UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 19-CIV-61461-RAR
19-CIV-62725-RAR

YARINELL ROMÁN, *et al.*, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

SPIRIT AIRLINES, INC.,

Defendant.
_____/

CINTYA LARIOS GUZMAN, individually and on behalf of all others similarly situated,

Plaintiff,

v.

SPIRIT AIRLINES, INC.,

Defendant.
_____/

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

This cause is before the Court on Defendant Spirit Airlines, Inc.'s ("Spirit") Motion to Dismiss Under Fed. R. Civ. P. 12(c) [ECF No. 54] ("Motion"). The Motion asks the Court to dismiss two related class action cases that have been consolidated for purposes of discovery [ECF No. 67]: *Román, et al. v. Spirit Airlines, Inc.*, Case No. 19-cv-61461-RAR ("*Román* Action") and *Guzman v. Spirit Airlines, Inc.*, Case No. 19-cv-62725-RAR ("*Guzman* Action").[1] Both cases

[1] Unless otherwise noted, all references to the docket correspond to the docket in the *Román* Action in accordance with the Court's Order Denying *Román* Plaintiffs' Motion to Stay the Second-Filed *Guzman* Action and Consolidating Cases [ECF No. 67].

relate to Spirit's Shortcut Security Program ("Shortcut Security"), whereby customers were offered the ability to bypass the standard airport security line for an additional fee. Plaintiffs in both cases purchased Shortcut Security, allegedly never received the benefit of their bargain, and sued Spirit for breach of contract.

In its Motion, Spirit argues that if it breached any contract, it breached its own Contract of Carriage—which contains a valid and enforceable class action waiver. And, given that Plaintiffs only invoke federal jurisdiction under the Class Action Fairness Act, 28 U.S.C. section 1332(d), the Court therefore lacks subject matter jurisdiction over Plaintiffs' individual claims. Plaintiffs respond that they entered into a contract separate and apart from Spirit's Contract of Carriage when they purchased Shortcut Security and thus have not waived the right to seek relief for their claims as a class.

The Court has reviewed the Motion, Plaintiffs' Response in Opposition [ECF No. 58] ("Response"),[2] Spirit's Reply [ECF No. 60] ("Reply"), and the record. Being fully advised, it is

ORDERED AND ADJUDGED that Spirit's Motion [**ECF No. 54]** is **GRANTED**. Both the *Román* Action and the *Guzman* Action are **DISMISSED** for the reasons set forth herein. The Clerk is instructed to **CLOSE** this case and any pending motions are **DENIED as moot**.[3]

[2] Plaintiff *Guzman* did not file a response to the Motion despite being provided an opportunity to do so. *See* Paperless Order Granting in Part Motion for Extension of Time [ECF No. 43 in *Guzman* Action]. Nevertheless, the *Guzman* Action is subject to the same Rule 12(c) analysis as the *Román* Action and warrants dismissal on identical grounds.

[3] The *Román* Plaintiffs' pending Motion for Leave to Amend Class Action Complaint [ECF No. 73]—which requests that the Court rule on the instant Motion first to prevent duplicative briefing—warrants denial based on futility because the proposed amended complaint also seeks relief for breach of Spirit's Contract of Carriage. *See Trotter v. Shull*, 720 F. App'x 542, 545 (11th Cir. 2017) ("Denial of leave to amend based on futility is justified when the proposed amended complaint remains subject to dismissal.") (citing *Burger King Corp. v. Weaver*, 169 F.3d 1310, 1320 (11th Cir. 1999)).

BACKGROUND

Spirit is a budget airline that offers low basic fares. Compl. [ECF No. 1] at ¶ 18. "Spirit attempts to make up for lost profits by offering consumers the opportunity to contract for further amenities or services." *Id*. Among those offerings is Spirit's "Shortcut Security" service, which purports to provide passengers who purchase the service some form of expedited security process. *Id*. at ¶ 19. Spirit offers consumers the opportunity to enter into a standard form Shortcut Security contract online at www.spirit.com and at Spirit-electronic and Spirit-agent-staffed kiosks. *Id*. at ¶¶ 20-21. These cases involve four Plaintiffs—Yarinell Román, Paul Roberts II, Joaquin Rivera, and Cintya Larios Guzman—all of whom entered into a Shortcut Security contract and maintain they did not receive any form of expedited security process.

