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VIA ECF

The Honorable Raymond J. Dearie, USDJ
United States District Court for the Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

RE: Dover, et al. v. British Airways PLC, No. 1:12-cv-5567
Plaintiffs' Response to Defendants' Pre-Motion Letter

Your Honor:

Plaintiffs write in response to the request of Defendant British Airways PLC ("BA") for a pre-motion hearing regarding a potential motion to dismiss under Rule 12(b)(6). (See Doc. 9.) Plaintiffs do not oppose this request, but respectfully suggest that the proposed motion would be futile.

As indicated in BA's letter and explained more fully in the Complaint, Plaintiffs allege a single cause of action for breach of contract (*see* Compl. at ¶¶ 1-11, 74-76). BA offers its customers the option to accept a membership agreement (the "Contract") in what is known as the BA Executive Club. Customers who accede to the Contract ("Members") are promised that they will earn points ("Miles") in exchange for engaging in certain activity such as paying for BA flights or using a BA-branded credit card. These Miles can be exchanged for, among other things, airline tickets ("Reward Tickets"). While Members commonly think that Reward Tickets can be purchased without spending additional money, BA does reserve the right to charge additional incidental taxes and fees. This is a common practice in the industry. For example, United Airlines, Inc. charges its customers $2.50 for each departure from a domestic airport; this represents the cost of what is known as the September 11 Security Fee.

The Contract informs Members that when they purchase Reward Tickets, BA may impose, among other incidental charges, what BA chose to call a "fuel surcharge." When Members attempt to redeem Miles for a Reward Ticket, they often are stunned to learn that this "fuel surcharge" can exceed $500 per ticket. This surcharge is not actually a fuel surcharge because, despite its name, the charge is not based on the price of fuel. Rather, it is a charge BA imposes simply to increase its revenue.

This is the heart of the breach of contract that Plaintiffs allege; i.e., that the term "fuel surcharge" must, at the absolute minimum, mean a charge that is related to the cost of fuel. BA,

on the other hand, says that it can charge whatever it wants as a "fuel surcharge," regardless of whether the charge is based on fuel costs. Essentially, BA is arguing that the word "fuel" in the Contract has no meaning.

A motion to dismiss based on BA's counterintuitive theory of contract interpretation would be futile. *See Fed. Ins. Co. v. Am. Home Assur. Co.*, 639 F.3d 557, 567 (2d Cir. 2011) (New York Law) (explaining that unambiguous terms of a contract are assigned their "plain and ordinary meaning" and that the interpretation of "an ambiguous term or phrase" is a matter for the jury); *cf. Anderson News, L.L.C. v. Am. Media, Inc.*, 680 F.3d 162, 184 (2d Cir. 2012) (explaining that the pleading standard is "lower than probability" and that "a given set of actions may well be subject to diverging interpretations, each of which is plausible"). Similarly, while BA also apparently intends to move to dismiss on the theory that Plaintiffs' claims are preempted by the Airline Deregulation Act of 1978 ("ADA"), such argument is misguided because the United States Supreme Court has held that the ADA does not preempt a claim for breach of contract. *See American Airlines, Inc. v. Wolens*, 513 U.S. 219, 228 (1995).

A. <u>Plaintiffs Allege a Plausible Claim for Breach of Contract.</u>

BA's primary argument is that Plaintiffs do not state a claim for breach-of-contract because the Contract includes broad language that permits BA to levy "any surcharge." There are two problems with this argument, each of which independently is sufficient to defeat BA's proposed motion. First, even assuming that the Contract permits BA to impose a hypothetical "Revenue Enhancement Surcharge" (which is what the purported Fuel Surcharge actually is), this is not what BA chose to do. Rather, BA told Members that they could be charged a "fuel surcharge" and then imposed a purported "fuel surcharge." And it is black-letter law that a "fuel surcharge" must be based upon the price of fuel. *See Fed. Ins. Co.*, 639 F.3d at 567.[1]

Second, BA's interpretation of the term "surcharge" is flawed. As explained in Plaintiffs' Complaint, all of the surcharges BA lists are "pass-through" charges; i.e., charges imposed by some other entity, such as governments, airport authorities, or insurance carriers. Accordingly, as used in the Contract, the term "surcharge" refers only to pass-through charges. And while BA notes that the Contract incorporates the terms of another document, the "General Conditions of Carriage for Passengers and Baggage," which allows BA to impose "any surcharge," nothing in that document alters the Contract's definition of the term "surcharge." *See, e.g., Koss v. Wackenhut Corp.*, 704 F. Supp. 2d 362, 367 (S.D.N.Y. 2010) (explaining that contractual terms are understood in context and must be interpreted to give effect to the agreement as a whole).

