UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

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JOHN BEERMANN, individually and on behalf of all others similarly situated,

Civil Action: 3:20-cv-00713-JAM

Plaintiff,

v.

TAUCK, INC. D/B/A TAUCK WORLD DISCOVERY,

Defendant.

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DEFENDANT'S MOTION TO DISMISS AND TO STRIKE CLASS ALLEGATIONS

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Defendant, Tauck, Inc. d/b/a Tauck World Discovery ("Tauck"), under Federal Rules of Fed. R. Civ. P 12(b)(6) and 12(f)(2), respectfully requests that this Court dismiss the Complaint filed by Plaintiff, John Beermann, in its entirety, and strike the class allegations found at Paragraphs 37 through 49 of the Complaint. We detail the reasons supporting this Motion below.

I. Introduction

Tauck, a family-owned company based in Connecticut, has been providing land and cruising tours around the world since its founding in 1925. Its premier services and hard-gotten reputation have earned Tauck numerous awards, including—as Plaintiff points out—a spot on Travel + Leisure's "World's Best" list for the last 23 years in a row. But despite Tauck's long-running success, it—like many others—has faced numerous challenges as a result of the Covid-19 pandemic. In fact, when Covid-19 began spreading earlier this year, Tauck was forced to cancel all tours through July 31, 2020. Plaintiff's 15-night land-and-cruise tour of Japan was among those affected.

Trying to help its guests during this difficult time, Tauck went far beyond what it was legally required to do and voluntarily provided Plaintiff (and other guests) a 100-percent refund on the amount he paid for the tour, which in the case of Plaintiff was in excess of $29,000.00. Additionally, Tauck provided Plaintiff (and other guests) with a 100-percent credit on the fees he paid for the Tauck Cruise Protection Program ("Protection Program"), which, for him and his wife, totaled $1,598.00.[1] Yet despite Tauck's gratuitous accommodations, Plaintiff is suing Tauck

[1] Tauck offers its guests travel protection coverage through two programs: (1) its Guest Protection Program ("GPP"); and (2) its Cruise and Event Protection Program ("CPP"). Both the GPP and CPP provide guests coverage for trip cancellations, trip interruptions, trip delays, medical expenses, and other travel assistance services. CPP is available for tours involving a cruise component and GPP is available for tours which do not involve a cruise component. Here, Plaintiff alleges that he purchased the protection coverage for him and his wife on July 30, 2019, for the tour that was ultimately cancelled on March 19, 2020. *See* Compl. ¶ 3-4. Plaintiff's protection coverage was therefore in effect beginning on July 30, 2019, and, therefore, he and his wife could have elected to cancel their tour for any reason (including unrelated to Covid-19) at any point thereafter and received a money-back refund for the cost of the tour.

because he contends he was entitled to a refund—rather than a credit—for the amounts he paid for the Protection Program. Plaintiff's contention lacks any merit whatsoever.

For the reasons explained in detail below, this Court should strike all of Plaintiff's class-action allegations under the Connecticut Unfair Trade Practices Act ("CUTPA") and dismiss this Complaint in its entirety.

First, the Court should strike Plaintiff's class-related allegations under CUTPA because—as a non-Connecticut resident who was not injured in Connecticut—he cannot represent or participate in a class action.

Second, the Court should dismiss Plaintiff's individual CUTPA claim (Count Four) both because, as a matter of law, Plaintiff fails to allege and otherwise has no actual right to a refund of the amounts he paid for the Tauck Cruise Protection Program, and also because he fails to plead the requisite elements for his claim.

Third, the Court should reject Plaintiff's claims under the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA") (Count Six) and under forty-eight (48) other states' consumer-protection laws (Count Five) because—as Plaintiff concedes—only Connecticut law governs this action.

Fourth, the Court should dismiss Plaintiff's unjust-enrichment claim (Count Eight) because he fails to allege and otherwise has no actual right to a refund, and also because unjust enrichment is unavailable when a contract between the parties exists—and here, Plaintiff not only acknowledges that a contract exists, he relies on it.

Fifth, the Court should dismiss Plaintiff's conversion (Count Two) and statutory-theft (Count Three) claims because he alleges a mere failure to repay—which, according to binding

precedent, cannot give rise to conversion or theft—and also because Plaintiff fails to plead the elements necessary to support either claim.

Sixth, Plaintiff's omission-based negligent-misrepresentation claim (Count Seven) fails because Plaintiff fails to allege that Tauck assumed a "duty to disclose" in the first place, and because, as a matter of law, Tauck had no such duty.

