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VIA ECF

The Honorable Margo K. Brodie
United States District Judge
United States District Court Eastern District of New York
225 Cadman Plaza East
Brooklyn New York 11201

Re: ***Dover, et al. v. British Airways PLC, No. 1:12-cv-05567-MKB-MDG***
Defendant's Pre-Motion Letter

Dear Judge Brodie:

This firm is counsel to defendant British Airways PLC ("BA") in the above-referenced matter. We submit this letter pursuant to Rule 3(A) of Your Honor's Individual Practices and Rules to request a pre-motion hearing to discuss the defendants' intention to file a motion to dismiss the plaintiffs' complaint ("Complaint") pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

The Complaint attempts to state a breach of contract claim on behalf of a putative class of members of BA's frequent flier program, the Executive Club. The Complaint posits that the Executive Club Contract (the "Contract") does not permit BA to charge a fuel surcharge and that BA further breaches the Contract by supposedly deviating from a statement made on its website that fuel surcharges reflect "the fluctuating price of worldwide oil." (Comp. ¶¶ 9, 45).

The plaintiffs' claim fails because the Contract does not say what the plaintiffs allege and their misreading of the Contract cannot support a breach of contract claim. *See, e.g.*, *Investors Compensation Scheme Ltd v. West Bromwich Building Society*, [1997] UKHL 28;[1] *Ellse v Hill-Pickford [2006] EWHC 3293* (Ch) (enforcing contract as written); *Cordts-Auth v. Crunk*, LLC, 479 F. App'x 375, 378 (2d Cir. 2012) (affirming dismissal of breach of contract claim that rested upon a "fatal misunderstanding of the contract terms"); *Goldman v. Metropolitan Life Ins. Co.*, 5 N.Y.3d 561, 571, 841 N.E.2d 742, 746 (N.Y. 2005) (affirming dismissal of breach of contract claim).

The Contract provides that "Awards for travel on British Airways are subject to the General Conditions of Carriage for Passengers and Baggage" ("Conditions of Carriage"). (Contract, § 13.1). The Conditions of Carriage establishes that BA may charge its passengers

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[1] The Contract provides that it is governed by English law. (Contract ¶ 30.1). When an Executive Club member books his or her ticket on BA, however, that contract is governed by state law. *See, e.g., Prince of Peace Enterprises v. Top Quality Food Mkt., LLC*, 760 F. Supp. 2d 384, 396 (S.D.N.Y. 2011).

fuel surcharges: "We may charge *any* surcharge to the fare for your ticket which applies under our tariff on the date you pay for your ticket, *for example a* **fuel** or insurance **surcharge**." (Conditions of Carriage, § 4(a)(v)) (emphasis added). Similarly, the Contract provides that members will be liable for "*any* taxes and other *charges* associated with Reward travel . . . *including without limitation* . . . **fuel surcharges** . . . ." (Contract, § 13.14) (emphasis added). As such, the relevant contracts explicitly anticipate the payment of the very fees challenged.

Nevertheless, the plaintiffs concoct an argument that BA may not charge fuel surcharges if they are imposed by BA itself instead of a "governmental or quasi-governmental" body. (Comp., ¶¶ 7, 42). In so doing, the plaintiffs misread the Contract in such a way that the last clause in Section 13.14 – "or other incidental fees or taxes charged by any person or relevant authority or body" – would then modify and constrain the rest of the sentence. The plaintiffs' argument fails for a myriad of reasons. First, the plaintiffs ignore the explicit provisions of the Contract and Conditions of Carriage, set forth above, which permit BA to charge *any* fuel surcharge, however imposed. Second, the Contract does not mandate anywhere that the fees charged must be imposed by the government. Third, the argument is wrong as a matter of contract construction because the use of the disjunctive "or" provides that the clause does not modify the rest of the sentence. *Ellse v Hill-Pickford [2006] EWHC 3293* (Ch); *Portside Growth & Opportunity Fund v. Gigabeam Corp., Inc.*, 557 F. Supp. 2d 427, 431 (S.D.N.Y. 2008) ("'or' is a disjunctive particle used to express an alternative or to give a choice of one among two or more things"). Finally, even if the last clause did modify the remainder of the sentence (which it does not), BA is a "person" that charges the fuel surcharge, as explicitly anticipated by the relevant contracts. *See* Section 61(b) of the Law of Property Act 1925 ("Person" includes a corporation).