A. Spirit's Contract of Carriage

The rights and remedies of all Spirit passengers are governed by Spirit's Contract of Carriage ("COC"). *See* Compl. at Ex. A [ECF No. 1-3].[4] Spirit's COC governs *all* aspects of its services—from the initial purchase of passengers' reservations (*id*. at § 2.1), to retrieving checked baggage (*id*. at § 7.3.4.1), paying fares and other fees (*id*. at § 3), and everything in between: checking-in prior to the flight (*id*. at § 2.3); arriving at the airport (*id*. at § 2.3.2); presenting identification and other travel documentation (*id*. at §§ 4.1-4.2); obtaining boarding passes (*id*. at

[4] Plaintiffs attached a version of the COC from December 28, 2018 to their Complaint. However, as noted by Spirit, "the December 7, 2018 COC was not in force or effect relative to any of the alleged incidents giving rise to Plaintiffs' claims." Mot. at 1 n.1. Consequently, Spirit attached five relevant COCs to its Motion that were in force at the time of Plaintiffs' claims. *See* Mot. at Ex. A-E. The Court may consider these COCs because Plaintiffs referred to the COC in their Complaint; the COC is central to Plaintiffs' claims; the attached COCs contain identical language and their contents are not in dispute; and Spirit properly attached the COCs to its Motion. *See Mesidor v. Waste Mgmt., Inc. of Fla.*, 606 F. App'x 934, 935 n.1 (11th Cir. 2015) (providing that the Court may consider documents outside the pleadings when considering a motion under Rule 12(c) under these circumstances) (citing *Fuller v. SunTrust Banks, Inc.*, 744 F.3d 685, 696 (11th Cir. 2014)). For ease of reference, the Court will refer to the COC attached to the Complaint [ECF No. 1-3].

§§ 2.3.1, 2.4.1); security screening and security checkpoints (*id*. at § 2.3.2); being available for boarding at the gate prior to the scheduled departure time (*id.* at § 2.4.1.(b)); seats (*id*. at § 4.11); checked and carry-on baggage, including any applicable increases in baggage charges (*id*. at §§ 7.1-7.3); and applying for refunds (*id*. at §§ 10.1, 10.4).

Spirit's COC contains certain claims restrictions, limits on liability, and contractual alteration processes. *Id*. at §§ 3.1, 12.1-12.4, 13.2-13.3. Among these is a clear and explicit class action waiver provision:

> No Class Action – Any case brought pursuant to this Contract of Carriage, Spirit's Tarmac Delay Plan, or Spirit's Customer Service Plan must be brought in a party's individual capacity and not as a plaintiff or class member in any purported class or representative proceeding.

Id. at § 13.2. Also included is a temporal limitation within which passengers must file a claim or bring an action against Spirit:

> Time Limit – No legal action may be brought by a passenger against Spirit or its directors, officers, employees or agents unless commenced within six (6) months from the date of the alleged incident.

Id. at § 13.3. Moreover, the COC expressly states that one or more of a series of "[a]dditional Spirit optional services" and charges may apply in connection with a passenger's transportation. *Id.* at § 3.1 ("All domestic and international fares are per customer for each way of travel and include the base fare plus any applicable taxes, fees and surcharges . . . Additional Spirit optional services may apply."). "Optional services may be purchased separately during the booking process by calling Reservations, on spirit.com or at the airports." *Id.* at § 3.3.4.

Spirit provides optional services in four main categories: bags, seats, memberships, and "other." *See* Mot. at Ex. F[5]; Compl. at ¶ 18. These include such services as overweight or oversized baggage, customer-requested seat assignments and upgraded "Big Front Seats," and membership in Spirit's "$9 Fare Club." *See* Mot. at Ex. F. Additionally, optional services under "other" include printed boarding passes, onboard snacks and drinks, change fees, and other "extras," including "Shortcut Security." *Id.* Spirit's website states that "Shortcut Security access is available in select airport locations . . . and gives access to the quickest possible lane to get through the security screening experience. At some airports, these are expedited queuing lanes - not necessarily dedicated screening lanes." *See* Mot. at Ex. G[6] ("Is this TSA PreCheck? No, Shortcut Security isn't TSA PreCheck. It gives customers the ability to get to security screening using one of the fastest lines available. Customers who have TSA PreCheck have access to special security lanes/privileges not available with Shortcut Security.").

