

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

JESSICA MITCHELL and KENNETH
COMBS JR., individually, and on
behalf of all others similarly situated,

Plaintiffs,

v.

NURSECON AT SEA, LLC, et al.,

Defendants.

Case No.: 20-cv-21503-UU

**DEFENDANT ROYAL CARIBBEAN CRUISES LTD.'S MOTION TO DISMISS
AMENDED CLASS ACTION COMPLAINT**

Defendant Royal Caribbean Cruises Ltd. (“RCCL”), pursuant to Rules 12(b)(1), 12(b)(6), and, if necessary, Rule 56 of the Federal Rules of Civil Procedure, moves this Court for the entry of an order dismissing Plaintiffs Jessica Mitchell (“Mitchell”) and Kenneth Combs, Jr.’s (“Combs, Jr.”) (collectively, “Plaintiffs”) Amended Class Action Complaint (“Amended Complaint”) [ECF No. 5]. In support, RCCL states:

INTRODUCTION

Federal courts are courts of limited jurisdiction. This Court has already “taken a ‘preliminary peek’ at RCCL’s arguments” on why this Court lacks subject matter jurisdiction, and found that these “arguments appear facially meritorious and potentially truly case-dispositive.” Order on Motion to Stay Discovery [ECF No. 26] at 2. As more fully set forth below, RCCL’s arguments are indeed meritorious and case dispositive.

Plaintiffs’ Amended Complaint seeks class-wide relief for claims arising out of the Defendants’ alleged refusal to issue refunds after the cancellation of a group cruise that was to take place aboard an RCCL vessel. *See* Am. Compl. ¶¶ 1, 17, 19-20. Plaintiffs sole basis for subject

matter jurisdiction is 28 U.S.C. § 1332(d)(2)(A), which provides district courts with original jurisdiction over certain class actions. *See* Am. Compl. ¶ 23. Yet, Plaintiffs waived their right to bring any class action claims in their ticket contract. It is well established in this District that where, as here, cruise line passengers receive a cruise ticket contract containing a class action waiver provision, such provision is not only binding, but may be raised at the motion to dismiss stage. *See, e.g., DeLuca v. Royal Caribbean Cruises, Ltd.*, 244 F. Supp. 3d 1342, 1346 (S.D. Fla. 2017) (holding parties' class action waiver was reasonably communicated to the plaintiffs and dismissing class action complaint); *McIntosh v. Royal Caribbean Cruises, Ltd.*, No. 17-CV-23575, 2018 WL 1732177, at *2 (S.D. Fla. Apr. 10, 2018) (same).

Indeed, here, RCCL provided Plaintiffs Mitchell and Combs Jr. with their cruise ticket contract containing the class action waiver more than a month before Plaintiffs filed this lawsuit. The cruise ticket contract was provided to Plaintiffs, through their travel agent, in a "Guest Ticket Booklet," which was personalized to Mitchell and Combs Jr., and contained information regarding their cruise itinerary. The cruise ticket contract, moreover, was readily available at all material times on RCCL's website: www.royalcaribbean.com. Whether Plaintiffs personally reviewed the cruise ticket contract, or not, is of no moment. The mere fact that RCCL delivered the contract to Plaintiffs' travel agent is sufficient to bind Plaintiffs to its terms. Thus, under any circumstance, Plaintiffs waived the right to bring class claims and, consequently, this Court has no subject matter jurisdiction over this action. This alone requires dismissal and can end the Court's inquiry.

But even if this Court delves further, which RCCL respectfully submits it lacks jurisdiction to do, Plaintiffs' Amended Complaint suffers from other fatal defects. Chief among them, Mitchell actually received a full refund for the cruise a day before she filed the Amended Complaint, and in doing so, expressly "waived all rights to further compensation." Thus, to the extent this Court

does not dismiss on jurisdictional grounds (which it can as to Mitchell on this basis), it should convert this into a motion for summary judgment and consider Mitchell's executed waiver to sue. What is more, Plaintiffs' claims fail on other grounds as well. Plaintiffs merely regurgitate statutory elements in counts I and II, which fall woefully short of stating a claim under the *Twombly* plausibility standard.

Simply put, Plaintiffs' Amended Complaint is riddled with deficiencies – none greater than the Court's absence to hear this action in the first place. The Court should grant RCCL's motion to dismiss this action.

BACKGROUND

The Amended Complaint alleges that Plaintiffs, Mitchell and Combs Jr., are nurses that booked and pre-paid a five-day and four-night nursing conference called NurseCon at Sea 2020, organized by Defendant NurseCon at Sea, LLC ("NurseCon"), and which was to be hosted aboard an RCCL vessel, *M/V Navigator of the Seas*¹ (the "Group Cruise"). *See* Am. Compl. ¶¶ 1, 10, 13. After a national emergency concerning the COVID-19 outbreak was declared, NurseCon allegedly informed Plaintiffs, and other nurses that had pre-paid to attend NurseCon at Sea 2020, that the event would be rescheduled to 2021. *Id.* ¶¶ 17, 19. Specifically, Plaintiffs allege they made down payments and monthly payments to Defendants, *Id.* ¶¶ 14-15, and that "Defendants have refused to issue any refunds for the cruise and convention fees [that Plaintiffs] prepaid." *Id.* ¶ 20. As a result of Defendants' alleged failure to issue refunds, Plaintiffs have filed a five-count complaint where they raise claims for breach of the implied covenant of good faith and fair dealing, unjust

¹ Plaintiffs incorrectly allege that RCCL's vessel was Independence of the Sea. *Compare* Am. Compl. ¶ 13 *with* Silva Decl. ¶ 6. Plaintiffs also named Royal Caribbean International as a Defendant. However, "Royal Caribbean International" is not a corporate entity, but rather the name of a cruise line operated by RCCL. *See* Silva Decl. ¶ 5.

enrichment, conversion, money had and received, and a claim under the Florida Consumer Collection Practices Act. *Id.* ¶¶ 35-58.

