UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

LAUREN SHIFLETT,

Plaintiff,

v. CASE NO.: 8:20-cv-1880-JSM-AAS

VIAGOGO ENTERTAINMENT INC.,

Defendant.
_____/

DEFENDANT'S MOTION TO DISMISS
AND INCORPORATED MEMORANDUM OF LAW

Defendant viagogo Entertainment, Inc. ("viagogo") moves to dismiss Plaintiff's Complaint under Federal Rule of Procedure 12(b)(1) because this Court lacks subject matter jurisdiction and under Rule 12(b)(6) because the Complaint fails to state a claim upon which relief can be granted. In support, viagogo states as follows:

Introduction

viagogo operates an online secondary ticket marketplace to connect buyers and sellers of tickets to events around the world. The transaction process is quite simple: a seller lists tickets for sale on viagogo's website, and if a buyer chooses to purchase those tickets, viagogo facilitates the transaction through its secure online platform. The buyer pays to viagogo the listed purchase price, plus fees and taxes, and the seller provides the tickets to the buyer. viagogo then compensates the seller after an event occurs.

By using viagogo's services, buyers and sellers agree to certain Terms and Conditions. One of those conditions is the viagogo Guarantee. Put simply, the viagogo Guarantee ensures that a buyer receives the tickets she purchases before the event occurs. In the rare instance that she does not, the viagogo Guarantee states that viagogo, at its sole and absolute discretion, may offer the buyer a refund. The viagogo Guarantee neither obligates viagogo to provide a refund nor promises a purchaser that she will receive one. The Terms and Conditions also note that all sales are final.

Once COVID-19 began to delay and postpone events throughout the country, viagogo unilaterally updated its website to enact COVID-19 policies, which are distinct and separate from the viagogo Guarantee. If COVID-19 delayed an event, the buyer's tickets would presumably remain valid for the rescheduled date and there would be no need for a refund or

voucher. If COVID-19 cancelled an event, however, viagogo offered the buyer a choice. A buyer could elect to receive either a refund or a voucher valued at 125% of the buyer's purchase price. The COVID-19 policies notified the buyer that receiving a refund could take months given the widespread impact of COVID-19.

Before COVID-19 shut down most of the nation, including Florida, Plaintiff purchased a ticket to a Tool concert in Tampa through viagogo's website. According to Plaintiff, the band's Facebook page indicated that the Tampa concert had been cancelled, entitling her to a refund. But viagogo had classified the event as only postponed, not entitling her to a refund. She now pursues claims for breach of contract, breach of implied contract, conversion, unjust enrichment, and for violations of FDUTPA.

As an initial matter, this Court lacks subject matter jurisdiction over this case. This requires dismissal under Rule 12(b)(1).

First, Plaintiff lacks standing to pursue claims related to any event but the Tool concert in Tampa, Florida. Consumers cannot pursue claims related to products that they did not purchase. Here, Plaintiff only alleges to have purchased tickets to the Tool concert. Thus, this Court lacks subject matter jurisdiction over claims related to any other event.

Second, Plaintiff's claims are moot. She wants a refund for her tickets to the Tool concert. viagogo gave her that exact option. But instead, she accepted a 125% voucher as compensation. Thus, there is no meaningful relief that this Court can offer Plaintiff.

To the extent that this Court maintains subject matter over any claim, each claim fails.

First, Plaintiff has failed to allege any factual allegations plausibly demonstrating any breach of contract. She bases her breach of contract claims on the purported breach of the

viagogo Guarantee. But the viagogo Guarantee does not apply here. It only applies where a buyer has not received her tickets before the event has occurred. And there is no plausible factual allegation that she did not. Moreover, it is implausible that viagogo breached the viagogo Guarantee by not providing a refund where the very terms of the viagogo Guarantee grant viagogo absolute discretion in doing so. To the extent that Plaintiff bases any breach of contract on violation of viagogo's COVID-19 policies, she has failed to plausibly plead that those policies constitute a contract.

Second, she cannot proceed on a breach of implied contract claim because the Terms and Conditions, an express contract, cover the same subject matter: the viagogo Guarantee. Thus, she cannot move forward on that count.

Third, the independent tort doctrine bars equitable claims that find their genesis in alleged contractual duties. Here, Plaintiff's conversion and unjust enrichment claims are simply breach of contract claims by another name. They should be dismissed.

Fourth, Plaintiff's conversion claim fails because there was no obligation to keep Plaintiff's monetary payment intact. Moreover, her chief complaint is that she wants a refund. This can be satisfied generally from the payment of any money. Both doom her conversion claims.

Fifth, Plaintiff's unjust enrichment claim fails because she has an adequate remedy at law available. A plaintiff cannot pursue an unjust enrichment claim where the underlying factual basis for recovery is the same as those legal claims. That is the exact situation here, and her unjust enrichment claims should be dismissed.

Sixth, Plaintiff has not plausibly suggested that viagogo engaged in any deceptive or unfair conduct. Several of the alleged FDUTPA violations, much like her tort claims, simply repackage Plaintiff's breach of contract claims. But breaching a contract cannot on its own satisfy FDUTPA's requirements. Moreover, the two remaining allegedly deceptive or unfair acts are belied by the Complaint itself. It is hard to fathom that viagogo's refusal to offer any refund is deceptive or unfair when the very Terms and Conditions grant viagogo discretion in doing so and inform buyers of that potentiality. Buyers agree that they may not ultimately receive any refund when they use viagogo's services. And far from "forcing" buyers to take a voucher, viagogo offers them a choice: a voucher *or* a refund. Thus, Plaintiff's FDUTPA claims should be dismissed as well.

For these reasons and those explained more fully below, the Court should dismiss Plaintiff's Complaint in its entirety under Rule 12(b)(1) and Rule 12(b)(6).

