UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ELLEN FENSTERER, an individual; on behalf of herself and all others similarly situated,	:	Case No.: 1:20-cv-05558-RMB-KMW
Plaintiff,	:	Motion Date: **September 21, 2020**
vs.	:	
CAPITAL ONE BANK (USA), N.A.,	:	**ORAL ARGUMENT REQUESTED**
Defendant.	:	

BRIEF IN SUPPORT OF CAPITAL ONE BANK (USA), N.A.'S MOTION TO DISMISS THE FIRST AMENDED CLASS ACTION COMPLAINT

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Defendant Capital One Bank (USA), N.A. ("Capital One"), pursuant to Federal Rules of Civil Procedure 12(b)(1) and (b)(6), states as follows in support of its Motion to Dismiss the First Amended Class Action Complaint (the "Complaint").

INTRODUCTION

COVID-19 rapidly and profoundly changed the world we live in—businesses had to shift to remote status, flights and travel plans were unexpectedly cancelled, friends and family members became ill or worse. Like so many people, Plaintiff Ellen Fensterer was impacted by COVID-19. Because of travel restrictions, the flights she booked on British Airways using a combination of rewards redemption and a direct charge on her Capital One credit card were cancelled by British Airways. Fensterer claims that Capital One then undertook an elaborate scheme to prevent her from getting a refund for those flights that she booked with a third-party airline.

The disruption caused by COVID-19 was—and still is—an incredible challenge and source of frustration (if not worse) for almost every person on the planet. Fensterer is no exception. Although she was understandably frustrated by not getting the answer she wanted, as quickly as she wanted, for a trip that she wanted but could not take, her frustration does not change the fact that she cannot state any claim for which relief can be granted. Among many other failures, she does not plausibly allege (nor could she) that she ever was entitled to an instant refund, whether from British Airways (the third party from which she purchased the

airline ticket) or from Capital One (which facilitated her purchase). Nor can she plausibly allege that Capital One ever wrongfully retained her purchase price.

Moreover, Fensterer has now received from British Airways the full refund that she seeks in this case. Regardless of the timing of that refund, it grants her the very relief sought in the Complaint and renders her claim moot. And, as a result, this Court lacks jurisdiction over her Complaint. This Court should dismiss the Complaint with prejudice.

BACKGROUND[1]

Fensterer's Complaint centers on her desire to obtain a refund for flights British Airways cancelled because of COVID-19—a refund that was controlled by the travel provider and that she now has received. Fensterer used a Capital One Card as well as associated rewards points to purchase an international flight to Greece for herself and family members from British Airways, a third-party airline. Compl. ¶¶ 15–16.[2] She charged $4,906.31 to her card and used Reward Miles to complete the purchase. *Id.* ¶ 16. This payment went to the travel provider—British Airways—with Capital One merely facilitating the purchase. *See id.* ("The tickets were purchased *through* Capital One Venture Card Rewards." (emphasis added)).

[1] With the exception of the final paragraph in this section, Capital One merely recounts the Complaint's allegations in this section. It does not admit that any allegations in the Complaint are true.

[2] A copy of the Complaint is attached to the Goldstein Declaration as Exhibit A.

Months later, the pandemic took hold in the United States and Europe. When Fensterer first called Capital One Venture Travel's customer service number, according to the Complaint, she was told to wait to see if British Airways cancelled her flights, at which point she would receive a refund from British Airways. *Id.* ¶ 18. After British Airways cancelled the flights, Fensterer called Capital One Venture Travel twice more. *Id.* ¶¶ 19, 21. She alleges that during those calls, she was told that she could receive a travel voucher from British Airways for the value of her tickets, but that British Airways was not providing refunds. *Id.*

Fensterer filed her Complaint against Capital One alleging five claims under New Jersey law, which she hopes to pursue on behalf of herself and a putative class. Each claim boils down to Fensterer's assertion that Capital One financially damaged her by telling her that she could not receive a refund from British Airways but could receive a voucher. *See id.* ¶¶ 40, 60. As relief, Fensterer seeks damages in the form of that refund.

