UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

CHRISTINE MONAHAN; RENEE IANNOTTI; and LILLIAN TAYLOR, individually and on behalf of all others similarly situated,	§	
Plaintiffs,	§	
	§	Civil Action No. 6:21-cv-00887-ADA-JCM
v.	§	
SOUTHWEST AIRLINES CO.,	§	
Defendant.	§	

DEFENDANT SOUTHWEST AIRLINES CO.'S MOTION TO STAY, TRANSFER, DISMISS, AND STRIKE

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INTRODUCTION

This case—which has no connection whatsoever to this judicial district—is all but a mirror image of a certified class action filed in the Eastern District of Texas and currently on appeal (the "*Earl* Case").[1] The Fifth Circuit granted a discretionary appeal of the *Earl* certification order just 27 days after the order issued and within three days of the filing of Plaintiffs' response to the request to appeal.

The similarities between the *Earl* Case and this case are obvious. The proposed nationwide classes are the same (purchasers of tickets on Defendant Southwest, regardless of the aircraft type flown).[2] The proposed class period is the same (the 18-months preceding the FAA's grounding of Boeing's 737 MAX 8 aircraft). The core factual allegations are the same (a purported years' long failure to disclose defects in the MAX aircraft leading to safety risks). And the claimed injury is the same (an overcharge in the price of tickets).

These similarities are no surprise to the Plaintiffs' lawyers at Hecht Partners LLP ("Hecht Partners"). Two lawyers at that firm filed the *Earl* Case while working at another law firm, and those lawyers then continued to represent certain *Earl* Plaintiffs after leaving to form Hecht Partners. Eventually Hecht Partners withdrew from the *Earl* Case because of squabbles with their co-counsel and former law partners. This lawsuit is seemingly yet another round in the fight among lawyers for control of the same class of airline ticket purchasers.

Because of these similarities and the inherent inefficiency of litigating the same case in multiple jurisdictions, this case should be stayed (or dismissed outright) under the First-to-File

[1] *Damonie Earl et al. v. The Boeing Company and Southwest Airlines Co.*, Case No. 4:19-cv-00507 (E.D. Tex.) (filed July 11, 2019). Southwest Airlines Co. is hereinafter "Southwest."

[2] See *infra* Argument Section I for a discussion of negligible differences between the classes. For example, the *Earl* Case additionally includes a class of purchasers of American Airlines flights.

Rule pending a final, non-appealable resolution of the *Earl* Case. And if that hurdle is cleared, the case should be dismissed for improper venue or transferred to the Northern District of Texas, where Southwest is headquartered, because none of the parties reside in this judicial district and no events giving rise to the claims occurred in this judicial district.

The First-to-File Rule and improper venue are not the only impediments facing this lawsuit, however. Plaintiffs here face the same threshold problem as the *Earl* plaintiffs: a lack of Article III standing. The entirety of Plaintiffs' 209-paragraph Complaint speaks of harms—hypothetical injuries and damages—that admittedly never happened to any Plaintiff or any Southwest passenger. Plaintiffs, who purchased tickets for travel on Southwest, claim they were exposed to alleged safety risks on a single aircraft model: Boeing's MAX aircraft. ***None*** of the Plaintiffs ***flew*** on a MAX aircraft, however. And for the absent putative class members who did fly on a MAX aircraft, ***none*** flew on flights impacted in any way by the alleged defects. That's right: Every Plaintiff and putative class member safely flew from Point A to Point B without any physical or emotional injury. And the alleged injury that they do claim—an overcharge at the point of purchase—is no injury at all in the Fifth Circuit, which has held that plaintiffs have no standing to assert a purely economic loss when they safely received exactly what they bargained for (here, safe transport from Point A to Point B). *See Rivera v. Wyeth-Ayerst Labs.*, 283 F.3d 315 (5th Cir. 2002). This case should therefore be dismissed pursuant to Rule 12(b)(1).

Plaintiffs—in trying to plead themselves into an injury—have also failed to state a claim on which relief can be granted in the face of Rule 12(b)(6). They assert that they bargained for (and received) alleged promises that in reality are vague, imprecise, and non-contractual corporate statements cherry-picked from Southwest's website. For example, they assert that Southwest promised to "continually work to create and foster a Culture of Safety and Security that proactively

identifies and manages risk to the operation and workplace before they can become injuries, accidents, or incidents."[3] There are neither measurable nor defined standards, however, for assessing whether a "breach" of alleged promises of this nature actually occurred, and so they are legally unenforceable. Plaintiffs have thus failed to state a breach-of-contract claim. Perhaps more troubling, Plaintiffs use the ubiquitous "this contract is subject to applicable laws, rules, and regulations" language to try to backdoor in a private right of action for a host of FAA regulations. That language is insufficient on its face to create an enforceable promise, and in any event, any claim for breach of that purported "promise" and the others alleged is expressly preempted by the Airline Deregulation Act (which preempts state-law claims related to "prices" and "services" of an airline) and also preempted by the Federal Aviation Act (which pervasively regulates the field of aviation safety).

Finally, each Plaintiff agreed to a class-action waiver when purchasing their tickets during the putative class period. Plaintiffs' class allegations should therefore be dismissed or stricken.

For these reasons and others set forth below, Southwest respectfully requests that the Court:

(1) stay this action pending a final, non-appealable resolution of the *Earl* Case or dismiss this action, each pursuant to the First-to-File Rule;

(2) dismiss Plaintiffs' Complaint for improper venue, pursuant to Fed. R. Civ. P. 12(b)(3) and 28 U.S.C. § 1406(a), because no parties reside in this District and no events or omissions giving rise to the claim occurred in this District;

(3) transfer this action, pursuant to 28 U.S.C. § 1404(a), to the Northern District of Texas, where Southwest is headquartered;

(4) dismiss Plaintiffs' Complaint, pursuant to Fed. R. Civ. P. 12(b)(1), for failure to establish Article III standing and subject-matter jurisdiction;

(5) dismiss Plaintiffs' Complaint, pursuant to Fed. R. Civ. P. 12(b)(6), for failure to state a claim given the indefinite alleged promises and pre-empted state-law claims it is based on; and/or

[3] *Monahan* Compl. (Dkt. 1) ¶ 161.

(6) dismiss or strike Plaintiffs' class action allegations based on the express class action waiver in Southwest's Terms and Conditions.[4]

FACTUAL ALLEGATIONS AND BACKGROUND

I. Plaintiffs' Breach-of-Contract Claim Rests on Alleged Exposure to Mere *Risk* of Flying on a Single Aircraft.

Plaintiffs assert a single claim for breach of contract against Southwest based on its alleged violations of Southwest's Contract of Carriage—the primary agreement that Southwest's passengers enter into when purchasing a ticket.[5] The gravamen of Plaintiffs' Complaint is their contention that Southwest exposed its ticket purchasers to the potential ***risk*** of flying on an unsafe aircraft—Boeing's 737 MAX 8 (the "MAX"), which comprised only a tiny percentage of the aircraft in Southwest's fleet.[6] In fact, none of the Plaintiffs actually flew on a MAX aircraft.[7]

Plaintiffs allege that a breach purportedly occurred in three ways: "[1] by flying the unsafe, non-airworthy, and defective Boeing 737 MAX, [2] by not sufficiently training its pilots to fly the 737 MAX, and [3] by violating Federal Aviation ('FAA') regulations."[8] The gist of these alleged breaches is as follows:

- Unsafe and Un-Airworthy Design: Plaintiffs allege that (i) the MAX was designed with a Maneuvering Characteristics Augmentation System ("MCAS") that could automatically alter the pitch of the aircraft, (ii) MCAS only relied on a single angle-of-attack sensor ("AoA Sensor"), (iii) AoA Sensors have a high failure rate, (iv) an indicator that alerts pilots when their AoA Sensors disagree was not functional on the MAX, (v) the functionality of the switches to deactivate MCAS changed from the previous generation of Boeing's 737 aircraft (the "737 NG") to the MAX, (vi) it was difficult to manually disengage MCAS, (vii) the MAX's automatic throttle could cause dangerous speed conditions, and (viii) MCAS could override pilot input.[9]

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[4] If the Court transfers this action to the Northern District of Texas, Southwest reserves the right to pursue in that judicial district any and all other un-granted relief requested in this filing.

[5] *See Monahan* Compl. (Dkt. 1) ¶¶ 1, 29-33.

[6] *See id.* ¶¶ 1, 46-186.

[7] *See* Behrens Dec. (Ex. 5) at ¶ 5 (filed under seal contemporaneously herewith).

[8] *Monahan* Compl. (Dkt. 1) ¶ 1.

[9] *See id.* ¶¶ 63-133.

- Deficient Pilot Training: Plaintiffs allege that Southwest's pilots were neither properly trained to fly nor sufficiently familiar with the MAX because Southwest failed to (i) disclose to its pilots the existence of MCAS or how to respond to its operation, and (ii) disclose that certain indicators and switches relating to MCAS were either not operational on the MAX or different from the "737 NG".[10]

- FAA Regulations: Plaintiffs allege that Southwest and Boeing concealed MCAS from FAA regulators and minimized training and simulation to cut costs.[11]

As purported proof of those alleged defects, Plaintiffs refer to the fatal Lion Air and Ethiopian Airline overseas crashes in 2018 and 2019, respectively.[12]

Plaintiffs' 71-page Complaint barely relies on the provisions of the Contract of Carriage, however. Instead, Plaintiffs focus their allegations on Southwest's purported breaches of two other documents: Southwest's Customer Service Commitment (the "Customer Commitment") and Southwest's Safety and Security Commitment (the "Safety Commitment").[13] Reading those documents together, Plaintiffs claim that Southwest:

(1) violated the Customer Commitment's promise that Southwest's pilots are "trained and familiar with every airplane in [its] fleet,"

(2) breached both the Customer Commitment's and Safety Commitment's promises that Southwest's "first priority . . . is and has always been safety" (among other similar statements from those documents), and

(3) contravened the various safety-related FAA regulations that the Contract of Carriage, Customer Commitment, and Safety Commitment purportedly incorporate because the Contract of Carriage "is subject to applicable laws, rules, and regulations."[14]

On the basis of those alleged breaches, Plaintiffs claim they "did not receive the benefit of the bargain and were overcharged for the purchased tickets."[15]

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[10] *See Monahan* Compl. (Dkt. 1) ¶¶ 154-160.

[11] *See id.* ¶¶ 134-150.

[12] *See id.* ¶¶ 4-14.

[13] *See id.* ¶¶ 151-186.

[14] *See id.* ¶¶ 175-185.

[15] *Id.* ¶¶ 154, 161, 186.

II. Plaintiffs' Injury Theory Is Based on Alleged Safety Risks That Did Not Manifest on Their Own Flights.

Despite repeatedly stressing how purportedly unsafe, non-airworthy, and defective the MAX was, Plaintiffs do not allege that any of the safety risks materialized on their Southwest flights. Quite the contrary, Plaintiffs do not even allege that they flew on a MAX aircraft (none, in fact, did), and they admit their claims are solely based on purported potential exposure to the "risk of flying on . . . the fatally flawed 737 MAX."[16] Plaintiffs thus base their claims on the injuries suffered by others (i.e., passengers of Lion Air Flight 610 and Ethiopian Airlines Flight 302).[17]

III. The Named Plaintiffs and Class Definitions

The Named Plaintiffs are three individuals who "purchased Southwest tickets for air travel which occurred between August 29, 2017 and March 13, 2019."[18] They are citizens of Massachusetts, Pennsylvania, and Georgia.[19] The Named Plaintiffs seek to represent a single nationwide class that includes every person who purchased a Southwest ticket over an 18-month period—regardless of whether the person actually flew with the ticket they purchased and, if they did fly, regardless of whether they flew on one of the few MAX aircraft in Southwest's fleet:

> All persons who provided valuable consideration, whether in money or other form (e.g., voucher, miles/points, etc.), in exchange for a ticket for air transportation on Southwest Airlines which transportation took place between August 29, 2017, and March 13, 2019 [the "Class Period"].[20]

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[16] *Monahan* Compl. (Dkt. 1) ¶ 166.

