UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JON BEERMANN, individually and on behalf of all others similarly situated, Plaintiff, v. TAUCK, INC. D/B/A TAUCK WORLD DISCOVERY, Defendant.	Civil Action No. 3:20-cv-00713-JAM

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS AND TO STRIKE CLASS ALLEGATIONS

ORAL ARGUMENT REQUESTED

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INTRODUCTION

This suit was filed for damages resulting from Tauck's secret "policy" of refusing to refund monies to purchasers of its Protection Plan, which Tauck rendered worthless by unilaterally canceling its Tours and through no fault of Plaintiff or any other putative Class member. There is no basis for this refusal under the plain terms of the Protection Plan. Having rendered the Protection Plan insurance worthless as a result of its unilateral conduct, rather than providing premium refunds, Tauck instead is willing to offer a highly conditional credit that only has value if Plaintiff and Class members spend a very substantial sum to purchase another Tour, which may be impossible for many.

Ignoring Plaintiff's well-pled allegations, Tauck spins its failure to refund the cost of Protection Plan premiums that it never earned, arguing that Plaintiff must establish ***his right*** to a refund in order to get ***his*** money back. That argument is backwards. Plaintiff does not plead a breach of contract claim. Rather, Tauck must return the money unless it can establish that ***it had a right*** to provide only a highly conditional credit. Notably, Tauck does not contend that it has a contractual right, or any other right to offer a self-serving credit instead of a cash refund.

Tauck's affirmative conduct and inaction offend public policy and well-established consumer rights and protections in Connecticut and elsewhere. For months now, Plaintiff and other Class members have been held in limbo by Tauck's unlawful decision to keep its customers' money. Tauck failed to make Plaintiff and Class members whole, relying on a self-proclaimed "policy" that is found nowhere in the Protection Plan, and invoking Covid-19 as a smokescreen to deny refunds for a product that Tauck solely and unilaterally rendered worthless for its intended purpose.

For the reasons set forth herein, Tauck's motion to dismiss should be denied in its entirety.

LEGAL STANDARD

On a motion to dismiss, a court must "accept all factual allegations in the complaint as true and draw inferences from those allegations in the light most favorable to the plaintiff." *Jaghory v. N.Y. State Dep't of Educ.*, 131 F.3d 326, 329 (2d Cir. 1997). A complaint should be sustained so long as it contains "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Plausibility at the pleading stage is distinct from probability, and "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of [the claims] is improbable, and ... recovery is very remote and unlikely." *Id.* at 556 (quotation marks omitted). The plaintiff need only plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Mantikas v. Kellogg Company*, 910 F.3d 633, 638 (2d Cir. 2018) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

ARGUMENT

Plaintiff seeks to recover, for himself and all other Tauck customers similarly situated, refunds for Protection Plan[1] premiums wrongfully withheld by Tauck based on its secret and unlawful no-refund "policy." *See* Compl. ¶¶ 37-39, Dkt. 1. Based on a common nucleus of factual allegations, Plaintiff asserts claims against Tauck for (i) declaratory and injunctive relief, (ii) conversion, (iii) civil theft, (iv) violation of the Connecticut Unfair Trade Practices Act ("CUTPA"), (v) violation of state consumer protection statutes, (vi) violation of the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"), (vii) negligent misrepresentation, and

[1] When denying Plaintiff his requested refund, the Tauck Guest Relations Specialist referred to the insurance policy as a Tauck Cruise "Protection Plan." *See* Plaintiffs' Class Action Complaint ("Compl.") Ex. 1, Dkt. 1-1. Tauck refers to the same insurance policy in its Motion as a "Protection Program." Mot. at 1. Consistent with the Complaint, Plaintiff will continue to refer to the insurance policy at issue as a "Protection Plan."

(viii) unjust enrichment. *Id*. at ¶¶ 50-128. In response, Tauck seeks to strike all class allegations and dismiss the pleadings as to all eight claims.[2] *See* Defendant's Motion to Dismiss and to Strike Class Allegations ("Mot." or "Motion"), Dkt. 32. As Plaintiff demonstrates below, Tauck's arguments are without merit.

I. The Conduct at Issue is Ongoing, Entitling Plaintiff and the Class to Declaratory and Equitable Relief

Tauck misleadingly argues that Plaintiff is seeking redress for "things that *already happened*" and therefore cannot form the basis for declaratory relief. Mot. at 16 (emphasis in original). To the contrary, Plaintiff explicitly alleges that Tauck continues to wrongfully withhold Protection Plan premiums purchased in connection with Tauck Tours that were unilaterally canceled by Tauck. Plaintiff further contends that Tauck "is changing the economic bargain without Plaintiff's consent," and "is continuing to intentionally and actively misrepresent to Plaintiff and members of the Class that it maintains a 'policy' that Protection Plan premiums are nonrefundable in any circumstances" without any legal basis for this secret no-refund "policy." Compl. ¶¶ 35, 53.c. Accordingly, Plaintiff is entitled to seek a declaratory judgment under Fed. R. Civ. P. 57 and 28 U.S.C. § 2201 and it is fully within this Court's discretion to declare unlawful Tauck's refusal to refund Protection Plan premiums. *See, e.g.*, *Allstate Ins. Co. v. Martinez*, 2012 WL 1379666, at **9-12 (D. Conn. Apr. 20, 2012) ("*Martinez*") (discussing

[2] Plaintiff's claims in Counts One, Two, Three, Four, Seven, and Eight are brought individually and on behalf of a nationwide class. *See* Compl. ¶¶ 51, 59, 69, 78, 117, and 122. Plaintiff's claims in Counts Five and Six are brought individually, and on behalf of a Multi-State Consumer Class and Florida Class, respectively. *See* Compl. ¶¶ 93, 104. Tauck does not specifically argue in its Motion or ask the Court to strike, pursuant to Fed. R. Civ. P. 12(f)(2), the class allegations as they relate to Plaintiff's causes of action other than Count Four. *See* Mot. at 4-5. Regardless, as explained *infra* at Sect. IV.A, a motion to strike class allegations at the pleadings stage as to any of these other Counts is premature and without merit.

broad discretion vested in district courts to sustain declaratory judgment claims, even where other adequate remedies may exist).