British Airways, however, now has refunded Fensterer's purchase of travel tickets. Decl. of B. Kalmar ISO Capital One Bank (USA), N.A.'s Mot. to Dismiss the First Am. Class Action Compl. ¶ 5. Capital One processed that refund and credited Fensterer's Capital One account for the exact amount of cash and reward points that Fensterer used to purchase the cancelled flight tickets. *Id.* ¶ 6. That refund was the product of British Airways' cancellation policies, not because

Fensterer filed suit against Capital One. As a result, Fensterer has received the relief her Complaint seeks from the travel provider.

STANDARD OF REVIEW

"Under Fed. R. Civ. P. 12(b)(1), a court must grant a motion to dismiss if it lacks subject-matter jurisdiction to hear a claim." *In re Schering Plough Corp. Intron/Temodar Consumer Class Action*, 678 F.3d 235, 243 (3d Cir. 2012). When a Rule 12(b)(1) motion raises a "factual attack on the Court's subject matter jurisdiction, the court may consider evidence outside the pleadings" to decide the motion. *United States ex rel. Customs Fraud Investigations, LLC v. Victaulic Co.*, 839 F.3d 242, 251 (3d Cir. 2016). "The plaintiff has the burden of persuasion to convince the court it has jurisdiction." *Gould Elecs., Inc. v. United States*, 220 F.3d 169, 178 (3d Cir. 2000).

To survive a Rule 12(b)(6) motion, a complaint must "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.*

ARGUMENT

Fensterer's receipt of the refund she seeks in this action entirely moots the claims raised in her Complaint. Furthermore, even if those claims remained live,

they fail as a matter of law. The Complaint should therefore be dismissed in its entirety.

I. This Court Lacks Subject Matter Jurisdiction Because Fensterer's Claims are Moot.

The complaint should be dismissed under Rule 12(b)(1) because Fensterer lacks any legally cognizable interest in this action's outcome. Article III "restrict[s] the federal courts to the adjudication of actual, ongoing cases or controversies." *Cty. of Morris v. Nationalist Movement*, 273 F.3d 527, 533 (3d Cir. 2001). A case becomes moot, "and therefore nonjusticiable as involving no case or controversy, if the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *In re Surrick*, 338 F.3d 224, 229 (3d Cir. 2003); *see also Camesi v. Univ. of Pittsburgh Med. Ctr.*, 729 F.3d 239, 247 (3d Cir. 2013) ("Article III requires that an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.").

Fensterer has no personal stake here. She sued exclusively to get a refund. *See, e.g.*, Compl. ¶¶ 40–42 (alleging that Capital One "financially damaged" Fensterer "[b]y misrepresenting" that she was "only entitled to travel vouchers," and Capital One's actions entitle Fensterer "to a full refund"); *id.* ¶ 44–45 ("Capital One has benefitted from its unlawful acts by retaining the payments used to purchase

travel tickets" and "must pay restitution to Plaintiff.").[3] Although the Complaint also requests, as an after-thought, "an order enjoining [Capital One] from retaining refunds for cancelled flights," the availability of any such relief hinges entirely on her claim that she was not paid a refund. Compl. at 13.

Because Fensterer has now received a full refund paid by British Airways and processed by Capital One, she has no stake in a challenge to Capital One's purported failure to give her a refund. *See Rosetti v. Shalala*, 12 F.3d 1216, 1224 (3d Cir. 1993). Nor would any decision on the merits of her claims for a refund affect her rights, because she already has been paid and her alleged injury has been redressed. *Id.*; *see also Mayer v. Wallingford-Swarthmore Sch. Dist.*, 405 F. Supp. 3d 637, 642 (E.D. Pa. 2019) ("Plaintiff has been refunded for the dues deducted after he resigned from the Union, and therefore he no longer has an interest in the outcome of the litigation as to these claims.").