Lastly, the Court should dismiss Plaintiff's declaratory-judgment claim (Count One) because Plaintiff seeks relief for conduct that already occurred, Plaintiff does not ask the Court to declare actual rights or legal relations, and/or because it is merely duplicative of Plaintiff's other claims.

II. Standard of Review

"To survive a motion to dismiss for failure to state a claim, a complaint must contain factual allegations that, if accepted as true, state a plausible claim for relief." *Weldon v. MTAG Services, LLC*, No. 3:16-cv-783(JCH), 2017 WL 776648, *3 (D. Conn. February 28, 2017). The court, in turn, "considers not whether the plaintiff ultimately will prevail, but whether he has stated a claim upon which relief may be granted so that he should be entitled to offer evidence to support his claim." *Gray v. Erfe*, No. 3:13-CV-39 JBA, 2015 WL 3581230, at *1 (D. Conn. June 5, 2015) (citing *York v. Association of Bar of City of New York,* 286 F.3d 122, 125 (2d Cir. 2002)).

In doing so, "the court applies a 'plausibility standard,' which is guided by two working principles.'" *Id* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "First, the requirement that the court accept as true the allegations in the complaint 'is inapplicable to legal conclusions,' and '[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.'" *Id.* (quoting *Harris v. Mills*, 572 F.3d 66, 72 (2d Cir. 2009)). "Second, . . . the complaint must state a plausible claim for relief," which involves " 'a context-specific task

that requires the reviewing court to draw on its judicial experience and common sense.'" *Id.* (quoting *Iqbal*, 556 U.S. at 679).

III. Argument

a. The Court should strike Plaintiff's class-wide allegations under CUTPA and dismiss Plaintiff's individual CUTPA claim (Count Four).

Plaintiff's CUTPA claim suffers from two primary defects. To begin with, it advances class-wide allegations even though Plaintiff can neither represent nor participate in a class action under CUTPA. Beyond that, Plaintiff's *individual* CUTPA claim fails both as a matter of law and because he fails to plead all requisite elements of the claim. We discuss those issues in turn.

i. The Court should strike Plaintiff's class-related allegations under CUTPA because—as a non-Connecticut resident who was not injured *in* Connecticut—he cannot represent nor participate in a class action.

Plaintiff—a Florida resident who suffered no injury while *in* Connecticut—can neither participate nor represent a CUTPA class. As CUTPA makes clear, only those who are "*residents* of this state or *injured* in this state" can represent or participate in a CUTPA class action. Conn. Gen. Stat. § 42-110g (b) (emphasis added). In fact, Judge Bryant stressed that point in a (fairly) recent case in which she struck all class-wide CUTPA allegations for precisely that reason. *See In re Trilegiant Corp.*, 11 F. Supp. 3d 82, 115 (D. Conn. 2014), *aff'd sub nom. Williams v. Affinion Grp., LLC*, 889 F.3d 116 (2d Cir. 2018).

Like Plaintiff, those in *In re Trilegiant* sued the defendant for, among other things, employing a "deceptive" refund policy. Also like Plaintiff, they tried pursuing class-wide claims under CUTPA. Yet as Judge Bryant pointed out, because "none of the named Plaintiffs are Connecticut residents, and none of the Plaintiffs were injured in Connecticut[,] . . . the terms of CUTPA and the state's jurisprudence *prohibit* the Plaintiffs from bringing a class action on behalf of a national class." *Id.* (emphasis added). Judge Bryant thus struck the plaintiffs' class-wide CUTPA allegations, allowing them to proceed on their individual CUTPA claims only.

That same result is warranted here. *See generally id. See also Chapman v. Priceline Grp., Inc.*, No. 3:15-CV-1519(RNC), 2017 WL 4366716, at *6 (D. Conn. Sept. 30, 2017) (Chatigny, J.) (agreeing with Judge Bryant's reasoning in *In re Trilegiant* and granting the defendant's motion "to strike the nationwide class allegations from the CUTPA claim on the ground that the plaintiff—a Texas resident who was injured, if at all, in Texas—may not represent a class under CUTPA."); *Fraiser v. Stanley Black & Decker, Inc.*, 109 F. Supp. 3d 498, 505 (D. Conn. 2015) ("Connecticut General Statutes Section 42–110g(b) . . . limits Fraiser's standing to raise a claim on behalf of a class[.] . . . Therefore, although Fraiser has individual standing to bring a CUTPA claim, she 'may not bring a class action because [she] could not be representative of class members with the statutorily required in-state residency or injury characteristics.'") (quoting *Metro. Enter. Corp. v. United Techs. Int'l, Corp., Pratt & Whitney Large Commercial Engines Div.*, 2004 WL 1497545, at *4 (D. Conn. June 28, 2004)).

