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and all others similarly situated*

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

ELLEN FENSTERER, an individual; on
behalf of herself and all others similarly
situated,

Plaintiff,

vs.

CAPITAL ONE BANK (USA), N.A.,

Defendant.

DOCKET NO. 1:20-CV-05558

**PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S
MOTION TO DISMISS FIRST AMENDED COMPLAINT**

Plaintiff, Ellen Fensterer ("Plaintiff" or "Ms. Fensterer"), on behalf of herself and all others similarly situated files the instant Memorandum of Law in Opposition to the Motion to Dismiss filed by Defendant, Capital One Bank (USA), N.A. ("Defendant" or "Capital One").

I. Statement of Relevant Facts

On January 9, 2020, Plaintiff purchased three (3) airline tickets for travel to occur on April 3, 2020, returning April 13, 2020, traveling to Athens, Greece to visit Plaintiff's daughter while she studied abroad. See Plaintiff's Amended Complaint. The travel was to be on British Airways originating from New York, with a connecting flight in London. See Id. The tickets

were purchased through Capital One Venture Card Rewards. Plaintiff applied Reward Miles on her account and charged \$4,906.31 to her Capital One Venture Card to make the purchase. See Id.

On March 11, 2020, United States President Donald Trump instituted a travel ban for flights from Europe to start on March 13, 2020 and continue for thirty (30) days. See Id. On March 12, 2020, Plaintiff called the Capital One Venture Travel customer service number and was instructed to wait two (2) more weeks to see if her flights would be cancelled and if so, a refund would be automatically be issued by British Airways. See Id. Plaintiff called Capital One Venture Travel again on March 25, 2020, and due to wait times, spent the next thirteen (13) hours waiting for a representative. See Id. When a representative finally answered, Plaintiff was informed that British Airways was only offering travel vouchers which were valid through January 9, 2021. See Id. On April 3, 2020, Plaintiff called British Airways directly and was told that assistance could not be offered because the tickets were purchased through Capital One, not the airline directly. Plaintiff learned during this call that purchases through the airline itself are refunded for cancelled flights, even if only one leg was cancelled. See Id. Plaintiff then contacted Capital One again and learned that neither her rewards points, nor credit card charges for the tickets would be refunded. See Id.

Plaintiff reviewed the terms and conditions listed on Capital One's website but saw that the only relevant information provided concerned ticket purchases made directly with the airlines and not the travel services. See Id. The website provided contact information for the airlines and set forth a dispute procedure only. See Id. Capital One has received substantial consideration for Plaintiff's purchases and has charged her for flights later cancelled by the airline because of the COVID-19 Pandemic. See Id. Capital One handled flight cancellation services poorly for

card members, so much so that consumers, including Plaintiff, have been left without travel and without a refund and/or reversal of charges and return of Rewards points. See Id.

II. ARGUMENT

A. Standard

1. Standard Under Fed. R. Civ. P. 12(b)(1)

A district court must take care not to reach the merits of a case when deciding a 12(b)(1) motion." Davis v. Wells Fargo, 824 F.3d 333, 348 (3d Cir. 2016). "Jurisdictional finding of genuinely disputed facts is inappropriate when the jurisdictional issue and substantive issues are so intertwined that the question of jurisdiction is dependent on the resolution of factual issues going to the merits of an action." When "a factual challenge to jurisdiction attacks facts at the core of the merits of the underlying cause of action, "the proper procedure for the district court is to find that jurisdiction exists and to deal with the objection as a direct attack on the merits of the plaintiff's case." Id.