That Capital One processed the refund after Fensterer filed her Complaint does not change this result. "[I]f developments occurring during the course of

[3] *See also* Compl. ¶¶ 51–52 (Capital One deprived Fensterer and the class "of the right to their property, in this case, the amounts paid for tickets" and Fensterer is "entitled to a refund"); *id.* ¶ 60 ("By misrepresenting that Plaintiff and the Class members were only entitled to travel vouchers, [Capital One] financially harmed" Fensterer, "causing damages"); *id.* ¶¶ 65, 67 (Capital One "breached its obligations . . . by failing after-the-fact to provide a full refund" and Fensterer is "entitled to fair compensation in the form of full refunds"); *id.* at 13 (requesting "[d]amages and refunds in the amount of all consideration paid").

adjudication eliminate a plaintiff's personal stake in the outcome of a suit, then a federal court must dismiss the case as moot." *Rosetti*, 12 F.3d at 1224. Although courts have recognized some narrow exceptions to that rule, none of them apply here. For example, a plaintiff can sometimes continue pursuing a claim if there is a "reasonable expectation that" she "will be subject to the same action again." *Rendell v. Rumsfeld*, 484 F.3d 236, 241 (3d Cir. 2007). Fensterer makes clear there is no such expectation here. In fact, she alleges the opposite: she wanted a refund because she bought tickets only "to visit her child while she was studying abroad" and has no plans to travel "for any other purpose in the future." Compl. ¶ 6. Nothing else shows that Capital One will repeat the conduct at issue here with respect to Fensterer. The "narrow" exception to the mootness doctrine for "exceptional situations" where a situation is "capable of repetition, yet evading review," therefore does not apply. *Rendell*, 484 F.3d at 241.

Fensterer's putative class claims also do not salvage her mooted action. A court may retain jurisdiction over a pending class certification motion "filed when the named plaintiff had a live claim" if the named plaintiff's claims are later mooted. *Rosetti*, 12 F.3d at 1228. Fensterer has filed no motion for class certification, though.

And any motion filed now would fall outside this exception because Fensterer no longer has a live claim. *Id.*[4]

This action is moot because Fensterer has no legally cognizable interest in the outcome of this action. *Surrick*, 338 F.3d at 229. This Court should dismiss the Complaint in its entirety for lack of jurisdiction.

II. Fensterer Admits this is a Contract Dispute Yet Specifies No Contractual Provision Allegedly Breached.

Putting aside that Fensterer has received the relief she seeks, her Complaint fails on the merits for failure to state a claim. In publicizing this action, Fensterer and her counsel have asserted that the issues she raises are ones of "simple contract law." *See* D. Serino, *Travel companies making it difficult to get refunds on cancelled vacations*, WYKC Studios (July 7, 2020, 6:03 PM), available at https://www.wkyc.com/article/travel/travel-companies-making-it-difficult-to-get-refunds-on-cancelled-vacations/95-2d73a626-558f-446f-899a-fdde1de92b6d (last accessed July 23, 2020). And Fensterer claims breach of contract in Count Five of

[4] The Third Circuit has recognized a further exception allowing a named plaintiff with mooted individual claims to continue to represent a putative class she is seeking to certify if the named plaintiff's "individual claim for relief is 'acutely susceptible to mootness' by the actions of a defendant." *Richardson v. Bledsoe*, 829 F.3d 273, 279 (3d Cir. 2016). The rationale for that rule is to prevent a defendant from "'buy[ing] off' the small individual claims of the named plaintiffs," defeating the goals of Fed. R. Civ. P. 23. *Id.* at 284–85. That exception is not applicable here, where Fensterer's refund was the result of British Airways' policies, not the result of any attempt by Capital One to buy off an individual claim.

her Complaint. Yet nowhere in her Complaint does Fensterer describe the contract at issue or explain how that contract or any of its provisions entitle her to a refund from Capital One for tickets she purchased from British Airways. Fensterer's breach of contract claim therefore should be dismissed.