B. Relevant Federal Regulations

An airline's "[c]ontract of [c]arriage is a federally regulated contract that governs the rights of the parties." *Pons v. Arubaanse Luchtvaart Maatschappij*, No. 17-cv-22008, 2018 WL 2188477, at *3 (S.D. Fla. Mar. 29, 2018). Contracts of carriage are regulated by the Federal Aviation Regulations, 14 C.F.R. § 1.1 *et seq*. ("FARs"). An airline's contract of carriage "applies

[5] Spirit attaches its "Optional Services Page" from its website as Exhibit F. The Court may consider Exhibit F because Plaintiffs' Class Action Complaint refers to Spirit's optional services and makes repeated reference to the Shortcut Security "option" [ECF No. 1 at ¶¶ 1, 4-6, 9, 23, 43, 53, 56, 58, 68]. Moreover, the Optional Services Page is central to Plaintiffs' claims; the contents of the attached Optional Services Page are not in dispute; and Spirit properly attached the Optional Services Page to its Motion. *See Mesidor*, 606 F. App'x at 935 n.1.

[6] Spirit attaches its "Need Information About Shortcut Security Page" from its website as Exhibit G. The Court may consider Exhibit G because Plaintiffs' Class Action Complaint makes repeated reference to the Shortcut Security "option" [ECF No. 1 at ¶¶ 1, 4-6, 9, 23, 43, 53, 56, 58, 68]. Moreover, Shortcut Security is central to Plaintiffs' claims; the contents of the attached Need Information About Shortcut Security Page are not in dispute; and Spirit properly attached the page to its Motion. *See Mesidor*, 606 F. App'x. at 935 n.1.

to all scheduled direct air carrier operations in interstate . . . air transportation [and] applies to all contracts with passengers, for those operations, that incorporate terms by reference." 14 C.F.R. § 253.2; *see also id.* § 253.3 ("Passenger means any person who purchases . . . air transportation."). An airline's contracted services "include items such as ticketing, boarding procedures, provision of food and drink, and baggage handling, in addition to the transportation itself. These matters are all appurtenant and necessarily included with the contract of carriage between the passenger . . . and the airline." *Koutsouradis v. Delta Air Lines, Inc.*, 427 F.3d 1339, 1343 n.1 (11th Cir. 2005) (quoting *Hodges v. Delta Airlines, Inc.*, 4 F.3d 350, 354 (5th Cir. 1993)). Further, "[t]he procedures used to move passengers from the terminal onto the plane in an orderly fashion [which] are an integral part of the customer's experience of air travel" are appurtenant and necessarily included with the contract of carriage. *Branche v. Airtran Airways, Inc.*, 342 F.3d 1248, 1258 (11th Cir. 2003).

The FARs expressly permit airlines to incorporate contracts of carriage into passengers' tickets or other written instruments. 14 C.F.R. § 253.4(a). These include "optional services that are available to a passenger purchasing air transportation." *Id.* § 399.85(d); *id.* § 399.84(c) (when offering tickets for passenger air transportation, air carriers may also "offer additional services in connection with air transportation" so long as "[t]he consumer affirmatively 'opt[s] in' (i.e., agree) to such a service and the fee for it before that fee is added to the total price for the air transportation-related purchase."). "[T]he term 'optional services' is defined as any service the airline provides, for a fee, beyond passenger air transportation. Such fees include, but are not limited to, charges for checked or carry-on baggage, advance seat selection, in-flight beverages, snacks and meals, pillows and blankets and seat upgrades." *Id.* § 399.85(d). The optional services fee "is added to the total price for the air transportation-related service." *Id.* § 399.84(c).

"[T]he carrier must prominently disclose on its website information on fees for all optional services that are available to a passenger purchasing air transportation . . . with a ***conspicuous*** link from the carrier's homepage directly to a page or a place on a page where all such optional services and related fees are disclosed." *Id.* § 399.85(d) (emphasis added). The FARs expressly state that if an airline fails to provide such "conspicuous notice" of incorporation, then the airline cannot enforce its contract terms with respect to such offers. *See id.* § 253.4(a) ("In addition to other remedies at law, an air carrier may not claim the benefit as against the passenger of, and the passenger shall not be bound by, any contract term incorporated by reference if notice of the term has not been provided to that passenger in accordance with this part."). Notably, the FARs do not expressly or impliedly prohibit class action waivers in the airlines' contracts of carriage. *See id.* § 1.1 *et seq.*

