useless flight vouchers. *See* Section IV, *supra*.

V. The Complaint States a Claim for Unjust Enrichment.

For the reasons previously state, Plaintiff's breach of contract claim should stand. Further, Plaintiff's unjust enrichment claim should not be dismissed unless Plaintiff's other claims are also dismissed, which they should not be for the reasons stated herein. *See Reid v. Unilever U.S., Inc.*, 964 F. Supp. 2d 893, 924 (N.D. Ill. 2013) (unjust enrichment claim based on same conduct underlying surviving ICFA claim); *see also Sirazi v. Gen. Mediterranean Holding, SA*, 2013 U.S. Dist. LEXIS 29636 at *25 (N.D. Ill. Mar. 5, 2013) (dismissal of unjust enrichment claim denied where plaintiffs' fraud claim survived); *Peddinghaus v. Peddinghaus*, 692 N.E.2d 1221, 1225 (1st Dist. 1998) (reversing dismissal of unjust enrichment claim based on fraud).

Furthermore, even if this Court were to find Plaintiff's breach of contract claim deficient in some way, the unjust enrichment claim will survive dismissal of the claims if the deficiency does not relate to the allegations of Plaintiff's other claims. *See Cleary v. Philip Morris Inc.*, 656 F.3d. 511, 517 (7th Cir. 2011) ("unjust enrichment will stand or fall" with a related claim to the extent that it "rests on the same improper conduct alleged in [the other] claim"). At best, therefore,

Volaris' argument is premature and its request for dismissal of Plaintiffs' unjust enrichment claim should be denied.

VI. The Complaint States a Claim for Unconscionability.

Substantive unconscionability is a recognized cause of action. *See Davis v. Cash for Payday*, 193 F.R.D. 518, 522 (N.D. Ill. 2000). There are two aspects to unconscionability – procedural and substantive – both of which have been more than sufficiently alleged in the Complaint. Importantly, for purposes of resolving Defendant's motion, the substantive unconscionability inquiry is fact intensive, making dismissal at this stage inappropriate. *Abels v. JPMorgan Chase Bank*, N.A., 678 F. Supp. 2d 1273, 1280 (S.D. Fla. 2009 ("Whether or not a reasonable person would have actually agreed to it is a factual question that cannot be decided on a motion to dismiss."); *see also Tripp v. Bunge N. Am., Inc.*, 2009 WL 2998921 (E.D. Ark. Sept. 11, 2009) (summary judgment on enforceability of arbitration provision precluded because genuine issue of material fact existed as to whether arbitration provision was unconscionable). For these reasons, Plaintiff has adequately alleged unconscionability. *See, e.g., Jett v. Warrantech Corp.*, 436 F. Supp. 3d 1170, 1181 (S.D. Ill. 2020) (denying motion to dismiss unconscionability cause of action).

To the extent that Volaris claims its contract of carriage allowed it to cancel Plaintiff's flight without giving her a refund, it is unconscionable. "'[I]n assessing whether a contractual provision should be disregarded as unconscionable, Illinois courts look to the circumstances existing at the time of the contract's formation, including the relative bargaining positions of the parties and whether the provision's operation would result in unfair surprise.'" *We Care Hair Dev., Inc. v. Engen*, 180 F.3d 838, 843 (7th Cir. 1999) (citations omitted). "A contract is unconscionable when, viewed as a whole, 'it is improvident, oppressive, or totally one-sided.'" *Id.* (citation

omitted). "'The presence of a commercially unreasonable term, in the sense of a term that no one in his right mind would have agreed to, can be relevant to drawing an inference of unconscionability but cannot be equated to it.'" *Id.* (citations omitted).

To be sure, no reasonable consumer would agree to pay for a flight knowing that the airline could cancel the flight at its option and refuse to refund the airfare. At the very least, this is a question of fact that should not be decided on a motion to dismiss.

VII. The Complaint States a Claim for Violation of ICFA.

ICFA is a remedial statute intended to protect consumers against fraud, unfair methods of competition, and other unfair and deceptive business practices. *Siegel v. Shell Oil Co.*, 612 F.3d 932, 934 (7th Cir. 2010) (internal citation omitted). "To state a claim under the ICFA, a plaintiff must allege five elements: (1) a deceptive act or unfair practice occurred, (2) the defendant intended for plaintiff to rely on the deception, (3) the deception occurred in the course of conduct involving trade or commerce, (4) the plaintiff sustained actual damages , and (5) the damages were proximately caused by the defendant's deception." *Blankenship v. Pushpin Holdings, LLC*, 2015 U.S. Dist. LEXIS 135944, at *19 (N.D. Ill. Oct. 6, 2015).

Plaintiff's Complaint pleads facts in support of each of these elements, which Volaris does not dispute. *See* Compl't ¶¶ 54-63. Specifically, Plaintiff alleges Volaris misrepresented and/or omitted material facts regarding it obligation to provide refunds to Plaintiff and the Illinois Subclass when it canceled their flights. *See* Compl't ¶ 61. In fact, Volaris admits it still has not informed consumers of their right to a refund and continues to steer passengers to "future travel credits" and forego refunds. *See* Abardía Decl. ¶ 12 ("In response to the Enforcement Notice, Volaris instituted a program to offer passengers whose flights had been canceled by Volaris the option of refunds or future travel credits."). "An omission or concealment of a material fact in the

conduct of trade or commerce constitutes consumer fraud. 815 ILCS 505/2." *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 504, 675 N.E.2d 584, 595 (1996) (citation omitted). Volaris omitted or concealed the fact that Plaintiff and other members of the Class were entitled to cash refunds for their canceled flights, not just credit toward future flights, thereby violation Section 2 of ICFA.[3]

Volaris maintains Plaintiff cannot establish deceptive conduct because she "sought to cancel her flight and failed to perform the contract by not showing for the rescheduled flight from O'Hare." Mem. at 15. Again, as with Volaris' other arguments in support of dismissal, this too turns on questions of fact—*e.g.*, whether or not the flight was canceled. Dismissal based on these disputed questions of fact is clearly inappropriate.

CONCLUSION

For all of the foregoing reasons, and any other reasons that may appear to the Court, Defendant Concesionaria Vuela Compañia de Aviación, S.A.P.I. de C.V.s Motion to Dismiss Class Action Complaint [15] should be denied. In the alternative, if the Court is inclined to grant the motion or aspects thereof, Plaintiff respectfully requests leave to amend.

Date: July 30, 2020

Respectfully submitted,

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[3] *See also Frequently Asked Questions Regarding Airline Ticket Refunds Given the Unprecedented Impact of the Covid-19 Public Health Emergency on Air Travel*, https://www.transportation.gov/sites/dot.gov/files/2020-05/Refunds- Second Enforcement Notice FINAL (May 12 2020).pdf ("If an airline, by representation or omission, engages in conduct that is likely to mislead consumers about their right to a refund . . . the Aviation Enforcement Office would deem such conduct to be a deceptive practice.") (footnote omitted) (last visited July 29, 2020).