Moreover, plaintiff pursuing a breach of contract claim under New Jersey law must plead facts showing: "(1) a contract between the parties; (2) a breach of that contract; (3) damages flowing therefrom; and (4) that the party stating the claim performed its own contractual obligations." *Frederico v. Home Depot*, 507 F.3d 188, 203 (3d Cir. 2007); *see also Caponegro v. U.S. Dept. of Hous. & Urban Dev.*, No. 15-cv-3431, 2019 WL 5418087, at *4 (D.N.J. Oct. 23, 2019) ("[I]t is not enough for Plaintiff to simply allege how FNBL breached the contract. Plaintiff must also state how he met his own contractual obligations under the contract, as well as what damages flowed as a result of the breach."). The plaintiff must also allege supporting facts, "such as specific dates as to when the breach occurred and the *specific provision or provisions that were breached*." *Caponegro*, 2019 WL 5418087, at *4 (emphasis added).

Fensterer alleges *no* facts identifying any specific contractual provision requiring Capital One to refund airfare purchased from a third-party vendor at all, much less within a specific timeframe. Fensterer alleges only that Capital One entered into a contract with Fensterer under which Fensterer would pay for airfare

that Capital One would provide "via third parties" like British Airways. Compl. ¶ 62. Nowhere does Fensterer allege that this contract obligated Capital One, as opposed to the third-party airlines, to give refunds should the third-party airline cancel the flights because of COVID-19 (or any other reason).

Instead, Fensterer merely asserts that Capital One's "*services* carried with it the obligation to refund all consideration." *Id.* ¶ 63 (emphasis added). This allegation omits mention of any *contract* containing that requirement, much less of any specific contractual *provision* obligating Capital One to give refunds.[5] And any such provision would make little sense in this case, where British Airways held both Fensterer's funds and the power to decide whether to refund those amounts or provide some other form of compensation. *Supra* at 3. The Complaint's bare allegations do not suffice to state a claim for breach of contract.

Also defeating this claim is Fensterer's inability to plead facts showing she suffered damage because of Capital One's alleged "misrepresentation" that she was not entitled to a refund from British Airways. Ignoring for the moment that Fensterer has received a full refund, she fails to allege any facts showing that any such

[5] Fensterer effectively admits that she cannot identify any contractual provision by alleging that she "checked the terms and conditions listed on Capital One's website but saw that the only relevant information concerned ticket purchases made directly with the airlines." Compl. ¶ 22.

statement damaged her in any quantifiable way. *Infra* at 12. Count Five should be dismissed.

So should Fensterer's remaining claims, all of which she premises on tort theories meant to circumvent her failure to adequately allege a breach of contract claim. If a plaintiff's action is "essentially a basic breach of contract case," the plaintiff cannot use tort allegations "to enhance the benefit of the bargain she contracted for." *Saltiel v. GSI Consultants, Inc.*, 788 A.2d 268, 280 (N.J. 2002). "Under New Jersey law, a tort remedy does not arise from a contractual relationship unless the breaching party owes an independent duty imposed by law." *Id.*; *see also Florian Greenhouse, Inc. v. Cardinal IG Corp.*, 11 F. Supp. 2d 521, 528 (D.N.J. 1998) (permitting a fraud claim where "[t]he factual basis for the alleged fraud [was] extraneous to the contract").

The only relationship here is a contractual one—a fact Fensterer and her counsel have made clear both in their public statements and in the Complaint's recognition that her relationship with Capital One was subject to "terms and conditions." Compl. ¶ 22. Fensterer does not identify any independent duties that Capital One purportedly violated by merely *telling her* that British Airways would give her a voucher. Instead, she focuses on a single alleged duty: a supposed obligation to refund the airfare she bought from British Airways. That alleged duty

is rooted entirely in the contractual obligations Fensterer alleges—but fails to adequately describe. As a result, her remaining claims also fail as a matter of law.