C. Procedural History

The *Román* Plaintiffs originally brought claims against Spirit for breach of contract, violation of the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"), and unjust enrichment. Compl. at ¶¶ 71-111. Spirit initially filed a Motion to Dismiss [ECF No. 7] under Rule 12(b)(6) of the Federal Rules of Civil Procedure, claiming that all of the *Román* Plaintiffs' claims were federally preempted by the Federal Aviation Act of 1958, 49 U.S.C. § 40101 *et seq.*, and/or factually insufficient. The Court granted the motion in part, dismissing the *Román* Plaintiffs' unjust enrichment claims as duplicative of their breach of contract claims, and converting the motion to dismiss as to the FDUTPA claims into a motion for summary judgment [ECF No. 31]. Ultimately, the Court granted Spirit's Motion for Summary Judgment as to Plaintiffs' FDUTPA claims and entered an order denying Plaintiffs' Motion for Reconsideration of the same [ECF Nos. 44, 66]. The Court's rulings were limited exclusively to federal preemption and factual plausibility and have left Plaintiffs only with breach of contract claims against Spirit.

Importantly, the *Guzman* Plaintiffs stipulated to abide by the Court's orders in the *Román* Action, and the cases were ultimately consolidated for purposes of discovery [ECF No. 39 in *Guzman* Action]. Thus, *Guzman* is likewise left only with a breach of contract claim.

The parties dispute whether Plaintiffs' contracts for Shortcut Security were properly incorporated into Spirit's COC or *vice versa*. According to Spirit, the company fulfilled its obligations under the FARs by providing notice, at the time the tickets at issue were purchased, that the COC was incorporated into the terms and conditions of the ticket purchase. Thus, the COC's terms apply to Plaintiffs' claims, and, given the COC's class action waiver, Plaintiffs are left with individual $6.00 breach of contract claims that are insufficient to invoke federal jurisdiction. In opposition, Plaintiffs read the regulations differently and maintain that Spirit failed to comply with the FARs by failing to give conspicuous notice that Shortcut Security was incorporated into the COC. Consequently, Spirit cannot enforce the terms of its COC as they relate to Plaintiffs' claims.

LEGAL STANDARD

"Judgment on the pleadings is appropriate where there are no material facts in dispute and the moving party is entitled to judgment as a matter of law." *Perez v. Wells Fargo N.A.*, 774 F.3d 1329, 1335 (11th Cir. 2014) (quoting *Cannon v. City of W. Palm Beach*, 250 F.3d 1299, 1301 (11th Cir. 2001)). "In determining whether a party is entitled to judgment on the pleadings, [the Court] accept[s] as true all material facts alleged in the non-moving party's pleading" and must "view those facts in the light most favorable to the non-moving party." *Id.* (citing *Hawthorne v. Mac Adjustment, Inc.*, 140 F.3d 1367, 1370 (11th Cir. 1998)). When a defendant moves for judgment on the pleadings pursuant to Rule 12(c), the motion "is governed by the same standard as a motion to dismiss for failure to state a claim on which relief may be granted" under Rule 12(b)(6). *Black*

v. Kerzner Int'l Holdings Ltd., 958 F. Supp. 2d 1347, 1349 (S.D. Fla. 2013) (internal citation omitted).

The Court's duty to accept the factual allegations in the complaint as true, however, does not require it to consider "general or conclusory allegations." *Griffin Indus., Inc. v. Irvin*, 496 F.3d 1189, 1205-06 (11th Cir. 2007). Notably, "[t]he enforceability of a procedural device, like a class action waiver, should be resolved at this stage of the litigation by way of a motion to dismiss." *DeLuca v. Royal Caribbean Cruises, Ltd.*, 244 F. Supp. 3d 1342, 1345 (S.D. Fla. 2017) (citations omitted); *see also Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1367 (11th Cir. 1997) ("Facial challenges to the legal sufficiency of a claim or defense, such as a motion to dismiss based on failure to state a claim for relief, should . . . be resolved before discovery begins.").