Plaintiffs purport to maintain this lawsuit as a class action, representing all persons that paid to attend the Group Cruise, and who were not reimbursed after the event was cancelled. *Id.* ¶ 26. RCCL is making a factual challenge to this Court’s subject matter jurisdiction which, as explained below, allows this Court to consider matters outside the four-corners of the Amended Complaint. In support of its motion, RCCL attaches the declaration of Juan Silva, Associate Vice President, Product Digital Sales, as **Exhibit A** (the “Silva Decl.”).

A. Plaintiffs’ Travel Agent, Destinations, Inc., Booked Plaintiffs’ Group Cruise with RCCL.

Defendant NurseCon created and promoted the Group Cruise. *See* Am. Compl. ¶ 1. NurseCon contracted with non-party Destinations, Inc. (“Destinations”), a travel agency incorporated in the State of Utah, to manage bookings for the Group Cruise. *See* Silva Decl. ¶ 8. In turn, on May 29, 2019, Destinations entered into an Incentive House Contract with RCCL to reserve certain staterooms on the M/V *Navigator of the Seas*, scheduled to depart from Miami, Florida on April 27, 2020. *See id.* at Ex. 1. Paragraph 32 of the Incentive House Contract provides:

LIABILITY; ADDITIONAL TERMS & CONDITIONS

The liability of Cruise Line to the Travel Company, the Group and to all Passengers/Guests, will be limited to and governed by, and strictly in accordance with, the terms and conditions contained in the Cruise/Cruise Tour Ticket Contract or similar contracts found on the Cruise Line’s website . . . in effect at the time of the Sailing Date A copy of the Cruise/Cruise Tour Ticket Contract, in effect as of the date hereof, is available at royalcaribbean.com and the terms and conditions for carriage of Guests set forth therein are expressly incorporated into and made part of this Agreement with the following exceptions: Sections 9a and 10b [which do not relate to the class action waiver provisions]. . . .

Id. at Ex. 1, p. 13 (bold type in original).

B. Destinations is a Registered Travel Agent on RCCL's CruisingPower Platform, and has agreed to RCCL's Travel Agent Guidelines, including the Cruise Ticket Contract Portion Thereof.

Since January 2018, Destinations has booked and reserved trips on RCCL-operated cruise ships for its clients. *See* Silva Decl. ¶ 11. Destinations is a registered user of RCCL's CruisingPower travel agency portal which is located at <http://www.cruisingpower.com> (the "CruisingPower"). *Id.* ¶ 12. When creating its account on CruisingPower, Destinations agreed to RCCL's Travel Agent Guidelines (the "Guidelines"). *Id.* ¶ 13. A copy of the Guidelines has been available for review on CruisingPower at all relevant times to this action. *Id.* at Ex. 2.

Section 7.7 of the Guidelines provides:

Cruise Ticket Contract

The Cruise Ticket Contract sets forth the terms and conditions which govern all cruises and the booking thereof and is incorporated by reference in these Guidelines. Travel Partner should familiarize itself with the Cruise Ticket Contract as it governs the legal rights of all passengers relative to cruise cancellation, provision of medical services, privacy rights, RCL's liability and the passenger's ability to bring a claim. Should any conflict arise between the brochures or communications relative to any booking, the Cruise Ticket Contract shall prevail. The Cruise Ticket Contract is available for reference on www.cruisingpower.com.

Id. at Ex. 2, p. 31 (bold type in original).

C. Plaintiffs Mitchell and Combs Jr., through their travel agent Destinations, created their Group Cruise reservation at RCCL.

NurseCon's website provides the option to register for the Group Cruise through its website: <http://nursecon.com> (last accessed June 26, 2020). *See* Silva Decl. ¶ 15. After clicking the "REGISTER NOW" button on the homepage, the registration page for the Group Cruise provides, in pertinent part, that: "All travel and billing provided by our licensed travel agent Destinations, Inc." *See* <https://nursecon.rezmagic.com/Booking/Reservation/Start?tripID=5072>

(last accessed June 26, 2020); Silva Decl. ¶ 15. Using Destination’s separate registration website interested persons provided Destinations the necessary information (e.g., name, address, and other requisite booking information) to create a reservation for the Group Cruise. Silva Decl. ¶ 16. Destinations, in turn, provided RCCL the necessary information to create each reservation. *Id.* ¶ 17. With the information that was provided by Destinations, RCCL created reservation number 7991061 for Mitchell and reservation number 8001409 for Combs, Jr. *Id.* ¶ 20.

D. RCCL, through its CruisingPower Portal, provided Plaintiffs’ Travel Agent (Destinations) the Cruise Ticket Contract and its Class Action Waiver.