[17] *See id.* ¶¶ 4-14.

[18] *See id.* ¶¶ 22-24.

[19] *See id.*

[20] *Id.* ¶ 188.

ARGUMENTS AND AUTHORITIES

I. Plaintiffs' Claims Should Be Stayed or Dismissed Pursuant to The First-To-File Rule

Southwest respectfully requests the Court stay or dismiss this action pursuant to the First-To-File Rule pending a final, non-appealable resolution of the *Earl* Case.

A. Relevant Background to the *Earl* Case

1. Counsel

The *Earl* Case was filed in July 2019.[21] Plaintiffs were represented by, among others, David Hecht and Andrew Lorin—then at another law firm.[22] Mr. Hecht later formed Hecht Partners, with Mr. Lorin joining the firm. Hecht Partners eventually moved to withdraw from the *Earl* Case in October 2020, which that court granted amid "squabbling" between the various plaintiffs' law firms and an "ongoing rift . . . which ha[d] plagued this [*Earl*] action at many turns."[23] Hecht Partners has now filed this case, and Mr. Lorin is counsel of record.

2. Factual allegations and core issues

In the *Earl* Case, plaintiffs allege that Southwest and Boeing conspired to expose ticket-purchasers to the risk of flying on the MAX to sell tickets at inflated prices.[24] Based on that alleged conduct, the *Earl* plaintiffs assert, via a class action, that Southwest and Boeing violated the Racketeer Influenced and Corrupt Organizations Act ("RICO") through a pattern of racketeering

[21] Class Action Complaint and Demand for Jury Trial, *Earl* Case (July 11, 2019) (Dkt. No. 1). The live pleading in the *Earl* Case is Plaintiffs' First Amended Complaint (Dkt. 165) (the "*Earl* FAC"), which Southwest has attached to this filing as Exhibit 1 for the Court's convenience.

[22] *Id.*

[23] Mem. Op. and Order, *Earl* Case, Oct. 30, 2020 (Dkt. No. 204).

[24] *See Earl* FAC (Ex. 1) ¶¶ 339-340.

activity involving fraud.[25] The *Earl* plaintiffs claim damages in the amount that they were purportedly overcharged on their ticket purchases.[26]

In the *Earl* Case, the issue of Southwest and Boeing's alleged "scheme to defraud" is pervasive. The primary component of the alleged scheme is the supposed intentional concealment "of the scope and nature of the deadly safety issues present on the MAX 8 aircraft."[27] To succeed on their RICO concealment claims, the *Earl* plaintiffs must establish, *inter alia*, the existence of various alleged safety issues and Southwest's and Boeing's purported knowledge of them.

In *Earl*, the plaintiffs' safety-related allegations fall into three general categories:

- Unsafe and Un-Airworthy Design: The *Earl* plaintiffs allege that MCAS was defectively designed in the following ways, which rendered the MAX "fatally defective": (i) the single AoA Sensor problem, (ii) the AoA Sensor failure-rate problem, (iii) the AoA Sensor disagree problem, (iv) the secrecy problem, (v) the manual disengagement problem, and (vi) the machine-over-man problem.[28] To gain certification of the MAX, the *Earl* plaintiffs allege that Southwest and Boeing concealed those defects from the public, pilots, and regulators.[29]

- Deficient Pilot Training: The *Earl* plaintiffs allege that Boeing and Southwest concealed MCAS from pilots, did not properly train pilots how to deal with or deactivate MCAS, and failed to disclose the fact that the "AoA Disagree Indicator" was not functional on the MAX, and issued false statements to falsely convince others that the MAX was safe following the two fatal MAX crashes.[30]

- FAA Regulations: The *Earl* plaintiffs allege that Southwest was directly involved in, and exerted inappropriate influence on, the testing, specification, and development of the MAX.[31] They also allege that Southwest and Boeing worked together to rush the launch of the MAX, purposefully cut corners to save money, and jointly adhered to a secret policy of avoiding simulation and testing.[32]

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[25] *Earl* FAC (Ex. 1) ¶¶ 327-354.

[26] *See id.* (Ex. 1) ¶ 52.

[27] *See id.* (Ex. 1) ¶¶ 339, 340.

[28] *See id.* (Ex. 1) ¶¶ 108-151.

[29] *See id.* (Ex. 1) ¶¶ 152-163, 185-215, 224-249, 254-261.

[30] *See id.* (Ex. 1) ¶¶ 19-21, 120-141, 185-215, 224-249, 254-261, 279-288.

[31] *See id.* (Ex. 1) ¶ 74, 167.

[32] *See id.* (Ex. 1) ¶¶ 23, 164-172.

3. Status of the *Earl* Case and Pending Appeal

On September 3, 2021, Judge Mazzant granted the *Earl* plaintiffs' motion for class certification and certified four classes of Southwest and American Airlines ticket purchasers.[33]

On September 17, Southwest and Boeing each petitioned the Fifth Circuit for leave to appeal the Eastern District's certification order.[34] Plaintiffs filed an opposition on September 27.[35] On September 30, 2021—less than a month after the certification order issued and within three days of the close of briefing—the Fifth Circuit granted both Southwest's and Boeing's petitions to pursue the discretionary appeals.[36] The Fifth Circuit has not yet set a briefing schedule.

B. Legal Standards

When multiple lawsuits with substantially overlapping issues are filed in the federal court system, the First-to-File Rule authorizes the court in the latter-filed case to stay the case before it. *See West Gulf Mar. Ass'n v. ILA Deep Sea Local 24 et al.*, 751 F.2d 721, 728 (5th Cir. 1985).[37] The First-to-File Rule emanates from the desire "to avoid the waste of duplication, to avoid rulings which may trench upon the authority of sister courts, and to avoid piecemeal resolution of issues that call for a uniform result." *Id.* at 729. The Rule is not only implicated when related cases are pending before two federal district courts but also becomes relevant when related cases are pending

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[33] Mem. Op. and Order, *Earl* Case, Sep. 3, 2021 (Dkt. 470) (the "*Earl* Cert. Order") at 82-85.

[34] *See* Southwest's Petition for Permission to Appeal Pursuant to Fed. R. Civ. 23(f), No. 21-90044 (5th Cir.) (filed Sept. 17, 2021) (the "SWA *Earl* Cert. Appeal"); Petition of the Boeing Company for Permission to Appeal Under Fed. R. Civ. P. 23(f), No. 21-90044 (5th Cir.) (filed Sept. 17, 2021) (the "Boeing *Earl* Cert. Appeal").

[35] Plaintiffs-Respondents' Answer to Petitioners' Request to Appeal Pursuant to Rule 23(f), No-2190044 (filed Sept. 27, 2021).

[36] Order, No. 21-40720, No. 21-90044 (5th Cir. Sep. 30, 2021). On October 6, 2021, the panel of judges who issued the September 30 order disclaimed any interest that they may have in the *Earl* Case as potential class members, rescinded the September 30 order, and then re-granted the requests to appeal. Orders, No. 21-90044 (5th Cir. Oct. 6, 2021).

[37] The court may also dismiss or transfer the case. *See West Gulf*, 751 F.2d at 728. For reasons discussed herein, however, the most appropriate remedy is a stay.

between a federal district court and a federal circuit court of appeals. *See Burger v. Am. Mar. Officers Union*, 170 F.3d 184 (5th Cir. 1999).

For the First-to-File Rule to apply, the crucial inquiry is whether the issues raised in both lawsuits "substantially overlap." *Int'l Fid. Ins. Co. v. Sweet Little Mexico Corp.*, 665 F.3d 671, 678 (5th Cir. 2011). To determine if substantial overlap exists, the Fifth Circuit has analyzed factors such as (i) whether the core issue is the same or (ii) whether the operative facts are so similar that the proof required would likely be the same. *See id*. Complete identity of parties and issues need not be shown for substantial overlap to exist. *See Save Power Ltd. v. Syntek Fin. Corp.*, 121 F.3d 947, 951 (5th Cir. 1997). The two actions only need "involve closely related questions or common subject matter." *Sirius Computer Sols., Inc. v. Sparks*, 138 F. Supp. 3d 821, 827 (W.D. Tex. 2015) (quoting *Rooster Prods. Int'l, Inc. v. Custom Leathercraft Mfg. Co.*, No. SA–04–CA–864–XR, 2005 WL 357657, at *2 (W.D. Tex. Feb. 1, 2005)). If substantial overlap is not found, the First-to-File Rule may still apply depending on the extent of overlap, the likelihood of conflict, the comparative advantage and interest of each forum in resolving the dispute. *Int'l Fid.*, 665 F.3d at 678 (using "less than complete" to indicate a lack of substantial overlap (citing *Save Power*, 121 F.3d at 951)).

C. Argument and Authorities

1. The *Monahan* and *Earl* lawsuits substantially overlap.

Everyone in the proposed *Monahan* class is included in the certified *Earl* class, they seek the same damages (difference between what was paid in the real world and what would have been paid in the but-for world absent the complained-of conduct), and they do so based on the same factual allegations, even if the legal theory leading to recovery (RICO v. breach of contract) is different. The two cases thus substantially overlap.

a. The pleaded classes are the same.

The entirety of the *Earl* certified class of Southwest ticket purchasers is encompassed in the *Monahan* putative class.[38] In both lawsuits, the class definitions include persons who paid for a ticket on Southwest Airlines for air transportation that took place between August 29, 2017 and March 13, 2019:

***Monahan* Alleged Class**[39]	***Earl* Alleged Class**[40]	***Earl* Certified Class**[41]
All persons who provided valuable consideration, whether in money or other form (*e.g.*, voucher, miles/points, etc.) in exchange for a ticket for air transportation on Southwest Airlines which took place between August 29, 2017, and March 13, 2019.	All persons in the United States who purchased a ticket for air travel to fly on a Southwest Airlines aircraft from the date Southwest first took delivery of the MAX 8, August 29, 2017, until the date that all 737 MAX Series aircraft were grounded by the FAA, March 13, 2019, inclusive.	All persons who conducted the transaction to purchase and bore the economic burden for a ticket for air travel within, to, or from the United States on a Southwest Airlines aircraft, except for such persons whose tickets were solely for flight segments (a) for which the MAX 8 aircraft was not scheduled for use as of the reservation date nor actually used or (b) that were not on MAX 8 routes[42] as of the reservation date (i.e., routes that had not as of the time of the reservation included the use of a MAX 8 aircraft).

The overlapping class definitions are thus plainly sufficiently similar to trigger the First-to-File Rule. *See West Gulf*, 751 F.2d at 731 n.5 (5th Cir. 1985) (concluding that a difference in plaintiffs is "not a reason to deny the simultaneous pendency of two essentially identical actions");

[38] The *Earl* Case also has classes of purchasers of flights on American Airlines.

[39] *Monahan* Compl. (Dkt. 1) ¶ 188.

[40] *Earl* FAC (Ex. 1) ¶ 295.

[41] *Earl* Cert. Order at 82-83.

[42] Although the class definition references "MAX routes," that term encompasses every route on which a MAX ever flew, and thus encompasses virtually all flights taken during the class period.

Nat'l Health Fed'n v. Weinberger, 518 F.2d 711, 713 (7th Cir. 1975) (applying the First-to-File Rule even though "the plaintiffs here are different plaintiffs").

The fact that Boeing is not a party to this action does not prevent the application of the First-to-File Rule because (i) Plaintiffs have included numerous allegations pertaining to Boeing and its alleged conduct,[43] and (ii) the difference of a single party does not negate the application of the First-to-File Rule. *See Save Power*, 121 F.3d at 951 ("The fact that Syntek is not a party to the Original Action does not undermine the appropriateness of transfer in view of all the facts of this case.").

b. The requested recovery (overcharge injury and damages) in both cases is the same.

The plaintiffs in both lawsuits claim an overcharge as their respective measure of damages:

***Monahan* Requested Recovery[44]**	***Earl* Requested Recovery[45]**
Plaintiffs and Class members did not receive the benefit of the bargain and were overcharged for the purchased tickets.	The sole theory of injury in this case—asserted by all Plaintiffs and both classes—is an airline ticket overcharge due to Defendants' fraudulent scheme.