2. Standard Under Fed. R. Civ. P. 12(b)(6)

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the sufficiency of a complaint. Kost v. Kozakiewicz, 1 F.3d 176, 183 (3d Cir. 1993). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)) (internal quotation marks omitted). In deciding a motion to dismiss under Rule 12(b)(6), courts must "accept as true all allegations in the complaint and all reasonable inferences that can be drawn from them after construing them in the

light most favorable to the nonmovant.” Davis v. Wells Fargo, 824 F.3d 333, 341 (3d Cir. 2016) (quoting Foglia v. Renal Ventures Mgmt., LLC, 754 F.3d 153, 154 n.1 (3d Cir. 2014)) (internal quotation marks omitted). A plaintiff’s pleading obligation is to set forth “‘a short and plain statement of the claim,’” which gives the defendant “‘fair notice of what the . . . claim is and the grounds upon which it rests.’” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (alteration in original) (quoting Fed. R. Civ. P. 8(a)(2) and Conley v. Gibson, 355 U.S. 41, 47 (1957)).

B. Plaintiff’s Claims are not Moot

1. Whether Fensterer received a refund is a question of fact outside the four corners of the complaint.

In its Motion, Defendant argues that Plaintiff’s claims are moot because Plaintiff received a refund. (Defendant’s Memorandum, pp. 5-8.) However, nothing in Plaintiff’s Amended complaint states anything about such a refund. (*See generally*, Am. Compl.) In support of that contention, Defendant relies on its own affidavit which is outside the four corners of the Complaint. Accordingly, that is not in accordance with Fed. R. Civ. P. 12(b)(1). *See Doty v. United States*, No. 15-3016 (NLH), 2016 U.S. Dist. LEXIS 77650, at *5-7 (D.N.J. June 15, 2016) (“Because the instant motion pursuant to Rule 12(b)(1) was filed prior to an answer, this Court must “review only whether the allegations on the face of the complaint, taken as true, allege facts sufficient to invoke the jurisdiction of the district court.”)

Plaintiff does not concede that all of the monies wrongfully held by Capital One were refunded. There exists a dispute of fact which must proceed to discovery.

2. Plaintiff Has a Concrete Interest in the Outcome of the Litigation

Even if the Court were to accept Defendant’s procedurally improper averment as true- namely that Capital One refunded Ms. Fensterer the amount of the price of the tickets- Plaintiff

still has a concrete interest in the outcome of litigation. For that reason, as articulated below, Plaintiff's claims (and the claims of similarly situated class-members) are not moot under Fed. R. Civ. P. 12(b)(1).

Under Federal Rule of Civil Procedure 12(b)(1), "as long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." See Campbell-Ewald Co. v. Gomez, 136 S. Ct. 663, 669 (2016), *citing to* Chafin v. Chafin, 133 S.Ct. 1017, 1023 (2013) (internal quotation marks omitted). While Capital One cites to a refund purportedly issued by Capital One to Ms. Fensterer in its Motion to Dismiss (See Defendant's Memorandum, pp. 5-8), Defendant simply ignores the fact that Plaintiff's damages go beyond the cash price of the airline tickets. Specifically, the Amended Complaint alleges *inter alia* "Capital One Venture Card has received a windfall of **cash and/or redemption of reward miles benefits** from consumers..." and that Plaintiff seeks damages for "**fees, taxes and interest** that Defendant charged and/or collected." (Am. Compl. ¶¶ 24, 67 (emphasis added.)) Furthermore, the Amended Complaint seeks "treble damages" as well as "attorney fees and costs" under the New Jersey Consumer Fraud Act, by N.J.S.A. § 56:18-19. (Am. Compl. ¶¶ 41-42.)¹

The Amended Complaint describes damages for which Plaintiff has not been and cannot be refunded. Accordingly, Plaintiff (and other similarly situated class members) have a concrete interest in the outcome of litigation. Accordingly, Plaintiff's claims are not moot under Fed. R. Civ. P. 12(b)(1).

3. Even If Plaintiff's Claims Were Now Mooted, She Has a Stake in Litigation the Claims Would Relate Back

¹ "Among the equitable and legal remedies available against violators of the [New Jersey Consumer Fraud Act] are treble damages, reasonable attorneys fees, and costs of suit.... The purpose of those remedies is not only to make whole the victim's loss, but also to punish the wrongdoer and to deter others from engaging in similar fraudulent practices." Furst v. Einstein Moomjy, Inc., 860 A.2d 435, 441 (N.J. 2004) (internal citations omitted).