III. Fensterer Fails to State a Claim Under the New Jersey Consumer Fraud Act.

In addition to the fatal defects described above, Fensterer fails to state a claim for violating the New Jersey Consumer Fraud Act (the "CFA" or "Act"). The CFA declares "[t]he act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, [or] misrepresentation . . . in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid," to be "an unlawful practice." N.J. Stat. Ann. § 56:8-2. The CFA provides a cause of action for "[a]ny person who suffers any ascertainable loss of moneys or property, real or personal, as a result of the use or employment by another person of any method, act, or practice declared unlawful under" the Act. *Id.* § 56:8-19.

Fensterer alleges that Capital One misrepresented to her that she could only receive a travel voucher from British Airways and not a refund. Compl. ¶ 36. That "misrepresentation," Fensterer claims, is an unlawful practice that "financially damaged" her and "entitle[s]" her "to a full refund." *Id.* ¶¶ 40–41.

Again putting aside that Fensterer has in fact received a refund, she fails to explain how being told that she was only eligible for a voucher qualifies as an "ascertainable loss." A private litigant under the CFA "must plead a claim of

ascertainable loss that is capable of surviving a motion for summary judgment." *Weinberg v. Sprint Corp.*, 801 A.2d 281, 283 (N.J. 2002). Doing so requires the plaintiff to plead facts showing that she "suffered an actual loss" that is "quantifiable or measurable." *Thiedemann v. Mercedes-Benz USA, LLC*, 872 A.2d 783, 792–93 (N.J. 2005).

Fensterer does not identify any quantifiable or measurable loss. She alleges only that a voucher would be "of no practical use" because she has no plans to travel in the future, that the vouchers "included limitations and arbitrary deadlines for use," and that travel risks "make a travel voucher worth even less than it otherwise might be." Compl. ¶¶ 3–7. Those conclusory assertions reflect Fenster's personal preference for a refund. Her preferences fall far short of plausibly identifying a quantifiable or measurable loss. Moreover, Fensterer fails to link any alleged loss to the purported misrepresentation that "British Airways was only offering travel vouchers." *Id.* ¶ 19. Among other things, she does not allege that she took any detrimental action in reliance on that statement. She therefore fails to plead any ascertainable loss caused by an unlawful practice under the CFA.

The CFA claim also fails because the Complaint does not contain facts showing that Capital One made a misrepresentation "in connection with the sale or advertisement of any merchandise" or "with the subsequent performance" of a contract for sale. N.J. Stat. Ann. § 56:8-2. The CFA focuses on misrepresentations

"material to [a sale] transaction . . . made to induce the buyer to make the purchase." *Gennari v. Weichert Co. Realtors*, 672 A.2d 1190, 1205–06 (N.J. Super. Ct. App. Div. 1996), *aff'd as modified*, 691 A.2d 350 (N.J. 1997). The Act covers "fraud in the subsequent performance," should a seller "at some point elect[] not to fulfill its obligations" following a sale. *Weiss v. First Unum Life Ins. Co.*, 482 F.3d 254, 266 (3d Cir. 2007). But those obligations arise from the seller's "affirmative representation of a future act." *Annunziata v. Millar*, 574 A.2d 1021, 1030 (N.J. Super. Ct. Ch. Div. 1990).

The Complaint lacks any allegations of such representations. Fensterer does not allege that Capital One (or anyone) made assurances *before* her purchase that she would receive a refund for flight cancellations as opposed to rebooking or a voucher. Fensterer instead alleges a misrepresentation long *after* her purchase, lacking any connection to an earlier "affirmative representation" that Capital One would facilitate (and British Airways would pay) a refund for a cancelled flight. Fensterer thus fails to plead an actionable claim under the CFA. Count One should be dismissed.

IV. Fensterer Cannot Maintain a Claim for Unjust Enrichment.

Count Two's unjust enrichment claim also fails on multiple grounds. At the outset, "an unjust enrichment claim cannot be sustained under New Jersey law if there is a valid and unrescinded contract governing the parties' rights." *Urbino v.*

Ambit Energy Holdings, LLC, No. 14-cv-5184, 2015 WL 4510201, *7 (D.N.J. July 24, 2015). As Fensterer acknowledges, her relationship with Capital One was subject to "terms and conditions listed on Capital One's website." Compl. ¶ 22.