MEMORANDUM OF LAW

Legal Standard

A Rule 12(b)(1) motion challenges a court's subject matter jurisdiction over a case. Such a motion properly raises issues of standing, *Stalley ex rel. United States v. Orlando Regional Healthcare Sys., Inc.*, 524 F.3d 1229, 1232 (11th Cir. 2008), and mootness, *North Carolina v. Rice*, 404 U.S. 244, 246 (1971).

To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a complaint must plead sufficient "factual content that allows the court to draw the reasonable inference that defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). This requires "more than labels and conclusions [or] a formulaic recitation of the

elements of a cause of action." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Plaintiffs must set forth "factual allegations" that are "plausible" and "raise a right to relief above the speculative level." *Id.* This "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 556 U.S. at 678. Pleading "a sheer possibility that a defendant acted unlawfully" is not enough. *Id.*

"Legal conclusions couched as factual allegations are not sufficient, nor are unwarranted inferences, unreasonable conclusions, or arguments." *Lutman v. Harvard Collection Servs., Inc.*, 2015 WL 4664296, at *2 (M.D. Fla. Aug. 6, 2015) (citing *Twombly*, 550 U.S. at 555). Unreasonable inferences or conclusions include accepting facts or allegations contradicted by other facts contained in the complaint. *See Griffin Indus., Inc. v. Irvin*, 496 F.3d 1189, 1205-06 (11th Cir. 2007) ("Our duty to accept the facts in the complaint as true does not require us to ignore specific factual details of the pleading in favor of general or conclusory allegations."); *Rance v. Rocksolid Granit USA, Inc.*, 2010 WL 11601453 (S.D. Fla. Sept. 2, 2010) (adopting report and recommendation recommending dismissal of claims based on contradiction between complaint's factual allegations and its exhibits).[1]

Background

Plaintiff alleges that she purchased two tickets through the viagogo website to a Tool concert in Tampa, Florida scheduled for April 19, 2020. (Compl. ¶ 43.) She pleads that she found out that the concert would not take place because of COVID-19 when she saw a post on Tool's Facebook page. (Compl. ¶ 46.) She contends that on multiple occasions she contacted

[1] Federal Rule of Civil Procedure 10(c) states that an exhibit to a complaint is a part of the complaint for all purposes.

viagogo, whose representatives told Plaintiff that the concert was rescheduled and not cancelled. (Compl. ¶ 47.)

Plaintiff contends that she is entitled to a full refund under the "viagogo Guarantee." (Compl. ¶ 48.) Plaintiff believes that the viagogo Guarantee "promised that if a [v]iagogo user purchased tickets to any event through [v]iagogo, and the event was cancelled, the user would receive a full, money-back refund for their purchase." (Compl. ¶ 13.) Plaintiff selectively quotes the viagogo Guarantee stating that "in the rare instance that a problem arises . . . viagogo will issue you a refund for the costs of the ticket." (Compl. ¶ 27 (ellipsis in original).) Plaintiff contends that she relied on this term and condition when purchasing her ticket before the COVID-19 pandemic hit Florida. (Compl. ¶ 32.)

Plaintiff pleads that in response to the COVID-19 pandemic, viagogo created a new section of its website addressing cancellations and postponements caused by COVID-19. (Compl. ¶ 34 (citing "Coronavirus (COVID-19) Update" section of viagogo website).) According to Plaintiff, if an event were merely postponed, a purchaser is not entitled to a refund whereas if an event is cancelled, she is entitled to a refund or a voucher. (*See* Compl. ¶¶ 35-36.) Plaintiff contends that viagogo wrongfully classified her event as postponed instead of cancelled. (Compl. ¶¶ 46-47.)

On August 14, 2020, viagogo informed Plaintiff by email that the Tool concert was cancelled. (Meade Decl., attached as Ex. 1, Ex. 1-A.) On August 17, 2020, viagogo informed Plaintiff by email that she could either receive a refund or a voucher valued at 125% of her original order. (Meade Decl., Ex. 1-B.) On August 20, 2020, Plaintiff received a voucher in

the amount of $513.69. (Meade Decl., Ex. 1-C.) viagogo also reminded Plaintiff that she could receive a refund. (Meade Decl., Ex. 1-D.)

Argument

I. The Court lacks subject matter jurisdiction over Plaintiff's claims.

A. Plaintiff lacks standing to pursue claims for other events.

Standing requires that an individual have suffered an injury-in-fact. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1546 (2016). In consumer class actions, "[i]t is axiomatic that [plaintiff] suffer[s] no injury from products [s]he did not buy." *Blobner v. R.T.G. Furniture Corp.*, 2019 WL 3808130, at *4 (M.D. Fla. July 24, 2019) (Moody, J.); *see also Ohio State Troopers Ass'n, Inc. v. Point Blank Enters., Inc.*, 347 F. Supp. 3d 1207, 1221-22 (S.D. Fla. 2018) (collecting cases). To avoid burdening parties and the court with unnecessary discovery, a court can dismiss those claims related to products not purchased at the pleading stage. *See, e.g.*, *Snyder v. Green Roads of Fla. LLC*, 430 F. Supp. 3d 1297, 1303 (S.D. Fla. 2020).

Here, Plaintiff only alleges to have purchased tickets to a Tool concert in Tampa to take place on April 19, 2020. (Compl. ¶ 43.) She does not allege to have purchased tickets through viagogo for any other Tool concert, any other band's concert, or any other event. (*See generally* Compl.) As a result, she lacks standing to pursue claims related to any other concert or event *but* the Tool concert for which she purchased tickets. *See Snyder*, 430 F. Supp. 3d at 1303; *Blobner*, 2019 WL 3808130, at *4.