To determine the existence and degree of an overcharge, the courts in both cases will need to conduct highly fact-specific, and expert driven, analyses at multiple points in those lawsuits (e.g., class certification, *Daubert* motions, summary judgment, and trial). *See, e.g.*, Earl Order on *Daubert* Motion [Dkt. No. 460] (discussing complex nature of expert testimony to determine extent of overcharge); *Earl* Cert. Order, at 24–25, 44–48, 72–76 (same).

[43] *See, e.g.*, *Monahan* Compl. (Dkt. 1) ¶¶ 46-141 (pertaining almost exclusively to Boeing).

[44] *Id.* ¶ 186

[45] Redacted *Earl* Class Certification Mot. at 33 (Dkt. No. 278); *see also Earl* Cert. Order at 31 ("[T]hey claim economic overcharge on their respective airline tickets and seek to recoup the injury inflicted by the overcharge.").

Because the nature of the injury and the damages claimed in both cases are identical, permitting this matter to proceed would risk duplicative analysis and inconsistent rulings. *See Gonzalez v. Unitedhealth Group, Inc.*, No. 6:19-CV-00700-ADA, 2020 WL 2992174, at *3 (W.D. Tex. June 3, 2020) (applying the First-to-File Rule when "the likelihood of conflict is high if two courts were to issue conflicting rulings on the merits of these cases").

c. The core liability facts and evidentiary proof in both lawsuits substantially overlap.

Regardless of the legal theory leading to the same overcharge recovery (RICO in *Earl* and contract in *Monahan*), both cases hinge on a substantially overlapping set of core issues and operative facts aimed at answering the same question: whether purchasers were exposed to an unsafe aircraft and thereby subjected to an overcharge. Whether seeking to prevail on breach of safety- and training-based promises or RICO allegations of a conspiracy to conceal safety defects from the pilots, the public, and the FAA, the plaintiffs in both cases must prove that the MAX was in-fact unsafe and defective. Indeed, the safety-related allegations in both lawsuits demonstrate the identical nature of the core liability facts, which fall into the same three general categories charted below.

Table 1: Safety and Airworthiness of MAX

***Monahan* Allegations**[46]	***Earl* Allegations**
• "participating in the flawed design and insufficient testing of the defective 737 MAX,"	• "Southwest was directly involved in the testing, specification, and development of the 737 MAX 8."[47]
• "violating FAA regulations,"	• "Boeing and Southwest also misled . . . the FAA about the appropriate fix for the MCAS's flawed design."[48]

[46] *See Monahan* Compl. (Dkt. 1) ¶ 161 (first row of table).

[47] *Earl* FAC (Ex. 1) ¶ 167.

[48] *Id.* (Ex. 1) ¶ 29.

• "failing to properly inspect the 737 MAX,"	• "After the Lion Air Crash, Southwest had also discovered that an important safety feature had not been installed on its airplanes."[49]
• "choosing to fly the unsafe and non-airworthy 737 MAX, and"	• "Boeing and Southwest were aware of the risk of crashes in the MAX 8 posed by its fatal defect, but they intentionally subjected Plaintiffs and Class members to that risk, and consciously disregarded that risk in order to maximize profits."[50]
• "misleading the FAA, pilots, and the public regarding the unsafe condition of its 737 MAX aircraft."	• "This case is . . . about how Southwest worked with Boeing . . . by lying to and defrauding customers, regulators, and its own pilots and employees, risking thousands of lives in the process."[51]

Table 2: Pilot Training

***Monahan* Allegations**	***Earl* Allegations**
• Never disclosing that MCAS existed, how it operated, how to respond to its activation, and how to manually override and/or disengage it.[52]	• "[N]either Southwest nor Boeing had told the pilots flying the planes that a computer-controlled system could potentially issue erroneous commands to the aircraft and that the only way to turn it off was to disable the aircraft's electric trim capabilities."[53]
• Failing to disclose to its pilots that the AoA Disagree Indicator was either not installed or not operational in its 737 MAX aircraft.[54]	• "After the Lion Air Crash, Southwest had also discovered that an important safety feature had not been installed on its airplanes. Specifically, Boeing had not activated the AoA Disagree Indicator . . . Southwest made no mention of this until after a subsequent crash . . . in fact, Southwest covered up the error . . ."[55]

[49] *Earl* FAC (Ex. 1) ¶ 210.

[50] *Id.* ¶ 341.

[51] *Id.* ¶ 2.

[52] *See Monahan* Compl. (Dkt. 1) ¶ 154.

[53] *Earl* FAC (Ex. 1) ¶ 204.

[54] *See Monahan* Compl. (Dkt. 1) ¶ 154.

[55] *Earl* FAC (Ex. 1) ¶¶ 210-211.

• Failing to inform its pilots about the existence of MCAS and related systems, thereby putting its pilots in a situation where they "would have expected that the procedures historically used to control a runaway stabilizer would operate in the 737 MAX as they had in the previous 737 models . . ."[56]	• "Southwest misleadingly implied that it had maintained such procedures all along . . . Southwest's statement was deceptive. . . . The airline's own pilots had been recently told for the first time that MCAS existed. It therefore could not have been the case that Southwest's 'existing' operating procedures . . . reflected the scenarios in the then-recently released bulletin."[57]

Table 3: FAA Regulations and Fraudulent Certification and Testing

***Monahan* Allegations**	***Earl* Allegations**
• "[T]aking possession of and operating the 737 MAX in a condition that made the aircraft non-airworthy[.]"[58]	• "But in reality, Southwest knew the 737 MAX 8 was fatally flawed and had worked with Boeing to cover it up and falsely tout the safety of the airplane."[59]
• "[F]ailing to inform pilots about the existence and operation of the MCAS."[60]	• "Pilots were not notified about the existence of MCAS, let alone trained to handle its failure due to a malfunctioning AoA Sensor. In fact, the Southwest Airlines Pilots Association . . . stated clearly that the system was not in the aircraft's manuals before the Lion Air crash."[61]
• "[N]ever informing the FAA that the MCAS had not undergone simulation and testing . . . ."[62]	• "Neither Southwest nor Boeing said anything to the public, regulators, or their customers about this policy of avoiding simulation and testing."[63]

[56] *Monahan* Compl. (Dkt. 1) ¶ 159.
[57] *Earl* FAC (Ex. 1) ¶¶ 206-207.
[58] *Monahan* Compl. (Dkt. 1) ¶ 176.
[59] *Earl* FAC (Ex. 1) ¶ 2.
[60] *Monahan* Compl. (Dkt. 1) ¶ 176.
[61] *Earl* FAC (Ex. 1) ¶ 199.
[62] *Monahan* Compl. (Dkt. 1) ¶ 176.
[63] *Earl* FAC (Ex. 1) ¶ 169.

Regardless of the difference in legal causes of action, the factual determination of whether purchasers were exposed to a risk of flying on an unsafe aircraft will dominate both this Court's and the *Earl* court's resolutions of their respective plaintiffs' claims, and the evidence required in both lawsuits is largely identical. The Court should thus have no difficulty applying the First-to-File Rule. *See Needbasedapps, LLC v. Robbins*, 926 F. Supp. 2d 919, 932 (W.D. Tex. 2013).

d. Both lawsuits present the same fundamental standing concerns.

Because the proposed classes and theory of injury are the same, the claims in both cases fail for lack of standing under Article III. As set forth in Argument Section III, Plaintiffs' claims should be dismissed for lack of standing. These arguments are the same arguments as presented in the *Earl* Case, and they principally rely on the Fifth Circuit's decision in *Rivera v. Wyeth-Ayerst Labs.*, 283 F.3d 315 (5th Cir. 2002). Although the trial court in the *Earl* Case permitted certain theories of injury to proceed,[64] the Fifth Circuit promptly granted Southwest and Boeing's discretionary petitions to appeal the certification order based on, among other things, the argument that the *Earl* plaintiffs lack standing under *Rivera*.[65]

Moving ahead in this matter would therefore require the Court to decide whether Plaintiffs have Article III standing to assert an un-manifested safety-risk overcharge. Doing so would force the parties to expend significant time and resources to address an issue that is already squarely before the Fifth Circuit on a discretionary appeal, waste judicial resources for the same reason, and risk inconsistent rulings. Accordingly, nearly all of the factors that guide the First-to-File Rule—comity, sound judicial administration, avoidance of the waste of duplication, among others—weigh in favor of staying this action. Indeed, the "question of whether to stay a second-filed action

[64] *See* Mem. Op. and Order, *Earl* Case, Feb. 14, 2021 (Dkt. 56).

[65] *See* SWA *Earl* Cert. Appeal at 2-3; Boeing *Earl* Cert. Appeal at 2.

when another, first-filed case is on appeal is precisely the type of situation contemplated by the first-filed rule." *E.g., Se. Power Group, Inc. v. SAP Am., Inc.*, No. 2:20-CV-00398-JMG, 2020 WL 4805352, at *4 (E.D. Pa. Aug. 18, 2020).[66]

2. The Court cannot transfer this matter to the Eastern District.

While the First-to-File Rule permits courts to stay, transfer, or dismiss second-filed cases, transferring this matter to the Eastern District is not possible and, as a result, a stay or dismissal is the only appropriate remedy. *See Am. Home Mortg. Servicing, Inc. v. Triad Guar. Ins. Corp.*, 714 F. Supp. 2d 648, 653 (N.D. Tex. 2010) ("The facts before the Court are thus insufficient to establish that the Court could properly transfer this case to the Delaware court under 28 U.S.C. § 1404(a). The Court therefore GRANTS a stay in this case, rather than a transfer."). Transfer is not permitted when venue is improper in the transferee district. *See* 28 U.S.C. § 1404(a); *In re Volkswagen AG*, 371 F.3d 201, 203 (5th Cir. 2004).

Here, venue is improper in the Eastern District.[67] Southwest does not reside in the Eastern District for venue purposes and none of the events or omissions giving rise to Plaintiffs' claim are alleged to have occurred in the Eastern District. *See* 28 U.S.C. § 1391(b), (d); *see infra* Argument Section II (outlining why venue is improper in this District, which apply equally to the Eastern District).

The inability to transfer to the Eastern District should not dissuade the Court from applying the First-to-File Rule. Given the substantial overlap between this matter and the *Earl* Case, the

[66] Even if the Court were to find the *Earl* and *Monahan* lawsuits did not substantially overlap, the First-to-File Rule would still apply. *See West Gulf*, 751 F.2d at 731 ("It would be unwise to resolve separately in each of the affected districts [the questions presented] . . . [a] different analysis leads to disharmony among the federal courts."); *Int'l Fid.*, 665 F.3d at 678 (using "less than complete" to indicate a lack of substantial overlap (citing *Save Power*, 121 F.3d at 951)).

[67] Venue was arguably proper in the *Earl* Case because Boeing may have been subject to the Eastern District's personal jurisdiction if that district were a separate state. *See* 28 U.S.C. § 1391.

Court is well within its discretion to apply it to Plaintiffs' case. Instead, the inability to transfer to the Eastern District merely dictates that a stay is the more appropriate remedy. *Am. Home Mortg. Servicing, Inc.*, 714 F. Supp. 2d at 653; *see also Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936) ("[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.").[68]

II. Plaintiffs' Claims Should Be Dismissed for Improper Venue Pursuant to Fed. R. Civ. P. 12(b)(3) and 28 U.S.C. § 1406(a)

Venue is not proper in the Western District of Texas. Southwest therefore respectfully requests, in the alternative, that the Court dismiss Plaintiffs' breach-of-contract claim for improper venue pursuant to Fed. R. Civ. P. 12(b)(3) and 28 U.S.C. § 1406(a).