Moreover, a district court may consider extrinsic materials on a motion to dismiss if "[1] a plaintiff refers to a document in his complaint, [2] the document is central to his claim, [3] its contents are not in dispute, and [4] the defendant attaches the document to its motion to dismiss." *Mesidor*, 606 F. App'x at 935 n.1 (quoting *Fuller*, 744 F.3d at 696). A court may also consider public documents without converting a motion to dismiss into a motion for summary judgment. *See id.* (citing *Nix v. Fulton Lodge No. 2 of Int'l Ass'n of Machinists and Aerospace Workers*, 452 F.2d 794, 797–98 (5th Cir. 1971)).

ANALYSIS

A. Plaintiffs' class action claims are subject to dismissal pursuant to the COC's class action waiver.

i. Plaintiffs' claims are governed by Spirit's COC.

As a threshold matter, Shortcut Security is governed by the COC. Spirit offered Plaintiffs various "optional services" in connection with their air transportation, all of which are "appurtenant [annexed to] and necessarily included with the contract of carriage between the

passenger [] and the airline." *Koutsouradis*, 427 F.3d at 1343, n.1; *Hodges*, 4 F.3d at 354. Plaintiffs purchased Shortcut Security for a $6.00 fee, which was "added to the total price" for Spirit's "air transportation-related service[s]." 14 C.F.R. § 399.84(c). These add-on services and charges are contemplated by and consistent with Spirit's COC, which includes several express references to "optional services" that are "guest initiated modifications" to the contracted services and total fare. *See* Mot. at Ex. A, pp. 6-7 §§ 3.1, 3.3.1, 3.3.3, 3.3.4.

Spirit's Contract of Carriage is not required to specifically mention Shortcut Security or other optional services for it to apply. *See* 14 C.F.R. § 253.5(a), (b). Spirit disclosed all optional services and fees, including Shortcut Security, via a link on Spirit's homepage directly to its dedicated "Optional Services" page. *See* Mot. at Ex. F. Thus, Spirit's disclosures satisfy the notice requirements for optional services prescribed by the FARs. *See* 14 C.F.R. § 399.85(d). In sum, Shortcut Security cannot be construed as a separate stand-alone service distinct from Spirit's COC. It is an optional service offered only to, and in conjunction with, passengers who are parties to the COC, consistent with the FARs.

In response, Plaintiffs maintain that Shortcut Security is not an optional service governed by the COC because Spirit failed to "sufficiently [notify] its customers that its Shortcut Security program was incorporated into its [COC]." Resp. at 6. In support of this argument, Plaintiffs point to 14 C.F.R. section 253.5(a), which states:

> Notice of incorporated terms. Except as provided in § 253.8, each air carrier shall include on or with a ticket, or other written instrument given to a passenger, that embodies the contract of carriage and incorporates terms by reference in that contract, a conspicuous notice that:
>
> (a) Any terms incorporated by reference are part of the contract, passengers may inspect the full text of each term incorporated by reference at the carrier's airport or city ticket offices, and passengers have the right, upon request at any location where the carrier's tickets are sold within the United States, to receive free of charge by

> mail or other delivery service the full text of each such incorporated term . . . .

14 C.F.R. § 253.5(a). Plaintiffs assert that Spirit's failure to provide the aforementioned "conspicuous notice" renders the COC inapplicable. Resp. at 6 (citing 14 C.F.R. § 253.4(a) ("[A]n air carrier may not claim the benefit as against the passenger of, and the passenger shall not be bound by, any contract term incorporated by reference if notice of the term has not been provided to that passenger in accordance with this part.")).

But in reaching this conclusion, Plaintiffs misapply the FARs at issue. Notwithstanding the COC's clear inclusion of "optional services,"[7] the purpose of section 253.5(a) is to ensure that air carriers notify passengers that their contracts of carriage are incorporated by reference in their tickets at the time that tickets are purchased. As Spirit notes, the FARs came about as a result of the Airline Deregulation Act, 49 U.S.C. § 1371 *et seq*., which eliminated domestic airline tariffs. As noted in the final rule underlying Part 253:

> Contracts of carriage . . . are long and complex—too much so . . . to practicably be contained within the size constraints of the short-form ticket generally used today for passenger air travel. Not only would the actual contracts be impracticably bulky, containing large amounts of verbiage of no interest to the typical passenger, but the differences in the contracts of the different air carriers would make it impossible for travel agents, who ticket all carriers, to use uniform ticket stock as they do now.