Sometime after RCCL created the reservations for Mitchell and Combs, CruisingPower automatically generated a guest ticket booklet (“Guest Ticket Booklet”) for each reservation. *Id.* ¶ 21. Each Guest Ticket Booklet includes a cruise summary, travel summary, travel documents, port directions, and a “Cruise/Cruise Tour Ticket Contract” (the “Cruise Ticket Contract”). *Id.* ¶ 22. The Cruise Ticket Contract begins at page 10 of each Guest Ticket Booklet. *Id.* at Ex. 3, p. 10 (as to Mitchell); *id.* ¶ 25 at Ex. 4, p. 10 (as to Combs Jr.).

On March 10, 2020, CruisingPower emailed Mitchell, through her travel agent Destinations, a link to her Guest Ticket Booklet – including the Cruise Ticket Contract - for reservation 7991061 using the email address info@destinationsinc.com. *Id.* at ¶ 26. On March 10, 2020, CruisingPower emailed Combs, through his travel agent Destinations, a link to his Guest Ticket Booklet – including the Cruise Ticket Contract - for reservation 8001409 using the email address info@destinationsinc.com. *Id.* at ¶ 26. The following notice appears at the bottom of the first page of the guest ticket booklets for Mitchell and Combs, Jr.’s reservations :

IMPORTANT NOTICE TO GUESTS:

Your Cruise/Cruisetour Ticket Contract is contained in this booklet. The Contract contains important limitations on the rights of passengers. It is important that you carefully read all the terms of this Contract, paying particular attention to section 3 and sections 9

through 11, which limit our liability and your right to sue, and retain it for future reference. This Agreement requires the use of arbitration for certain disputes and waives any right to trial by jury to resolve those disputes.

Id. at Ex. 3, p. 1 (bold type and all capitals in original); *id.* at Ex. 4, p. 1 (bold type and all capitals in original).

Mitchell and Combs Jr.'s Cruise Ticket Contract contains the following paragraph at the top of the first page:

**IMPORTANT NOTICE TO GUESTS
YOUR CRUISE/CRUISETOUR TICKET CONTRACT
CONTAINS IMPORTANT LIMITATIONS ON THE RIGHTS
OF PASSENGERS. IT IS IMPORTANT THAT YOU
CAREFULLY READ ALL TERMS OF THIS CONTRACT,
PAYING PARTICULAR ATTENTION TO SECTION 3 AND
SECTIONS 9 THROUGH 11, WHICH LIMIT OUR
LIABILITY AND YOUR RIGHT TO SUE, AND RETAIN IT
FOR FUTURE REFERENCE.**

Id. at Ex. 3, p. 10 (bold type and all capitals in original); *id.* at Ex. 4, p. 10 (bold type and all capitals in original).

Paragraph 9 of Mitchell and Combs Jr.' Cruise Ticket Contract (the "Class Action Waiver") provides in relevant part:

FORUM SELECTION CLAUSE FOR ALL LAWSUITS; CLASS
ACTION WAIVER:

b. CLASS ACTION RELIEF WAIVER. PASSENGER HEREBY AGREES THAT EXCEPT AS PROVIDED IN THE LAST SENTENCE OF THIS PARAGRAPH, PASSENGER MAY BRING CLAIMS AGAINST CARRIER ONLY IN THE PASSENGER'S INDIVIDUAL CAPACITY. EVEN IF THE APPLICABLE LAW PROVIDES OTHERWISE, PASSENGER AGREES THAT ANY ARBITRATION OR LAWSUIT AGAINST CARRIER, VESSEL OR TRANSPORT WHATSOEVER SHALL BE LITIGATED BY PASSENGER INDIVIDUALLY AND NOT AS A MEMBER OF ANY CLASS OR AS PART OF A CLASS OR REPRESENTATIVE ACTION, AND PASSENGER

EXPRESSLY AGREES TO WAIVE ANY LAW ENTITLING
PASSENGER TO PARTICIPATE IN A CLASS ACTION

Id. at Ex. 3, p. 12 (all capitals in original); *see id.* at Ex. 4, p. 12 (all capitals in original).

E. The Cruise Ticket Contract is Also Publicly Posted on RCCL’s Website.

RCCL publicly posts the Cruise Ticket Contract on its website <http://www.royalcaribbean.com>. *Id.* ¶ 31. When accessing the site, the Guest Ticket Contract is publicly available by clicking on the hyperlink titled “Cruise Contract” located at the bottom left corner of all pages on the website. *Id.* ¶ 32. This Cruise Ticket Contract publicly posted on the RCCL website is the same document that was provided to Mitchell and Combs Jr.’s travel agency, Destinations, through CruisingPower. *Id.* ¶ 33. The version of the Cruise Ticket Contract on RCCL’s website has not changed and is the same at all relevant times to this action. *Id.* ¶ 34.