A. Legal Standards

Federal Rule of Civil Procedure 12(b)(3) permits a party to move to dismiss a case for improper venue. Fed. R. Civ. P. 12(b)(3); *Atl. Marine Const. Co. v. U.S. Dist. Ct. for W. Dist. of Texas*, 571 U.S. 49, 55 (2013). The determination of whether venue is "improper" is governed by 28 U.S.C. § 1391. It provides that a civil action may only be brought in one of three locales: (i) the location of the defendant's residence,[69] (ii) the location where "a substantial part of the events or omissions giving rise to the claim occurred,"[70] or (iii) if there is no district in which an action

[68] Southwest's fundamental position is that the most efficient judicial action with respect to this lawsuit is to stay this matter pending resolution of the *Earl* Case, such that no court should act on this suit other than to stay it. Southwest thus presents its First-to-File arguments before its venue arguments, below. If the Court believes it is more appropriate to address the venue arguments first, Southwest would then respectfully reserve its First-to-File arguments for determination thereafter if not mooted by ruling on the proper venue.

[69] *See* 28 U.S.C. § 1391(b)(1) ("A judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located.").

[70] 28 U.S.C. § 1391(b)(2).

may otherwise be brought, any judicial district in which any defendant is subject to the court's personal jurisdiction.[71] If a lawsuit is not brought in one of those places, the plaintiff's claims are subject to dismissal for improper venue pursuant to Fed. R. Civ. P. 12(b)(3) and 28 U.S.C. § 1406(a). *See, e.g.*, *Atl. Marine*, 571 U.S. at 55; 28 U.S.C. § 1406(a) (providing that if the district court where a lawsuit is filed is "in the wrong division or district," the court "shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.").

The plaintiff bears the burden of demonstrating that venue is proper in its selected forum. *See, e.g.*, *UOP LLC v. Exterran Energy Sols., L.P.*, No. MO:20-CV-233-DC, 2021 WL 4096560, at *2 (W.D. Tex. Aug. 26, 2021). To avoid dismissal, a plaintiff must therefore present sufficient facts to show that venue is proper. *See Psarros v. Avior Shipping, Inc.*, 192 F. Supp. 2d 751, 753 (S.D. Tex. 2002). While courts generally resolve factual disputes in the plaintiff's favor, the court should only accept as true a plaintiff's ***uncontroverted*** facts. *See id.*; *Langton v. Cbeyond Commc'n, L.L.C.*, 282 F. Supp. 2d 504, 508 (E.D. Tex. 2003). In deciding a motion to dismiss for lack of proper venue, courts within the Fifth Circuit are "permitted to look at evidence in the record beyond simply those facts alleged in the complaint and its proper attachments." *Ambraco, Inc. v. Bossclip B.V.*, 570 F.3d 233, 238 (5th Cir. 2009) (quoting *Ginter ex rel. Ballard v. Belcher, Prendergast & Laporte*, 536 F.3d 439, 441 (5th Cir. 2008)).

B. Arguments and Authorities

The Court should dismiss this case for improper venue because venue in this District is not proper under any of the three venue provisions in 28 U.S.C. § 1391.

[71] *See* 28 U.S.C. § 1391(b)(3).

1. Venue is not proper under 28 U.S.C. § 1391(b)(1) because Southwest does not reside in the Western District.

While § 1391(b)(1) fixes venue based on a corporation's residence, § 1391(d) explains how to determine corporate residency if the forum state, like Texas, contains multiple judicial districts:

> [I]n a State which has more than one judicial district and in which a defendant that is a corporation is subject to personal jurisdiction at the time an action is commenced, ***such corporation shall be deemed to reside in any district in that State within which its contacts would be sufficient to subject it to personal jurisdiction if that district were a separate State***, and, if there is no such district, the corporation shall be deemed to reside in the district within which it has the most significant contacts.

28 U.S.C. § 1391(d) (emphasis added). In short, the determination of a corporate defendant's residency is contingent on the sufficiency of the defendant's contacts with only the individual judicial districts, rather than the whole state. *See Broadway Nat'l Bank v. Plano Encryption Techs., LLC*, 173 F. Supp. 3d 469, 476 (W.D. Tex. 2016); *Graham v. Dyncorp Int'l, Inc.*, 973 F. Supp. 2d 698, 701 (S.D. Tex. 2013) ("There is a twist, however, in states like Texas with multiple federal judicial districts. . . . The Court will thus conduct a personal jurisdiction 'contacts' analysis, but with the Southern District of Texas, rather than the State of Texas, being the relevant jurisdiction."). The first step to determining residency under this multi-district analysis is determining the district in which the defendant has contacts sufficient to subject it to personal jurisdiction if that district were a separate state. Here, the Northern District of Texas meets that criteria because, as explained below, Southwest's principal place of business is in that district and events relevant to Plaintiffs' allegations occurred there.[72]

[72] In *eRoad Ltd. v. PerDiemCo LLC*, this Court indicated that it could jump directly to the second step of the multi-district analysis—determining which judicial district in the state has the "most significant contacts." *See* No. 6:19-CV-00026-ADA, 2019 WL 10303654, at *5 (W.D. Tex. Sept. 19, 2019). But there, the only legitimate contact with the State of Texas (the Court having ignored a sham office that the defendant had set up in Marshall, Texas, as its purported principal place of business) was the defendant having been formed in the Western District of Texas. *Id.* That single contact was therefore the "most significant contact" under § 1391(d).

The personal-jurisdiction contact analysis encompasses two distinct concepts: (i) specific jurisdiction, and (ii) general jurisdiction. *See Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1024 (2021). Specific jurisdiction exists only where (i) a defendant has purposefully directed its activities towards the forum or purposefully availed itself of the privileges of conducting activities in the forum, (ii) the plaintiff's claim arises out of or relates to the defendant's forum-related contacts, and (iii) the exercise of personal jurisdiction is fair and reasonable. *Monkton Ins. Servs., Ltd. v. Ritter*, 768 F.3d 429, 433 (5th Cir. 2014). In contrast, general jurisdiction exists only when a defendant's affiliations with a forum are so "continuous and systematic" as to render it "essentially at home" in the forum. *Ford Motor Co.*, 141 S. Ct. at 1024. Accordingly, "only a select 'set of affiliations with a forum' will expose a defendant to such sweeping jurisdiction." *Id.* (quoting *Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014)).

Here, Plaintiffs cannot show that Southwest has sufficient contacts with this District to subject it to either specific or general personal jurisdiction in the Western District if it were a separate state. First, the Complaint inadequately pleads personal jurisdiction and venue in the Western District. Plaintiffs' 71-page, 209-paragraph Complaint only contains four paragraphs directly pertaining to this District, personal jurisdiction, or venue:

- "Southwest is . . . organized and existing under the laws of the State of Texas, with its headquarters located at 2702 Love Field Drive, Dallas, Texas 75235."[73]
- "Southwest has employees and operations throughout Texas, and operates flights from Dallas Love Field, San Antonio, Houston Hobby and Bush-Intercontinental Airports, Harlingen/South Padre Island, Corpus Christi, Lubbock, Midland/Odessa, El Paso, Austin, and Amarillo."[74]

[73] *Monahan* Compl. (Dkt. 1) ¶ 20.

[74] *Id.* ¶ 21.

- "Personal jurisdiction over Southwest is properly asserted in this judicial District, where it maintains an active business presence and regularly conducts business."[75]
- "Venue is proper in this District . . . because Defendant resides in this District, [and] Defendant is subject to personal jurisdiction in this District . . ."[76]

Of those, only the first-listed paragraph (the location of Southwest's headquarters) contains sufficient specific factual information to warrant consideration by the Court. But since Plaintiffs allege that Southwest's corporate headquarters is located in Dallas, that paragraph does not support venue in this District. The remaining paragraphs are either too general (Southwest's operations in Texas) or too conclusory (general jurisdiction and venue allegations) to be credited by the Court. *See, e.g.*, *Panda Brandywine Corp. v. Potomac Elec. Power Co.*, 253 F.3d 865, 869 (5th Cir. 2001).

Second, Plaintiffs do not allege the existence of specific jurisdiction and, even if they had, specific jurisdiction does not exist in this District. Plaintiffs instead generically allege that personal jurisdiction is "properly asserted in this judicial District" only because Southwest allegedly "maintains an active business practice and regularly conducts business" here.[77] But there are no allegations of any particular conduct in this District, let alone any from which the Plaintiffs' breach-of-contract claims arise. *See Monkton Ins. Servs., Ltd. v. Ritter*, 768 F.3d 429, 433 (5th Cir. 2014). Indeed, Plaintiffs' claims arise out of and relate to (i) the alleged purchase of Southwest tickets (presumably) in Massachusetts, Pennsylvania, and Georgia where the Plaintiffs reside,[78] (ii) corporate statements allegedly made on Southwest's website, and (iii) various operational decisions allegedly made by Southwest's management involving the operation of its aircraft fleet,

[75] *Monahan* Compl. (Dkt. 1) ¶ 26.

[76] *Id.* ¶ 27.

[77] *See id.* ¶ 26.

[78] Although Southwest's Terms and Conditions reflect the Named Plaintiffs' agreement that "any transactions carried out through the Sites will be deemed to take place in the State of Texas, United States of America, regardless of the jurisdiction where you may be located or reside . . ." *See* Southwest's Terms and Conditions, Ex. 4-A, Hursh Dec. (Ex. 4) at 4.

pilot training, and compliance with FAA regulations.[79] ***None*** of that conduct is alleged to have occurred in this District, and ***none*** did occur in this District.[80]

Third, Plaintiffs have not identified a cognizable basis for the exercise of general jurisdiction over Southwest in this District for venue purposes. General business activities—even if substantial, continuous, and systematic—are simply insufficient to confer general jurisdiction without a showing that a corporate defendant is "essentially at home in the forum." *See Daimler*, 571 U.S. at 137. And the lack of allegations notwithstanding, Southwest should not be subject to general jurisdiction in the Western District for venue purposes. Southwest's principal place of business is ***not*** located in the Western District of Texas. *See* Compl. at 7, ¶ 20. Southwest's management and executive teams are ***not*** located in the Western District.[81] Southwest's website is ***not*** managed in the Western District.[82] While it is true that Southwest operates aircraft in and out of airports in San Antonio, Austin, El Paso, and Midland/Odessa, those airports make up only a small fraction of the total number of airports at which Southwest operates.[83]

2. Venue is not proper under 28 U.S.C. § 1391(b)(2) because no events giving rise to the claims are alleged to have occurred in the Western District.

For venue to be proper under 28 U.S.C. § 1391(b)(2), the plaintiff must demonstrate that a substantial part of the events or omissions giving rise to the claim occurred in the judicial district where its claims were brought. "Although the chosen venue does not have to be the place where the most relevant events took place, the selected district's contacts still must be ***substantial***." *McClintock v. Sch. Bd. E. Feliciana Par.*, 299 F. App'x 363, 365 (5th Cir. 2008) (emphasis added).

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[79] *See, e.g., id.* ¶ 18.

[80] *See* Kasher Dec. (Ex. 2) at ¶¶ 3-4; Sheppard Dec. (Ex. 6), at ¶ 4 (filed under seal contemporaneously herewith).

[81] *See* Kasher Dec. (Ex. 2) at ¶¶ 3-4, 7.

[82] *See* Lam Dec. (Ex. 3), at ¶ 3.

[83] *See* Kasher Dec. (Ex. 2) at ¶ 6.

A court must confine its analysis to the claims of the named plaintiffs rather than putative class members. *See Abrams Shell v. Shell Oil Co.*, 343 F.3d 482, 490 (5th Cir. 2003); 2 Newberg on Class Actions § 6:36 (5th ed.). In the context of evaluating the named plaintiffs' claims, "the Court ***looks to the defendant's conduct***, and where that conduct took place, rather than focusing on the activities of the plaintiff." *DFW Aviation, LLC v. Mansfield Heliflight, Inc.*, No. 1:19-CV-481-LY, 2019 WL 5072883, at *5 (W.D. Tex. Oct. 9, 2019) (quoting *Gault v. Yamunaji, L.L.C.*, No. A-09-CA-078-SS, 2009 WL 10699952, at *5 (W.D. Tex. Apr. 17, 2009)). For breach-of-contract claims, "courts consider [i] where the contract was negotiated or executed, [ii] where it was to be performed, and [iii] where the alleged breach occurred." *Olibas v. Gomez*, No. EP-05-CA-225-KC, 2006 WL 8434074, at *2 (W.D. Tex. Feb. 2, 2006); *accord DFW Aviation*, 2019 WL 5072883, at *5.