Notice of Terms of Contract of Carriage, 47 FR 52128-02, at "Supplementary Information." The Civil Aeronautics Board—the board formerly tasked with imposing domestic airline tariffs—solved this issue by implementing "rules or legislation to allow carriers to continue to 'incorporate

[7] "[T]he term 'optional services' is defined as any service the airline provides, for a fee, beyond passenger air transportation. Such fees include, but are not limited to, charges for checked or carry-on baggage, advance seat selection, in-flight beverages, snacks and meals, pillows and blankets and seat upgrades." 14 C.F.R. § 399.85(d).

by reference' on the tickets the contract terms governing carriage, while providing a means for interested persons to learn what any of those terms are." *Id.*

Ultimately, the Civil Aeronautics Board adopted a rule that "requires notice, to be given with each ticket, that terms are incorporated by reference," "that the passenger may obtain a free copy," and "that the passenger be able to obtain more information about those terms from any location in the United States where the carrier's tickets are sold." *Id.* The rule was eventually codified at section 41707 of Title 49, which states, "an air carrier may incorporate by reference in a ticket or written instrument any term of the contract for providing interstate air transportation." 49 U.S.C. § 41707.[8] Thus, under section 253.4, a ticket may incorporate contract of carriage terms by reference (*i.e.*, without stating their full text) if the ticket contains or is accompanied by sufficient notice to the passenger. 14 C.F.R. § 253.4.

This reading is commanded by the plain language of section 253.5, which provides that "each air carrier shall include on or with a ticket, or other written instrument given to a passenger, that *embodies the contract of carriage and incorporates terms by reference in that contract*, a conspicuous notice . . . ." *Id.* § 253.5 (emphasis added). Clearly, the regulation contemplates the ticket itself incorporating the terms from the contract of carriage, rather than *vice versa*. Specifically, under section 253.5, the airline is required to include with the ticket "conspicuous

[8] Courts have consistently held that air carriers can incorporate their contracts of carriage in their airline tickets. *See Covarrubias v. Am. Airlines, Inc.*, No. C10-1158JLR, 2011 WL 13100749, at *2 (W.D. Wash. Apr. 21, 2011) (citing 14 C.F.R. § 253.4) ("Conditions of Carriage agreement which is incorporated into every airline ticket"); *Hekmat v. U.S. Transp. Sec. Admin.*, 247 F. Supp. 3d 427, 434 (S.D.N.Y. 2017) (airline ticket incorporates airline's contract of carriage by reference); *Covino v. Spirit Airlines, Inc.*, 406 F. Supp. 3d 147, 152 (D. Mass. 2019) (citing 14 C.F.R. § 253.4) (airline carrier may incorporate by reference in a ticket any term of the contract of carriage); *Vincent v. Nw. Airlines, Inc.*, No. 10-10131, 2010 WL 3272836, at *2 (E.D. Mich. Aug. 19, 2010) (citing 49 U.S.C. § 41707) (airline ticket incorporated terms found in airline's contract of carriage); *see also Ruta v. Delta Airlines, Inc.*, 322 F. Supp. 2d 391, 399 (S.D.N.Y. 2004) (citing 14 C.F.R. § 253.4) ("The tariff provisions applicable to plaintiff's claims—which, together with the passenger ticket, 'exclusively and conclusively govern the rights and liabilities' between a passenger and her airline").

notice" that the ticket incorporates by reference terms from the COC. *Id*. This requires a two-step notice: (1) Each ticket must provide notice that the terms of the airline's contract of carriage are incorporated by reference; and (2) the airline must make the terms of the contract of carriage available to the public. 47 FR 52128-02, at "Notice of Incorporated Terms"; 14 C.F.R. § 235.4.

Therefore, Spirit was *not* required—as Plaintiffs maintain—to provide conspicuous notice of Shortcut Security or other optional services incorporated *into* its COC. Rather, under sections 253.4 and 253.5, Spirit was required to give conspicuous notice to Plaintiffs that *their tickets* include terms incorporated by reference *from* its COC. Plaintiffs cannot and do not claim that Spirit failed to provide conspicuous notice of their COC at the time they purchased their tickets, perhaps because this claim has recently been squarely rejected. *See Covino v. Spirit Airlines, Inc.*, 406 F. Supp. 3d 147, 151-53 (D. Mass. 2019) (finding that Spirit's online booking system provided adequate notice under sections 253.4 and 253.5 that the terms of the company's contract of carriage were incorporated by reference into the terms and conditions of the ticket). Accordingly, Spirit properly complied with part 253 and section 41707.[9]

Paradoxically, Plaintiffs also proceed to argue that Spirit failed to notify them that the COC was incorporated by reference into their Shortcut Security offers. Resp. at 9. In doing so, Plaintiffs fail to point to any authority requiring Spirit to include any notices regarding Shortcut Security's inclusion as an "optional service" in its COC. *See* Reply at 9-10.