That she may contend that her purchase is substantially similar is not enough to confer standing related to those other events. As the Southern District of Florida explained in *Ohio State Troopers Ass'n, Inc.*, courts in the Eleventh Circuit have roundly rejected any such

contention. *See* 347 F. Supp. 3d at 1221-22 (collecting cases). This Court has followed suit. *See, e.g.*, *Blobner*, 2019 WL 3808130, at *2-4 (relying on *Ohio State Troopers Ass'n, Inc.* to hold that plaintiff lacked standing for claims concerning products that he did not purchase).

Accordingly, this Court must dismiss claims related to any event other event.

B. Plaintiff's claims are moot because she accepted a voucher.

Article III only allows federal courts to adjudicate "actual, ongoing cases or controversies." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990). A case becomes moot when it "no longer presents a live controversy with respect to which the court can give meaningful relief." *Yunker v. Allianceone Receivables Mgmt., Inc.*, 701 F.3d 369, 372 (11th Cir. 2012). Where a plaintiff demands a refund and has received that opportunity, those claims become moot. *See, e.g.*, *Christian Coalition of Fla., Inc. v. United States*, 662 F.3d 1182, 1185 (11th Cir. 2011) (affirming dismissal under Rule 12(b)(1) where plaintiff received refund sought in lawsuit). Such is the case here.

Plaintiff's lawsuit focuses on the allegedly-wrongful classification of the Tool concert as postponed. If classified correctly, Plaintiff contends, viagogo would offer her the opportunity for either a refund or a 125% voucher. (Compl. ¶ 36 (quoting COVID-19 policies).) viagogo gave her that exact opportunity. (Meade Decl., Ex. 1-B.)[2] Plaintiff accepted the 125% voucher worth $513.69. (*See* Meade Decl., Ex. 1-C). Thus, the Court has nothing left to offer her.

[2] "Since the Court's power to hear the case is at issue in a Rule 12(b)(1) motion, courts are free to weigh evidence outside the complaint (*e.g.*, affidavits, declarations, and deposition testimony)." *Crane v. United States*, 2014 WL 1328921, at *3 (M.D. Fla. Apr. 2, 2014). The emails attached to the declaration of Pamela Meade are viagogo business records that are kept in the normal course of business and represent competent, admissible evidence. viagogo offers this outside evidence solely for the purpose of disposing of the Rule 12(b)(1) portion of this Motion.

There are exceptions to the mootness doctrine: "(1) where one issue has become moot, but the case as a whole remains alive because other issues have not become moot; (2) when one party unilaterally alters its conduct to terminate the dispute . . . ; and (3) where a controversy is capable of repetition, yet evad[es] review." *See Yunker*, 701 F.3d at 372-73 (internal quotation marks omitted) (alteration in original). None applies here.

The entire lawsuit is moot because Plaintiff accepted the voucher instead of the refund. At bottom, she would have never brought the lawsuit if the Tool concert had been classified as cancelled and she had been offered the choice of a refund or a voucher. That has now happened. She accepted the voucher—hardly a unilateral move by viagogo. Plaintiff has now been compensated for the single cancelled concert for which she bought tickets. It strains reason that viagogo could wrongfully classify her concert again. Any other claims or requests for relief "in the abstract" and "apart from any concrete application" does suffice to invoke these exceptions. *Summers v. Earth Island Inst.*, 555 U.S. 488, 494 (2009).

Accordingly, this Court lacks subject matter jurisdiction over Plaintiff's claims.

II. Rule 12(b)(6) requires dismissal because Plaintiff has failed to state a claim.

A. The viagogo Guarantee and COVID-19 policies are not the same.

As an initial matter, Plaintiff's Complaint improperly attempts to substitute the COVID-19 policies related to refunds and vouchers as the viagogo Guarantee. The viagogo Guarantee is a term of viagogo's Terms and Conditions that govern a buyer's use of viagogo's services. The COVID-19 policies are separate and distinct policies that viagogo unilaterally enacted in response to the unprecedented global pandemic.

In exchange for use of viagogo's website and services, a buyer agrees to certain Terms and Conditions. *See* Terms and Conditions Preamble, attached as Ex. 2.[3] The Terms and Conditions constitute the entire agreement between a buyer and viagogo. *See* Terms and Conditions ⁋ 7.5. No modification, amendment, or supplement to the Terms and Conditions is valid or effective "unless made in accordance with the express terms" of the Terms and Conditions. Terms and Conditions ⁋ 7.5. This occurs only if viagogo posts a revised version of the Terms and Conditions. *See* Terms and Conditions ⁋ 1.4.

viagogo's terms and conditions do contain a "viagogo Guarantee." *See* Terms and Conditions ⁋ 1.3. But Plaintiff's Complaint paints an incomplete picture as to what the viagogo Guarantee actually covers. (*See* Compl. ⁋ 27 (utilizing ellipsis).) The relevant portion of the viagogo Guarantee reads:

> **1.3 viagogo Guarantee.** When you purchase tickets on viagogo, viagogo guarantees that You will receive the tickets You paid for in time for the event. In the rare instance that a problem arises and the original ticket Seller does not provide You with the tickets listed for sale, viagogo will, in its sole and absolute discretion, review comparably priced tickets and offer You replacement tickets at no additional cost, or viagogo will issue You a refund for the cost of the tickets. "Comparably priced" replacement tickets are determined by viagogo in its sole and absolute discretion.