Finally, even if Capital One had refunded Ms. Fensterer and paid all of her damages, the class-action could still proceed with her as class representative.

Article III mootness is “more flexible than other justiciability requirements, especially in the context of class action litigation. Richardson v. Dir. Fed. Bureau of Prisons, 829 F.3d 273, 278 (3d Cir. 2016) *citing* United States Parole Comm'n v. Geraghty, 445 U.S. 388, 397, 100 S. Ct. 1202, 1209 (1980). The “special mootness rules have evolved over time to allow a plaintiff to continue seeking class certification in certain circumstances even though his individual claim for relief has become moot.” Richardson, at 279. “One such special [mootness] rule is commonly referred to as the relation back doctrine.” Id. The relation-back doctrine permits courts to relate a would-be class representative's (now moot) claim for relief back in time to a point at which that plaintiff still had a personal stake in the outcome of the litigation.” In such an instance, the “plaintiff can thus continue to represent, or seek to represent, a class of similarly situated persons despite no longer having a justiciable claim for individual relief.” Id. The “termination of a class representative's claim does not moot the claims of the unnamed members of the class.” Id.

Here, Plaintiff could travel again in the future, using miles and/or pay for travel utilizing Capital One's travel services, making this situation capable of repetition. Capital One cannot avoid the instant class action by attempting to “pick off” Ms. Fensterer as class representative. Accordingly, even if the Court were to consider the purported refund provided by Capital One to Ms. Fensterer (which it should not), and even if the purported refund mooted her personal claim (which it does not), Fensterer still has a stake in the litigation and could still serve as class-plaintiff. Plaintiff's claims are not moot.

C. Plaintiff Has Asserted a Viable Breach of Contract Claim

In its Memorandum, Defendant erroneously argues that the Amended complaint fails to state a claim for breach of contract. (Defendant's memorandum, pp. 8-11.) For the reasons stated below, that argument fails.

A cause of action exists for breach of contract when the plaintiff can demonstrate that there exists "[a] valid contract, defective performance by the defendant, and resulting damages." Zelnick v. Morristown-Beard Sch., 137 A.3d 560, 566 (N.J. Super. Ct. 2015) *citing* Coyle v. Englander's, 199 N.J. Super. 212, 223, 488 A.2d 1083 (App.Div.1985) (citation omitted). In addition to the express terms of a contract, terms may be implied in fact and enforceable "[b]y interpretation of a promisor's word and conduct in light of the surrounding circumstances." Wanaque Borough Sewerage Auth. v. Twp. of W. Milford, 144 N.J. 564, 574, 677 A.2d 747 (N.J. 1996).

Plaintiff alleges that she and other class members entered into contracts with Defendant through its travel service to provide airline travel tickets via third parties and in exchange Plaintiff and class members would pay money and/or travel points and/or a combination of the two to Defendant to complete the transaction. (Am. Compl. ¶ 64.) Defendant's services carried with it the obligation to refund all consideration paid by Plaintiff and Class Members should flights be cancelled as a result of unforeseen world events, specifically the COVID19 Pandemic. (Am. Compl. ¶ 65.) Plaintiff and other class members paid consideration in reliance that cancelled flights would entitle them to a full refund. (Am. Compl. ¶ 66.) However, Defendant breached its obligation by failing to provide a full refund. Plaintiff and class members did not receive full compensation and are entitled to damages as will be established in discovery. (Am. Compl. ¶ 67.)

Defendant's contention that the contract is not identified is belied by the plain language of the Amended Complaint.

D. Plaintiff Has Asserted a Viable Claim Under the New Jersey Consumer Fraud Act

Contrary to Defendant's contention, Plaintiff's Amended Complaint states a viable claim under the New Jersey Consumer Fraud Act.