Given the clear text of CUTPA and how sister courts have applied it when presented with similar facts, the Court should strike all of Plaintiff's class-related CUTPA allegations. That, in turn, would leave Plaintiff with only an individual CUTPA claim. *See In re Trilegiant*, 11 F. Supp. 3d at 119. But, as detailed next, his attempt at an individual CUTPA claim fails as well.

ii. The Court should dismiss Plaintiff's individual CUTPA claim (Count Four) both because, as a matter of law, he fails to allege and otherwise has no right to a refund, and because he fails to plead the requisite elements of the claim.

Plaintiff's individual CUTPA claim fares no better. At bottom, Plaintiff complains he should get "his money back, not a coupon that will only have value at some unspecified date in the future[.]" Compl. ¶ 35. Yet nowhere in Plaintiff's 128-paragraph Complaint does he specifically allege—much less establish—he is legally entitled to a refund to start with. Plaintiff just implies, in a mere conclusory manner, that should be the case.

But, as Judge Bryant found in *In re Trilegiant*, "[a]lthough a denial of a full refund to a wronged or deceived consumer fails to alleviate the harm caused by an alleged wrong or deception, the denial of a refund cannot be wrongful [under CUTPA] *unless a consumer has a legal entitlement to a refund*." *In re Trilegiant Corp., Inc.*, No. 3:12-CV-0396 (VLB), 2016 WL 8114194, at *13 (D. Conn. Aug. 23, 2016) (emphasis added), *aff'd sub nom. Williams*, 889 F.3d 116 (2d Cir. 2018). In fact, the Second Circuit's later affirmance of Judge Bryant's decision in *In re Trilegiant* equally applies here: Plaintiff's claim over not receiving "a full refund to which [he] would *not* have been entitled at law *cannot* constitute an 'unfair or deceptive' act." *Williams*, 889 F.3d at 126 (2d Cir. 2018) (emphasis added). Plaintiff's individual CUTPA claim, therefore, fails as a matter of law.

Besides, even if Plaintiff could establish a legal right to a refund (which he cannot because one does not exist), his CUTPA claim would still fail because he fails to sufficiently allege the elements of his CUTPA claim. In pleading a deceptive practice,[2] one must allege the following:

[2] While one may plead a CUTPA violation based on either a *deceptive* or *unfair* practice, Plaintiff attempts only to plead a deceptive-practices claim. To be sure, he has no specific allegations about how Tauck's practices were at all "unfair." Conversely, Plaintiff makes several references about how Tauck's conduct was "deceptive." *See, e.g.,* Compl. ¶ 9 ("Advising Plaintiff and Class members that Tauck has 'always' had a policy that Protection Plan premiums are 'non-refundable under any circumstance' is false, misleading and **deceptive** to Plaintiff and other consumer Class members.") (emphasis added); ¶ 30 ("It is apparent that Tauck never had any such policy at all and that Tauck is now refusing to provide refunds to which Plaintiff and the Class are entitled by referring to a policy that never existed. This is **deceptive**.") (emphasis added); ¶ 81 ("Defendant does business in Connecticut, sells and distributes its Protection Plans in Connecticut, and engaged in **deceptive** acts and practices in connection with the sale of Protection Plans in Connecticut and elsewhere in the United States.") (emphasis added). And although Plaintiff uses the phrase "unfair and deceptive acts" in Paragraph 85, he focuses only on Tauck's alleged *omission*: one of the ways to establish a *deceptive* practice. *See* Compl. ¶ 85 ("Defendant engaged in unfair and deceptive acts in violation of Conn. Gen. Stat. §§ 42-110, et seq. ***when it failed to disclose*** that premiums for the Protection Plans were nonrefundable in all circumstances, including unilateral Tour cancellations by Tauck.") (emphasis added).

That said, were Plaintiff to suggests he intended to assert an unfair-practices claim all along, Tauck notes he failed to present a single allegation that would tend to establish *unfairness*. *See Ulbrich v. Groth*, 310 Conn. 375, 409, 78 A.3d 76, 100 (2013) (explaining that, to allege unfairness, one must at least address one of the following: (1) [W]hether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers, [competitors or other businesspersons]."). Therefore, to the extent he ever intended to, Plaintiff fails in alleging an unfair-practice claim under CUTPA as well.

"First, there must be a representation, omission, or other practice *likely to mislead consumers*. Second, the consumers must interpret the message reasonably under the circumstances. Third, the misleading representation, omission, or practice must be *material*—that is, likely to affect consumer decisions or conduct." *Smithfield Assocs., LLC v. Tolland Bank*, 86 Conn. App. 14, 28, 860 A.2d 738, 749 (2004) (emphasis added). Here, Plaintiff fails to allege the first and third elements.

