UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

ROBERT J. ZAMMETTI and MICHAEL J. LOWRY,

Plaintiffs,

v.

SOUTHWEST AIRLINES, CO.,

Defendant.

Case No.: SACV 14-01792-CJC(ANx)

ORDER GRANTING IN SUBSTANTIAL PART DEFENDANT'S MOTION TO DISMISS

I. INTRODUCTION & BACKGROUND

Plaintiffs Robert J. Zammetti and Michael J. Lowry (together, "Plaintiffs") bring this class action against Defendant Southwest Airlines, Co. ("Southwest"), alleging unlawful business practice, breach of contract, and tort causes of action. According to

the First Amended Complaint ("FAC"), Southwest is a commercial airliner that assigns boarding positions based on the time a passenger checks in for the flight. (Dkt. No. 11 [FAC] ¶¶ 5, 12.) The earlier a passenger checks in during the 24-hour window prior to flight departure, the higher the boarding priority that passenger receives. (FAC ¶ 12.) Southwest does, however, reserve early boarding priority for Business Select fares and Rapid Rewards A-List (Preferred) members. (FAC ¶ 14.) Southwest additionally offers for $12.50 one-way an "Early Bird Check-in" option. (FAC ¶ 15.) The Early Bird Check-in option will "guarantee automatic check-in and assign a 'priority' boarding position thirty-six (36) hours before the flight's departure time." (FAC ¶ 15.) Plaintiffs allege that they purchased the Early Bird Check-in option for their non-Business Select tickets, but still received a lower boarding assignment than other individuals who did not purchase the Early Bird Check-in for their non-Business Select tickets. (FAC ¶¶ 9–11.) The FAC further alleges that Southwest maintained deceptive published and unpublished boarding policies and procedures that misinformed customers about the various boarding priorities associated with the different tickets offered by Southwest in conjunction with the Early Bird Check-in. (FAC ¶¶ 16–18.)

The FAC alleges the following nine causes of action: (1) unfair or unlawful business practices pursuant to California Business & Professions Code § 17200 *et seq.*; (2) false advertising pursuant to California Business & Professions Code § 17500 *et seq.*; (3) breach of contract; (4) fraudulent concealment; (5) intentional misrepresentation; (6) negligent misrepresentation; (7) breach of the covenant of good faith and fair dealing; (8) willful misconduct; and (9) unjust enrichment. (*See* FAC.) Before the Court is Southwest's motion to dismiss the FAC. (Dkt. No. 14 ["Def.'s Mot."].) For the following reasons, Southwest's motion is GRANTED IN SUBSTANTIAL PART.[1]

[1] Having read and considered the papers presented by the parties, the Court finds this matter appropriate for disposition without a hearing. *See* Fed. R. Civ. P. 78; Local Rule 7-15. Accordingly, the hearing set for January 26, 2015 at 1:30 p.m. is hereby vacated and off calendar.

II. LEGAL STANDARD

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the claims asserted in the complaint. The issue on a motion to dismiss for failure to state a claim is not whether the claimant will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims asserted. *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997). Rule 12(b)(6) is read in conjunction with Rule 8(a), which requires only a short and plain statement of the claim showing that the pleader is entitled to relief. Fed. R. Civ. P. 8(a)(2). When evaluating a Rule 12(b)(6) motion, the district court must accept all material allegations in the complaint as true and construe them in the light most favorable to the non-moving party. *Moyo v. Gomez*, 32 F.3d 1382, 1384 (9th Cir. 1994). However, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (stating that while a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, courts "are not bound to accept as true a legal conclusion couched as a factual allegation" (citations and quotes omitted)). Dismissal of a complaint for failure to state a claim is not proper where a plaintiff has alleged "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570.

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III. ANALYSIS[2]

A. ADA-Preempted Claims

Southwest seeks dismissal of Plaintiffs' first (unfair competition), second (false advertising), fourth (fraudulent concealment), fifth (intentional misrepresentation), sixth (negligent misrepresentation), eighth (willful misconduct), and ninth (unjust enrichment) causes of action on the ground that such claims are preempted by the ADA. The ADA seeks to promote "maximum reliance on competitive market forces" and, to that end, includes a preemption provision to "ensure that the States would not undo federal deregulation with regulation of their own." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992). The preemption provision prohibits States from enforcing any law "related to a price, route, or service of an air carrier that may provide air transportation . . . ." 49 U.S.C. § 41713(b)(1). The Supreme Court has recognized that the "related to" language expresses a broad preemptive purpose. *Nw., Inc. v. Ginsberg*, 134 S. Ct. 1422, 1428 (2014) (citing *Morales*, 504 U.S. at 383)). "State common-law rules fall comfortably within the language of the ADA pre-emption provision." *Id.* at 1429. In determining *which* common-law rules are preempted, the court must assess whether preemption of the claim would further congressional intent. *Hanni v. Am. Airlines, Inc.*, No. C 08-00732 CW, 2008 WL 1885794, at *4 (N.D. Cal. Apr. 25, 2008) ("Congressional intent is the 'ultimate touchstone' of any preemption analysis, express or implied." (citing *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 96, (1992)).

[2] As a preliminary matter, Plaintiffs contend that Southwest failed to meet and confer in compliance with Local Rule 7-3 prior to filing the motion to dismiss. (Dkt. No. 21 ["Pls.' Opp'n"].) Southwest has submitted a supporting declaration that one week prior to filing the present motion, Southwest's counsel informed Plaintiffs' counsel that Plaintiffs' claims were preempted by the Airline Deregulation Act ("ADA") and that Southwest would file a motion to dismiss based on preemption should Plaintiffs fail to voluntarily dismiss the case. (Dkt. No. 23 ["Def.'s Reply] Exh. 1, Decl. of M. Roy Goldberg ¶ 5.) The Court finds that this sufficiently complied with Local Rule 7-3.