F. RCCL has been Accommodating with all Refund Requests pertaining to the Group Cruise and has Already Refunded Mitchell

At some point following the postponement of the Group Cruise because of COVID-19, Destinations requested, and RCCL agreed, to refund all group passengers that requested one (or offer a credit to those who still wanted to cruise in the future). *Id.* ¶¶ 35-36. Destinations then submitted to RCCL various refund requests, including a signed refund request by Mitchell. *Id.* ¶¶ 39-40; *see also id.* at Ex. 5 (Mitchell’s signed refund request). Mitchell’s refund request contains a Refund Request Agreement which provides in relevant part: “I accept a refund and **waive all rights to further compensation** from NurseCon at Sea, LLC and its affiliates, vendors and contractors.” *Id.* Ex. 5, at p. 2 (emphasis added). RCCL, in turn, issued a refund to Destinations for all amounts paid by Mitchell (and others from the Group Cruise). *See id.* ¶ 42. Destinations thereafter issued a refund check to Mitchell on May 1, 2020, which she deposited or otherwise negotiated. *Id.* at Ex. 6; *see id.* ¶ 43.

MEMORANDUM OF LAW

I. Motion to Dismiss Standards.

A. Challenge to the Court's Subject Matter Jurisdiction

A motion to dismiss for lack of subject matter jurisdiction may be based on either a facial or factual jurisdictional attack. *Lawrence v. Dunbar*, 919 F.2d 1525, 1528-29 (11th Cir. 1990) (citing *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cir.), *cert denied*, 449 U.S. 953, 101 S. Ct. 358, 66 L.Ed.2d 217 (1980)). Factual attacks “challenge ‘the existence of subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings, such as testimony and affidavits, are considered.’” *Id.* “If the facts necessary to sustain jurisdiction do not implicate the merits of plaintiff’s cause of action, then” the court is free to weigh evidence to satisfy itself as to the existence of its power to hear the case. *Garcia v. Copenhaver, Bell & Assocs., M.D.’s, P.A.*, 104 F.3d 1256, 1261 (11th Cir. 1997). “In short, no presumptive truthfulness attaches to plaintiff’s allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims.” *Lawrence*, 919 F.2d at 1529 (citing *Williamson v. Tucker*, 645 F.2d 404, 412-13 (5th Cir. 1981), *cert. denied*, 454 U.S. 897, 102 S.Ct. 396, 70 L.Ed.2d 212 (1981)). As a Court within this District recently stated in a case against RCCL, “[t]he enforceability of a procedural device, like a class action waiver, should be resolved . . . by way of a motion to dismiss.” *DeLuca*, 244 F.Supp.3d at 1345.

Under Article III of the Constitution, moreover, the federal courts' jurisdiction extends to only ongoing “cases” and “controversies.” *Edelsberg v. Brea Financial Group, LLC*, 2019 WL 1302828, *2 (S.D. Fla. Feb. 26, 2019) (internal citations omitted)). Thus, “[i]f an intervening circumstance deprives the plaintiff of a personal stake in the outcome of the lawsuit, at any point

during litigation, the action can no longer proceed and must be dismissed as moot.” *Id.* (internal citations omitted).

B. Plaintiffs’ Pleading Standard

Under Rule 8 of the Federal Rules of Civil Procedure, a plaintiff must provide a “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Although a complaint “does not need detailed factual allegations,” it “requires more than labels and conclusions, and a formulaic recitation of a cause of action’s elements will not do.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545, 127 S. Ct. 1955, 1959, 167 L. Ed. 2d 929 (2007). Indeed, to survive a motion to dismiss, a complaint must “state a claim to relief that is plausible on its face.” *Id.* 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.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009).

II. The Parties’ Class Action Waiver Divests the Court of Subject Matter Jurisdiction over the Case

As discussed below, the Court lacks subject matter jurisdiction over this action because Plaintiffs waived their right to bring any class action claims in their Cruise Ticket Contract.²

A. The Class Action Waiver Warrants the Dismissal of Plaintiffs’ Class Action Allegations

“[I]t is well settled that the general maritime law of the United States, and not state law, controls the issue of whether a passenger is bound to terms set forth in a cruise ship’s ticket and

² Given that RCCL’s challenge to this Court’s subject matter jurisdiction does not implicate the merits of Plaintiffs’ claim, but instead relates solely to a class action waiver provision within a document under which Plaintiffs have not sued, the court is free to consider matters outside the pleadings. *See Garcia*, 104 F.3d at 1261 (court can weigh evidence to satisfy itself as to the existence of its power to hear the case “[i]f the facts necessary to sustain jurisdiction do not implicate the merits of plaintiff’s cause of action”).

contract of passage.” *McIntosh v. Royal Caribbean Cruises, Ltd.*, No. 17-CV-23575, 2018 WL 1732177, at *2 (S.D. Fla. Apr. 10, 2018). “[W]hether the Plaintiff boarded the ship or not is irrelevant to this determination. The class action waiver is not limited to claims occurring after a passenger boards the ship.” *Id.* at *1 n. 1. “Under general maritime law, a term or condition of a cruise ticket contract is enforceable once it is reasonably communicated to the passenger.” *DeLuca*, 244 F. Supp. 3d at 1346. “The test involves a two-pronged analysis of: (1) the physical characteristics of the clause in question; and (2) whether the plaintiff had the ability to become meaningfully informed of the contract terms.” *Id.* Both prongs are met here.