As for the first element, Plaintiff fails to sufficiently allege that Tauck's alleged omission *was likely to mislead* consumers. In fact, all Plaintiff alleges is that "Defendant engaged in unfair and deceptive acts in violation of Conn. Gen. Stat. §§ 42-110, *et seq.* when it failed to disclose that premiums for the Protection Plans were nonrefundable in all circumstances, including unilateral Tour cancellations by Tauck." *See* Compl. ¶ 85. Yet he says nothing about—much less sufficiently alleges—whether Tauck's "omission" was one that would likely (or at all) mislead consumers. Moreover, to the extent Plaintiff hopes the Court may draw that inference for him, the Supreme Court has made clear that "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Iqbal*, 556 U.S. 662, 678. Presenting nothing more than "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements"—as Plaintiff does here—"do not suffice." *Id.* At any rate, it would not be *plausible*, given the context, that Tauck's alleged omission likely misled consumers, and so his claim fails for this reason as well. *Id.* at 679.

Similarly, Plaintiff fails to sufficiently allege the third element of his CUTPA claim: that Tauck's alleged omission was "*material*—that is, likely to affect consumer decisions or conduct." *Smithfield*, 86 Conn. App. At 28 (emphasis added). In fact, far from alleging how Tauck's omission was sufficiently material, Plaintiff's Complaint fails to address *this* element altogether.

Accordingly, Plaintiff's individual CUTPA claim fails to state a claim as he did not allege two necessary elements.

At bottom, Plaintiff did not—and, indeed, cannot—demonstrate a legal entitlement to a refund or that Tauck's so-called "omission" was likely to mislead consumers. Thus, the Court should dismiss Plaintiff's CUTPA claim with prejudice as an amendment would be futile. *See Illinois Tool Works Inc. v. J-B Weld Co.*, LLC, No. 3:19-CV-01434 (JAM), 2020 WL 3489388, at *6 (D. Conn. June 26, 2020) (Meyer, J) (dismissing with prejudice because "it would be unproductive to engage in another round of motion practice. . . given the near-certainty that any proposed amendment to restore this particular claim would be futile.").

b. The Court should reject Plaintiff's claims under FDUTPA (Count Six) and forty-eight (48) other states' consumer-protection laws (Count Five) because—as Plaintiff concedes—*Connecticut* law governs this action.

In the alternative to his CUTPA claim, Plaintiff asserts claims for violations of Florida's Deceptive and Unfair Trade Practices Act ("FDUTPA") (Count Six) and for "Violations of [48] Other State Consumer Protection Laws" (Count Five). *See* Compl. 17–21. But these claims fail as a matter of law because, as Plaintiff concedes in his Complaint, *Connecticut* law governs this dispute. *See* Compl. ¶¶15–19.

To be sure, Tauck's terms and conditions make clear that they "shall be governed ***in all respects*** by the laws of the State of Connecticut without giving effect to its conflicts of law provisions[,] . . . [and that] ***any*** cause of action arising under these Terms shall exclusively be brought in such courts." Compl. ¶ 15 (emphasis added and citing and quoting from Tauck's terms and conditions available at: https://www.tauck.com/terms-and-conditions (last accessed August

26, 2020)).[3] Plaintiff, in fact, emphasizes this in his Complaint: "Tauck has selected Connecticut as its chosen law by including the Connecticut choice-of-law provision in its Terms and Conditions. *Tauck acquiesces to the application of Connecticut law and expects that Connecticut law will apply to claims brought by its customers*." *See* Compl. ¶ 18 (emphasis added).

As Plaintiff concedes, the effect of Tauck's choice-of-law provision is that, should a dispute arise between them, only Connecticut law would apply. And so, here, Connecticut law must "govern not only interpretation of the contract in which [the choice-of-law provision] is contained, but also tort claims arising out of or relating to the contract." *Travel Servs. Network, Inc. v. Presidential Fin. Corp. of Massachusetts*, 959 F. Supp. 135, 146 (D. Conn. 1997).