Terms and Conditions ⁋ 1.3. Thus, the plain terms of the viagogo Guarantee ensure that a buyer receives her tickets. If a buyer does not, viagogo may—not must—offer a refund.[4]

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[3] Plaintiff at various points throughout her Complaint partially quotes from viagogo's Terms and Conditions, (*see, e.g.*, Compl. ⁋ 27), or partially utilizes viagogo's website to quote viagogo policies, (*see, e.g.*, Compl. ⁋⁋ 35-36), and does so to bolster her claims. Because the Terms and Conditions and viagogo policies are "central to [and] referenced in" Plaintiff's Complaint, this Court may consider them at the Motion to Dismiss stage. *See Certain Underwriters at Lloyd's London v. BE Logistics, Inc.*, 736 F. Supp. 2d 1311, 1314 (S.D. Fla. 2010) (quoting *La Grasta v. First Union Sec., Inc.*, 358 F.3d 840, 845 (11th Cir. 2004)).

[4] Plaintiff quotes from a separate section of the viagogo website, not the Terms and Conditions, for the proposition that viagogo would offer refunds for cancelled events unrelated to COVID-19. (*See* Compl. ⁋ 35.) While that "[g]enerally" may have been the case, (Compl. ⁋ 35 (quoting viagogo FAQs)), nothing suggests that viagogo gave up its discretion in offering one as laid out in the Terms and Conditions.

The Terms and Conditions are clear: "[a]ll sales . . . are final." Terms and Conditions ⁋ 6.8. viagogo will not offer refunds for "date or time changes." Terms and Conditions ⁋ 6.8. To the extent that the Terms and Conditions even mention the potentiality of a refund, the plain language makes clear that it is discretionary and at viagogo's sole discretion. *See, e.g.*, Terms and Conditions ⁋⁋ 2.11 (stating that viagogo "may refund the buyer" price paid for invalid tickets); 2.15 (requiring that buyer "apply for a refund" under viagogo Guarantee).

In a separate part of its website and after Plaintiff purchased her tickets to the Tool concert, viagogo posted a "Coronavirus (COVID-19) Update." (Compl. ⁋ 34.) viagogo provided this update to inform buyers and sellers about the steps that it would be taking to address the "evolving situation due to COVID-19" related to postponed and cancelled events. COVID-19 Update, attached as Ex. 3. A postponed event is one that "will still happen but on a different day than originally planned" or one slated for "a future, undetermined date." COVID-19 Update, Events and Travel FAQs. An event is cancelled if it "will no longer happen and will not be rescheduled." COVID-19 Update, Events and Travel FAQs.

Tickets to postponed events remain valid. *See* COVID-19 Update. If an event was cancelled due to COVID-19, a buyer could make a choice: a 125% voucher or a refund. *See* COVID-19 Update. Unless and until there was "an official announcement," an event would be considered postponed and not cancelled. *See* COVID-19 Update. The COVID-19 policies also informed buyers that "[d]ue to the unprecedented number of cancelled and postponed events worldwide, and the continuously evolving impact of the current COVID-19 pandemic on the global live events industry, it could take up to several months to process [a] refund." COVID-19 Update, Refunds FAQs.

These COVID-19 policies do not appear in the Terms and Conditions. *See generally* Terms and Conditions. The COVID-19 policies do not purport to alter the Terms and Conditions. *See generally* COVID-19 Update.

Properly framed, the Terms and Conditions and COVID-19 policies are not interchangeable. The Terms and Conditions govern the buyer's transaction and provide the viagogo Guarantee that covers a buyer never receiving tickets—not an event postponement or cancellation. The Terms and Conditions explicitly state that all sales are final and that the decision to offer any refund (whether under the viagogo Guarantee or otherwise) remains in viagogo's sole and absolute discretion. The COVID-19 policies do not alter that buyers have no absolute right to a refund under the governing Terms and Conditions.

B. Plaintiff's breach of contract claims fail.

1. Any claim of breach related to COVID-19 policies fails for lack of contract formation.

Fundamentally, any breach of contract claim requires the existence of a valid contract. *See Lyons v. DBHI, LLC*, 2010 WL 335634, at *1 (Del. Ct. Common Pleas Jan. 27, 2010).[5] It is "the blackest of black-letter law that an enforceable contract requires an offer, acceptance, and consideration." *Cigna Health & Life Ins. Co. v. Audax Health Solutions, Inc.*, 107 A.3d 1082, 1088 (Del. Ct. Chan. 2014). Plaintiff fails to allege any of these essential elements related to the COVID-19 policies.

[5] "In diversity cases, the choice-of-law rules of the forum state determine what law governs." *Interface Kanner, LLC v. JPMorgan Chase Bank*, 704 F.3d 927, 932 (11th Cir. 2013). "[U]nder Florida law, courts 'enforce choice-of-law provisions unless the law of the chosen forum strongly contravenes strong public policy.'" *Id.* (quoting *Maxcess, Inc. v. Lucent Techs., Inc.*, 433 F.3d 1337, 1341 (11th Cir. 2005)). The Terms and Conditions specify that Delaware law governs the relationship between the Parties. *See* Terms and Conditions ⁋ 7.4. Nothing suggests this offends strong public policy. *See, e.g.*, *Cent. Fla. Sterilization, LLC v. Synergy Health AST, LLC*, 2016 WL 11457771, at *4 (M.D. Fla. Apr. 19, 2016) (enforcing Delaware choice-of-law provision in contract).

As described above, the Terms and Conditions containing the viagogo Guarantee and the COVID-19 policies governing refunds for COVID-19 related cancellations are separate and distinct. *See* Section II.A. The Complaint makes clear that viagogo enacted the COVID-19 policies unilaterally and without consulting any buyer, much less Plaintiff herself. (*See* Compl. ¶ 34 (stating that viagogo updated website in response to COVID-19).) Thus, any suggestion of offer and acceptance is implausible on its face. Independent of that, there is no factual allegation that she gave up anything additional related to the COVID-19 policies. Plaintiff agreed to be bound by the Terms and Conditions when she utilized viagogo's site. Plaintiff agreed to make payment in exchange for her tickets. All of this occurred before COVID-19, and there is nothing to plausibly suggest that she exchanged any additional consideration related to the COVID-19 policies. *See Cigna Health & Life Ins. Co.*, 107 A.3d at 1091 (holding lack of contract formation where "new obligation" occurring after underlying transaction closed for lack of consideration where only consideration alleged related to underlying transaction).