In support of their position, Plaintiffs rely on *Ron v. Airtran Airways, Inc*., 397 S.W.3d 785 (Tx. Ct. App. 2013). Resp. at 13. There, the airline cancelled the plaintiff's flight from Nassau,

[9] Plaintiffs do not allege any violations or lack of notice under part 253. Even if such violations were alleged, part 253 does not create a private right of action. *See Cavalieri v. Avior Airlines C.A.*, No. 17-CV-22010, 2019 WL 1102882, at *5 (S.D. Fla. Feb. 15, 2019) (citing *Shrem v. Sw. Airlines Co*., No. 15-CV-04567, 2017 WL 1478624 (N.D. Cal. Apr. 25, 2017)), *report and recommendation adopted*, 2019 WL 1099860 (S.D. Fla. Mar. 8, 2019).

Bahamas. *Ron*, 397 S.W.3d at 785. In response to a motion for summary judgment, the plaintiff provided an affidavit stating that he asked the airline to "provide the provisions" that allowed the airline to cancel the flight. *Id.* at 786. An airline representative explained that the requested provisions were available at the AirTran home office in Florida but were not available in the Bahamas. *Id.* Thus, the airline was found liable under part 253 because "[t]he Contract of Carriage was not at the AirTran customer service counter and it was not available for inspection at the airport." *Id.* at 786-87, 789-90 (citing 14 C.F.R. § 253.4(b)) ("Each air carrier shall make the full text of each term that it incorporates by reference in a contract of carriage available for public inspection at each of its airport and city ticket offices").

In this case, however, Plaintiffs do not allege that Spirit failed to make any term in its COC available for inspection at any airport or otherwise. Thus, Plaintiffs argument in this regard is unavailing.

ii. The COC's class action waiver applies to Plaintiffs' claims.

Given that Spirit's COC governs Plaintiffs' rights and remedies, the Court must now apply the relevant terms to Plaintiffs' claims. Spirit's COC contains a choice-of-law provision which states that the rights of the parties "will be governed by and construed in accordance with the laws of the United States of America and the State of Florida." *See* Mot. at Ex. A § 13.1. Under both federal and Florida law, "[i]t is well-established that parties can agree to class action waivers." *McIntosh v. Royal Caribbean Cruises, Ltd.*, No. 17-CV-23575, 2018 WL 1732177, at *2 (S.D. Fla. Apr. 10, 2018) (citing *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 334 (2011); *Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205 (11th Cir. 2011)), *appeal docketed*, No. 19-10562 (11th Cir. Feb. 11, 2019). Indeed, various courts have held that the enforceability of a class action waiver should be resolved by way of a motion to dismiss and before discovery begins. *See DeLuca*, 244 F. Supp. 3d at 1345; *Chudasama*, 123 F.3d at 1367.

The FARs permit airlines to incorporate contracts of carriage into passengers' tickets or other written instruments, 14 C.F.R. § 253.4(a), and expressly provide that "[t]he incorporated terms may include . . . [c]laims restrictions," *id*. § 253.5(b)(2). And although the FARs expressly prohibit "any contract of carriage provision containing a choice-of-forum clause[,]" *id*. § 253.10, they are silent regarding class action waiver provisions in the airlines' contracts of carriage, *see* 14 C.F.R. § 1.1 *et seq*.

Here, Plaintiffs specifically allege that they were parties to Spirit's COC and that the COC governs all manner of Spirit's services: "flight reservation, flight fare, refusal of guests, acceptance of children, baggage, schedule changes, delayed flights, canceled flights, denied boarding, refunds, non-revenue guests, tarmac delay plan, and guest service plan." Compl. at ¶ 29, 31, 43, 53. Plaintiffs go so far as to acknowledge the class action waiver provision in Spirit's COC. *Id*. at ¶ 30. Given Plaintiffs' awareness of the class action waiver provision and the incorporation of the COC into their ticket purchases, the COC's class action waiver provisions must be enforced, and Plaintiffs' class claims related to Shortcut Security must be dismissed as a matter of law.[10]

iii. The COC's temporal limitation applies to Román and Rivera's claims.