Tauck cites several cases from the Eastern District of Virginia for the proposition, which Plaintiff does not dispute, that declaratory relief is generally forward looking and designed to address ongoing or future conduct. *See* Mot. at 16. Each of those cases involved challenges to property foreclosures that had previously occurred. *See Tapia v. U.S. Bank, NA.*, 718 F. Supp. 2d 689, 695-96 (E.D. Va. 2010) (discussing facts of that case and two other cases cited by Tauck where "declaratory relief was not appropriate because the property had already been foreclosed."). Here, though Tauck previously accepted payment for Protection Plan premiums, its refusal to refund any portion of those premiums for trips that it canceled is ongoing and Tauck continues to improperly exercise control over those funds, which rightfully belong to Plaintiff and the Class.

The Second Circuit set out a five-factor test to guide courts in in determining whether a declaratory judgment is appropriate: (i) whether such judgment would be useful in clarifying or settling the legal issues involved; (ii) whether it would finalize the controversy and offer relief from uncertainty; (iii) whether the proposed remedy is merely for procedural fencing or a race to *res judicata*; (iv) whether a declaratory judgment would increase friction between sovereign legal systems or improperly encroach on the domain of a state or foreign court; and (v) whether there is a better or more effective remedy. *See The New York Times Co. v. Gonzales*, 459 F.3d 160, 167 (2d Cir. 2006) (internal quotation marks omitted).[3]

[3] Paradoxically, while Tauck also argues that Plaintiff's declaratory relief claim is "merely duplicative of his other claims" (Mot. at 17), it seeks to dismiss *all* claims and does not contend that some "better or more effective remedy" exists.

Here, as was true in *Martinez*, a case involving a dispute over an insurer's obligation to defend or indemnify certain insureds, "a declaratory judgment from this Court would undeniably serve a useful purpose in clarifying or settling" Tauck's obligation to refund the Protection Plan premiums paid by Plaintiff and the Class for trips that Tauck unilaterally canceled. *See Martinez*, 2012 WL 1379666, at *10; *Douglas v. Ocwen Loan Serv'g., LLC*, 2016 WL 1572925, at *6 (E.D. Va. Apr. 18, 2016) (rejecting argument that alleged unlawful conduct and injury had already occurred and finding declaratory relief appropriate to address "ongoing active dispute over appropriate interest rate.").[4] There is also no threat that a declaratory judgment would improperly encroach on the domain of any other court or legal system, nor is the requested relief some form of procedural fencing or race to *res judicata* as Plaintiff is simply asking that the Court issue "a declaratory judgment [] that Defendant's [] conduct is unlawful" and that Tauck be "required to stop advising consumers falsely of its 'policy' concerning non-refundability of Protection Plan premiums and further disclose to consumers that they are entitled to refunds." Compl. ¶¶ 54, 56.[5]

II. Tauck's Refusal to Refund Protection Plan Premiums Satisfies the Requirements for Conversion and Statutory Theft Claims Under Connecticut Law

To plead a cause of action for conversion, a plaintiff must allege that "(1) the material at issue belonged to the plaintiff, (2) that [defendant] deprived the plaintiff of that material for an indefinite period of time, (3) that [defendant's] conduct was unauthorized and (4) that

[4] *See also Richards v. FleetBoston Fin. Corp*., 235 F.R.D. 165, 174-75 (D. Conn. 2006) (at class certification stage, concluding that injunctive and declaratory relief would be both reasonably necessary and appropriate where plaintiffs sought "payment of monies unlawfully withheld in the past.").

[5] Tauck is simply wrong in contending that Plaintiff fails to adequately seek "a declaration of *rights* or *other legal relations* between interested parties." Mot. at 17. To the contrary, that is precisely what Plaintiff seeks in asking this Court to declare that Tauck is unlawfully retaining Protection Plan premiums paid by Plaintiff and other Class members in connection with Tours unilaterally canceled by Tauck.

[defendant's] conduct harmed the plaintiff." *News Am. Mktg. In-Store, Inc. v. Marquis*, 86 Conn. App. 527, 544–45 (2004), *aff'd*, 276 Conn. 310 (2005). Statutory theft is a similar cause of action that requires a showing of intent by a defendant to deprive the owner of the property at issue or to appropriate that property to itself. *Suarez-Negrete v. Trotta*, 47 Conn. App. 517, 520-21 (1998). Specifically, to prove civil theft, a party must establish "(1) there was an intent to do the act complained of, (2) the act was done wrongly; and (3) the act was committed against an owner . . . the essential cause of action is a wrongful exercise of dominion over personal property of an another." *Kosiorek v. Smigelski*, 138 Conn. App. 695, 713 (2012).

Under these standards, the Complaint properly pleads claims for conversion (Count Two) and statutory theft (Count Three). Specifically, Plaintiff alleges that the funds at issue, $1,598.00 paid by Plaintiff for the optional Protection Plan, belonged to Plaintiff since it was his money that was paid to the Defendant. Compl. ¶ 3. Defendant deprived Plaintiff of these funds by retaining them after unilaterally canceling Plaintiff's trip. Compl. ¶¶ 4-5. Defendant did not disclose that the Protection Plan funds were "non-refundable under any circumstances" or that Defendant would offer a highly conditional credit for a future Tauck Tour instead of returning the Protection Plan premium to Plaintiff. Compl. ¶¶ 9-10.

Defendant's conduct was not "authorized" by Plaintiff, who was harmed by being deprived of his right to his own property, namely, the Protection Plan premiums he paid in connection with his Tour. Compl. ¶ 63. Additionally, Plaintiff alleges that Tauck acted intentionally and that its conduct was wrongful. Compl. ¶¶ 74-75. Construing these allegations most favorably to Plaintiff, as required on a motion to dismiss, the Complaint adequately pleads claims for conversion and statutory theft.