The Court finds—and Plaintiffs concede—that the unfair competition, false advertising, and unjust enrichment claims are preempted by the ADA. (*See* Pls.' Opp'n at 11–12, 18.) These claims are based on Southwest's Early Bird Check-in program, which relates to both price and service. *See Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 226 (1995) (defining "rates" to include airline's charges for upgrades through mileage credits and "services" to include access to flights and class-of-service upgrades).

Plaintiffs do dispute whether their fraudulent concealment, intentional misrepresentation, negligent misrepresentation, and willful misconduct claims are likewise preempted by the ADA. However, these common-law tort claims are all based on the same Early Bird Check-in and the allegation that Southwest misrepresented its benefits, thus deceiving Plaintiffs into purchasing the add-on. (*See* FAC ¶¶ 94–122, 129–130.) Such claims directly relate to the prices and services of Southwest and preemption of these claims is consistent with the ADA's deregulatory aim. *See Wolens*, 513 U.S. at 823; *Morales*, 504 U.S. at 388–89 ("It is clear as an economic matter that state restrictions on fare advertising have the forbidden significant effect upon fares . . . [C]ompelling or restricting price advertising surely 'relates to' price."); *cf. Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1265–1266 (9th Cir. 1998) (holding that the ADA does not displace state tort law in actions that affect deregulation in a "peripheral manner," such as injuries resulting from the "pushing of beverage carts, keeping the aisles clear of stumbling blocks, the safe handling and storage of luggage, assistance to passengers in need, or like functions"). In sum, Plaintiffs' first, second, fourth, fifth, sixth, eighth, and ninth causes of action are preempted by the ADA.

B. Breach of Covenant of Good Faith and Fair Dealing

Southwest additionally moves to dismiss Plaintiffs' seventh cause of action for breach of the implied covenant of good faith and fair dealing on the basis of ADA

preemption. The Supreme Court has recently recognized that there is no uniform understanding of the good faith and fair dealing doctrine among the States. *Ginsberg*, 134 S. Ct. at 1431. For the purposes of ADA preemption, "[w]hen the law of a State does not authorize parties to free themselves from the covenant, a breach of covenant claim is pre-empted…." *Id.* at 1432.

Under California law, all contracts impose an implied covenant of good faith and fair dealing, but such covenant is "plainly subject to the exception that the parties may, by express provisions of the contract, grant the right to engage in the very acts and conduct which would otherwise have been forbidden by an implied covenant." *Steiner v. Thexton*, 48 Cal. 4th 411, 419-20 (2010); *see also Hurtado v. Superior Court*, 11 Cal. 3d 574, 581 (1974) ("[G]enerally speaking[,] the forum will apply its own rule of decision."). [3] Where, as in California, the parties are permitted to circumscribe the covenant of good faith and fair dealing by contract, *Carma Developers (Cal.), Inc. v. Marathon Dev. Cal., Inc.*, 2 Cal. 4th 342, 373 (1992), this amounts to the type of non-state-imposed obligation that falls outside ADA preemption. *See Ginsberg*, 134 S. Ct. at 1432 & n.2. As such, Southwest's motion to dismiss the seventh cause of action of the FAC is denied.

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[3] After relying on California law in the initial motion to dismiss, (*see* Def.'s Mot. at 13, 16; Exh. A), Southwest belatedly argues for the first time in the reply brief that Texas law governs this action. (Def.'s Reply at 4–5, 11–13; Exhs. 2–4.) "It is improper for a moving party to introduce new facts or different legal arguments in the reply brief than those presented in the moving papers. *U.S. ex rel. Giles v. Sardie*, 191 F. Supp. 2d 1117, 1127 (C.D. Cal. 2000) (citing *Lujan v. Nat'l Wildlife Fed.*, 497 U.S. 871, 894–95 (1990)). Because Southwest has improperly raised a new and different legal argument in the reply brief than in the motion to dismiss, the Court declines to consider it.

C. Breach of Contract Claim

Finally, Southwest moves to dismiss Plaintiffs' breach of contract claim for failure to allege the existence of a contract. The elements for a breach of contract claim under California law are: (1) the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) damage to plaintiff therefrom. *Wall St. Network, Ltd. v. New York Times Co.*, 164 Cal. App. 4th 1171, 1178 (2008). The FAC alleges that Southwest "offers the 'Early Bird Check-in' add-on to guarantee automatic check-in and assign a 'priority' boarding position thirty-six (36) hours before the flight's departure" and that this add-on costs $12.50 each way. (FAC ¶ 15.) Plaintiffs further allege that they purchased the Early Bird Check-in add-on "to receive a priority boarding position" but that despite this purchase, they were assigned to a boarding priority lower than other passengers who had not purchased the Early Bird Check-in. (FAC ¶¶ 8–11.) These allegations are sufficient to state a breach of contract claim.

IV. CONCLUSION

Accordingly, Southwest's motion to dismiss is GRANTED IN SUBSTANTIAL PART. The first, second, fourth, fifth, sixth, eighth, and ninth causes of action are dismissed on the basis of ADA preemption. The third and seventh causes of action of the FAC sufficiently state a claim for relief and, thus, Southwest's motion is DENIED as to those causes of action.

DATED: January 14, 2015

CORMAC J. CARNEY
UNITED STATES DISTRICT JUDGE