1. The Physical Characteristics of the Cruise Ticket Contract Provide Adequate Notice of the Class Action Waiver

“The first prong of the analysis looks at the physical characteristics of the ticket contract in order to determine whether its terms are clearly presented.” *Lankford v. Carnival Corp.*, No. 12-24408-CIV, 2014 WL 11878384, at *6 (S.D. Fla. July 25, 2014). “In considering whether the terms in a ticket contract are clearly presented, the Court assesses features ‘such as size of type, conspicuousness and clarity of notice on the face of the ticket, and the ease with which a passenger can read the provisions in question.’” *Id.* (citing *Wallis v. Princess Cruises, Inc.*, 306 F.3d 827, 835 (9th Cir. 2002)); *see also Baer v. Silversea Cruises Ltd.*, 752 F. App'x 861, 865 (11th Cir. 2018) (noting that in analyzing the first prong “courts look to the physical characteristics of the limitations provision, including the size of the text, its conspicuousness, and its typeface.”). Notably, “[t]he Eleventh Circuit has held a warning on page 128 of a booklet ‘in very small, but legible, type’ satisfied the physical characteristics prong.” *Lankford*, No. 12-24408-CIV, 2014 WL 11878384, at *6 (quoting *Estate of Myhra v. Royal Caribbean Cruises, Ltd.*, 695 F.3d 1233, 1246 (11th Cir. 2012)).

Here, RCCL's Cruise Ticket Contract has repeatedly been held to satisfy the reasonable communicativeness test. *See, e.g., DeLuca*, 244 F. Supp. 3d at 1346; *McIntosh*, No. 17-CV-23575, 2018 WL 1732177, at *2. Among other things, the bottom of page one of each Guest Ticket Booklet contains a bold-faced statement advising passengers that the Cruise Ticket Contract is enclosed and warns them to pay particular attention to certain sections of the Cruise Ticket Contract, including section 9 which contains the Class Action Waiver, because they limit RCCL's liability and a passenger's right to sue. *Silva Decl.* at Ex. 3, p. 1; *id.* at Ex. 4, p. 1.³ The same language also appears in bold-faced and all-capitals as the first paragraph of the Cruise Ticket Contract, which is on page 10 of each Guest Ticket Booklet. *Id.* at Ex. 3, p. 10; *id.* at Ex. 4, p.10. And regarding the physical characteristics of the Class Action Waiver itself, it is contained in a separately numbered paragraph with a heading that alerts the reader of its contents: "CLASS ACTION RELIEF WAIVER." *Id.* at Ex. 3, p. 12 (all capitals in original); *id.* at Ex. 4, p. 12 (all capitals in original).

The first prong of the reasonable communicativeness test is easily satisfied.

2. Plaintiffs had the Ability to Become Meaningfully Informed of the Contract's Terms

In analyzing the second prong, courts determine "whether the passenger 'had the ability to become meaningfully informed of the clause and to reject its terms.'" *Baer*, 752 F. App'x at 865 (quoting *Krenkel v. Kerzner Int'l Hotels Ltd.*, 579 F.3d 1279, 1281 (11th Cir. 2009)). Here,

³ The first page of Cruise Ticket Contract that appears on royalcaribbean.com also includes a warning in bold-faced and all-capitals advising passengers to pay particular attention to section 9 of the contract, which includes the Class Action Waiver. *See* <https://www.royalcaribbean.com/content/dam/royal/resources/pdf/cruise-ticket-contract.pdf> (last visited June 28, 2020).

Plaintiffs had the opportunity to become meaningfully informed of the Class Action Waiver through their travel agent, Destinations, and by accessing RCCL's website at all relevant times.

a. Plaintiffs, through their Travel Agent Destinations, Received Notice of the Class Action Waiver

“It is settled law that travel agents are to be construed as agents of the ticket purchaser, and passengers are accordingly charged with constructive knowledge of ticket terms and conditions while the tickets are in their agent's possession.” *Warrick v. Carnival Corp.*, No. 12-61389-CIV, 2013 WL 3333358, at *12 (S.D. Fla. Feb. 4, 2013); *Gomez*, 964 F. Supp. at 50 (D.P.R. 1997) (imputing knowledge of terms of contract on passengers based on their travel agent's knowledge and duty to advise them of terms, and noting that “courts have also held that notice of important conditions of a passage contract can be imputed to a passenger who has not personally received the ticket or possession thereof. The ticket may be received by passengers themselves or by their travel agent.”); *Kirby v. NCL (Bahamas) Ltd.*, 2010 WL 11556551 (S.D. Fla. Dec. 28, 2010) (citing *Gomez* and granting motion to dismiss based on limitations in cruise ticket contract communicated to plaintiff's agent). Importantly, *even where a passenger does not themselves purchase, possess, or read* the cruise ticket at issue, *she is charged with constructive notice of its terms and conditions*, at the time the agent received the cruise ticket contract, as long as the cruise line timely delivered the cruise ticket contract terms to the passenger's agent. *See Hodes v. S.N.C. Achille Lauro ed Altri-Gestione*, 858 F.2d 905, 912 (3d Cir. 1988) (emphasis added) (abrogated on other grounds) (charging guests with notice of ticket provisions through agent's possession of the tickets where the plaintiffs came into actual possession of the tickets “immediately before boarding the ship,” but plaintiffs' agent had been in possession of tickets before the sailing date).