Alternatively, the plaintiffs claim that if BA is permitted contractually to charge a fuel surcharge (which it is), then BA supposedly breached the Contract in the manner in which it set the fuel surcharge. The Contract and the Conditions of Carriage, however, do not impose any obligation upon BA to set the fuel surcharge in any particular manner. Once again, the plaintiffs are seeking to engraft onto the Contract a provision that does not exist.

In an attempt to support imposing additional provisions not found in the contracts, the plaintiffs rely exclusively upon a statement on BA's website that "British Airways applies a fuel surcharge on all flights to reflect the fluctuating price of worldwide oil." (Comp. ¶ 45). This statement cannot form the predicate of a breach of contract claim for numerous independent reasons, three of which are discussed below.[2]

First, the statement is not part of the Contract. Parties are not bound by the terms of any document unless it is clearly identified in the agreement. *See, e.g., PaineWebber, Inc. v. Bybyk*, 81 F.3d 1193, 1201 (2d Cir. 1996) (documents "'must be so referred to and described' so that

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[2] Given page constraints, BA cannot articulate all of the bases on which it may move to dismiss. If the Court permits BA to move to dismiss the Complaint, BA reserves the right to include additional arguments.

they 'may be identified beyond all reasonable doubt.'" (quoting *Chiacchia v. National Westminster Bank USA*, 124 A.D.2d 626, 628, 507 N.Y.S.2d 888, 889-90 (2d Dep't 1986)).

Second, even if the statement were incorporated into the Contract, (which it is not), it is too vague to be enforceable. To enforce an agreement, it must be sufficiently "definite and explicit so [that the parties'] intention may be ascertained to a reasonable degree of certainty." *Best Brands Beverage, Inc. v. Falstaff Brewing Corp.*, 842 F.2d 578, 587 (2d Cir. 1987) (vacating judgment; "documents simply do not contain the various essential terms necessary to create a binding agreement.") Here, there is no definite and explicit promise containing all essential terms. *See Gambello v. Time Warner Commun., Inc.*, 186 F. Supp. 2d 209, 226 (E.D.N.Y. 2002) (agreement too vague and uncertain to be enforceable).

Third, to the extent that the plaintiffs challenge BA's fuel surcharges and disclosures, such claims are preempted under Section 501 of the Airline Deregulation Act ("ADA") because, among other things, they relate directly to and would have a significant economic and competitive impact on airline rates. 49 U.S.C. § 41713(b); *see United Airlines, Inc. v. Mesa Airlines*, 219 F.3d 605, 609 (7th Cir. 2000); *Joseph v. JetBlue Airways Corp.*, No. 5:11-CV-1387 TJM/ATB, 2012 WL 1204070, at *5-6 (N.D.N.Y. Apr. 11, 2012). The Supreme Court articulated a narrow exception to ADA preemption for breach of contract claims "for the airline's breach of its own, self-imposed undertakings." *American Airline v. Wolens*, 513 U.S. 219, 232 (1995). While the Eastern District of New York has held broadly that contract claims are not pre-empted, *In re Jetblue Airways Corp. Privacy Litig.*, 379 F. Supp. 2d 299, 317 (E.D.N.Y. 2005), *Donkor v. British Airways Corp.*, 62 F. Supp. 2d 963, 971 (E.D.N.Y. 1999), *Galbut v. Am. Airlines, Inc.*, 27 F. Supp. 2d 146, 151 (E.D.N.Y. 1997), numerous courts have found that the *Wolens* exception does not apply where the parties' bargain has been enhanced or enlarged by state laws or policies external to the agreement and where claims or defenses would require the court to consider laws or regulations outside the four corners of the contract. *See e.g., Buck v. American Airlines, Inc.*, 476 F.3d 29, 36-37 (1st Cir. 2007) (*Wolens* exception did not apply and ADA preempted state-law breach of contract claims based on violations of federal regulations); *Volodarskiy v. Delta Air Lines*, Inc., No. 11 C 00782, 2012 WL 5342709 (N.D. Ill., Oct. 29, 2012) (*Wolens* is inapplicable where claim requires reference to regulations not specifically and expressly incorporated into the contract). Here, the ability to charge fuel surcharges and disclosures relating thereto are regulated by the federal government, and they relate directly to the rates, pricing and services of BA. As such, the plaintiffs' claim is preempted.

For all of these reasons, BA respectfully requests a pre-motion conference to discuss its motion to dismiss the Complaint.

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Respectfully submitted,

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Cc: All Counsel of Record