Just as the COC's class action waiver applies to Plaintiffs' claims, so too does the COC's temporal limitation on liability. Airlines are specifically permitted to include such contractual limitations of liability in their contracts of carriage, 14 C.F.R. § 253.5(b)(2), and this Court has repeatedly held that these limitations govern even if more permissive temporal limitations might otherwise apply under state law, *see Pons*, 2018 WL 2188477, at *2-3; *Miller v. Delta Air Lines, Inc*., No. 4:11-CV-10099-JLK, 2012 WL 1155138, at *3-4 (S.D. Fla. Apr. 5, 2012). In fact, the specific limitations period contained in Spirit's COC has been upheld as a valid time bar to a

[10] Notably, the COC does not impede, and Spirit does not contest, Plaintiffs' right to bring individual actions against Spirit relative to Shortcut Security.

passenger's untimely claim. *See Covino*, 406 F. Supp. 3d at 153-54 (finding that plaintiff passenger's claim was time barred and granting Spirit's motion to dismiss).

Spirit's COC states that "[n]o legal action may be brought by a passenger against Spirit or its directors, officers, employees or agents unless commenced within ***six (6) months*** from the date of the alleged incident." Mot. at Ex. A § 13.2 (emphasis added). Here, Plaintiffs Román and Rivera filed their actions outside the time permitted by the COC. Plaintiff Román alleges that her claims arose "[i]n or around October 2018." Compl. at ¶¶ 31, 72. Plaintiff Rivera alleges that his claims arose even earlier, "in or around June 2018." *Id*. at ¶¶ 54, 89. Yet, Plaintiffs did not file their Class Action Complaint until June 12, 2019. *Id.* Thus, Plaintiff Román filed her action against Spirit eight (8) months from the date of the alleged incident, and Plaintiff Rivera filed his action twelve (12) months from the date of the alleged incident. Pursuant to the COC, Plaintiffs Román and Rivera cannot bring these claims—even individually. Consequently, their claims must be dismissed with prejudice.

B. Plaintiffs Roberts and Guzman's individual claims are dismissed for lack of subject matter jurisdiction.

Plaintiffs Roberts and Guzman's claims are not barred by the COC's temporal limitation. However—without their class allegations—this Court lacks subject matter jurisdiction over their individual breach of contract claims. Indeed, Plaintiffs' individual damages are only $6.00. *See* Compl. at ¶¶ 1, 4, 5, 6, 32, 45-46. Consequently, it is facially apparent from Plaintiffs' allegations that their individual amount in controversy is well below the jurisdictional minimum of $75,000 required to establish diversity jurisdiction. *See* 28 U.S.C. § 1332(a); *see also Roe v. Michelin N. Am., Inc*., 613 F.3d 1058, 1061 (11th Cir. 2010) (holding that it may be facially apparent from the pleadings whether the amount in controversy exceeds the jurisdictional requirement). Furthermore, all parties are alleged to be citizens of Florida for purposes of diversity. Compl. at

¶¶ 14-16. Thus, this Court lacks subject matter jurisdiction over Plaintiffs Roberts and Guzman's individual claims against Spirit. Therefore, Plaintiffs' individual claims must be dismissed pursuant to Rule 12(h)(3) of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.").

CONCLUSION

For the foregoing reasons, it is hereby **ORDERED AND ADJUDGED** as follows:

1. Plaintiffs Román and Rivera's breach of contract claims against Spirit are hereby **DISMISSED *with prejudice***.
2. Plaintiffs Roberts and Guzman's **class action claims** are hereby **DISMISSED *with prejudice***. Their **individual claims** are hereby **DISMISSED *without prejudice*** so that they may seek relief in the appropriate forum if they so desire.
3. The Clerk is directed to **CLOSE this case**.
4. Any pending motions are **DENIED as moot.**

DONE AND ORDERED in Fort Lauderdale, Florida, this 31st day of August, 2020.

RODOLFO A. RUIZ II
UNITED STATES DISTRICT JUDGE