Simply put, Plaintiff's agreeing to Tauck's terms and conditions bars him from asserting claims under other states' laws. *See, e.g.*, *id.* at 146–47 (D. Conn. 1997) (dismissing the plaintiff's CUTPA claim "[i]n light of [its] reliance on Massachusetts law elsewhere, as well as [its] failure to contest [the defendant's] interpretation of the choice-of-law provision, [thus leading] the Court [to] conclude[] that the choice-of-law provision mandates application of Massachusetts law to all claims arising out of or connected to the Loan Agreements."); *Alpha Beta Capital Partners, L.P. v. Pursuit Inv. Mgmt., LLC*, 193 Conn. App. 381, 426–27 (2019) (striking CUTPA and other statutory claims given the agreement's choice-of-law clause provided that only New York law would apply); *Grey Mountain Partners, LLC v. Insurity, Inc.*, No. X03HHDCV166067644S, 2017 WL 5641378, at *6 (Conn. Super. Ct. Oct. 18, 2017) (holding that a similar choice of law provision was broad enough to bar the plaintiff's CUTPA claim). As a result, Plaintiff's claims under other states' laws are improper and fail as a matter of law.

[3] As Tauck's terms and conditions also make clear, they are intended to set the parameters over the parties' entire legal relationship. *See* https://www.tauck.com/terms-and-conditions ("[P]lease read these Terms carefully; they impose legal obligations on you and on Tauck, and establish our legal relationship.").

That aside, Plaintiff's claims under FDUTPA and other states' consumer-protection laws also fail for the same reasons his CUTPA claim does: Plaintiff has no legal right to a refund to begin with. Plus, Plaintiff fails to address how Tauck's alleged "omission" was misleading or at all material. So even if other states' laws could apply here, Plaintiff's claims would do no better under any other consumer-protection statute. *See, e.g.*, *Muy v. Int'l Bus. Machines Corp.*, No. 4:19CV14-MW/CAS, 2019 WL 8161747, at *1 (N.D. Fla. June 5, 2019) (explaining that "[a] deceptive practice under FDUTPA [requires a showing of] a '*material* representation or omission that is likely to mislead the consumers acting reasonably under the circumstances.") (internal citations omitted).

For these reasons, the Court should dismiss Plaintiff's catch-all claim under 48 other states' consumer-protection statues generally (Count Five) and under FDUTPA specifically (Count Six).

c. The Court should dismiss Plaintiff's unjust-enrichment claim (Count Eight) because he fails to allege he is legally entitled to a refund, and because unjust enrichment is unavailable when a contract between the parties exists—a fact Plaintiff concedes and relies on.

Plaintiff's claim for unjust enrichment has the same defect his unfair-practices claims do: he fails to allege he is legally entitled to a refund in the first place and, at any rate, he has no such right. As Judge Bryant explained in *In re Trilegiant*, while "[t]he failure to provide a refund establishes that a conferred benefit has been retained, [that alone] does not establish that benefit has been retained unjustly." *In re Trilegiant Corp.*, 2016 WL 8114194, at *13 (D. Conn. Aug. 23, 2016) (citing *Stoffan v. S. New England Tel. Co.*, 4 F. Supp. 3d 364 (D. Conn. 2014) (holding that the failure to pay discretionary income to a terminated employee did not unjustly enrich the employer which had no legal duty to pay the income)). The reality is, "[m]ost consumers are not legally entitled to the refunds they are provided *gratis* as a goodwill measure." *Id.* And so where—

like here—the claimants give "no authority suggesting that they were *legally entitled* to full refunds . . . , [it cannot] be deemed an unjust enrichment." *Id.* (emphasis in the original).

The Second Circuit has since affirmed Judge Bryant's holding, creating binding precedent on precisely this issue. *See Williams*, 889 F.3d 116, 126 ("[A]s with their failed CUTPA claim, they cannot argue that Trilegiant was unjustly enriched by not refunding additional, legitimate past membership fees to which its customers were not entitled."). The result should thus be no different here.

Beyond that, Plaintiff's unjust-enrichment claim also fails given "unjust enrichment [is a] common law principle[] of restitution, which provide[s] a means of recovery in a situation *where no valid contract exists*." *Weinshel, Wynnick & Assocs., LLC v. Charles*, No. CV136033831S, 2014 WL 7671672, at *3 (Conn. Super. Ct. Dec. 17, 2014) (emphasis added). As such, it "do[es] not apply where, as here, the parties entered into a contract which was valid and binding[.]" *Id.* *See also Filip v. Soare*, No. CV054010580, 2006 WL 1359930, at *2 (Conn. Super. Ct. May 5, 2006) (rejecting the plaintiff's unjust-enrichment claim because there was no express or "implied contract between [the parties] which would entitle the plaintiff to recover under a theory of unjust enrichment." The court also noted that "unjust enrichment relates to a benefit of money or property and applies when no remedy is available based on contract. *The lack of a remedy under a contract is a precondition to recovery based on unjust enrichment or quantum meruit.*") (emphasis added); *Cadco, Ltd. v. Doctor's Assocs., Inc.*, No. LLICV146010928S, 2015 WL 7941597, at *8 (Conn. Super. Ct. Nov. 13, 2015) ("Unjust enrichment is a common-law principle of restitution; it is a noncontractual means of recovery without a valid contract, one that has been applied in circumstances *where no contract exists*.") (internal citations omitted and emphasis added).