Here, Plaintiffs' travel agent, Destinations, was repeatedly advised, in writing, that the Cruise Ticket Contract would govern RCCL's relationship with the passengers.⁴ Silva Decl. at Ex. 1, p. 13, ¶ 32; *id.* at Ex. 2, p. 31, ¶ 7.7; *id.* at Ex. 3, p. 1; *id.* at Ex. 4, p. 1. Indeed, the Guidelines went as far as advising Destinations to "familiarize itself with the Cruise Ticket Contract as it governs the legal rights of all passengers relative to cruise cancellation . . . RCCL's liability and the passenger's ability to bring a claim." *Id.* at Ex. 2, p. 31, ¶ 7.7. The Incentive Contract, which was signed on May 29, 2019, also warned Destinations that RCCL's liability was "limited to and governed by" the Cruise Ticket Contract. *Id.* at Ex. 1, p. 13, ¶ 32. Subsequently, on March 10, 2020, more than a month before Plaintiffs' cruise was to set sail, RCCL transmitted to Destinations, via email, a hyperlink to the Guest Ticket Booklet for Mitchell and Combs, Jr. *Id.* ¶¶ 26-27. Each Guest Ticket Booklet contained a copy of the Cruise Ticket Contract and Class Action Waiver. *Id.* ¶¶ 22-23; *id.* at Ex. 3, p. 10; *id.* at Ex. 4, p. 10.

Plaintiffs, through Destinations, had several months before the scheduled cruise departure to review and apprise themselves of the Cruise Ticket Contract's terms. This is more than sufficient advance notice. *See, e.g., McArthur v. Kerzner Int'l Bahamas Ltd.*, 607 F. App'x 845, 848 (11th Cir. 2015) ("because the [plaintiffs'] trip involved travel arrangements made by the travel agent, they are charged with constructive notice of the terms and conditions in the contract the travel agent had with the Atlantis Resort."); *See Foster v. Cunard White Star*, 121 F.2d 12, 13 (2d Cir. 1941) ("Plaintiff is charged with notice of the [contractual] limitation, since her brother, who purchased the ticket for her . . . had it in his possession for some 17 days before the voyage commenced."); *Ames v. Celebrity Cruises, Inc.*, No. 97 CIV. 0065 (LAP), 1998 WL 427694, at *5

⁴ NurseCon's website, the attached Declaration of Mr. Silva, the Incentive Contract, and the Release and Waiver confirm that Destinations was Plaintiffs' travel agent.

(S.D.N.Y. July 29, 1998) (finding that the plaintiffs had reasonable notice of ticket contract’s terms where they received tickets only two or three days prior to departure).

Indeed, notice is bolstered by the fact that the Cruise Ticket Contract was also available for Plaintiffs’ review, at all material times, on RCCL’s website: royalcaribbean.com. *See, e.g., Calixterio v. Carnival Corp.*, No. 15-22210-CIV, 2016 WL 3973791, at *4 (S.D. Fla. Jan. 7, 2016) (“Although Plaintiff asserts she never actually read the ticket contract, there is nothing in the record to suggest that Plaintiff could not read the ticket contract—which was available on Carnival’s website and in her mother-in-law’s possession—prior to embarking on the cruise had she chosen to do so.”). Thus, the second prong of the reasonable communicativeness test is also satisfied.

B. The Class Action Waiver prevents Plaintiffs meeting the Jurisdictional Requirements in 28 U.S.C. 1332(d)(2)(A)

The sole alleged basis for this Court’s subject matter jurisdiction over this case is 28 U.S.C. §1332(d)(2)(A), which provides original jurisdiction in district court in certain class actions. Am. Compl. ¶ 23. Because the Class Action Waiver prohibits Plaintiffs from bringing a class action, this Court lacks subject matter jurisdiction over the case. *See, e.g., Horton v. Dow Jones & Company, Inc.*, 2019 WL 952314, *3-*4 (S.D. N.Y. Feb. 27, 2019) (explaining that because the class waiver bars plaintiff from proceeding on a class basis, the district court does not have original subject matter jurisdiction).

III. The Court also lacks Subject Matter Jurisdiction Over Mitchell’s Claims because she Already Accepted Her Refund; Alternatively, Mitchell Waived her Right to Sue

Mitchell’s claims center on Defendants’ failure to refund the money she paid to attend the Group Cruise. *See generally* Am. Compl. On April 15, 2020 Mitchell expressly requested a refund for her cruise. *See* Silva Decl. at Ex. 5. In doing so, Mitchell signed a waiver, expressly stating: “I accept a refund and waive all rights to further compensation from NurseCon and its affiliates,

vendors and contractors.” *Id.* at Ex. 5, p. 2. Mitchell was then sent a \$1,269.00 refund check, which she deposited (or negotiated) on May 5, 2020. *Id.* at Ex. 6. Because Mitchell accepted her full refund and waived her right to further compensation, she no longer has a “case” or “controversy” and, therefore, lacks standing to sue.

Under Article III of the Constitution, the federal courts' jurisdiction extends to only ongoing “cases” and “controversies.” *Edelsberg*, 2019 WL 1302828, at *2 (internal citations omitted). Thus, “[i]f an intervening circumstance deprives the plaintiff of a personal stake in the outcome of the lawsuit, at any point during litigation, the action can no longer proceed and must be dismissed as moot.” *Id.* (internal citations omitted). Here, since Mitchell has already accepted the refund for which she filed suit, she no longer has a “case” or “controversy” and the Court is powerless to continue as to her. *See, e.g., Hunter v. C.I.R.*, 2010 WL 2605715, *4 (S.D.N.Y. June 29, 2010) (report and recommendation) (dismissing plaintiff's claim for lack of subject matter jurisdiction where plaintiff had received the refund for which he filed suit).