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[1] BA is misguided to contend that the promise of a charge based on the price of fuel is too indefinite to be enforced as a matter of law. First, it is plausible to believe that a jury would, even without expert testimony, find this term to mean "a charge that varies with the price of fuel" — i.e., a charge that moved up and down as the price of fuel moved up and down. Second, from a scientific perspective, a statistical measure known as R-squared can be used to determine whether a fuel surcharge is actually based on the price of fuel. (*See* Compl. at ¶¶ 50-55.)

In other words, the Contract only allows BA to impose a fuel surcharge (even one actually based on the price of fuel) if that fuel surcharge is imposed by an entity other than BA itself.

B. Plaintiffs' Claims are Not Preempted by the Airline Deregulation Act.

BA also argues that Plaintiffs' claim is preempted by the ADA. But the ADA does not preempt state contract law. *See Wolens*, 513 U.S. at 228; *cf. In re Nig. Charter Flights Contract Litig.*, 520 F. Supp. 2d 447, 469-70 (E.D.N.Y. 2007) (Dearie, J.) (analyzing ADA preemption solely with respect to tort claims). Put another way, as acknowledged by BA, the ADA cannot preempt an airline's self-imposed undertakings. *In re Jetblue Airways Corp. Priv. Litig.*, 379 F. Supp. 2d 299, 313 (E.D.N.Y. 2005) (Amon, J.).

Plaintiffs' straightforward breach of contract claim falls squarely within *Wolens* and *Jetblue*. BA's implicit contention that this was not a "self-imposed" undertaking is baffling. Indeed, Plaintiffs bring their claim in part *because* "[n]o United States or United Kingdom-based governmental or quasi-governmental authority or body" imposes fuel surcharges. BA chose to denominate the charge in question a "fuel surcharge," and BA chose to tell Members that it was imposing such a charge on them. This case was brought largely because the charge that BA decided to call a fuel surcharge is not actually a fuel surcharge. (Comp. at ¶ 42.)

After acknowledging that the law in this District is against them, BA cites authority from other jurisdictions for the proposition that that *Wolens* does not apply where the parties' bargain has been "enhanced or enlarged by state law or policies external to the agreement." But even if that description could apply to BA's fuel surcharges (which it does not), the cases cited do not stand for such a premise. *Buck v. American Airlines, Inc.* is a case in which plaintiffs unsuccessfully attempted to claim that federal regulation, unlike state regulation, was not preempted by the ADA. 476 F.3d 29, 32 (1st Cir. 2007). The First Circuit was reticent to even refer to *Buck* as involving a claim for breach of contract, colorfully describing the claim as "pleochroic raiment" designed to conceal the true nature of Plaintiffs' claim for breach of various federal statutes. *Id.*; *see also id.* at 36 (explaining that Plaintiffs could not show any particular definitive contractual term that all of the defendants, who had varying contracts, breached).[2]

C. BA's Proposed Motion Would Be Futile.

At bottom, BA's proposed motion would be futile both because BA cannot establish on a motion to dismiss that the term "fuel surcharge" means something other than a charge based on the price of fuel, and because the ADA does not preempt this claim for breach of contract. Plaintiffs ask BA to reconsider filing this unmeritorious motion. In the alternative, Plaintiffs respectfully request a pre-motion hearing at the Court's earliest convenience.

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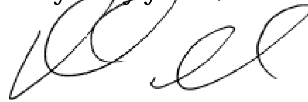
[2] *Volodarskiy v. Delta Air Lines, Inc.* is similarly unhelpful for BA: it holds that the defendant had not intended to implicitly incorporate a particular European Union regulation into its contract. No. 11 C 782, 2012 U.S. Dist. LEXIS 154831, at *22 (N.D. Ill. Oct. 29, 2012).

Very truly yours,



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