Tauck misconstrues and distorts the nature of Plaintiff's allegations, which are *not* based in express or implied contract. *See* Mot. at 12-14. Rather, Plaintiff plainly alleges that Tauck's purported "policy" of never refunding Protection Plan premiums "appears nowhere in any [] relevant documents" and "that Tauck never had any such policy at all . . . ." Compl. ¶ 30. Notably, the cases cited by Tauck did involve breach of contract claims and the courts found that the plaintiffs there could not show "that they ever possessed or owned legal title to" the disputed funds. *Deming v. Nationwide Mut. Ins.* Co., 279 Conn. 745, 773 (2006) (though "the funds at issue were held in separate accounts designated for each plaintiff, under the terms of the contract, the right to those funds did not vest in the plaintiffs until and unless their employment was terminated in accordance with the terms set forth therein."). *See also Mystic Color Lab, Inc. v. Auctions Worldwide, LLC,* 284 Conn. 408, 425-29 (2007) (under terms of agreement, auctioneer had exclusive rights to auction proceeds for 15 days with no obligation to segregate those funds or hold in constructive trust for seller; accordingly, relationship between auctioneer and seller was deemed to that of debtor and creditor, not a bailment, and plaintiff could pursue contractual rights, but not claims for conversion or theft); *Cherry Hill Const. Inc. v. E.F.S. Mach., LLC,* 2015 WL 3975711, at *4 (Conn. Super. Ct. June 3, 2015) (defendant's failure to deliver construction equipment after receiving $10,000 amounted to "unmet obligation to pay the plaintiff and are not sufficient to assert claims for conversion or statutory theft.").

While citing to *Deming* for the proposition that a "mere" obligation to pay money may not be enforced by a conversion or statutory theft action, Tauck overlooks the Connecticut Supreme Court's statement that "[m]oney can clearly be subject to conversion. Similarly, money can be the subject of statutory theft." 279 Conn. at 771 (internal citations and quotations omitted). The *Deming* court itself recited a list of decisions in which Connecticut courts

approved conversion and statutory theft claims for the recovery of money that was wrongfully taken from a plaintiff. *See, e.g.*, *Devitt v. Manulik,* 176 Conn. 657, 662–63 (1979) (recovery of money wrongfully taken from joint survivorship bank account); *Dunham v. Cox*, 81 Conn. 268, 270–71 (1908) (recovery of a sum of money entrusted to the defendant for payment to a third person); *Shelby Mutual Ins. Co. v. Della Ghelfa,* 3 Conn. App. 432, 445, (1985), *aff'd*, 200 Conn. 630 (1986) (recovery by insurer from insured's attorney pursuant to General Statutes [Rev. to 1979] § 38–325 [b])...." (Citations omitted); *Howard v. MacDonald*, 270 Conn. 111 (2004) (unlawful transfer of funds from elderly woman's bank account to defendant's bank account).

Here, Plaintiff submits that the facts are more akin to a bailment because there is no governing contract and Plaintiff always maintained a "sufficient property interest" in the Protection Plan premiums. *See Mystic Color*, 284 Conn. at 421. Indeed, those premiums were paid by Plaintiff and other Class members, separate and apart from the costs of purchased Tours, specifically to protect against any unforeseen possibility that *they* (not Tauck) might need to cancel those expensive tours. While Tauck fulfilled its obligation to refund the cost of Tours it unilaterally canceled, it offers no explanation for failing to refund the premiums beyond relying on a manufactured (and apparently secret) "policy" that such payments are never refundable.

Contrary to the Defendant's claims, Plaintiff does not merely allege that the Defendant should have repaid him for the funds in the amount of $1,598.00. Rather, Plaintiff alleges that Defendant wrongfully retained his money and imposed on him a requirement to book a second Tour with Defendant in order to derive any benefit from Protection Plan premiums that Defendant improperly converted for its own benefit and to the detriment of Plaintiff. As set forth in the Complaint, Tauck misrepresented the nature of the Protection Plan at the outset in order to induce Plaintiff and other Class members to purchase the insurance: "Defendant represented that

a Protection Plan protected against the risk of the consumer having to cancel a Tour. Defendant failed to disclose the material fact in connection with its sale of Protection Plans that the premium was non-refundable in any circumstances, and specifically if Tauck chose to cancel the Tour." Compl. ¶ 72. Having received premium payments because of this material omission, Tauck then "wrongfully exercised control over and/or intentionally interfered with the rights of Plaintiff and members of the Class by limiting purchasers of canceled trips to apply the amount paid for Protection Plans to the purchase of a future trip." Compl. ¶ 62.

The facts here are more like those in *Carney v. Lopez*, 933 F. Supp. 2d 365 (D. Conn. 2013), where a receiver appointed to recover funds for victims of an alleged Ponzi scheme brought various claims, including conversion, against corporate insiders of an investment firm. The receiver alleged that the defendants converted certain assets by taking possession of misappropriated money from receivership entities. *See id*. at 370, 384. In declining to dismiss the conversion claim, the court concluded that "whether the transfers were authorized or not presents an issue of fact not appropriately resolved at this stage of the proceedings" and that "documentation of fraudulent transfers in the amended complaint [] sufficiently identified monies subject to the conversion claim." *Id*. at 385.

Tauck does not dispute that the Protection Plan premiums were paid separately by Plaintiff and other Class members and can be easily identified. Nor does Tauck deny that it is continuing to exercise control over those funds by refusing to refund any portion to its customers. Moreover, Tauck's intent to deprive Plaintiff and other Class members of their rights to the Protection Plan premiums is evident from that same refusal to offer any refund. By instead offering the so-called "Dreamsaver" vouchers, Tauck is effectively holding its customers' money hostage and forcing them to book a future Tour in order to derive any potential benefit from the

Protection Plan, which may be a burden, an inconvenience, or even an impossibility for many. At the motion to dismiss stage, the facts alleged in the Complaint are sufficient to support Plaintiff's claims for both conversion and statutory theft.

III. Plaintiff Properly States A Valid Individual CUTPA Claim[6]

Tauck's piecemeal analysis of Plaintiff's CUTPA claim should be rejected. The relevant inquiry is not whether Plaintiff has to establish *his legal entitlement* to a refund in order to get his money back. Mot. at 5. After all, Plaintiff does not allege any breach of contract. Instead, Tauck must return the money unless it can establish *that it had a right* to keep it and issue a highly conditional credit. Most significantly, Tauck does not argue in its Motion that it has any contractual right to offer a highly conditional credit instead of a cash refund. Tauck's secret no-refund "policy" violates CUTPA.