Even in the absence of a contract, her claim would still fail as a matter of pleading. To state a claim, Fensterer must plead facts plausibly showing that: (1) Capital One received a benefit, (2) at Fensterer's expense, (3) under circumstances that would make it unjust for Capital One to retain the benefit without paying for it. *See Jurista v. Amerinox Processing, Inc.*, 492 B.R. 707, 753–54 (D.N.J. 2013). "Further, the unjust enrichment doctrine requires that plaintiff show that it expected remuneration from the defendant at the time it performed or conferred a benefit on defendant and that the failure of remuneration enriched defendant beyond its contractual rights." *Maniscalco v. Brother Int'l Corp. (USA)*, 627 F. Supp. 2d 494, 505 (D.N.J. 2009).

Fensterer fails to allege facts showing that she conferred any benefit on Capital One. She used her Capital One credit card to purchase airfare from British Airways, not from Capital One. Capital One could not have *retained* a benefit *never given* to it by Fensterer.

The Complaint also fails to establish that Fensterer expected any remuneration that she did not receive. Fensterer vaguely asserts that no "limitation [on refunds] existed at the time of purchase," but alleges no facts plausibly showing that this is

true. Compl. ¶ 55. Similarly absent are factual allegations showing that anyone assured Fensterer when she bought her airfare that she would receive a refund instead of a voucher should an emergency like COVID-19 cause her flights to be cancelled. Instead, the Complaint demonstrates that Fensterer received what she reasonably would have expected when she bought travel tickets: she first received those tickets, and she later was offered compensation for the tickets' value when the flights were cancelled because of the global pandemic. *Id.* ¶¶ 4, 19.

The Complaint fails to plausibly plead that Capital One was unjustly enriched because it told Fensterer that she could receive a British Airways voucher instead of a refund, or that Fensterer failed to receive remuneration she purportedly was promised. Count Two should be dismissed.

V. Fensterer Lacks Any Immediate Right to Possession Supporting a Conversion Claim.

Fensterer also fails to state a claim for conversion in Count Three. A conversion claim under New Jersey law requires Fensterer to plead facts plausibly establishing: (1) that she "owned, or had a right to use, the property in question at the time of the conversion; and (2) the defendant's actions constituted an exercise of unlawful dominion over the plaintiff's property by the defendant in a manner that is inconsistent with the plaintiff's title or rights." *In re Price*, 361 B.R. 68, 83–84 (Bankr. D.N.J. 2007). Fensterer's "right to immediate possession of the property is

essential to [her] claim of conversion." *Hunter v. Sterling Bank*, 588 F. Supp. 2d 645, 650 (E.D. Pa. 2008).

The Complaint fails on each element. Fensterer alleges that Capital One deprived her of the right to her "property, in this case, the amounts paid for tickets on cancelled flights." Compl. ¶ 51. But she fails to allege facts showing that Capital One ever had possession or control over that property. Instead, Fensterer admits that she willingly paid *British Airways* those amounts, using a Capital One credit card and points, to receive travel tickets from *British Airways*. *Id.* ¶ 4. And when British Airways cancelled her flight, Capital One allegedly told Fensterer that British Airways would give her a voucher equivalent to those amounts paid. *Id.* ¶ 19. The Complaint contains no indication that Capital One ever had control over the property to which Fensterer claims a right, or that Capital One had any say in whether Fensterer would receive a refund. As a result, Fensterer fails to plausibly plead that Capital One exercised any dominion, lawful or not, over that property.

Moreover, Fensterer's allegations do not plausibly convey how communicating a voucher offer equates to wrongfully exercising control over anything that is rightfully Fensterer's property. Fensterer does not establish that she had any right to possess or control her funds and points after she used them to buy airfare. Instead, the allegations show that Fensterer voluntarily paid amounts for travel reservations and that *British Airways*, through Capital One, in turn provided

her travel tickets. Fensterer identifies nothing in the law or in any contract that required a refund over some other form of compensation. Nor does Fensterer establish that she had any existing right to the amounts paid, much less a "right to *immediate* possession" of a refund making Capital One's initial offer of a voucher wrongful. *Hunter*, 588 F. Supp. 2d at 650 (emphasis added). Her allegations therefore do not suffice to establish a plausible claim for conversion, and should be dismissed.