Thus, lacking formation, any breach of contract claim based on the COVID-19 policies fails. *See Chase Manhattan Bank v. Iridium Africa Corp.*, 239 F. Supp. 2d 402, 408 (D. Del. 2002) (noting that requirements for formation of express and implied contracts "are identical").

2. Plaintiff's breach of contract claims fail for lack of breach of the viagogo Guarantee.

A plaintiff may only proceed on a breach of an express or implied contract claim where she has pleaded sufficient facts plausibly demonstrating breach of the term of a contract. *See Tani v. FPL/Next Era Energy*, 811 F. Supp. 2d 1004, 1023 (D. Del. 2011) (stating that "breach

of an obligation imposed by the contract" is required element of breach of contract claim). There is no plausible factual allegation that viagogo has breached the viagogo Guarantee.

Here, Plaintiff alleges that failing to provide a refund under the viagogo Guarantee amounted to breach of contract. But as described above, the viagogo Guarantee as defined by Plaintiff's Complaint is incorrect and incomplete. *See* Section II.A. The viagogo Guarantee, by its plain terms, addresses a specific circumstance: where an "original ticket Seller does not provide [buyer] with the tickets listed for sale" in time for the event. *See Phunware v. Excelmind Grp. Ltd.*, 117 F. Supp. 613, 625 (D. Del. July 30, 2015) (stating that court assesses unambiguous contract language "based on the plain meaning of the language on the face of the contract"). And Plaintiff has not pleaded any factual basis to conclude that happened here. Nor can she. She alleges that the Tool concert has been cancelled. There can be no plausible breach of a guarantee that she would receive her tickets *before* an event occurred for an event she pleads will *never* occur.

Thus, Plaintiff has failed to plead any factual material suggesting plausibly that Plaintiff may be entitled to relief related to the breach of any viagogo Guarantee, requiring dismissal of that claim.

3. The Terms and Conditions contradict Plaintiff's allegations.

"The court may grant a motion to dismiss when unambiguous language of a contract contradicts plaintiffs' allegations in a complaint." *Phunware*, 117 F. Supp. 3d at 625. Such is the case here.

Plaintiff contends that because the Tool concert was purportedly canceled, the viagogo Guarantee automatically obligated viagogo to refund her purchase. The terms and conditions,

in fact, state the opposite. *See* Terms and Conditions ⁋ 1.3 (stating that viagogo retained "sole and absolute discretion" to issue refund). It is implausible that Plaintiff can proceed on the theory that the viagogo Guarantee requires a refund where the Terms and Conditions flatly contradict that notion.

Accordingly, Plaintiff's breach of contract claims fail.

4. The existence of an express contract precludes any implied contract claim.

A party may not simultaneously allege an express contract and implied contract based on the same terms or embracing the same subject matter. *See Chase Manhattan Bank*, 239 F. Supp. 2d at 409; *Beach to Bay Real Estate Ctr. LLC v. Beach to Bay Realtors Inc.*, 2017 WL 2928033, at *7 (Del. Ct. Ch. July 10, 2017) ("Indeed, the Plaintiffs recognize there is no recovery or cause of action for an implied contract where express agreements exist covering the subject matter."); *Gerstley v. Mayer*, 2015 WL 756981, at *6 (Del. Super. Ct. Feb. 11, 2015) ("Because a written contract governs the parties' rights and obligations in this matter, the Plaintiffs cannot recover under an implied contract theory.").

Here, the basis of the breach of the express contract claim is that viagogo has failed to honor the viagogo Guarantee—the exact same basis of the breach of the implied contract claim. (*Compare* Compl. ⁋⁋ 62, 65 (failure to honor viagogo Guarantee and provide full cash refund for purportedly cancelled concert amounted to breach of express contract), *with* Compl. ⁋ 75 ("Defendant breached the contract by receiving and retaining Plaintiff's payment but refused to honor Viagogo Guarantee with a full refund of all payments made, including fees.").) This precludes her implied contract claim. *See, e.g.*, *Beach to Bay Real Estate Ctr. LLC*, 2017 WL 2928033, at *7; *Gerstley*, 2015 WL 756981, at *6; *see also, e.g.*, *Schwob v. Int'l Water Corp.*,

136 F. Supp. 310, 314 (D. Del. 1955) ("The existence of a valid express contract for services precludes implication of a contract covering the same subject matter.").

Thus, this Court should dismiss Plaintiff's breach of implied contract claim.

C. Plaintiff's tort claims fail.

1. The independent tort doctrine bars Plaintiff's conversion and unjust enrichment claims.

"The independent tort doctrine provides that where a party is in contractual privity with another, to bring a valid tort claim, the party must establish that the tort is independent of any breach of contract." *Ultimate Motors, Inc. v. Lionhear Motorcars, LLC*, 2019 WL 9786489, at *2 (S.D. Fla. July 23, 2019).[6] Accordingly, plaintiff may not simply "recast causes of action that are otherwise breach-of-contract claims as tort claims." *Kaye v. Ingenio, Filiale De Loto-Quebec, Inc.*, 2014 WL 2215770, at *4 (S.D. Fla. May 29, 2014). To escape the rule's strictures, a plaintiff must allege sufficient factual content demonstrating an "action beyond and independent of breach of contract that amounts to an independent tort." *Id.*[7]

[6] Florida choice of law rules for tort claims apply a "most significant relationship" test. *Green Lead Nursery v. E.I. DuPont De Nemours & Co.*, 341 F. 3d 1292, 1301 (11th Cir. 2003). Here, Plaintiff pleads that she is a Florida resident, (Compl. ¶ 7), and the focus of her claim is the purported cancellation of a concert in Florida, (Compl. ¶ 43). Based on the allegations in the complaint and for purposes of this motion specifically tailored to Plaintiff's factual allegations, Florida law applies to her tort claims.