As this Court has noted, "[i]t is well settled that whether a defendant's acts constitute . . . deceptive or unfair trade practices under CUTPA . . . is a question of fact for the trier." *Langan v. Johnson & Johnson Consumer Companies, Inc.*, 95 F. Supp. 3d 284, 288-89 (D. Conn. 2015) (Meyer, J.) (citation omitted); *see also Moura v. Harleysville Preferred Ins. Co.*, 2019 WL 5298242, at *10 (D. Conn. Oct. 18, 2019) ("Courts in this District have routinely found that CUTPA[] claims . . . should be resolved at the summary judgment stage rather than the motion to dismiss stage.") (collecting cases). CUTPA is "remedial in character and must be liberally

[6] Plaintiff acknowledges that recent case law interpreting Conn. Gen. Stat. §§ 42-110, *et seq.* holds that a non-resident cannot bring an action under this statute on behalf of a nationwide class, but also note that Tauck's online Terms and Conditions provide for uniform application of Connecticut law. Compl. ¶ 15. If the Court should grant Defendant's motion in any part, Plaintiff respectfully requests leave to replead Count Four so it may have an opportunity to add a Connecticut resident as a named plaintiff. *See Edwards v. North American Power and Gas, LLC*, 2016 WL 2851544, at *1 (D. Conn. May 13, 2016) (after motion to dismiss granted the court provided plaintiff leave to amend his complaint to add plaintiffs from other states).

construed in favor of those whom the legislature intended to benefit." *Fairchild Heights Residents Ass'n, Inc. v. Fairchild Heights, Inc.*, 310 Conn. 797, 817 (2014) (citation omitted).

CUTPA can be violated by a "deceptive" trade practice or "conduct that constitutes [] an 'unfair' trade practice, in violation of the [FTC] 'cigarette rule.'" *Morin v. Tracy, Driscoll & Co. Inc.*, 2004 WL 1395945, at **4-5 (Conn. Super. May 26, 2004). Here, despite Tauck's incorrect assertion (*see* Mot. at 6, n.2), Plaintiff has alleged that Tauck's acts are both deceptive and unfair. *See* Compl. ¶ 85 ("***Defendant engaged in unfair and deceptive acts in violation of Conn. Gen. Stat. §§ 42-110, et seq.*** when it failed to disclose that premiums for the Protection Plans were non-refundable in all circumstances, including unilateral Tour cancellations by Tauck.") (emphasis added).

A. Tauck Engaged in Deceptive Acts or Practices Under CUTPA

An act or practice is deceptive under CUTPA when there is: (1) "a representation, omission, or other practice likely to mislead consumers"; (2) the consumer "interpret[s] the message reasonably under the circumstances"; and (3) "the misleading representation, omission, or practice [is] material—that is, likely to affect consumer decisions or conduct." *Langan*, 95 F. Supp. 3d at 288 (quoting *Smithfield Assocs., LLC v. Tolland Bank*, 86 Conn. App. 14, 28 (2004)) (internal quotation marks omitted). Tauck erroneously argues that Plaintiff failed to sufficiently allege the first and third elements of an individual CUTPA claim for deceptive acts or practices. Mot. at 7 ("[Plaintiff] says nothing about—much less sufficiently alleges—whether Tauck's 'omission' was one that would likely (or at all) mislead consumers."). In fact, Plaintiff pled the following allegations:

- Advising Plaintiff and Class members that Tauck has "always" had a policy that Protection Plan premiums are "non-refundable under any circumstances" is ***false, misleading and deceptive to Plaintiff*** and other consumer Class members. Compl. ¶ 8 (emphasis added).

- Tauck's "policy," as Tauck ***misleadingly communicated*** to Plaintiff by email, is to never refund the cost of the Protection Plan. However, Tauck's "policy" appears nowhere in any of the relevant documents. There is no written policy regarding refunds of Protection Plan fees when Tauck cancels a Tour. It is apparent that Tauck never had any such policy at all and that Tauck is now refusing to provide refunds to which Plaintiff and the Class are entitled by referring to a policy that never existed. This is deceptive. Compl. ¶ 30 (emphasis added).

- Defendant represented that a Protection Plan protected against the risk of the consumer having to cancel a Tour. Defendant ***failed to disclose the material fact*** in connection with its sale of Protection Plans that that the premium was non-refundable in any circumstances, and specifically if Tauck chose to cancel the Tour. This ***omission was material to Plaintiff's and Class members' decisions*** to purchase the Protection Plans. Compl. ¶ 72 (emphasis added).

- Defendant only represented that a Protection Plan protected against the risk of purchasing a Tour and the consumer having to cancel. A ***material omission*** was that if Tauck cancelled a Tour the purchase of a Protection Plan would not be refunded. Compl. ¶ 86 (emphasis added).

- ***Plaintiff and Class members would not have purchased Protection Plans but for Defendant's material omissions and misrepresentations*** as described in this Complaint. Compl. ¶ 91 (emphasis added).

These clear and concise allegations satisfy the necessary elements of a deceptive act under CUTPA.[7]

B. Tauck Engaged in Unfair Acts or Practices Under CUTPA

Plaintiff also properly alleges that Defendant's misrepresentations constituted "unfair" conduct pursuant to the FTC "cigarette rule," which entails an analysis of:

> (1) [W]hether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or

[7] Tauck cites to a summary judgment to assert that the denial of a refund cannot be wrongful under CUTPA unless a consumer has a legal entitlement to a refund. Mot. at 6 (citing *In re Trilegiant Corporation, Inc.*, 2016 WL 8114194 (D. Conn. Aug. 23, 2016)). But the sole basis for the CUTPA claim in that action was defendant's "refund mitigation strategy," which involved certain protocol customer service representatives followed. *Id*. at **12-13. Conversely, here, Tauck manufactured a no-refund "policy," found nowhere in the Protection Plan, to deny refunds for a product it unilaterally rendered worthless. Compl. ¶ 30. Moreover, when Judge Bryant considered the defendants' motion to dismiss the alleged unfair and deceptive acts and practices under CUTPA at the *pleadings* stage, she denied it. *In re Trilegiant Corp., Inc.*, 11 F. Supp. 3d 82, 120 (D. Conn. 2014).

> otherwise—in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers …

Ventres v. Goodspeed Airport, LLC, 275 Conn. 105, 155 (2005). All three criteria do not need to be satisfied to support a finding of unfairness. *Id.* A practice can violate CUTPA because it violates all three prongs to a limited extent or because it violates just one of the prongs to a greater extent. *Id*.