Here, Plaintiffs' breach-of-contract claim bears no relation to the Western District of Texas, let alone a "substantial" or "significant" one. Indeed, outside of a single paragraph in their 71-page, 209-paragraph Complaint, Plaintiffs do not even attempt to tie their allegations to the Western District. That single paragraph, which concerns operations at certain airports in this District,[84] does not comprise or even suggest a "substantial" or "significant" part of the events or omissions giving rise to the Named Plaintiffs' claims, and so is not relevant at all.

The three breach-of-contract venue factors also support a finding that venue is improper here. The location of the alleged contract negotiation and/or execution is not in this District. Plaintiffs' Complaint is silent as to where the Contract of Carriage was negotiated and/or executed, and it certainly does not allege that such conduct occurred in this District. And, in the face of that omission, it strains credulity to accept that those events occurred in this District because (i)

[84] *Monahan* Compl. (Dkt. 1) ¶ 21.

Southwest drafted the Contract of Carriage at its headquarters in Dallas, (ii) that contract is not individually negotiated with ticket purchasers,[85] and (iii) the Named Plaintiffs almost certainly entered into the Contract of Carriage while outside of this District because all of them live hundreds or thousands of miles from this District. In addition, neither the location of alleged contract performance nor breach is in the Western District. Plaintiffs do not identify those locations in their Complaint, but ***all*** of their flights were to and from locations outside of Texas.[86]

3. 28 U.S.C. § 1391(b)(3) does not apply to this action because there is a district—the Northern District of Texas—where venue is proper.

By its own terms, § 1391(b)(3) only applies "if there is no district in which an action may otherwise be brought as provided in this section[.]" In this instance, Plaintiffs could have filed their lawsuit against Southwest in the Northern District of Texas pursuant to § 1391(b)(1) because Southwest's principal place of business is in that District. Section 1391(b)(3) therefore does not apply to this action and cannot support venue in the Western District.

III. Plaintiffs' Lawsuit Should Be Transferred to the Northern District of Texas Pursuant to 28 U.S.C. § 1404

In the alternative, Southwest respectfully requests that the Court transfer this action to the Northern District of Texas pursuant to 28 U.S.C. § 1404(a).

A. Legal Standards

"[T]he plaintiff may not, by choice of an inconvenient forum, 'vex,' 'harass,' or 'oppress' the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947). To mitigate those concerns, a defendant may request a transfer for good cause pursuant to 28 U.S.C. § 1404(a) to a district where the lawsuit could have been filed. *See In re Volkswagen of Am., Inc.*, 545 F.3d 304, 315 (5th Cir.

[85] *See* Sheppard Dec. (Ex. 6), at ¶ 4 (filed under seal contemporaneously herewith).

[86] *See* Behrens Dec. (Ex. 5), at ¶ 4 (filed under seal contemporaneously herewith).

2008). Under § 1404, the plaintiffs' choice of forum carries little weight. *See id.* at 314. Instead, good cause exists when transfer is "clearly more convenient" based on certain private- and public-interest factors, discussed below. *See id.*

Additionally, in this analysis, the Court should only consider the allegations pertaining to the Named Plaintiffs themselves, as the location of putative class members is entitled to no weight. *See Henrichs v. Nova Biomedical Corp.*, 6:14-CV-2, 2014 WL 2611825, at *2 (S.D. Tex. June 11, 2014).

B. Arguments and Authorities

Where one district "has no connection to the parties, the witnesses, or the facts of this case" and another district has "extensive connections to the parties, the witnesses, and the facts of this case," an action must be transferred to the forum with meaningful connections to the case. *Volkswagen*, 545 F.3d at 315 (granting mandamus relief and ordering transfer from the Eastern District of Texas to the Northern District of Texas).

That paradigm perfectly describes this case. ***None*** of the parties resides in this District. Southwest's headquarters in Dallas is a 104-mile drive to this Court, and Plaintiffs reside in Massachusetts, Pennsylvania, and Georgia.[87] ***None*** of the events giving rise to Plaintiffs' claims is alleged to have occurred in this District. In particular, ***none*** of the Plaintiffs even flew on Southwest to an airport in this District,[88] and as described above, Southwest's business activities that might be relevant to this case occurred in the Northern District of Texas. And ***none*** of the potential witnesses are located here. Indeed, the vast majority of Southwest's likely witnesses live in the Dallas area, and most Boeing witnesses who are necessary (given the extensive allegations

[87] *Monahan* Compl. (Dkt. 1) ¶¶ 20-24.

[88] *See* Behrens Dec. (Ex. 5), at ¶ 4 (filed under seal contemporaneously herewith).

related to Boeing in the Complaint) are very likely to reside in Washington. The Northern District of Texas will thus be more convenient for every single witness in this case. For those reasons, and those set forth below, transfer to the Northern District of Texas—a district with an actual connection to this case—is manifestly appropriate.

First, Plaintiffs could have filed their lawsuit in the Northern District of Texas because Southwest resides in Dallas. *See* 28 U.S.C. § 1391(b)(1).

Second, the private-interest factors[89] heavily weigh in favor of transfer. Though the private-interest transfer factors touch on several issues, the "convenience of the witnesses is probably the single most important factor in a transfer analysis." *Garrett v. Hanson*, 429 F. Supp. 3d 311, 319 (E.D. Tex. 2019) (citing *In re Genentech, Inc.*, 566 F.3d 1338, 1342 (Fed. Cir. 2009)). In that regard, the private-interest transfer factors overwhelmingly favor transfer:

- Access to Proof. ***None*** of Southwest's books and records are located in or around Waco. They are, instead, located at Southwest's headquarters in Dallas.[90] This factor therefore heavily weighs in favor of transfer. *See Volkswagen.*, 545 F.3d at 316.

- Securing Witness Attendance. ***None*** of the likely witnesses in this case lives in or around Waco. To the contrary, many of Southwest's potential witnesses reside outside of this Court's subpoena range but within the subpoena range of the Northern District of Texas.[91] For example, of the 46 current or former Southwest employees deposed in *Earl* or identified in Southwest's Rule 26 disclosures, (a) 17 live within the subpoena range of the Northern District of Texas but not this District, (b) 5 live outside the subpoena range of both districts, and (c) 24 live within the subpoena range of both districts.[92] Further, Southwest is unaware of any potential witnesses within the subpoena range of this Court who are not also within the subpoena range of the Northern District of Texas. Accordingly, this factor weighs in favor of transfer. *See id.* at 316-17.

[89] Private-interest transfer factors include, without limitation, (i) the relative ease of access to sources of proof, (ii) the availability of compulsory process to secure the attendance of witnesses, (iii) the cost of attendance for willing witnesses; and (iv) all other practical problems that make trial of a case easy, expeditious and inexpensive. *Volkswagen*, 545 F.3d at 315.

[90] *See* Sheppard Dec. (Ex. 6), at ¶ 5 (filed under seal contemporaneously herewith).

[91] *See id.* (Ex. 6), at ¶ 6 (filed under seal contemporaneously herewith).

[92] *See id.* (Ex. 6) (filed under seal contemporaneously herewith).

- Cost of Witness Attendance. ***All*** of Southwest's likely witnesses will be forced to make the roughly 200-mile roundtrip to and from Waco in order to testify, if not farther.[93] Requiring Southwest's witnesses to travel to Waco will not only be inconvenient, but will also force them to "suffer monetary costs . . . [and] the personal costs associated with being away from work, family, and community." *Id.* at 317. The same inconvenience goes for all of the out-of-state witnesses (whether from Boeing, given the extensive Boeing-related allegations[94] or the Plaintiffs themselves). For those witnesses, travel to the Northern District of Texas will be less expensive, less time-intensive, and substantially more convenient than travel to this District because, without limitation, Dallas has two international airports (DFW Airport and Love Field) that offer a wide variety of flight times and costs, while Waco has a regional airport with (so far as Southwest can tell) limited, if any, direct flights to or from anywhere other than DFW Airport. Given the location of all witnesses, this factor favors transfer.

If the convenience of witnesses is "the single most important factor in the transfer analysis," *Garrett*, 429 F. Supp. 3d at 319, the Court respectfully must transfer this matter to the Northern District of Texas. And the fact that the Dallas and Waco courthouses are within 100 miles of each other as the crow flies should not matter. As the Fifth Circuit has stated in applying its so-called "100-mile rule," that "rule did not imply, however, that a transfer *within* 100 miles does not impose costs on witnesses or that such costs should not be factored into the venue-transfer analysis, but only that this factor has greater significance when the distance is greater than 100 miles." *In re Radmax, Ltd.*, 720 F.3d 285, 289 (5th Cir. 2013).

Finally, the public-interest transfer factors[95] either support transfer to the Northern District of Texas or are neutral—***none*** weighs against transfer:

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[93] The current employees identified in Ex. 6 (Sheppard Dec.) would have to drive between 64 and 1,731 miles to the Waco courthouse, and the vast majority of those employees live in the Dallas area. *See* Sheppard Dec. (Ex. 6), at ¶ 6 (filed under seal contemporaneously herewith).

[94] *See Monahan* Compl. (Dkt. 1) ¶¶ 46-150. The Boeing division at issue is Boeing Commercial Airplanes, which is based in Renton, Washington. *See* Kasher Dec. (Ex. 2), at ¶ 5.

[95] Public-interest transfer factors include, without limitation, (i) the local interest in having localized controversies decided at home, (ii) the administrative difficulties flowing from court congestion, (iii) the familiarity of the forum with the law that will govern the case, and (iv) the avoidance of unnecessary problems of conflict of laws or the application of foreign law. *See Weber v. PACT XPP Techs., AG*, 811 F.3d 758, 767 (5th Cir. 2016).

- Local Interest in Deciding Localized Disputes at Home. This factor strongly weighs in favor of transfer, as Southwest's principal place of business is located in the Northern District of Texas.

- Administrative Difficulties From Court Congestion. This factor is likely neutral. While current caseload statistics are not available, the most recent caseload statistics (covering March 31, 2019 to March 31, 2020) indicate that although the Northern District of Texas may have a slightly higher caseload, this District can take longer to take cases through trial (median 18.5 months in the Northern District of Texas vs. 24.6 in this District).[96]

- Familiarity With the Law That Will Govern the Case. This factor is neutral. Both this Court and those in the Northern District of Texas are equally familiar with the applicable law.

- Avoidance of Unnecessary Conflict of Law Problems. This factor is neutral. The same law applies in both this District and the Northern District of Texas.

The transfer factors thus demonstrate that the Northern District is clearly more convenient than the Western District. Indeed, ***no*** factors counsel against transfer.

IV. Plaintiffs' Complaint Should Be Dismissed for Lack of Article III Standing Pursuant to Fed. R. Civ. P. 12(b)(1)

In the further alternative, Southwest respectfully requests the Court dismiss Plaintiffs' Complaint for lack of Article III standing pursuant to Federal Rule of Civil Procedure 12(b)(1).

A. Legal Standards

Plaintiffs cannot "maintain an action in federal court" without Article III standing. *Wendt v. 24 Hour Fitness USA, Inc.*, 821 F.3d 547, 550 (5th Cir. 2016). To establish Article III standing, plaintiffs must establish an "injury in fact," which must be "(a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). A "concrete" injury "must actually exist." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016). Each plaintiff must also separately establish a

[96] Tables C-1 and C-5, Federal Judicial Caseload Statistics 2020 Tables (Mar. 31, 2020), https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2020-tables.

"particularized" and "actual" injury to herself or himself "that is 'distinct and palpable,' as opposed to merely '[a]bstract.'" *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990); *see also Spokeo*, 136 S. Ct. at 1547 n.6 ("[E]ven named plaintiffs who represent a class 'must allege and show that they ***personally*** have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong.'"); *see also TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 (2021) ("Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not." (quoting *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 466 (2016) (Roberts, C.J., concurring)). Further, a "federal court is powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing." *Whitmore*, 495 U.S. at 155-56; *see also Trinity Indus., Inc. v. Martin*, 963 F.2d 795, 798 (5th Cir. 1992) (same).