[7] In *Tiara Condominium Ass'n, Inc. v. Marsh & McLennan Cos.*, the Supreme Court of Florida addressed application of Florida's economic loss rule, a similar but distinct rule. 110 So.2d 399, 400 (Fla. 2013). The court explained that the economic loss rule "ha[d] its roots in the products liability arena, and was primarily intended to limit actions in the products liability context," but courts had extended its application "to circumstances when the parties [were] in contractual privity and one party s[ought] to recover damages in tort arising from the contract." *Id.* at 401-02. The court held, however, "that the application of the economic loss rule [was] limited to products liability cases" and "recede[d] from prior case law" extending its application past products liability actions. *Id.* at 400. However, the holding did nothing to abolish the common law requirement that "to bring a valid tort claim, a party still must demonstrate . . . that the tort is independent of any breach of contract claim." *Id.* at 408 (Pariente, J., concurring). Courts still apply this common law requirement in the wake of *Tiara Condominium*'s limitation of an analogous concept. *See, e.g.*, *Ultimate Motors, Inc.*, 2019 WL 9786489, at *2.

For example, in *PNC Bank, National Ass'n v. Colonial Bank, N.A.*, this Court dismissed a conversion claim where plaintiff sought funds due under a loan agreement. 2008 WL 2917639, at *1 (M.D. Fla. July 24, 2008). There, plaintiff alleged that defendant "grossly mismanaged the loan in violation of the [a]greement." *Id.* The conversion count was "based solely on [defendant]'s alleged 'wrongful retention' of funds that should have been paid to [plaintiff] under the [a]greement." *Id.* at *3. But "[t]his allegation relate[d] directly to the performance of the [a]greement" and was "exactly coextensive" with the breach of contract claim. *Id.* As a result, the conversion claim was barred. *See id.*

Similarly, in *Kaye v. Ingenio, Filiale De Loto-Quebec, Inc.*, the Southern District of Florida held that plaintiff's fraudulent inducement claim amounted to nothing more than a breach-of-contract claim and that the independent tort doctrine barred its pursuit. 2014 WL 2215770, at *5. As the court noted, the "critical inquiry focused on whether the alleged fraud is separate from the performance of the contract." *Id.* The alleged fraud there was that defendant represented that it would allow plaintiff to prosecute patent infringers, but defendant had not allowed plaintiff to do so. *See id.* But that was "a right specifically embodied in" the contract. *Id.* And a "failure to allow [plaintiff] to exercise a right granted to him by the [contract] is merely a breach of the [contract]." *Id.* Thus, plaintiff could not recast the run-of-the-mill breach of contract claim as one sounding in tort. *Id.*

Just as in *PNC Bank* and *Kaye*, the tort theories of recovery all relate to the performance of the contract and are coextensive with the breach of contract allegations. Plaintiff alleges that viagogo has breached a contract term when it "collected Plaintiff's funds" but subsequently "refused to provide [a] refund[] to Plaintiff." (Compl. ¶ 65.) Put differently,

Plaintiff alleges that viagogo breached a contract term when it "t[ook] possession of [funds]" from Plaintiff then "refus[ed] to refund" them, (Compl. ¶ 88 (conversion)), and when it wrongly "retain[ed] possession and control of funds paid by Plaintiff," (Compl. ¶ 95 (unjust enrichment)).

Just as in *PNC Bank* and *Kaye*, the independent tort doctrine requires dismissal or her conversion and unjust enrichment claims.

2. Plaintiff's conversion claim fails because there was no obligation that she be returned her exact $410.95 and her recovery, if any, can be satisfied by the payment of any money.

Conversion of money requires that a plaintiff show there existed "an obligation to keep intact or deliver the specific money in question, so that money can be identified." *Gasparini v. Prodomingo*, 972 So.2d 1053, 1056 (Fla. 3d DCA 2008). Being specifically identifiable ensures that "a fund of money exists to pay a specific debt owed and that the claimant is not merely transforming a contract dispute into a conversion claim." *Rich v. Wachovia Bank N.A.*, 2009 WL 10699957, at *4 (S.D. Fla. June 19, 2009). Thus, a plaintiff may not pursue conversion where the "subject of [the] conversion [is] an indebtedness which may be discharged by the payment of money generally." *Id.* Plaintiff has failed to plead any factual basis to conclude that viagogo had an obligation to keep the money intact and, instead, pursues claims that can be discharged by the payment of money generally.

First, there is no plausible allegation that viagogo had to keep her money intact so that it was specifically identifiable. The Terms and Conditions unequivocally state that a buyer's money "is paid to [viagogo]." Terms and Conditions ¶ 10. Thereafter, viagogo "compensate[s]" the seller. Terms and Conditions ¶ 10. Thus, the plain language of the Terms

and Conditions demonstrates that there is no obligation or even expectation that a buyer's money be kept intact. In fact, the Terms and Conditions contradict this position completely. *See, e.g.*, *Herssein Law Grp. v. Reed Elsevier, Inc.*, 2014 WL 11370411, at *7 (S.D. Fla. Mar. 5, 2014) (dismissing conversion claims contradicted by contractual terms). Moreover, once she paid viagogo, she lost title to it and any interest in keeping it intact. *See e.g.*, *Indus. Park Devel. Corp. v. Am. Exp. Bank, FSB*, 960 F. Supp. 2d 1363, 1367 (M.D. Fla. 2013) (dismissing conversion claim because "depositor loses title to funds when they are deposited into an account").