Tauck's omissions and misrepresentations—namely, referring to a Tauck policy that did appear anywhere in the relevant documents and outright refusing to refund the Protection Plan insurance premium after Tauck unilaterally canceled the Tour—violates the public policy of the common laws of Connecticut, and is enough to state a claim under the first prong of the "cigarette rule." Compl. ¶ 30. The second prong of the "cigarette rule" is met because Tauck's decision to keep insurance premiums when the underlying interest that is being insured was canceled through no fault of Plaintiff is unethical and unscrupulous. Compl. ¶ 86; *see Freeman v. A Better Way Wholesale Autos, Inc.*, 174 Conn. App. 649, 665 (2017) ("defendant also provided a misleading assurance regarding the availability of a refund of the deposit to induce the plaintiff to pay the deposit. Its conduct in so doing was unethical."). The final prong of the "cigarette rule" addressing whether substantial injury occurred to consumers is easily satisfied as Tauck took $1,598 from Plaintiff for insurance coverage. Compl. ¶¶ 6, 87; *see Freeman*, 174 Conn. App. at 666 (finding the third element of the "cigarette rule" is met where the defendant refuses to refund a deposit because "the fact that the deposit theoretically remains available to [plaintiff] as a store credit does not make the money freely available to her."). The final prong is also met because Plaintiff alleges, and Tauck does not dispute, that the matter in controversy exceeds the

Class Action Fairness Act, 28 U.S.C. § 1332(d)(2)(A), minimum value of $5 million. Compl. ¶ 11.

As the Appellate Court of Connecticut held in another case involving an unfair practice or action in violation of CUTPA:

> Clearly, having lost the use of her $2500 [deposit], the plaintiff suffered an ascertainable loss. The fact that she may have a credit, with a dealership with which she no longer wants to do business, that can be used to purchase a vehicle she does not want, is not the equivalent of having full use of the money. We conclude that the court properly found that the plaintiff had suffered an ascertainable loss.

Freeman, 174 Conn. App. at 667.

IV. Plaintiff States Valid Claims Under Other State Consumer Protection Statutes

A. Tauck's Motion to Strike Class Allegations Is Premature

As a threshold matter, Tauck does not specifically argue that the class allegations for any cause of action other than Count Four should be dismissed under Fed. R. Civ. P. 12(f)(2). Tauck only requests such relief as to the nationwide class pled in Count Four. *See* Mot. at 4-5. Nonetheless, should Tauck's Motion be interpreted to request class allegations applicable to any other Count be stricken under Fed. R. Civ. P. 12(f)(2), the argument is without merit and premature.

Rule 12(f) of the Federal Rules of Civil Procedure provides that, upon motion, a court may strike "any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter" from a pleading. To prevail, Tauck most demonstrate (1) no evidence in support of the allegations would be admissible; (2) that the allegations have no bearing on the issues in the case; and (3) that to permit the allegations to stand would result in prejudice to the movant. *Tucker v. American Intern. Group, Inc.*, 936 F. Supp. 2d 1, 16 (D. Conn. 2013). Tauck has not argued for and cannot meet this formidable burden. "[T]he Second Circuit has set a high standard for its application, cautioning that 'courts should not tamper with the pleadings unless

there is a strong reason for doing so.'" *Yungk v. Campbell Hausfeld/Scott Fetzer Co.*, 2007 WL 2100114, at *2 (D. Conn. July 17, 2007) (quoting *Lipsky v. Commonwealth United Corp.*, 551 F.2d 887, 893 (2d Cir. 1976)). Courts in this Circuit strongly disfavor moving to strike class allegations under Rule 12(f), finding it premature to foreclose "plaintiff from having the ability to set forth its proof":

> "A motion to strike class allegations under Rule 12(f) is even more disfavored because it requires a reviewing court to 'preemptively terminate the class aspects of . . . litigation, solely on the basis of what is alleged in the complaint, and before plaintiffs are permitted to complete the discovery to which they would otherwise be entitled on questions relevant to class certification."

Calibuso v. Bank of Am. Corp., 893 F. Supp. 2d 374, 383 (E.D.N.Y. 2012) (quoting *Ironforge.com v. Paychex, Inc.*, 747 F. Supp. 2d 384, 404 (W.D.N.Y. 2010)); *see also Harris v. United Tech. Corp.*, 241 F.R.D. 95, 99 (D. Conn. 2007) ("Rule 12(f) motions to strike are disfavored."); *Schaefer v. General Electric Co.*, 2008 WL 649189, at *4 (D. Conn. Jan. 22, 2008) (denying motion to strike class claims as premature).

In *Parker v. Time Warner Entm't Co., L.P.*, 331 F.3d 13 (2d Cir. 2003), the Second Circuit vacated and remanded a decision granting the defendant's motion to deny class certification prior to plaintiff moving to certify a class. *Id*. at 15-16. The *Parker* court observed that in the absence of a class certification motion "it remains unknown what class [the Plaintiff] would have sought to certify," rendering the district court's conclusions related to class certification "speculative." *Id*. at *21. According to the *Parker* court, a district court would be in a position to evaluate factors affecting class certification only after "it ha[d] the benefit of [the plaintiff's] motion to certify and the evidence relevant to that motion." *Id*. at 22; *see also Schaefer*, 2008 WL 649189, at *4 ("[I]t would be drastic and improper to strike the Complaint's class action allegations now, before Plaintiff moves for class certification."); *Chenensky v. N.Y.*

Life Ins. Co., 2011 WL 1795305, at *4 (S.D.N.Y. Apr. 27, 2011) ("[T]he harsh remedy of denial of class certification at this early stage, prior to any class discovery, is premature.").

At the pleading stage, when no discovery has occurred, a motion to strike class allegations faces a very high bar – a bar that Tauck falls woefully short of meeting.

B. Tauck's Narrow Choice of Law Provision Does Not Govern Other State Consumer Protection Related Claims

Tauck relies on three distinguishable cases for the proposition that the Connecticut choice of law provision found in its Terms and Conditions bars Plaintiff from asserting claims under other states' laws.[8] Mot. at 9. As an initial matter, these are all non-class cases alleging breach of contract claims. Further, two of the cases (*Travel Servs. Network, Inc.* and *Grey Mountain Partners, LLC*) were summary judgment decisions and the third (*Alpha Beta Capital Partners, L.P.*) was an appeal taken after trial. Importantly, the issue in all three cases was whether a CUTPA claim could be decided under the law of a different state. *See Travel Servs. Network, Inc.*, 959 F. Supp. at 146-47; *Alpha Beta Capital Partners, L.P.*, 193 Conn. App. at 426; *Grey Mountain Partners, LLC*, 2017 WL 5641378, at *5. Here, Plaintiff is not seeking to bring a CUTPA claim under another states' law. *See generally*, Compl. ¶¶ 92-115.