B. Arguments and Authorities

Plaintiffs fail to plead a cognizable injury-in-fact, such that dismissal for lack of Article III standing and subject-matter jurisdiction under Rule 12(b)(1) is required. Plaintiffs premise their alleged injury on a purported safety risk that did not actually harm them. As the Fifth Circuit has ruled in analogous cases, because Plaintiffs received exactly what they bargained for (i.e., a safe flight from Point A to Point B) and allege only an economic loss (i.e., no personal injury), they have ***not*** suffered a concrete, particularized injury-in-fact. Thus, Plaintiffs lack Article III standing to assert any of their federal or state-law claims, and dismissal is required for lack of subject-matter jurisdiction under Rule 12(b)(1).

The Fifth Circuit's controlling *Rivera v. Wyeth-Ayerst Laboratories* decision demonstrates why dismissal is required. 283 F.3d 315 (5th Cir. 2002). *Rivera* involved an interlocutory appeal from class certification, where the Fifth Circuit *sua sponte* dismissed, for lack of Article III standing, state-law claims for an injury that mirror the one asserted in this case:

Rivera	**This Case**
The plaintiff (a consumer of the prescription drug Duract) brought claims against drug manufacturer Wyeth based on the following "claim to injury":	Plaintiffs (Southwest ticket-purchasers) bring a claim against Southwest based on the following "claim to injury":
• "[Defendant] Wyeth sold [the drug] Duract;	• Southwest sold flights on MAXs to consumers;
• [The plaintiff] Rivera purchased and used Duract;	• Plaintiffs purchased and flew on Southwest flights;
• Wyeth did not list enough warnings on Duract, and/or Duract was defective;	• Southwest's conduct exposed its "unwitting[]" customers to risk;
• [o]ther patients were injured by Duract;	• Other passengers, ***not*** flying Southwest, were injured on MAX flights;
• Rivera would like her money back.	• Plaintiffs want all, or some, of their money back;
• The plaintiffs do *not* claim Duract caused them physical or emotional injury, was ineffective as a pain killer, or has any future health consequences to users.	• Plaintiffs do not claim that the alleged defects caused them physical or emotional injury (indeed, they disclaim it) or any future risk of injury, nor do they claim their flights were ineffective;
• Instead, they assert that their loss of cash is an 'economic injury.'"	• Instead, they allege economic injuries from potential risks that never materialized.
283 F.3d at 319	*See Monahan* Compl. (Dkt. 1), at ¶¶ 151-186

Faced with such alleged "claim to injury," the Fifth Circuit in *Rivera* first found no particularized, personal injury to the plaintiffs in that case, as the alleged safety defect that gave rise to their claims "was not defective as to them." 283 F.3d at 320. In other words, the *Rivera* plaintiffs ingested the drug with no resulting harm to them, just as Plaintiffs here boarded a flight (not even on a MAX) and deplaned safely at their destination.

The Fifth Circuit then addressed the plaintiffs' contract-like "benefit of the bargain" argument—which mirrors Plaintiffs' "benefit of the bargain" allegations in this case.[97] It rejected this argument, finding no claim to support it. 283 F.3d at 320. Even if the *Rivera* plaintiffs had alleged a contract for the purchase of the drug at issue and asserted a breach-of-contract claim,

[97] *Monahan* Compl. (Dkt. 1) ¶ 186 ("Plaintiffs and the Class members did not receive the benefit of the bargain and were overcharged for the purchased tickets").

moreover, the Fifth Circuit would still have found lack of standing because, by the plaintiffs' own admission, Ms. Rivera ***"paid for an effective pain killer, and [they] received just that—the benefit of her bargain."*** *Id*. (emphasis added).

In this case, despite their conclusory allegations otherwise,[98] Plaintiffs bargained for a safe flight from Point A to Point B and "received just that." They got the benefit of their bargain and do not (and cannot) allege otherwise. The MAX (or its alleged defects) may have purportedly injured ***others*** flying foreign airlines wholly unrelated to Southwest or Plaintiffs but, undisputedly, "was not defective as to" Plaintiffs' flights. (Indeed, although having actually flown on a MAX still would not overcome their Article III standing deficiencies, no Plaintiff even flew on a MAX.[99]) Thus, under *Rivera*, Plaintiffs have not suffered the requisite concrete and particularized injury-in-fact.

More recently, in *Wendt v. 24 Hour Fitness USA, Inc.*, 821 F.3d 547 (5th Cir. 2016), the Fifth Circuit applied these same principles outside of the product-liability context when affirming dismissal of alleged statutory violations concerning use of a gym membership. There, the plaintiffs sought to recover their membership dues from the defendant-gym because their membership contracts did not comply with several "technical provisions" of a state statute. *Id.* at 549. Plaintiffs had, however, been provided "exactly what they paid for: access to a gym." *Id.* at 550-51.

Other courts, including several in this Circuit, have reached similar conclusions, dismissing consumer claims under Article III where the alleged defect did not actually injure the plaintiffs

[98] For example, Plaintiffs' allegations that they "did not receive the benefit of the bargain and were overcharged for the purchased tickets" are conjectural and fail to "clearly and specifically set forth facts" to satisfy Article III. *Whitmore*, 495 U.S. at 155-56. Plaintiffs make no attempt to explain how providing transportation from Point A to Point B conferred diminished value.

[99] *See* Behrens Dec. (Ex. 5), at ¶ 5 (filed under seal contemporaneously herewith).

who, instead, got exactly what they paid for—safe use of a product even if it may have injured others.[100]

By contrast, this is ***not*** a case in which the plaintiffs negotiated a price for, purchased, and owned a tangible product with an alleged defect that purportedly affects the product's utility and value in an existing robust resale market—as was the case in *Cole v. General Motors Corp.*, 484 F.3d 717 (5th Cir. 2007). *Cole* involved plaintiffs who owned Cadillac DeVilles and had brought contract claims against General Motors for breach of express and implied warranties, based on an alleged defect in the Deville's airbag system. *Id.* at 718. The Fifth Circuit concluded that, unlike the *Rivera* plaintiffs, the *Cole* plaintiffs were not claiming "economic harm emanating from . . . potential physical harm" and that the *Cole* plaintiffs could "bring claims under a contract theory" to recover for the defective airbag systems present in the DeVilles sitting in their garages. *Id.* at 723. In so concluding, the Fifth Circuit reaffirmed *Rivera*'s holding that plaintiffs lack Article III

[100] *See, e.g.*, *In re Vioxx Prod. Liab. Litig.*, 874 F. Supp. 2d 599, 607 (E.D. La. 2012) ("In light of . . . the persuasive reasoning in *Williams* and *Rivera* . . . , the Court concludes that merely purchasing a drug—which in fact helped Plaintiff—does not generate an economic injury giving rise to Article III standing."); *Medley v. Johnson & Johnson Consumer Cos., Inc.*, No. 10-CV-02291, 2011 WL 159674, at *2 (D.N.J. Jan. 18, 2011) ("Plaintiffs bought and used shampoo, and subsequently wished that they had not done so because they feared for the future safety of their children. . . . Plaintiffs received the ***benefit of their bargain*** so long as there were no adverse health consequences, and the product worked as intended . . . . [T]he facts as pled in the [complaint] are legally insufficient to demonstrate an injury-in-fact of even the most de minimis amount, and that ***no further restyling*** of the [complaint] could overcome this jurisdictional hurdle." (emphasis added)); *Whitson v. Bumbo*, No. C 07-05597, 2009 WL 1515597, at *4, *6 (N.D. Cal. Apr. 16, 2009) ("(1) Whitson bought a Bumbo seat; (2) Defendants misrepresented the safety and intended uses of the Bumbo seat; and (3) Some children somewhere in the country were harmed while using the Bumbo seat; therefore, (4) Whitson, and a class of Bumbo seat purchasers that her lawyers would like her to represent, deserve damage awards. . . . In summary, Whitson does not have standing for her claims under a '***benefit of the bargain***' theory or any other stated theory." (emphasis added)). Nor here do Plaintiffs or the putative class of passengers they seek to represent possess Article III standing.

standing when they assert "economic injuries" based on potential safety risks that did not actually harm them or materialize in a diminished value to a tangible product they own. *Id.* at 722-23.

Plaintiffs' pleadings make clear that this case is analogous to *Rivera* and distinguishable from *Cole*. Their own words show that their alleged injuries "emanate[e] from . . . potential physical harm," *Cole*, 484 F.3d at 723, given that their purported injury arises solely from their potential exposure to the safety "risk of flying on (and/or by actually flying on) the fatally flawed 737 MAX."[101] Unlike in *Cole*, Plaintiffs here did not buy nor do they own a defective aircraft. They bought the temporary right to occupy a seat on a flight from Point A to Point B, and, as in *Rivera*, any alleged differential in value or price of their flights is based entirely on a hypothetical, speculative "risk" that never materialized as to any Plaintiff. Even more than in *Rivera*, where the plaintiffs physically ingested an allegedly defective drug that could potentially result in future harm, once Plaintiffs stepped off their flights, any abstract notion of a potential risk (past or future) vanished. Rather, Plaintiffs got exactly what they paid for: a safe flight, precisely as they would have received on any other US airline on any make and model of aircraft having none of the purported defects of the MAX.[102]

V. Plaintiffs' Complaint Should Be Dismissed for Failure to State a Claim Pursuant to Fed. R. Civ. P. 12(b)(6)

Southwest respectfully requests, in further alternative, that the Court dismiss Plaintiffs' Complaint for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6).

[101] *Monahan* Compl. (Dkt. 1) ¶ 166; *see also id.* at 185 ("Southwest then sold flights to the Class member customers who were at risk of travelling aboard aircraft that . . . were not safe or airworthy according to those regulations.").

[102] As noted above, the trial court in *Earl* found standing for the overcharge theory of injury, but that issue is expressly before the Fifth Circuit pursuant to its discretionary grant of leave to appeal.

A. Legal Standards

Dismissal under Rule 12(b)(6) is appropriate when a complaint fails to contain sufficient factual matter to state a claim to relief that is plausible on its face. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A claim has facial plausibility "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Only well-pleaded factual allegations are entitled to consideration; conclusory statements (whether factual or legal) must be disregarded. *See id.*

Dismissal under Rule 12(b)(6) is also appropriate when a complaint fails to properly plead facts sufficient to show each element of the plaintiffs' claims, *see Kan v. OneWest Bank, FSB*, 823 F. Supp. 2d 464, 469 (W.D. Tex. 2011), or when the pleadings (or any documents that can be read with the pleadings), affirmatively show that a claim is precluded by a contractual waiver provision. *See Roman v. Spirit Airlines, Inc.*, 482 F. Supp. 3d 1304, 1315 (S.D. Fla. 2020), *aff'd*, No. 20-13699, 2021 WL 4317318 (11th Cir. Sept. 23, 2021).

B. Arguments and Authorities

Here, the Court should dismiss Plaintiffs' claims pursuant to Rule 12(b)(6) because (1) Plaintiffs fail to plausibly allege enforceable obligations, and (2) their state-law contract claims are preempted by the Airline Deregulation Act and the Federal Aviation Act.

1. Plaintiffs fail to plausibly allege enforceable obligations.

a. Southwest did not incorporate "all applicable laws" into its Contract of Carriage or other documents.

Plaintiffs allege that Southwest breached the following statement in the Contract of Carriage: "This *Contract of Carriage* is subject to applicable laws, regulations and rules imposed by U.S. . . . governmental agencies."[103]

At least one court has already held that this precise statement does not incorporate all applicable laws as a matter of contract interpretation. *See Shrem v. Sw. Airlines Co.*, No. 15-CV-04567-HSG, 2017 WL 1478624, at *2 (N.D. Cal. Apr. 25, 2017), *aff'd*, 747 F. App'x 629 (9th Cir. 2019). That the Contract of Carriage is (like all contracts) subject to applicable law does not mean Southwest made a contractually-enforceable promise to comply with all laws, such that an alleged failure to comply with any particular law subjects it not only to any direct liability for violating the law, but also to secondary liability for breach of contract. Indeed, the "vast majority of . . . courts . . . hold[] that boilerplate contractual language guaranteeing compliance with international or domestic aviation laws does not incorporate extraneous law into the terms of an airfare contract." *Daversa-Evdyriadis v. Norwegian Air Shuttle ASA*, 2020 WL 562740, *4 (C.D. Cal. Sept. 17, 2020); *see also Shrem*, 2017 WL 1478624 at *2 ("Such an interpretation would . . . subject Defendant to potentially limitless, unspecified obligations.").