The New Jersey Consumer Fraud Act N.J. STAT. ANN. § 56:8, et seq. prohibits *inter alia* unconscionable consumer practices. The party alleging the a violation of the Act must prove three **elements**: "1) unlawful conduct by defendant; 2) an ascertainable loss by plaintiff; and 3) a causal relationship between the unlawful conduct and the ascertainable loss." Bosland v. Warnock Dodge, Inc., 197 N.J. 543, 557, 964 A.2d 741 (2009).

Plaintiff alleges in her Amended Complaint that Defendant made misrepresentations to Plaintiff and class members, specifically that they would not get refunds and would only be entitled to vouchers. (*See* Am. Compl., ¶36.) However, Defendant's services carried with it the obligation to refund all consideration paid by Plaintiff and Class Members should flights be cancelled as a result of unforeseen world events, specifically the COVID19 Pandemic. Plaintiff and class members reasonably believed they would receive refunds when the flights, purchased through Defendant were cancelled. However, Defendant informed Plaintiff it would not be providing refunds, although Defendant could not hold up its end of the bargain, and provide the travel services that Plaintiff and class members purchased.

Plaintiff and class members have not been made whole and continue to suffer a financial loss - as will be established in discovery.

E. Plaintiff has Asserted a Viable Claim for Fraudulent Misrepresentation

Plaintiff's Amended Complaint states a claim for common law fraud.

Fraud requires a misrepresentation upon which a plaintiff relies to her detriment.

Defendant has intentionally allowed wait times on hold to increase to unreasonable levels and instructed customer service representatives speaking to consumers to furnish misleading information in hopes of confusing consumers and reducing and/or avoiding issuance of refunds to which the consumers are entitled for all flights cancelled as a result of the COVID19 Pandemic. (See Am. Compl., ¶ 54.) Defendant intentionally misrepresented to Plaintiff and class members that passengers on cancelled flights are limited to rebookings or travel vouchers when no such limitation existed at the time of purchase. (See Id., ¶ 55.) Defendant's representations were made with the intent that Plaintiff and class members rely upon the misstatements in accepting re-bookings instead of pressing for a refund. See Id., ¶56. Plaintiff and the class members relied on Defendant's representations. See Id., ¶57. The reliance by Plaintiff and the class members on Defendant's representations was reasonable. Defendant's representations proximately caused damage to Plaintiff and the class members. See Id., ¶58. Plaintiff and class members have not been made whole and continue to be financially harmed as a result of Defendant's misrepresentations.

F. Plaintiff has Asserted a Viable Claim for both Unjust Enrichment and Conversion

"The doctrine of unjust enrichment rests on the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another." Goldsmith v. Camden Cnty. Surrogate's Office, 408 N.J. Super. 376, 382, 975 A.2d 459 (App. Div.) (internal quotation marks and citations omitted), certif. denied, 200 N.J. 502, 983 A.2d 1110 (2009). "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." Id.

A party can be held liable for common law conversion when it commits an unauthorized act of dominion over another's property inconsistent with its rights in that property LaPlace v. Briere, 404 N.J. Super. 585, 590, 962 A.2d 1139, 1142 (Super. Ct. App. Div. 2009).

As stated in the Amended Complaint, Capital One has benefitted from its unlawful acts by retaining the payments used to purchase travel tickets which have been cancelled. Retentions of those monies under these circumstances is unjust and inequitable because Capital One charged consumers full price for travel and fees for travel that consumers can no longer use due to a global pandemic (Am. Compl. 44.) Defendant deprived Plaintiff and the other members of the Class of the value they paid for the tickets on cancelled flights as well as their right to a refund. (Am. Compl. ¶ 49.)

Accordingly, Plaintiff has pleaded a claim for unjust enrichment and conversion.

III. CONCLUSION

For the foregoing reasons, Defendant's motion to dismiss must be denied.

Dated: September 21,
2020

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