Courts in this District also distinguish between "broad" and "narrow" choice of law provisions and each types reach and application.[9] Connecticut courts have adopted the reasoning of New York law that distinguishes between provisions that govern controversies "arising out of

[8] *Travel Servs. Network, Inc. v. Presidential Fin. Corp. of Massachusetts*, 959 F. Supp. 135 (D. Conn. 1997); *Alpha Beta Capital Partners, L.P. v. Pursuit Inv. Mgmt., LLC*, 193 Conn. App. 381 (2019); *Grey Mountain Partners, LLC v. Insurity, Inc.*, 2017 WL 5641378 (Conn. Super. Ct. Oct. 18, 2017).

[9] Tauck Tours and Protection Plans are purchased by customers residing throughout the U.S. Plaintiff notes that Tauck here uses its venue and choice of law provision as a sword to bar non-residents from bringing a nationwide class under Connecticut consumer protection statutes and then as a shield to argue non-residents also cannot bring a nationwide class under the consumer protection statutes of other states, including their own.

or relating to" a contract and those contracts that are "governed by and construed in accordance with" the laws of a state. *U.S. Fidelity and Guar Co. v. S.B. Phillips Co., Inc.*, 359 F. Supp. 2d 189, 205 (D. Conn. 2005). The latter type of contract is deemed too narrow to apply to tort claims related to the contract. *Id.*; *see also Blakeslee Arpaia Chapman, Inc. v. Helmsman*, 2002 WL 172670, *2–3 (Conn. Super. Jan. 9, 2002). Thus, Connecticut courts have held that "narrowly drawn choice of law provisions do not preclude causes of action under the laws of another state where such causes of action are not based in contract." *U.S. Fidelity*, 359 F. Supp. 2d at 205 (D. Conn. 2005) (citing *Messler v. Barnes Group, Inc.*, 1999 WL 61034, *9 (Conn. Super. Feb. 1, 1999)). Significantly, in evaluating whether a choice of law provision applies to tort claims arising out of a contract, courts applying Connecticut law have consistently held that language regarding a contract's construction and governance do not render the contract choice of law provisions applicable to resulting tort claims. *See e.g.*, *Blakeslee Arpaia Chapman*, 2002 WL 172670, at **1-2 (clause providing that "this Agreement shall be construed under and governed by" Massachusetts law does not apply to Connecticut tort claims [emphasis omitted; internal quotation marks omitted]); *In re Trilegiant Corp., Inc.*, 11 F. Supp. 3d 82, 144-45 (D. Conn. 2014) (provision that "terms and enforcement of this agreement ... shall be governed and interpreted in accordance with federal law, and to the extent state law applies, the law of Delaware, without regard to conflict-of-law principles" did not apply to tort claims); *Messler v. Barnes Group, Inc.*, 1999 WL 61034, at *9 (Conn. Super. Ct. Feb. 1, 1999) (citing various federal circuit for proposition that language concerning enforcement, construction, or governance does not reach tort claims).

In *Aviamax Aviation Ltd. v. Bombardier Aerospace Corp.*, 2010 WL 1882316 (D. Conn. May 10, 2010), the choice of law provision in the purchase agreement dictated that New York

law would apply. *Id*. at *3. The defendant argued that even though the plaintiff's claims sounded in tort, they were really premised on the purchase agreement between the parties. *Id*. The court held a nearly identical choice of law provision to the one found in Tauck's Terms and Conditions[10] "was too narrow to encompass tort claims arising out of contract-related transactions." *Id*. at *4; *see also Greystone Cmty. Reinvestment Assocs. v. First Union Nat'l Bank*, 2002 WL 229901, *2 (D. Conn. Jan. 25, 2002) (finding that a tort claim, even one that is closely related to the subject matter of the contract, may be brought even where it would be barred under the law of the state applied to similar contract claims under the contractual choice of law agreement). As discussed above, Plaintiff is not seeking redress from Tauck for the secret no-refund "policy" pursuant to a breach of contract claim, instead, the claims are brought pursuant to common law and consumer protection statutes grounded in tort law. Tauck's choice of law provision should not apply to these causes of action.

C. Plaintiff May Properly Represent Residents of the Multi-State Consumer Class States Based on His Individual CUTPA Claim

Even if the Court finds the Tauck choice of law provision applies to the consumer protection statute claims covering the Multi-State Consumer Class and Florida Class, the Second Circuit has made clear that because "class action plaintiffs are not required to have individual standing to press any of the claims belonging to their unnamed class members, it makes little sense to dismiss the state law claims of unnamed class members for want of standing when there was no requirement that the named plaintiffs have individual standing to bring those claims in the first place." *Langan v. Johnson & Johnson Consumer Companies, Inc.*, 897 F.3d 88, 95 (2d

[10] Compare the Tauck choice of law provision ("These Terms shall be governed in all respects by the laws of the State of Connecticut without giving effect to its conflicts of law provisions") (Mot. at 8) with *Aviamax Aviation Ltd.* ("Agreement shall be governed by and interpreted in accordance with the internal laws of the State of New York, USA, excluding any conflicts of law provisions thereof."). 2010 WL 1882316, at *4.

Cir. 2018). Plaintiff has stated a valid, individual claim under the CUTPA. Though, as a Florida resident, he may potentially be barred from asserting class claims on behalf of Connecticut residents under Conn. Gen.Stat. § 42–110g(b), CUTPA does *not* prevent him from bringing claims on behalf of residents of other states with materially similar laws. Further, this is not a question of individual or class standing under the CUTPA but a question of class certification law to be determined at the certification stage, not on the pleadings. *Id*. (Second Circuit held in *Langan* that "whether a plaintiff can bring a class action under the state laws of multiple states is a question of predominance under Rule 23(b)(3)").