Instead, the better characterization of Plaintiff's conversion claim is one for breach of contract action resulting only in allegations of a "general obligation to pay money." *Rich*, 2009 WL 10699957, at *4; *see also* Section II.C.1.

For example, in *Belford Trucking Co. v. Zagar*, the Fourth District Court of Appeals addressed a conversion claim related to an agreement between a truck driver and a commercial carrier in which the truck driver was to receive a percentage of freight charges as compensation. 243 So.2d 646, 647 (Fla. 4th DCA 1970). There, the agreement terminated, and the truck driver sought to recover the "legal currency rightly belonging to" him. *Id.* However, it was "readily apparent" that the truck driver could not pursue conversion. *Id.* at 648-49. Although the truck driver provided certain items as specifically-identifiable debts (including his share of freight charges, purchase price of a tractor, and other operational expenses), he still could not provide "the specificity required to make it a proper subject of conversion." *Id.* For this reason, his suit was one to enforce an obligation to pay—not damages for conversion of a specific, identifiable, stated sum. *Id.* at 649.

So too here. Although Plaintiff links her purchase of the Tool tickets and the payment to viagogo, as illustrated in *Rich*, it is not enough to simply claim some connection. A plaintiff must be more specific. Plaintiff has not been so here, nor can she be. Plaintiff's conversion claim amounts to a restatement of her breach of contract claims. *See* Section II.A. On its face, this is simply a claim that viagogo has an "obligation to pay money" to her under contractual obligations.

Accordingly, Plaintiff's conversion claim must be dismissed.

3. Plaintiff's unjust enrichment claim fails because she has an adequate remedy at law.

As an equitable claim, unjust enrichment "is available only when the plaintiff lacks an adequate legal remedy." *Matthews v. Am. Honda Motor Co.*, 2012 WL 2520675, at *3 (S.D. Fla. June 6, 2012). Claims under FDUTPA, *see, e.g.*, *id.*, and claims for breach of contract, *see, e.g.*, *Jovine v. Abbott Labs., Inc.*, 795 F. Supp. 2d 1331, 1341-42 (S.D. Fla. 2011), constitute available legal remedies. Where the factual predicate for the unjust enrichment claim is the same as the legal one, a plaintiff does not lack an adequate legal remedy. *See Matthews*, 2012 WL 2520675, at *3; *Jovine*, 795 F. Supp. at 1341-42. Such is the case here.

In *Jovine v. Abbot Laboratories, Inc.*, the Southern District of Florida dismissed plaintiff's unjust enrichment claim based on the availability of a host of legal remedies. 795 F. Supp. 2d at 1341-42. There, plaintiff brought suit related to the recall of infant formula under eight different theories—including breach of contract, FDUTPA, and unjust enrichment. *Id.* at 1335-35. Although plaintiff pled the unjust enrichment claim in the alternative, the unjust enrichment claim would rise or fall hand-in-hand with the legal claims. *See id.* at 1342. That was because he based his equitable claim (unjust enrichment) and legal claims (including

contract and FDUTPA) on "the exact same wrongful conduct." *Id.* at 1341-42. For example, if plaintiff could plead that defendant employed deceptive practices or breached any contract based on the exact conduct, he had an adequate legal remedy and his unjust enrichment claim was duplicative and not alternative. *See id.* at 1342. Thus, plaintiff did not lack an adequate legal remedy, requiring dismissal. *See id.*

Just as in *Jovine*, the underlying conduct for Plaintiff's unjust enrichment claim and breach of contract and FDUTPA claims are the same. (*Compare* Compl. ¶ 95 (contending viagogo was unjustly enriched by "retaining possession and control of funds paid by Plaintiff"), *with* Compl. ¶ 65 (alleging viagogo breached contract when it "collected Plaintiff's funds" but "refused to provide refund[]") *and* (Compl. ¶ 83 (stating that viagogo violated FDUTPA by "denying Plaintiff's refund")). Just as in *Jovine*, Plaintiff's equitable claim rises and falls with her legal ones, demonstrating an adequate legal remedy exists.[8] *See Matthews*, 2012 WL 2520675, at *3; *Jovine*, 795 F. Supp. 2d at 1341-42.

Accordingly, the Court should dismiss Plaintiff's unjust enrichment claim.

D. Plaintiff fails to state a cognizable FDUTPA claim.

To state a claim under FDUTPA, a plaintiff must allege a deceptive or unfair practice. *See* Fla. Stat. § 501.204(1). A practice is deceptive where it is likely to mislead consumers, whereas one is unfair where it "offends established public policy" and is "immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." *Rollins, Inc. v. Butland*, 951

[8] That Plaintiff's legal claims themselves are deficient does not make them unavailable. In both *Mathews* and *Jovine*, the court dismissed the underlying legal claims for failure to state a claim. *See Mathews*, 2012 WL 2520675, at *1; *Jovine*, 795 F. Supp. 2d at 1337-1344.

So. 2d 860, 869 (Fla. 2d DCA 2006). Plaintiff has failed to plead a sufficient deceptive or unfair practice here.