In fact, Plaintiff appears to purposefully avoid asserting a breach-of-contract claim (tacitly acknowledging he has no contractual entitlement to a cash refund) despite relying on the contract between him and Tauck to support his jurisdictional and choice-of-law allegations. *See* Compl. ¶¶ 15-19. At any rate, because a contract governing the relationship between the parties exists, as alleged in the Complaint, Plaintiff's unjust enrichment claim fails as a matter of law and should be dismissed.

Accordingly, because Plaintiff fails to allege a (and, in fact, has no) legal right to a refund, and also because Plaintiff alleges that a contract between him and Tauck exists, Plaintiff's unjust-enrichment claim (Count Eight) fails as a matter of law. The Court should thus dismiss Plaintiff's claim with prejudice, as an amendment would be futile. *See Illinois Tool Works Inc.* 2020 WL 3489388, at *6.

d. The Court should dismiss Plaintiff's conversion (Count Two) and statutory-theft (Count Three) claims because a mere failure to repay cannot give rise to conversion or theft; besides, Plaintiff fails to plead the elements necessary to support either claim.

As the Connecticut Supreme Court has stressed, "[a] mere obligation to pay money may not be enforced by a conversion action … and an action in tort is inappropriate where the basis of the suit is a contract, either express or implied." *Deming v. Nationwide Mut. Ins. Co.*, 279 Conn. 745, 772 (2006) (internal citation omitted and ellipses in original). *See also Cherry Hill Const. Inc. v. E.F.S. Mach., LLC*, No. CV156053196S, 2015 WL 3975711, at *3–4 (Conn. Super. Ct. June 3, 2015) (same). That's true of Plaintiff's statutory-theft claim as well. *See Mystic Color Lab, Inc. v. Auctions Worldwide, LLC*, 284 Conn. 408, 429 (2007) (reversing judgment and holding that the plaintiff's "claims for conversion and statutory theft must fail, in keeping with our precedent barring such claims for money owed."). Yet, that's precisely what Plaintiff's conversion and statutory-theft claims are about: Plaintiff is asking Tauck to pay him back.

The key difference between tort claims for conversion or statutory theft, on the one hand, and claims for mere repayment, on the other, is that conversion and theft claims require the property at issue belong to the claimant *when* the defendant converted or stole it. That is, "[c]onversion is an unauthorized assumption and exercise of the right of ownership over property belonging to another, to the exclusion of the owner's rights. Similarly, statutory theft is the stealing of another's property or the knowing receipt and concealment of stolen property." *Id.* at 418 (internal citations omitted). Moreover, "[s]tatutory theft[] . . . requires an element over and above what is necessary to prove conversion, namely, that the defendant intentionally deprived the complaining party of his or her property." *Id.* at 418–19.

The bottom line is neither of these torts apply here given Plaintiff did not—and cannot—allege he owned the specific property he claims Tauck converted or stole. *Id.* at 421 ("[I]n order to establish a valid claim of conversion or statutory theft for money owed, a party must show ownership or the right to possess specific, identifiable money, rather than the right to the payment of money generally."); *see also Deming*, 279 Conn. at 772 (noting that a plaintiff "must . . . show[] that the money claimed . . . at all times belonged to the plaintiff and that the defendant converted it to his own use."). Like the claimants in *Mystic River*, *Deming*, and *Cherry Hill*, Plaintiff merely contends Tauck should have repaid him. *See* Compl. ¶ 61 (alleging, in support of Plaintiff's conversion claim, that "[he] and the other members of the Class have an undisputed right to immediate refunds, in lieu of vouchers or future credits, for Protection Plans purchased in connection with trips canceled by Tauck."); *id.* ¶ 73 (alleging in support of Plaintiff's statutory-theft claim that "Defendant failed to provide and/or outright refused to provide refunds to Plaintiff and the Class members for Protection Plans they purchased after Defendant canceled their Tours."). Those allegations are not enough to support either claim. *See, e.g.*, *Cherry Hill Const.*,

2015 WL 3975711, at *4 ("The basis of the plaintiff's conversion and statutory theft claims is that the defendant has failed to return its $10,000 deposit for equipment that the defendant promised to it and failed to turn over to the plaintiff, pursuant to its agreement. These allegations constitute an unmet obligation to pay the plaintiff and are not sufficient to assert claims for conversion or statutory theft.")