Here, Plaintiff has asked the Court to certify classes under various states' materially similar consumer protection statutes on behalf of absent class members who reside in those states. *See* Compl. ¶¶ 38-39, 96, 107. Plaintiff may act in this representative capacity because he suffered the same injury, resulting from the same Tauck policy and practice, as those unnamed class members from other states. As the Second Circuit explained, "the crucial inquiry" at class certification "is not whether the laws of multiple jurisdictions are implicated, but whether those laws differ in a material manner that precludes the predominance of common issues." *In re U.S. Foodservice Inc. Pricing Litig*., 729 F.3d 108, 127 (2d Cir. 2013) (district court did not abuse its discretion in determining that variations in state law did not preclude certification). Plaintiff has proposed a Multi-State Consumer Protection Class with laws that do *not* differ in a material manner, making class certification appropriate. *See id.*[11] Accordingly, whether the laws of the

[11] *See also Klay v. Humana, Inc.*, 382 F.3d 1241, 1262 (11th Cir. 2004) ("if the applicable state laws can be sorted into a small number of groups, each containing materially identical legal standards, then certification of subclasses embracing each of the dominant legal standards can be appropriate")*; Krell v. Prudential Ins. Co. of Am*., 148 F.3d 283, 315 (3d Cir. 1998) ("Courts have expressed a willingness to certify nationwide classes on the ground that relatively minor differences in state law could be overcome at trial by grouping similar state laws together and applying them as a unit."); *Walsh v. Ford Motor Co.,* 807 F.2d 1000, 1017 (D.C. Cir. 1986) (holding that class certification is appropriate where "variations [in state law] can be effectively managed through creation of a small number of subclasses

states included in the Multi-State Consumer Class (and Florida Class) are materially similar to CUTPA, such that Plaintiff's individual claim under the CUTPA permits the certification of the Multi-State Consumer Class (or some variation thereof), is a question the Court must answer at the class certification stage rather than upon this premature and "disfavored" motion to strike.

V. Tauck Had a Duty to Disclose Its Secret No-Refund "Policy" and Plaintiff's Negligent Misrepresentation Claim is Sufficiently Pled

Tauck wrongly asserts that Plaintiff failed to allege any duty to disclose its secret no-refund "policy" on the premiums paid for the Protection Plan. Tauck even attempts to argue that under no circumstances would it ever have a duty to disclose material information because the parties "formed *only* an ordinary business relationship." Mot. at 15. Defendant reaches this conclusion by ignoring Plaintiff's well-plead allegations and ignoring well-settled Connecticut law and Second Circuit precedent, which recognizes that a travel agent owes special duties to its customers.

Plaintiff alleges that Tauck promotes itself "[a]s a family-owned travel company," that offers approximately 130 different Tours between March and June 2021 (*See* Compl. ¶¶ 22, 36) and failed to disclose the material fact that Protection Plan premiums are purportedly non-refundable in any circumstances. *See* Compl. ¶ 72. Further, Plaintiff alleges that Defendant retained control over Plaintiff's travel itinerary. *See, e.g.*, Compl. ¶ 26 ("Tauck's 'Conditions of Tour' states, Tauck 'reserves the right to alter or curtail the itinerary…as it deem[s] necessary.

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grouping the states that have similar legal doctrines"); *Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 761–62 (7th Cir. 2014) ("All of the applicable state consumer protection laws at issue here may be satisfied by proof that a statement is likely to mislead a reasonable consumer"); *Al Haj v. Pfizer Inc.*, 338 F. Supp. 3d 741, 757-58 (N.D. Ill. 2018) ("Pfizer moves to strike the complaint's class allegations, contending that variation in state consumer protection and unjust enrichment law categorically precludes class certification . . . . Class certification analysis is necessarily contextual, and the context—including whether and how to create subclasses—is in this instance better explored under Rule 23, on a developed record, than under Rule 12(f)").

Any savings realized by these changes will be refunded to guests.'"). As such, Plaintiff properly alleged that Tauck owed a duty to disclose material terms and is barred from making omission-based misrepresentations because Plaintiff's relationship with Defendant, a travel company, was a principal/agent relationship. Such allegations are sufficient at this stage of the pleadings. *Jean-Charles v. Perlitz*, 937 F. Supp. 2d 276, 285 (D. Conn. 2013) (finding plaintiff's allegations of fiduciary duty were sufficiently plead to survive a motion to dismiss and noting, trial courts in Connecticut address the legal sufficiency of breach of fiduciary duty claims on motions for summary judgment, rather than at the pleadings stage). Fiduciary relationships are "characterized by a unique degree of trust and confidence between the parties, one of whom has superior knowledge, skill or expertise and is under a duty to represent the interests of the other." *Jean-Charles v. Perlitz*, 937 F. Supp. 2d 276, 285 (D. Conn. 2013) (citing *Macomber v. Travelers Prop. & Cas. Corp.*, 261 Conn. 620, 640 (2002)). The Connecticut Supreme Court has "refused to define a fiduciary relationship in precise detail and in such a manner as to exclude new situations." *Jean-Charles v. Perlitz*, 937 F. Supp. 2d 276, 285 (D. Conn. 2013) (quoting *Alaimo v. Royer*, 188 Conn. 36, 41 (1982)). Instead, it chose "to leave the bars down for situations in which there is a justifiable trust confided on one side and a resulting superiority and influence on the other." *Id*.

Tauck's assertion that it owed no duties to Plaintiff because of a "strictly commercial relationship" is meritless. Second Circuit precedent recognizes that travel agents owe duties to their principals and has identified relevant factors in determining whether an individual or business is considered a travel agent. *Johnson v. Priceline.com, Inc.*, 711 F.3d 271, 277 (2d Cir. 2013). Relevant factors include whether the travel agent, in promoting the travel plans of a client, deals with carriers, plans an itinerary, arranges for hotel accommodations, guides tours, and sets

up the traveler's schedule. *Id*. In *Johnson v. Priceline.com, Inc.*, the Second Circuit distinguished a website called Priceline from a travel agent because Priceline did not promote travel plans, arrange itineraries, arrange travel schedules, nor deal with common carriers. *Id.*

In contrast, here, Plaintiff alleges that "Tauck prides itself as a 'family-owned travel company'" *See* Compl. ¶ 22. Moreover, on Plaintiff's behalf, Tauck arranged for a 15-night land and cruise Tour of Japan. *See* Compl. ¶ 3. Included with that Tour was a prearranged itinerary highlighting specific countries and cities. *Id*. ("The Tour was scheduled to begin on April 25, 2020 in Osaka, Japan and end on May 10, 2020 in Tokyo, Japan.") *See also* https://www.tauck.com/tours/land-of-rising-sun-cruise-around-japan (last accessed on October 8, 2020). Additionally, Plaintiff alleges that Tauck retained control over Plaintiff's travel itinerary. *See, e.g.*, Compl. ¶ 26 ("Tauck's 'Conditions of Tour' states, Tauck 'reserves the right to alter or curtail the itinerary…as it deem[s] necessary. Any savings realized by these changes will be refunded to guests.'"). Finally, Plaintiff alleges that Tauck deals with common carriers, such as cruise ships, on behalf of Plaintiff and clients. *See, e.g.*, Compl. ¶¶ 2, 3. In sum, Tauck acted as Plaintiff's travel agent because unlike the Defendant in *Priceline*, Tauck arranged and retained control of the entire travel itinerary, arranged hotel accommodations, set up the travelers schedules, and dealt with common carriers on behalf of Plaintiff and Class members. Because Tauck was Plaintiff's travel agent, Tauck owes Plaintiff and Class members the duty to disclose material terms and is barred from making omission-based misrepresentations.