Alternatively, this Court should exercise its discretion in accepting Mitchell's signed waiver and her overt action in depositing/negotiating her refund check and enter summary judgment against her because she released her claims. *See Seelen v. Med Coach, LLC*, 819CV00936T60SPF, 2019 WL 5423370, at *1 (M.D. Fla. Oct. 23, 2019) (internal citations omitted) (“Pursuant to Fed. R. Civ. P. 12(d), when reviewing whether a release that was not attached to the complaint was adequately supervised under the FLSA, it is appropriate to convert the motion to dismiss requesting such a review into a motion for summary judgment.”).⁵

⁵ “The court has discretion as to whether to accept material beyond the pleading that is offered in conjunction with a 12(b)(6) motion.” *Prop. Mgmt. & Investments, Inc. v. Lewis*, 752 F.2d 599, 604 (11th Cir. 1985). “However, once the court decides to accept matters outside the

In *Seelen*, for example, the Court converted defendant’s motion to dismiss into a motion for summary judgment for purposes of considering defendant’s payment of a check to plaintiffs, which was accompanied by a written waiver of claims. *See Seelen*, 2019 WL 5423370, at *1. Notably, the waiver in *Seelen* provided, in pertinent part, that “[y]our acceptance of this payment of wages and/or other compensation . . . means that you have given up the right you have to bring suit” *Id.* The plaintiffs then received, and cashed, the checks but did not sign the waiver form. *Id.* Under those facts, the court still dismissed the action because it held acceptance of the check operated as a waiver of plaintiffs’ claim – even when the waiver itself was not signed. *Id.* at *2-*3.

Moreover, while *Seelen* involved an employment action dealing with a statute involving the DOL, the facts here weigh more heavily in favor of dismissal since Mitchell not only received and cashed her refund check, but she also **signed** a waiver of “all rights to further compensation”. Silva Decl. at Ex. 5, p. 2. Mitchell thus released her claim. *See also Dietrich v. Grosse Pointe Park*, 16-11049, 2017 WL 764613, at *5 (E.D. Mich. Feb. 28, 2017) (granting motion for summary judgment following conversion of motion to dismiss to consider release and finding that “[i]t should be no surprise to Plaintiff that Defendants would rely on the release as a bar to this litigation, after all, Plaintiff himself signed it. . . . [and] [t]ur[n]ing to the release itself, its provisions quite clearly bar the claims that Plaintiff is bringing in this lawsuit.”); *Flood v. Young Woman Christina Ass’n of Brunswick, Ga., Inc.*, 398 F.3d 1261, 1267 (11th Cir. 2005) (affirming summary judgment based upon broad release of all claims).

pleading, it must convert the motion to dismiss into one for summary judgment.” *Id.* When the district court converts the motion, it “must comply with the requirements of Rule 56. The district court is required to notify the parties that the motion has been converted, and give the parties 10 days in which to supplement the record.” *Trustmark Ins. Co. v. ESLU, Inc.*, 299 F.3d 1265, 1267 (11th Cir.2002).

IV. Counts I and II Should be Dismissed for Failure to Properly State a Cause of Action

A. Plaintiffs' Claim under the Florida Consumer Collection Practices Act Should be Dismissed for Failure to State a Claim

Even if this Court has subject matter jurisdiction over this case, which it does not, counts I and II should still be dismissed for failure to properly state a claim.

To state a claim under the Florida Consumer Collection Practices Act (“FCCPA”), “the plaintiff must allege facts plausibly suggesting ‘(1) the defendant is a person within the meaning of the FCCPA, (2) the defendant collected or attempted to collect a debt from the plaintiff, and (3) the defendant committed an act or omission prohibited by the FCCPA when it collected or attempted to collect the debt.’” *Gause v. Med. Bus. Consultants, Inc.*, 424 F. Supp. 3d 1175, 1203 (M.D. Fla. 2019) (internal citation omitted)). Here, while RCCL may be alleged to be a person within the meaning of the FCCPA, Plaintiffs have failed to properly plead the remaining two prongs to state a viable claim, as set forth below.

1. Plaintiffs Fail to allege that RCCL Collected or Attempted to Collect A Debt from Plaintiffs

To allege a violation of the FCCPA, plaintiffs must allege that RCCL “collected or attempted to collect a debt from the plaintiff.” *Gause*, 424 F.Supp.3d at 1203. Here, there is no allegation that RCCL, specifically, collected or attempted to collect debt from Plaintiffs. Instead, Plaintiffs impermissibly lump Defendants together and allege that Plaintiffs made down payments in February 2019 and began making “payments to Defendants” in June 2019. Am. Compl. ¶¶ 14-15. Such vague allegations give RCCL no notice as to its purported conduct under the FCCPA.