On top of failing to allege that he owned the money he claims Tauck converted and stole, Plaintiff never alleges—or, even, suggests—Tauck acted with the requisite *intent* for establishing theft. That is, given "[s]tatutory theft under section 52–564 is synonymous with larceny under section 53a–119 of Connecticut General Statutes[,] . . . [it] requires 'the intent to deprive another of property or to appropriate the same to himself or a third person.'" *Lord v. Int'l Marine Ins. Servs.*, No. 3:08-CV-1299 JCH, 2013 WL 5346507, at *7 (D. Conn. Sept. 23, 2013) (citing Conn. Gen.Stat. § 53a–119 and *Mystic Color Lab*, 284 Conn. at 418–19), *aff'd sub nom. Schumann v. Int'l Marine Ins. Servs.*, 618 F. App'x 12 (2d Cir. 2015). Plaintiff's statutory-theft claim thus fails because he did not allege Tauck acted with required intent, either. *See Cherry Hill Const.* 2015 WL 3975711, at *2 ("[T]o the extent the plaintiff alleges a claim for statutory theft in count three, said count fails to state a legally sufficient claim absent the allegation of *intent*.") (emphasis added).

For these reasons, the Court should dismiss Plaintiff's conversion (Count Two) and statutory-theft (Count Three) claims. Moreover, the Court should do so with prejudice given an amendment to these claims would be futile. *See Illinois Tool Works Inc.* 2020 WL 3489388, at *6.

e. Plaintiff's *omission*-based negligent-misrepresentation claim (Count Seven) fails because he fails to allege that Tauck had a duty to disclose the allegedly omitted information, and because, as a matter of law, Tauck had no such duty.

Plaintiff's negligent-misrepresentation claim seeks to hold Tauck liable for an *omission* rather than an affirmative misrepresentation. *See* Compl. ¶ 118 ("Defendant failed to disclose,

concealed, suppressed, and *omitted* material information concerning the Protection Plan at the time of purchase[.]") (emphasis added). That distinction matters because an " action based on omission arises *only* if the defendant had a *duty to disclose* the omitted information[.]" *Office Furniture Rental All., LLC v. Liberty Mut. Fire Ins. Co.*, 981 F. Supp. 2d 111, 120 (D. Conn. 2013) (emphasis added). Plaintiff, though, alleges nothing regarding whether Tauck assumed this (exceptional) duty. Plus, given the strictly commercial relationship between them, Tauck could not have assumed that duty anyway.

To be sure, one only assumes a duty to disclose material information where they have invited "a closer degree of trust and reliance than in the ordinary business relationship." *Id.* (quoting *De La Concha of Hartford, Inc. v. Aetna Life Ins. Co.*, No. CV980580129, 2002 WL 31170495, at *8 (Conn. Super. Ct. Aug. 23, 2003), *aff'd,* 269 Conn. 424, 849 A.2d 382 (2004). And so, "a claim for negligent misrepresentation [based on an omission] can only stand when there is a special relationship of trust and confidence which creates a duty for one party to impart correct information to another." *Id.* But as Plaintiff's Complaint makes clear, Tauck formed *only* an ordinary business relationship with Plaintiff. Thus, as a matter of law, Plaintiff has no basis on which to advance a viable omission-based misrepresentation-claim against Tauck. *See, e.g.*, *De La Concha of Hartford.*, 2002 WL 31170495, at *8 (rejecting the plaintiff's omission-based negligent-misrepresentation claim because "the plaintiff and Aetna were not fiduciaries nor were they involved in any other relationship that would require Aetna to disclose to the plaintiff information about its internal decision to sell the Civic Center or to disclose its plans to promote the Civic Center.").

In sum, the Court should dismiss Plaintiff's negligent-misrepresentation claim (Count Seven) because Plaintiff fails to plead that Tauck incurred a duty-to-disclose the (allegedly)

omitted information, and because, as a matter of law, Tauck did not undertake such a duty. Moreover, the Court should do so with prejudice given an amendment to these claims would be futile. *See Illinois Tool Works Inc.* 2020 WL 3489388, at *6.

f. The Court should dismiss Plaintiff's declaratory-judgment claim (Count I) because Plaintiff seeks relief for conduct that already occurred, because Plaintiff does not ask the Court to declare *rights* or *legal relations*, and/or because Plaintiff seeks declarations that are duplicative of his other claims.