Accordingly, Plaintiff sufficiently alleges that Defendant, acting as a travel agent, owes the duty to disclose material information and is barred from making omission-based misrepresentations, such as its secret no-refund "policy" to Plaintiff and Class members. Defendant's motion to dismiss Count Seven should be denied.

VI. Plaintiff Has Stated a Claim for Unjust Enrichment

Defendant relies heavily on Judge Bryant's ruling in *In re Trilegiant Corp.*, 2016 WL 8114194 (D. Conn. Aug. 23, 2016) to urge dismissal of Plaintiff's claim for unjust enrichment but fails to note that this was a *summary judgment* ruling. In that same case, when Judge Bryant considered the defendants' motion to dismiss plaintiffs' unjust enrichment claim at the *pleadings* stage, she denied it. *In re Trilegiant Corp., Inc.*, 11 F. Supp. 3d 82, 127 (D. Conn. 2014).

As Judge Bryant explained, under Connecticut law, unjust enrichment is a "broad and flexible remedy," and plaintiffs seeking recovery under this theory "must prove (1) that the defendants were benefited, (2) that the defendants unjustly did not pay the plaintiffs for the benefits, and (3) that the failure of payment was to the plaintiffs' detriment." *Id.* (citing *Vertex, Inc. v. City of Waterbury*, 278 Conn. 557, 573 (2006)).

Plaintiff alleges exactly that: he and members of the class conferred a benefit on Defendant "in the form of money for Protection Plans covering specific trips," Defendant retained that benefit when it "rendered the [Plans] worthless by canceling the trips" and then "took the insurance money and will not return it" to the detriment of Plaintiff and the Class members who have the right to retain money paid for services that were not rendered. Compl. ¶¶ 34-35, 124-28. Accordingly, "[u]nder the liberal construction of the pleadings doctrine at the motion to dismiss stage . . . Plaintiff[] ha[s] sufficiently pled [his] unjust enrichment claim." *In re Trilegiant Corp., Inc.*, 11 F. Supp. 3d at 128.

Plaintiff further alleges that consumers are entitled to these refunds based on Defendant's deceptive and misleading conduct regarding its nonexistent "refund policy." *See, e.g.*, Compl. ¶ 30 ("It is apparent that Tauck never had any such policy at all and that Tauck is now refusing to provide refunds to which Plaintiff and the Class are entitled by referring to a policy that never existed"). This is sufficient to state a claim. *In re Trilegiant Corp., Inc.*, 2014 WL 1315835, at

*4 (D. Conn. Mar. 28, 2014) ("Since the deceptive or unfair practices used in the refund mitigation strategy can be used to support a claim for unjust enrichment, Priceline's motion to dismiss Schnabel's unjust enrichment claim related to that conduct is DENIED"). In contrast, it was only at the summary judgment stage that Judge Bryant found plaintiffs did not come forward with sufficient *evidence* to show that the defendants' retention of benefits was, as a matter of fact and law, *unjust*. *In re Trilegiant Corp.*, 2016 WL 8114194 at *13 (plaintiffs "have not presented evidence that the mitigation strategy employed by Trilegiant resulted in the accrual of membership fees in excess of those which would have accrued had Trilegiant not attempted to retain its customer"). Plaintiff is similarly entitled to present evidence supporting his well-founded allegation that Defendant's practices were deceptive, fraudulent, or otherwise unjust. *E.g.* Compl. ¶¶ 30, 86 ("Defendant never stated anywhere that the trip insurance premium would never be refunded in any circumstances. It is unfair and deceptive for Tauck to keep insurance money when the underlying thing that is being insured was canceled through no fault of Plaintiff or Class members").

While Defendant contends that a contract exists governing the Protection Plan at issue, Plaintiff actually pleads the *opposite*, and those allegations must be taken as true. Compl. ¶ 30 ("Tauck's 'policy,' as Tauck misleadingly communicated to Plaintiff by email, is to never refund the cost of the Protection Plan. However, Tauck's 'policy' appears nowhere in any of the relevant documents. *There is no written policy regarding refunds of Protection Plan fees when Tauck cancels a Tour*") (emphasis added). If Defendant believes there is in fact a written policy equivalent to a contract that governs and precludes Plaintiff's equitable claim, it must present evidence of such a contract in discovery. Currently, however, the claim must stand, and this would be true even *if* Plaintiff had pled any claim for breach of contract which, as Defendant

concedes, he has not. *Family Wireless #1, LLC v. Auto. Techs., Inc.*, 2016 WL 183475, at *12 (D. Conn. Jan. 14, 2016) ("a contract claim and an unjust enrichment claim may be pleaded in the alternative where the parties dispute whether the contract covered the subject matter of the unjust enrichment claim"); *Stevens v. Landmark Partners, Inc.*, 2009 WL 3151327, at *4 (D. Conn. Sept. 24, 2009) ("while Plaintiff cannot recover under both breach of contract and unjust enrichment, plaintiffs may plead these theories in the alternative").

CONCLUSION

Defendant's motion to dismiss should be denied in its entirety. However, if the Court grants the motion in any part, Plaintiff respectfully requests a reasonable time in which to amend the Complaint in order to address any deficiencies identified in that order.

Dated: October 15, 2020

Respectfully submitted,

JON BEERMANN, individually and on behalf of all others similarly situated,

By /s/ Jonathan M. Shapiro

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of October 2020, a copy of the foregoing was served by CM/ECF and/or mail on anyone unable to accept electronic filing. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

/s/ Jonathan M. Shapiro
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