2. Plaintiffs Fail to Allege the RCCL Committed a Prohibited Act under the FCCPA

Section 559.72 of the FCCPA, entitled “Prohibited practices generally,” lists nineteen debt collection practices that violate the FCCPA. *See* § 559.72(1)–(19), Fla. Stat. Plaintiffs, in

conclusory fashion, allege that Defendants have committed acts prohibited by subsections 7 and 9 of the FCCPA. *See* Am. Compl. ¶¶ 38-39. This is not sufficient.

a. Plaintiffs Fail to Allege a Violation of Section 559.72(7)

Section 559.72(7), Florida Statutes, states that no debt collector shall “[w]illfully communicate with the debtor...with such frequency as can reasonably be expected to harass the debtor” or “willfully engage in other conduct...to abuse or harass the debtor.” Here, Plaintiffs have tracked a section of the FCCPA without providing facts in support of their conclusory allegations or an explanation of RCCL’s alleged wrongdoing. Am. Compl., ¶¶ 38. This too warrants the dismissal of Count I. *See Locke v. Wells Fargo Home Mortg.*, No. 10-60286-CIV, 2010 WL 4941456, at *2 (S.D. Fla. Nov. 30, 2010) (“The Plaintiff’s claims merely tracks the language of section 559.72(7), and such conclusory allegations will not prevent dismissal.”).

b. Plaintiffs Fail to Allege a Violation of Section 559.72(9)

“To establish a violation under the Florida Consumer Collections Practices Act, Florida Statute Section 559.72(9), it must be shown that a legal right that did not exist was asserted and that the person had actual knowledge that the right did not exist.” *Pollock v. Bay Area Credit Serv., LLC*, No. 08-61101-CIV, 2009 WL 2475167, at *9 (S.D. Fla. Aug. 13, 2009). “Under Florida law, ‘the use of the word ‘knows’ requires knowledge of the impropriety or overreach of a claim.’” *Reese v. JPMorgan Chase & Co.*, 686 F. Supp. 2d 1291, 1309–10 (S.D. Fla. 2009) (internal citation omitted). “Simply pleading that Defendant had knowledge is not enough.” *Id.* at 1309.

Here, Plaintiffs do not allege any facts demonstrating that RCCL knowingly attempted to collect on an obligation that was not owed. Instead, Plaintiffs simply parrot the language of the statute without providing any factual support. Am. Compl., ¶ 39. However, “a formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S. at 55 (internal citation

omitted); *see also Reese*, 686 F.Supp.2d at 1309 (dismissing FCCPA claim where the plaintiff failed to plead any facts establishing that defendants had knowledge that they were pursuing a debt they were legally not entitled to); *see also Smith v. Univ. Cmty. Hosp., Inc.*, No. 8:18-CV-270-T-AAS, 2019 WL 118045, at *8 (M.D. Fla. Jan. 7, 2019) (“Conclusory allegations that track statutory language are insufficient to state a claim under Section 559.72(9)”). By solely regurgitating part of the FCCPA, Plaintiffs have failed to allege “enough facts to state a claim to relief that is plausible on its face.” *Twombly*, 550 U.S. at 555. Count I should be therefore dismissed.

B. Plaintiffs’ Claim for Breach of Implied Covenant of Good Faith and Fair Dealing Should be Dismissed

“Under Florida law, every contract contains an implied covenant of good faith and fair dealing, requiring that the parties follow standards of good faith and fair dealing designed to protect the parties' reasonable contractual expectations.” *Centurion Air Cargo, Inc. v. United Parcel Serv. Co.*, 420 F.3d 1146, 1151 (11th Cir. 2005). “A breach of the implied covenant of good faith and fair dealing is not an independent cause of action, but attaches to the performance of a specific contractual obligation.” *Id.* Indeed, “a claim for breach of the implied covenant of good faith and fair dealing cannot be maintained under Florida law absent an allegation that an express term of the contract has been breached.” *Barnes v. Burger King Corp.*, 932 F. Supp. 1420, 1439 (S.D. Fla. 1996); *see also Burger King Corp. v. Weaver*, 169 F.3d 1310, 1316 (11th Cir. 1999) (“The Florida appellate courts recently held that an action for breach of the implied covenant of good faith cannot be maintained in the absence of breach of an express contract provision.”).

Here, Plaintiffs have not alleged the existence of a contract between Plaintiffs and RCCL, let alone the breach of an express contractual provision. Am. Compl., ¶¶ 41-44. Instead, they have raised conclusory allegations about how Defendants “unfairly” and in “bad faith” refused to refund Plaintiffs’ money. *Id.*, ¶¶ 43. These allegations are not sufficient. *See Am. Pro Int’l Corp.*

v. Am. DJ Supply, Inc., No. 13-22093-CIV, 2013 WL 12064854, at *9 (S.D. Fla. Oct. 4, 2013) (dismissing claim for breach of the implied covenant of good faith and fair dealing where counterclaim plaintiffs failed to allege that counterclaim defendant “breached any term of the Agreement.”). Thus, count II of the Amended Complaint must be dismissed for failure to state a cause of action.

CONCLUSION

Based on the foregoing, Defendant Royal Caribbean Cruises Ltd., requests that this Court issue an order dismissing this action for lack of subject matter jurisdiction. Alternatively, RCCL requests that this Court dismiss on the other grounds set forth above.

Dated: June 29, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 29, 2020, I electronically filed the forgoing document with the Clerk of Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record via electronic transmission of Notices of Electronic Filing generated by CM/ECF.

By: /s/ David M. Levine
David M. Levine, Esq.