"Under the Declaratory Judgment Act, 28 U.S.C. § 2201(a), 'any court of the United States ... may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.'" *Tapia v. U.S. Bank, N.A.*, 718 F. Supp. 2d 689, 695 (E.D. Va. 2010), *aff'd*, 441 F. App'x 166 (4th Cir. 2011) (quoting 28 U.S.C. § 2201(a). That said, "'[d]eclaratory judgments are designed to declare rights so that parties can conform their conduct to avoid *future* litigation,' and [so] are [deemed] untimely if the questionable conduct *has already occurred* or damages have already accrued." *Id.* (emphasis added and internal citation omitted). In other words, "the underlying purpose of declaratory relief is to guide parties' conduct in the *future*." *Id.* (emphasis added). Yet here, Plaintiff is seeking relief over things that *already happened.* That is an inappropriate basis on which to seek declaratory relief. *See id.* at 696 (dismissing the plaintiff's claim for declaratory relief as inappropriate given the alleged harm had already occurred). *See also Merino v. EMC Mortg. Corp.*, No. CIV.A 1:09-CV-1121, 2010 WL 1039842, at *4 (E.D. Va. Mar. 19, 2010) (explaining that "a declaratory judgment is an inherently forward-looking mechanism, intended to guide parties' behavior in the future," and thus dismissing the plaintiff's claim for declaratory relief because the harm already occurred); *Horvath v. Bank of New York*, No. 1:09–cv–1129, 2010 WL 538039 (E.D.Va. Jan. 29, 2010) ("[d]eclaratory relief is reserved for forward looking actions").

Furthermore, Plaintiff fails to adequately state a claim under the Declaratory Judgment Act. The Declaratory Judgment Act provides that "any court of the United States . . . may declare the rights and other legal relations of any interested party . . . ." 28 U.S.C.A. § 2201(a). Plaintiff, however, does not seek a declaration of "rights or other legal relations." Instead, he asks the Court to declare that:

i. Tauck never "informed Plaintiff and Class members or anywhere disclosed that the trip insurance premium would never be refunded in any circumstances";

ii. it was "unfair and deceptive for Tauck to keep insurance money when the underlying thing that is being insured was canceled through no fault of Plaintiff and Class members"; and

iii. Tauck "intentionally and actively misrepresented, and is continuing to intentionally and actively misrepresent, to Plaintiff and members of the Class that it maintains a 'policy' that Protection Plan premiums are nonrefundable in any circumstances." Compl. ¶ 53.

Not one of these requests, however, seeks a declaration of *rights* or *other legal relations* between interested parties. Instead, they merely ask the Court to declare some proposed set of facts true. More inappropriate still, Plaintiff's second request also asks the Court to opine that it, too, considers Tauck's conduct "unfair and deceptive"—a conclusion that, standing alone, has no relevance to a *right* or a *legal relation* whatsoever.

Lastly, Plaintiff's declaratory-judgment claim should also be dismissed because it is merely duplicative of his other claims. *See E. Point Sys., Inc. v. Maxim*, No. 3:13-CV-00215 VLB, 2014 WL 523632, at *13 (D. Conn. Feb. 7, 2014) (dismissing declaratory-relief claims as duplicative); *Ainsworth v. Amica Mut. Ins. Co.*, No. 3:16-CV-01139 (MPS), 2018 WL 4425991, at *7 (D. Conn. Sept. 17, 2018) (same).

Accordingly, the Court should reject Plaintiff's improper request for declaratory relief (Count One) because it inappropriately seeks relief on events that have already occurred, does not state an adequate claim for relief, and/or is merely duplicative of the other claims.

IV. Conclusion

Plaintiff has not pleaded a single viable claim against Tauck. The Court should, therefore, dismiss this Complaint entirely.[4] Moreover, because allowing Plaintiff to amend these deficient pleadings would prove entirely futile, the Court should dismiss Plaintiff's Complaint with prejudice. Additionally, the Court should strike Plaintiff's class-wide allegations under CUTPA because he can neither represent nor participate in a CUTPA class action.

Respectfully submitted,

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[4] Worth noting, the Court should also dismiss Plaintiff's Complaint because he improperly incorporates "by reference [all] the preceding paragraphs" for each one of his claims. But as a sister court within the Second Circuit stressed in a case in which the plaintiff "simply incorporate[d] by reference all the preceding paragraphs[,] [i]t is not the duty of the defendants or this Court to sift through the Complaint and guess which factual allegations support which claims. Rule 8(a) places the burden squarely upon the plaintiff to clearly and succinctly state its claims." *Discon Inc. v. NYNEX Corp.*, No. 90-CV-546A, 1992 WL 193683, at *16 (W.D.N.Y. June 23, 1992). So for this reason, too, Plaintiff's Complaint should be dismissed in its entirety.

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of August 2020, a copy of the foregoing was electronically filed and served by CM/ECF and/or mail on anyone unable to accept electronic filing. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

/s/ Jeffrey L. Ment
Jeffrey L. Ment