Plaintiffs have thus failed to plead a claim for breach of contract based upon on generic references to "all applicable laws."

[103] *Monahan* Compl. (Dkt. 1) ¶¶ 31, 178; *see also id.* ¶ 175 (alleging breach of similar provision in the Safety Commitment).

b. Plaintiffs fail to plausibly allege enforceable obligations because the alleged promises are too vague and indefinite.

The remaining alleged promises at issue are sourced from documents external to the Contract of Carriage, and those alleged promises are, as a matter of law, too vague and indefinite to be actionable as a matter of law.

It is well-established that vague or indefinite contract terms are unenforceable. *See Fort Worth Indep. Sch. Dist. v. City of Fort Worth*, 22 S.W.3d 831, 846 (Tex. 2000). Indefinite contract terms are those whose meaning is not "reasonably certain" enough to provide a "basis for determining the existence of a breach and for giving an appropriate remedy." *Playoff Corp. v. Blackwell*, 300 S.W.3d 451, 455 (Tex. App.—Fort Worth 2009, pet. denied). Courts must distinguish between "carefully developed" representations, which are enforceable, and "general platitudes, vague assurances, . . . and indefinite promises," which are not. *Montgomery County Hosp. Dist. v. Brown*, 965 S.W.2d 501, 503 (Tex. 1998); *see also Dynegy Mktg. & Trade v. Multiut Corp.*, 648 F.3d 506, 516 (7th Cir. 2011) (noting that "[v]ague statements about 'best' prices do not an agreement make").

For the same reasons, aspirational statements in corporate documents are also unenforceable. *See Reynolds v. Murphy*, 188 S.W.3d 252, 268 (Tex. App.—Fort Worth 2006, pet. denied); *Marsh v. Delta Air Lines, Inc.*, 952 F. Supp. 1458, 1466 (D. Colo. 1997) (finding provisions in Delta's Business Conduct Policy like "Delta stands for the best in service and for fair dealings" to be merely vague assurances, general aspirational statements, and insufficient to support breach of contract claim). Such statements have also been held not to be actionable in a variety of other contexts. *See Retail Wholesale & Dep't Store Union Local 338 Ret. Fund v. Hewlett-Packard Co.*, 845 F.3d 1268, 1276 (9th Cir. 2017) ("[A] code of conduct is 'inherently aspirational.' . . . Such a code expresses opinions as to what actions are preferable, as opposed to

implying that all staff, directors, and officers always adhere to its aspirations.") (citing *Andropolis v. Red Robin Gourmet Burgers, Inc.*, 505 F. Supp. 2d 662, 686 (D. Colo. 2007)); *City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG*, 752 F.3d 173, 183 (2d Cir. 2014) ("It is well-established that general statements about reputation, integrity, and compliance with ethical norms are inactionable 'puffery,' meaning that they are 'too general to cause a reasonable investor to rely upon them.'").

Here, Plaintiffs base their breach-of-contract claim on statements that are too vague, imprecise, and aspirational to plausibly constitute enforceable obligations. For example, they allege breaches of the following statements:

- "[A]ll of our pilots . . . are ***trained*** and ***familiar*** with every airplane in our fleet."[104]
- Our "***first priority*** . . . and first responsibility to you, our valued customer, is and has always been safety."[105]
- Southwest "is committed to ensuring the Safety and Security of our Customers and Employees—it's our ***number one priority***."[106]
- Southwest "continually works to create and foster a ***Culture of Safety and Security*** that proactively identifies and manages risks to the operation and workplace before they can become injuries, accidents, or incidents."[107]
- "All Southwest Airline Employees, from Leadership to Frontline Employees, are responsible for . . . Establishing and upholding the ***highest levels of Safety and Security*** in our operation and our workplaces."[108]

None of those statements (or any other statements that Plaintiffs cite[109]) provide ***any*** basis, much less any reasonably certain or measurable basis, for determining the existence of breach or

[104] *Monahan* Compl. (Dkt. 1) ¶ 154 (emphasis added).
[105] *Id.* ¶ 161 (emphasis added).
[106] *Id.* ¶ 161 (emphasis added).
[107] *Id.* ¶ 161 (emphasis added).
[108] *Id.* ¶ 161 (emphasis added).
[109] *See id.* ¶¶ 161-174

how to fashion an appropriate remedy. *See Playoff Corp.*, 300 S.W.3d at 455. Indeed, the statements at issue, although certainly reflecting Southwest's safety values, fail to meet the legal specificity demanded by *Montgomery County*. *See* 965 S.W.2d at 503. Nor have Plaintiffs provided any standard or measure to determine how Southwest allegedly fell short in any of those areas (e.g., "foster[ing] a culture of [s]afety"). And finally, as explained below, the Federal Aviation Administration ("FAA") is the federal agency statutorily charged with authority to oversee and enforce issues related to airline safety– which that agency did with respect to the MAX and Southwest's pilot training. For Plaintiffs to argue, e.g., that Southwest's pilot training somehow breached a "safety contract" with customers not only fails to state a claim in the first place, it walks squarely into—indeed seeks to walk over—the FAA's regulatory authority and, thus, is the precise type of claim that is preempted. Plaintiffs cannot avoid preemption of safety claims by seeking to dress them up as vague contract claims.

Because Plaintiffs fail to plausibly allege the existence of an essential element of their breach-of-contract claims (i.e., enforceable promises), the Court should dismiss their claims. *See Kan*, 823 F. Supp. 2d 464 at 469.[110]

2. Plaintiffs' state-law contract claims are preempted by two federal laws.

a. The Airline Deregulation Act ("ADA") expressly preempts all claims related to a "price" or "service" of an air carrier.

The ADA expressly preempts state law claims "related to" either a "price . . . or service of an air carrier." 49 U.S.C. § 41713(b). That statute has an "unusual breadth" that "express[es] a

[110] As stated above, the Customer Commitment and the Safety Commitment suffer from the same flaw: the specific statements that Plaintiffs contend were breached are too vague and indefinite to enforce. Claims based on the Safety Commitment, however, have an additional flaw. Unlike the Customer Commitment, the Safety Commitment is not incorporated by reference into the Contract of Carriage and does not otherwise contain "terms and conditions" that "transportation" is "subject to" under the Contract of Carriage. *See* Contract of Carriage (Compl. Ex. A) § 1(a)(1).

broad pre-emptive purpose" that preempts state laws "having a connection with or reference to airline 'rates . . . or services.'" *Altria Grp., Inc. v. Good*, 555 U.S. 70, 85 (2008); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383-84 (1992).

Plaintiffs' claims fall within the ADA's preemptive scope because all have a "connection with or reference to" an air-carrier "price" or "service." Indeed, Plaintiffs' core allegation is that the transportation service itself—*i.e.*, transport on a commercial aircraft—was not as bargained for, and their specific theory of injury is that Plaintiffs would not have paid the full amount (i.e., the "price") of the airfare charged by Southwest for air transportation (i.e., the "service"). Although the Supreme Court recognized a narrow exception to the ADA's express preemption provision for "routine breach-of-contract claims" based on a "stipulation" by the airline and where there is "***no enlargement or enhancement based on state laws or policies external to the agreement***," *American Airlines v. Wolens*, 513 U.S. 219, 232–33 (1995) (emphasis added), that exception does not apply here for several reasons.

First, this case does not concern "routine breach-of-contract claims" solely involving a specific voluntary airline stipulation, as occurred *Wolens*, which concerned the alteration of mileage credits in a frequent flyer program. *Id.* at 224-225. Determining whether the MAX was safe, the pilots were trained, and applicable regulations were followed turns not on straightforward, "routine" breach-of-contract principles, but rather analysis of complicated airline regulations (as discussed in the next section) that are not part of the Contract of Carriage and have separate remedial processes. *Wolens*, 513 U.S. at 233; *Delta Air Lines, Inc. v. Black*, 116 S.W.3d 745, 754–56 & n.6 (Tex. 2003) (collecting authorities, holding that breach-of-contract claim related to airline "services" was preempted under the ADA, and concluding that contract remedies would exceed those provided by federal regulations). In short, Plaintiffs are seeking contractual remedies for

Southwest's allegedly "violating FAA regulations," "failing to properly train its pilots," and flying a "non-airworthy 737 MAX"[111]; and Southwest will therefore rely on federal statutes and regulations outside of the Contract of Carriage to show precisely that it complied with FAA regulations, properly trained pilots, and flew certified airworthy planes. "[T]o determine whether [Southwest] breached its contract with [Plaintiffs], a court must look to federal law, which is clearly external to the parties' agreement. Because a court adjudicating [this] contract claim [can]not confine itself to the terms of the parties' bargain, *Wolens* is not controlling." *Smith v. Comair, Inc.*, 134 F.3d 254, 258 (4th Cir. 1998) (holding contract claim to be preempted).

Second, to find a breach, the court must give effect to vague and indefinite statements (as discussed above), thereby impermissibly "enlarg[ing]" the parties' actual bargain to enforce extra-contractual commitments." *Wolens*, 513 U.S. at 233.

b. To the extent any enforceable promises exist, the claims are preempted by the Federal Aviation Act because Congress intended to occupy the field of aviation safety.

Each of Plaintiffs' state-law breach-of-contract theories—"flying the unsafe, non-airworthy, and defective Boeing 737 MAX, . . . not sufficiently training its pilots to fly the 737 MAX, and . . . violating [FAA] regulations"[112]—is preempted by the Federal Aviation Act (the "Act"), 49 U.S.C. § 40101, *et seq.* In passing the Act and instructing the FAA to regulate all aspects of aircraft safety—including airworthiness and pilot training—Congress manifested its clear intention to preempt state-law regulation of aircraft safety.

In pervasively regulating all aspects of aircraft safety, Congress has impliedly preempted the field of aircraft safety. Field preemption occurs where "federal law so thoroughly 'occupies a

[111] *E.g.*, *Monahan* Compl. (Dkt. 1) ¶ 161.

[112] *Monahan* Compl. (Dkt. 1) ¶ 1.

legislative field' as to make it reasonable to infer that Congress left no room for the States to act." *Hoagland v. Town of Clear Lake*, 415 F.3d 693, 696-97 (7th Cir. 2005) (quoting *Cipollone v. Liggett Group*, 505 U.S. 504, 516 (1992)). In evaluating field preemption under the Act, courts first ask whether the particular area of aviation commerce and safety is governed by pervasive federal regulations; if so, local standards are preempted. *Gilstrap v. United Air Lines, Inc.*, 709 F.3d 995, 1006 (9th Cir. 2013).

To begin, the "United States Government has *exclusive* sovereignty of [the] airspace of the United States." 49 U.S.C. § 40103(a)(1) (emphasis added). Indeed, in passing the Act, Congress made clear that the federal government "bears virtually complete responsibility" for the "supervision" of the airline industry, which Congress recognized was "unique among transportation industries" and is "subject to little or no regulation by States or local authorities." S. Rep. No. 1811, 85th Cong., 2d Sess. 5 (1958). As the Second Circuit stated, the Act "was enacted to create a uniform and exclusive system of federal regulation in the field of air safety. . . . [It] was passed by Congress for the purpose of centralizing in a single authority . . . the power to frame rules for the safe and efficient use of the nation's airspace." *Air Transp. Ass'n of Am., Inc. v. Cuomo*, 520 F.3d 218, 224-25 (2d Cir. 2008) (internal quotation marks omitted).