1. A breach of contract allegation does not satisfy FDUTPA's requirement of deceptive or unfair practice.

A run-of-the-mill breach of contract claim does not meet FDUTPA's standard. *Stubblefield v. Follett Higher Educ. Grp., Inc.*, 2010 WL 2025996, at *3 (M.D. Fla. May 20, 2010) ("Though Follett's actions may have breached the contract with SPC, they do not constitute a violation of a law, rule, or regulation, such that the breach is transformed into a FDUTPA violation."). As this Court explained, even "allegations of intentional breach are insufficient to state a claim under the statute." *Hache v. Damon Corp.*, 2008 WL 912434, at *2 (M.D. Fla. Apr. 1, 2008) (Moody, J.) (dismissing FDUTPA based on allegations of breach of warranties).[9]

In *Ultimate Motors Inc. v. Lionhear Motorcars, LLC*, the Southern District of Florida recently addressed this very principle. 2019 WL 9786489, *2 (S.D. Fla. July 23, 2019). Plaintiff and defendant entered into an agreement related to the purchase of a Mercedes Benz automobile in which plaintiff agreed to purchase the automobile and make a deposit and defendant agreed to deliver the automobile. *Id.* at *1. The agreement provided that if defendant could not deliver the automobile, defendant would refund plaintiff's deposit. *Id.* Ultimately, defendant could not deliver, so it refunded most—but not all—of the deposit. *Id.* Plaintiff brought various claims, including for breach of contract and violation of FDUTPA.

[9] To be sure, a breach of contract claim and FDUTPA claim are not mutually exclusive; however, there must be sufficient factual material demonstrating "*significant* allegations of unfair or deceptive conduct," *Hache*, 2008 WL 912434, at *2 (emphasis added), as to how the "conduct underlying the breach constitutes an unfair or deceptive trade practice in and of itself," *Ultimate Motors, Inc.*, 2019 WL 9786489, at *2.

Id. The court dismissed the FDUTPA claim because it was "based on nothing more than an alleged breach of contract." *Id.* at *2. Tellingly, plaintiff was "unable to articulate how [d]efendants' conduct constituted an unfair or deceptive trade practice without reference to the [a]greement." *Id.* Thus, the FDUTPA claim required dismissal.

Just as in *Ultimate Motors Inc.*, Plaintiff's allegations of deceptive conduct in "refusing to honor" the viagogo Guarantee, improperly classifying events as postponed to avoid providing refunds, and denying Plaintiff a refund are nothing more than a restatement of her alleged contract claims. First, Plaintiff incorporates the factual allegations related to her breach of contract claim into her FDUTPA claim, (*see* Compl. ¶ 77), so both claims contain the same factual underpinning. Second, these alleged acts are simply restatements of allegations supporting her breach of contract claim. Put differently, Plaintiff alleges a breach of contract when viagogo refused to honor the viagogo Guarantee and when viagogo misclassified her event because the actions resulted in the wrongful denial of a contractually-obligated refund.

These alleged acts are simply claims of breach of contract, insufficient to state a claim under FDUTPA.

2. The remaining alleged deceptive or unfair practices are implausible on their face.

In an attempt to escape the four corners of the contract, Plaintiff alleges that "offering and advertising a guarantee that Defendant knew it would be unable to honor in the event of mass cancellations" and that "attempting to force customers to accept vouchers they do not want in the middle of a public health and economic crisis" can satisfy FDTUPA. (Compl. ¶ 83.) But the Complaint is devoid of any factual material to substantiate either allegation.

With respect to the first allegation, there is no factual basis to jump to such a conclusion. The Complaint remains silent on pre-COVID-19 actions by viagogo. It makes no factual allegation plausibly suggesting that viagogo never had the intention of honoring any of its Terms and Conditions, much less the viagogo Guarantee. Without more factual enhancement, this accusation amounts to a "the-defendant-unlawfully-harmed-me accusation" that fails federal pleading standards. Moreover, as described above, the viagogo Guarantee states that the decision to give a refund is at viagogo's sole discretion. And nowhere in the Terms and Conditions does there appear any guarantee related to a refund. Thus, without any factual enhancement whatsoever, Plaintiff's contention that viagogo was offering any guarantee related to refunds is speculative at best.[10]

The same goes for the contention that viagogo "attempt[s] to force customers to accept a voucher they do not want." The only factual content related to the voucher is that viagogo offers a 125% voucher *as an alternative* to a refund. (*See* Compl. ¶ 36 (quoting viagogo COVID-19 Update).) This evinces a *choice*—the antithesis of force. Thus, the Complaint's own (and only) factual allegation related to any vouchers outright contradicts the unsupported contention that viagogo in any way "attempt[s] to force customers to accept a voucher they do not want." To infer otherwise, even at this stage, would be unreasonable. *See Griffin Indus., Inc.* 496 F.3d at 1205-06 ("Our duty to accept the facts in the complaint as true does not require us to ignore specific factual details of the pleading in favor of general or conclusory allegations."); *Rance*, 2010 WL 11601453, at *1 (adopting report and recommendation

[10] What is more, Plaintiff expressly pleads that she relied on the viagogo Guarantee. (Compl. ¶ 37.) It strains reason to think that if Plaintiff relied on a statement that viagogo retained discretion to provide a refund, she was deceived by viagogo's alleged denial of a refund to her.

recommending dismissal of claims based on contradiction between complaint's factual allegations and its exhibits); *see also Chapman v. Abbott Labs.*, 930 F. Supp. 2d 1321, 1324 (M.D. Fla. 2013) (stating that "court need not accept as true allegations in a complaint that contradict or are inconsistent with judicially-noticed facts").

Accordingly, Plaintiff's FDUTPA claim fails and must be dismissed.

Conclusion

WHEREFORE, for the foregoing reasons and authorities, Defendant viagogo Entertainment Inc. respectfully requests that the Court dismiss Plaintiff's Complaint with prejudice and grant such other and further relief as this Court deems just and proper.

Dated: September 17, 2020

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 17, 2020, a true copy of the foregoing was filed with the Court using the CM/ECF system, which will send notice to the following:

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