VI. Fensterer Fails to State a Claim for Fraudulent Misrepresentation.

This Court also should dismiss Fensterer's fraudulent misrepresentation claim for failure to state a claim. Fensterer must plead facts plausibly establishing these elements to pursue this claim: "(1) a material misrepresentation of a presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) an intention that the other person rely on it; (4) reasonable reliance thereon by the other person; and (5) resulting damages." *Konover Constr. Corp. v. E. Coast Constr. Servs. Corp.*, 420 F. Supp. 2d 366, 370 (D.N.J. 2006). And she must do so under Fed. R. Civ. P. 9(b)'s heightened pleading standard for fraud, which requires her to "state with particularity the circumstances constituting fraud or mistake." *At Home Sleep Sols., LLC v. iSleep management, LLC*, No. 17-cv-4801, 2018 WL 6191943, at *3 (D.N.J. Nov. 28, 2018). When Rule 9(b) applies, the plaintiff must support her allegations with "the who, what, when, where, and how of the events at issue." *In*

re Supreme Specialties, Inc. Sec. Litig., 439 F.3d 256, 276–77 (3d Cir. 2006). Fensterer does not meet this standard.

Fensterer asserts, without factual detail, that Capital One instructed customer service representatives to give customers "misleading information" to confuse customers and avoid giving refunds to them (again, refunds that would have come from the airlines, *not Capital One*). Compl. ¶ 55. *No* pleaded facts support this implausible assertion. Nor do any facts support the allegation that Capital One "intentionally misrepresented" that only vouchers were available for Fensterer's cancelled flights. *Id.* ¶ 56. Fensterer identifies *nothing* in her personal interactions with Capital One representatives reflecting that purported intent or knowledge. *See id.* ¶¶ 19, 21. These unsupported assertions do not satisfy Rule 12(b)(6)'s pleading standard, much less Rule 9(b)'s heightened standard.

Similarly lacking are Fensterer's conclusory allegations that she "relied on Defendant's misrepresentations" that she was only entitled to a voucher. *Id.* ¶ 57; *see also id.* ¶ 38. Fraudulent misrepresentation requires a plaintiff to show that her reliance was "actual, as well as justifiable." *Walid v. Yolanda for Irene Couture, Inc.*, 40 A.3d 85, 91 (N.J. Super. Ct. App. Div. 2012). Fensterer's unsupported assertions show neither. She does not identify any action she took or failed to take because of Capital One's statements. *See In re Santos*, 304 B.R. 639, 666 (Bankr. D.N.J. 2004) ("A person alleging pecuniary loss as a result of fraudulent

misrepresentation . . . must further show that he relied in fact upon the misrepresentation."). Indeed, the Complaint makes no reference to anything Fensterer did or did not do after she was told that British Airways would provide her a voucher instead of a refund.

Fensterer's allegations also fail to identify any damages attributable to purported misrepresentations and any reliance thereon. Even if she had not already received a refund, her Complaint does not explain how being *told* she would receive a voucher instead of a refund from British Airways caused her any quantifiable damage. Fensterer merely states that she was "financially harmed" by Capital One's representations, "causing damages." Compl. ¶ 60. She does not specify how those representations *themselves* damaged her or how she relied on those statements to her detriment. As with her CFA claim, Fensterer thus fails to establish any causal link between the alleged misconduct and her purported harm. *See supra* at 13. Her claim should be dismissed.

CONCLUSION

For the reasons above, this Court should grant Capital One's Motion to Dismiss and dismiss the Complaint with prejudice.

Dated: August 21, 2020
New York, NY

Respectfully submitted,

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By: */s/ Philip A. Goldstein*

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