

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

ADRIAN BOMBIN and SAMANTHA ROOD,
on behalf of themselves and all others similarly
situated,

Plaintiffs,

vs.

SOUTHWEST AIRLINES CO.,

Defendant.

CIVIL ACTION

ORAL ARGUMENT REQUESTED

No: 20-CV-01883

**SOUTHWEST AIRLINES CO.'S RESPONSE TO
PLAINTIFFS' SUBMISSION OF SUPPLEMENTAL AUTHORITY**

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Dated: November 11, 2020

The decision of the U.S. District Court for the Northern District of Texas in *Ward v. American Airlines*, Case No. 4:20-cv-00371, ECF 65 (November 2, 2020) (the “*Ward Decision*”) advanced by Plaintiffs as “supplemental authority” on November 10, 2020 (ECF 21), does not support Plaintiffs’ opposition to Defendant Southwest Airlines Co.’s (“Southwest”) Motion to Dismiss, Strike or Transfer the First Amended Complaint and action (ECF 16). Although the *Ward Decision* addressed claims related to American Airlines’ handling of refunds for flights that were cancelled or delayed, the similarities to this case end there. The *Ward* court granted in part and denied in part American’s motion to dismiss based on American Airlines’ Conditions of Carriage, which is materially distinct from and has no bearing on the contractual provisions applicable to this case. In addition, the *Ward Decision* actually *supports* consideration of the Southwest.com terms and conditions in connection with Southwest’s pending Motion.

I. SOUTHWEST’S CONTRACT OF CARRIAGE IS MATERIALLY DIFFERENT FROM AMERICAN AIRLINES’ REGARDING THE AVAILABILITY OF AIRFARE REFUNDS FOR NONREFUNDABLE TICKETS.

Plaintiffs contend that the *Ward Decision* supports denial of Southwest’s motion because it demonstrates that “Plaintiffs’ breach of contract claim is not preempted by the ADA [Airline Deregulation Act] and that customers are entitled to refunds irrespective of ticket type.” ECF 21, at 1. However, this assertion ignores the narrow scope of the so-called *Wolens* exception to ADA preemption, and the difference in language between the American Airlines Conditions of Carriage, on the one hand, and Southwest’s Contract of Carriage, on the other hand.

Southwest acknowledges that the ADA’s preemption clause does not shelter airlines from “routine breach-of-contract claims.” *Wolens v. Am. Airlines, Inc.*, 513 U.S. 219, 232 (1995). The *Wolens* exception applied in *Ward* because the American Airlines “Conditions of Carriage provide,” without qualification, “that if a passenger ‘decide[s] not to fly because [his or her] flight

was delayed or cancelled, we'll refund the remaining ticket value and any optional fees.” *Ward* Decision, at 2. Moreover, “For ‘nonrefundable’ tickets, the [American Airlines] Conditions of Carriage state ‘[w]e will refund a non-refundable ticket . . . if . . . [w]e cancel your flight,’ or ‘[w]e make a schedule change that results in a change of 61 minutes or more.’” *Id.* On its face, the *Ward* court found that this language supported Ward’s well-pleaded complaint that American made an express promise that it “will refund a non-refundable ticket”

In contrast, the Southwest Contract of Carriage (ECF 14, at 26-70 of 74), does not provide for a right of a refund for a non-refundable ticket. Rather, the Southwest Contract of Carriage differentiates between “Refundable Tickets” (Section 4(c)(1)), on the one hand, and “Nonrefundable Tickets” (Section 4(c)(3)), on the other. ECF 14, at 39-40 of 74. The only reasonable construction of the Southwest Contract of Carriage is that a nonrefundable flight is in fact a nonrefundable flight, *unless Southwest chooses to make a refund for a flight it canceled.* See Contract of Carriage § 4(c)(4) (listing three options available to Southwest, with refund being only one potential choice for Southwest in response to a nonrefundable canceled flight). In addition, with regard to Ms. Rood, pursuant to Section 4(c)(3) of the Southwest Contract of Carriage, the “fare paid for unused travel by Passengers who purchase restricted, nonrefundable Tickets are not eligible for refunds” ECF 14, at 40 of 74.

In sum, the express promise to make a refund relied upon in the *Ward* Decision does not exist in this case. Thus, as a matter of law, the *Ward* Decision is not relevant authority and does not support the continuation of Plaintiffs’ claims.

II. THE WARD DECISION SUPPORTS DISMISSAL OF THE CLAIMS BASED ON THE LANGUAGE OF THE SOUTHWEST.COM TERMS AND CONDITIONS.

Plaintiffs also assert that the *Ward* Decision supports denial of Southwest’s Motion because the Northern District of Texas declined to consider matters outside of the pleadings. ECF 21, at

2. But this argument ignores the fact that the *Ward* Decision granted the motion to dismiss and require arbitration of the claims of two of the three plaintiffs because those two plaintiffs had agreed to arbitrate their claims pursuant to the terms and conditions for Expedia and Hotwire, despite the fact that those terms and conditions were external to the complaint. Order, at 12. Given that Plaintiffs here do not deny that they agreed to the Southwest.com terms and conditions when they purchased their airfare, those terms and conditions should be considered, just as the *Ward* Decision considered the Expedia and Hotwire terms and conditions in dismissing the claims of two of three plaintiffs.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, James T. Moughan, hereby certify that a true and correct copy of the foregoing was filed electronically and was made available for viewing and downloading via the Court's CM/ECF system, and all counsel of record was served via the court's CM/ECF system notification.

Date: November 11, 2020

James T. Moughan

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