As relevant here, the Act requires the FAA to "promote safe flight of civil aircraft in air commerce" by prescribing various regulations to ensure safety in all aircraft operations. 49 U.S.C. § 44701. The Act requires the Administrator of the FAA to prescribe regulations for the following:

a. navigating, protecting, and identifying aircraft;

b. protecting individuals and property on the ground;

c. using the navigable airspace efficiently; and

d. preventing collision between aircraft, between aircraft and land and water vehicles, and between aircraft and airborne objects.

49 U.S.C. § 40103(b)(2).

In addition to addressing these general safety concepts, the Act specifically addresses airworthiness and pilot training. Section 44704(d)(1)—titled "Airworthiness certificates"—states that the "Administrator shall issue an airworthiness certificate when the Administrator finds that the aircraft conforms to its type certificate and, after inspection, is in condition for safe operation. . . . The Administrator may include in an airworthiness certificate terms required in the interest of safety." 49 U.S.C. § 44704(d)(1); *see also United States v. Boeing Co.*, 825 F.3d 1138, 1141 (10th Cir. 2016) ("The airworthiness certificate is FAA's designation that the aircraft in question conforms to the type design and is otherwise in condition for safe operation."). Section 44743(a), meanwhile, expressly relates to FAA's establishment of "pilot training requirements with respect to a new transport airplane." 49 U.S.C. § 44743(a); *US Airways, Inc. v. O'Donnell*, 627 F.3d 1318 (10th Cir. 2010) (discussing exclusive control of crewmember training programs and aviation safety). In short, "the FAA has established a comprehensive regulatory scheme addressing virtually all areas of air safety, including the certification of aircraft [and] . . . pilots." *Goodspeed Airport, LLC v. E. Haddam Inland Wetlands & Watercourses Comm'n*, 681 F. Supp. 2d 182 (D. Conn. 2010) (cleaned up), *aff'd*, 634 F.3d 206 (2d Cir. 2011).

The case law is replete with decisions concluding that federal law preempts state-law safety claims. The Fifth Circuit, for example, addressed field preemption in *Witty v. Delta Air Lines, Inc.*, ultimately holding that state-law failure-to-warn claims were preempted while noting "Congress enacted a pervasive regulatory scheme covering air safety concerns." 366 F. 3d 380, 384–85 (5th Cir. 2004). Consider also the following circuit court decisions:

- *Tweed-New Haven Airport Authority v. Tong*, 930 F.3d 65 (2d Cir. 2019) (noting that "we have held that the FAAct impliedly preempts the entire field of air safety" and holding state law related to runways were preempted);

- *Montalvo v. Spirit Airlines*, 508 F.3d 464 (9th Cir. 2007) (holding "the FAA preempts the entire field of aviation safety through implied field preemption," reasoning that "Congress intended to have a single, uniform system for regulating aviation safety," and rejecting state-law failure-to-warn claim);

- *Abdullah v. Am. Airlines, Inc.*, 181 F.3d 363, 371 (3d Cir. 1999) (finding standards of care relating to air safety have been preempted);

- *Burbank–Glendale–Pasadena Airport Authority v. City of Los Angeles*, 979 F.2d 1338 (9th Cir. 1992) (holding that regulation conditioning construction on city approval of placement of runways was preempted);

- *French v. Pan Am Express, Inc.*, 869 F.2d 1 (1st Cir. 1989) (finding that the field of pilot regulation was preempted); and

- *Pirolo v. City of Clearwater*, 711 F.2d 1006 (11th Cir. 1983) (holding that city ordinances regulating night operations and setting air traffic patterns were preempted).

Because the FAA has preempted the field of aviation safety, state-law breach-of-contract claims that purport to enforce concepts such as airworthiness, pilot training, and general safety concerns are preempted by the Act. In other words, only the FAA can prescribe the requirements for aircraft safety, airworthiness, and pilot training (and it has done so); these are not issues for a jury to decide under the law of Texas or any other state.[113]

VI. Plaintiffs' Class Allegations Should Be Dismissed or Stricken Based on an Express Class Action Waiver in Southwest's Terms and Conditions

The Court should dismiss or strike Plaintiffs' class-action allegations because Plaintiffs waived their right to seek class treatment by agreeing to Southwest's Terms and Conditions during the ticket purchasing process. Courts are authorized to strike class allegations under Rule 23(d)(1)(D) or Rule 12(f). *See, e.g.*, *Coleman v. Sears Home Improvement Prod. Inc.*, No. CV 16-2537, 2017 WL 1064965, at *5 (E.D. La. Mar. 20, 2017). The Court can also dismiss class

[113] The Plaintiffs' preempted claims are not saved by *Wolens* either. As indicated above, *Wolens* addressed express preemption under the ADA and did not purport to address implied field preemption under the Federal Aviation Act. *See Wolens*, 513 U.S. at 820 (stating the issue in terms of ADA preemption).

allegations under Rule 12(b)(6) because (i) Plaintiffs' Complaint expressly refers to the "terms and conditions . . . specified on Southwest's website," (ii) those terms and conditions are central to Plaintiffs' claims, and (iii) Southwest's Contract of Carriage, which is attached to Plaintiffs' Complaint, incorporates those terms by reference. *See In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007).

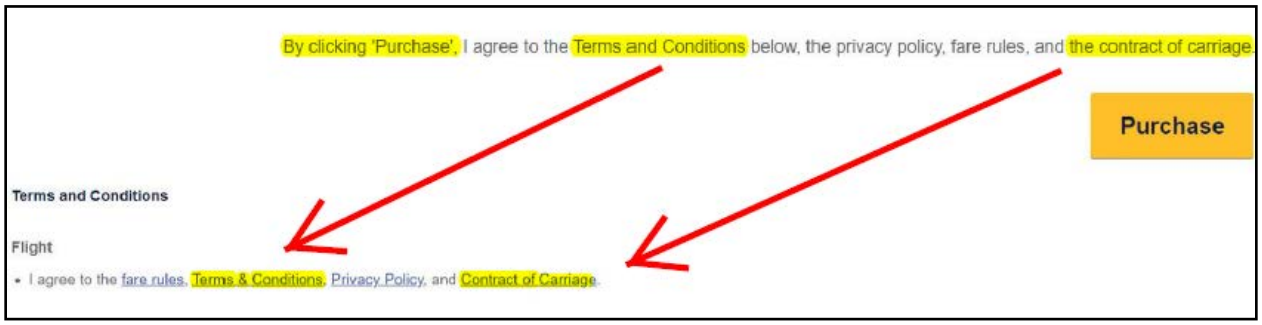
In Texas,[114] class action waivers are generally valid and enforceable. *See AutoNation USA Corp. v. Leroy*, 105 S.W.3d 190, 200 (Tex. App.—Houston [14th Dist.] 2003, no pet.); *see also Ranzy v. Extra Cash of Tex., Inc.*, CV H-09-3334, 2011 WL 13257274, at *7 (S.D. Tex. Oct. 14, 2011) (applying Texas law). Indeed, "there is no right to litigate a claim as a class action." *Ford Motor Co. v. Sheldon*, 22 S.W.3d 444, 452–53 (Tex. 2000). If a party freely enters into an agreement containing a class action waiver, courts should not balk at enforcing it. *See Philadelphia Indem. Ins. Co. v. White*, 490 S.W.3d 468, 471 (Tex. 2016) (citing "Texas's strong public policy favoring freedom of contract").

Similarly, federal aviation regulations expressly permit airlines to incorporate limitations on liability into passenger ticket purchases. *See Malik v. Cont'l Airlines, Inc.*, 369 Fed. Appx. 588, 589 (5th Cir. 2010); *Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922, 930 (5th Cir. 1997) (same); 14 C.F.R. §§ 253.4, 253.5. Incorporation must be "sufficiently plain and conspicuous to give reasonable notice." *Sam L. Majors*, 117 F.3d at 903; *see also* 14 C.F.R. § 253.5.

Here, Plaintiffs waived their right to seek class treatment when they agreed to Southwest's Terms and Conditions by virtue of booking online, and Plaintiffs further received notices of these terms (including the class action waiver) through trip-related or other e-mail communications from

[114] Southwest's Terms and Conditions are governed by Texas Law. *See* Southwest's Terms and Conditions, Ex. 4-A, Hursh Dec. (Ex. 4) at 3 (Forum Selection).

Southwest.[115] Prior to purchasing their tickets, Southwest gave each Plaintiff clear notice that the ticket purchases were governed by its Terms and Conditions and full opportunity to review their contents:



In turn, Southwest's Terms and Conditions expressly prohibit passengers from bringing class-action lawsuits against Southwest relating to their ticket purchases or subsequent flights:[116]

Forum Selection

These Terms and the relationship between you and Southwest shall be governed by the laws of the State of Texas without regard to any conflict of law provisions. You agree to the personal and exclusive jurisdiction of the courts located within Dallas, TX. You hereby consent to the exclusive jurisdiction and venue of the State and Federal courts in Dallas, Texas in all disputes. You agree and understand that you will not bring against the Southwest Parties any class action lawsuit related to your access to, dealings with, or use of the Service.

It would strain all reason for Plaintiffs to argue that they are somehow not bound by Southwest's Terms and Conditions, as (i) Plaintiffs were given notice of the applicability of the Terms and Conditions in the ***same line*** on the ***same webpage*** at the ***same point*** in the purchasing process where they agreed to the Contract of Carriage (shown above), and (ii) the Contract of Carriage expressly incorporates the "***terms and conditions*** . . . specified on Southwest's website."[117] If, as Plaintiffs expressly claim, the Contract of Carriage and the "terms and

[115] Each Plaintiff purchased at least one ticket via Southwest's Digital Platforms, which require agreeing to terms and conditions containing a class-action waiver in advance of purchase. *See* Behrens Dec. (Ex. 5) at ¶ 4 (identifying method of purchase) (filed under seal contemporaneously herewith); Hursh Dec. (Ex. 4) at ¶¶ 4-16 (explaining booking process).

[116] *See* Southwest's Terms and Conditions, Ex. 4-A, Hursh Dec. (Ex. 4) at 3 (Forum Selection).

[117] *See* Contract of Carriage (Compl. Ex. A) § 1(a)(1) (emphasis added).

conditions" on Southwest's website that it purportedly incorporates form binding agreements, then Southwest's Terms and Conditions are equally enforceable.

Accordingly, Plaintiffs' class-action allegations must be dismissed or stricken.[118]

CONCLUSION

For the foregoing reasons, Southwest respectfully requests that the Court (i) stay or dismiss this matter pursuant to the First-to-File Rule pending resolution of the *Earl* Case, (ii) dismiss Plaintiffs' Complaint (Dkt. 1) for improper venue, (iii) transfer this action to the Northern District of Texas, (iv) dismiss Plaintiffs' lawsuit for failure to establish Article III standing and lack of subject-matter jurisdiction under Rule 12(b)(1), (v) dismiss Plaintiffs' claims for failure to state a claim under Rule 12(b)(6), and/or (vi) dismiss or strike the class allegations based upon the class action waiver in Southwest's Terms and Conditions.

[118] If the Court finds that Plaintiffs waived their right to bring this action as a class action, Southwest additionally requests dismissal under Federal Rule of Civil Procedure 12(b)(1), as the amount in controversy—amount of an alleged overcharge for three individuals' flights—clearly would not be high enough to confer diversity jurisdiction, and Plaintiffs have only alleged jurisdiction under 28 U.S.C. § 1332(d) (the Class Action Fairness Act), not 28 U.S.C. § 1332(a).

Dated: October 27, 2021

Respectfully submitted,

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ATTORNEYS FOR DEFENDANT SOUTHWEST AIRLINES CO.

CERTIFICATE OF SERVICE

I hereby certify that on October 27, 2021, a true and correct copy of the above was served via e-mail through the Western District of Texas's CM/ECF system.

/s/ Philip A. Tarpley
Philip A. Tarpley

CERTIFICATE OF CONFERENCE

I certify that on October 25, 2021, I conferred with counsel for Plaintiffs (Andrew Lorin) in a good-faith attempt to resolve the matters presented in this filing by agreement, but counsel for Plaintiffs stated that he was opposed to each non-dispositive aspect of relief sought by this filing.

/s/ James V. Leito IV
James V. Leito IV