UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

LAUREN SHIFLETT,

Plaintiff,

v. Case No: 8:20-cv-1880-T-30AAS

VIAGOGO ENTERTAINMENT INC.,

Defendant.

ORDER

THIS CAUSE is before the Court on Plaintiff's Motion for Class Certification (Dkt. 50) and Defendant's Response in Opposition (Dkt. 54). Upon review of these filings, including the filings and evidence that the parties filed under seal, and upon being otherwise advised in the premises, the Court concludes that the motion should be denied. Plaintiff has not established that class treatment is appropriate for any of her proposed classes.

BACKGROUND

A. Procedural History

Plaintiff Lauren Shiflett filed the instant action as a class action lawsuit on behalf of all persons who purchased tickets through Defendant Viagogo Entertainment Inc. and who were deprived of a timely refund, or any refund, after events were canceled in response to the Coronavirus Disease 19 ("Covid-19") pandemic. According to the First Amended Complaint ("FAC"): "Defendant has quietly sought to force the buyers to endure the

financial losses of the event cancellation instead of issuing timely refunds pursuant to the Viagogo Website's terms and conditions ("Terms") and the implied covenant of good faith and fair dealing therein." (Dkt. 20).

The FAC alleges the following claims: breach of contract; breach of implied contract; violation of Florida's Deceptive and Unfair Trade Practices Act ("FDUTPA"); conversion; and unjust enrichment. In relevant part, Plaintiff seeks an order requiring Defendant to: "(i) enforce the Terms and communications regarding refunds issued by Viagogo; (ii) cease issuing "credits" or "vouchers" in lieu of timely cash refunds to any Class member who has not requested such credits or vouchers; and (iii) pay damages and restitution to Plaintiff and Class members." *Id.*

Viagogo moved to dismiss all of the claims for mootness and failure to state a claim. Viagogo also moved to strike the class allegations. The Court denied Viagogo's motion to dismiss with respect to all of its arguments except those related to the conversion claim, which the Court dismissed. The Court denied the motion to strike the class allegations as premature. Subsequently, the parties conducted substantial discovery. The Court concludes that the record is sufficient to consider the issue of whether class certification is appropriate. The Court turns to the facts relevant to that inquiry.

B. Viagogo's Services and Terms

Viagogo owns and operates "the world's largest secondary marketplace for tickets to live events." The market operates primarily through Viagogo's website, although buyers may purchase tickets using a mobile application. On the Viagogo website, sellers

list tickets for sale to events such as sporting events, concerts, and festivals. Buyers can find these tickets and purchase them directly through the Viagogo website or the mobile application. Viagogo charges a fee to both the buyers and sellers for use of Viagogo's services. Notably, the transaction sequence for purchases to all events is the same.

Plaintiff alleges that she purchased tickets using Viagogo's website under the site's "Terms," which reflect a three-party agreement between: (1) a ticket "Buyer," such as Plaintiff, (2) a ticket "Seller," and (3) Viagogo, which provides the platform and facilitates ticket sale transactions. Once the Buyer chooses tickets listed by a Seller and makes payment, Viagogo collects the payment. The Terms state that "[V]iagogo does not take title to the underlying ticket and the actual transactions are between the Buyers and Sellers," Terms ¶ 1.2, and that "[w]e [Viagogo] are not involved in the actual transactions between Buyers and Sellers." *Id.* ¶ 6.4.

The Terms state that a Seller is paid by Viagogo for the sale under two conditions: (1) the Seller provides "the exact tickets listed for sale" and (2) "the ticket Buyer successfully gains entry to the event." Terms ¶ 1.3. The Terms further provide that Viagogo will pay the Seller "5–8 working days after the event if delivery of the tickets was successful to the buyer." *Id.* ¶ 2.12. The record reflects that, despite this language, Viagogo would pay certain sellers before the event.

If the Buyer does not successfully gain entry to an event or if the Seller provides "invalid tickets," defined as "anything where buyers are refused entry," Viagogo "reserves the right to cancel the Seller's sale," or find replacement tickets at the Seller's

expense. *Id.* ¶ 2.11. If the Seller delivers "invalid tickets," Viagogo's terms state "we may refund the buyer at any time," and that Viagogo "reserves the right to refund the buyer and not pay the seller even if proof of non entry is not presented." *Id.*

The Terms also contemplate that a Buyer may not successfully gain entry to an event through no fault of the Buyer or Seller, but because the event is cancelled or re-scheduled: "In the event that an event is cancelled or re-scheduled, Viagogo reserves the right to cancel a seller's transaction." Terms ¶ 2.11. Viagogo also reserves "the right to withhold payment [to the Seller] or collect repayment [from the Seller] if the event was re-scheduled or cancelled…" *Id.* ¶ 2.12.

The Terms identify specific circumstances in which Viagogo expressly *will not* provide a refund to a Buyer, such as event date or time changes, partial performances, or lost tickets (Terms ¶ 6.8); or when Viagogo is unable to deliver tickets to the Buyer after up to three delivery attempts and efforts to "rearrange delivery … or arrange a collection point." *Id.* ¶ 2.11. Event cancellation is not described in the Terms as a circumstance in which Viagogo will not issue refunds.

C. Viagogo's Pandemic Response

Prior to the Covid-19 pandemic, Viagogo maintained a common policy of issuing full cash refunds to buyers as a matter of course for any cancelled events. The refund was usually initiated within twelve to forty-eight hours after the buyers were informed of the event's cancellation. Viagogo altered this policy in response to the Covid-19 pandemic. The record reflects that Viagogo's senior management recommended that

refunds should be frozen or placed on hold. Viagogo also significantly changed its policies by offering buyers a voucher instead of a full refund for cancelled events.

Viagogo updated its website to include a "Coronavirus (COVID-19) Update" section. This section expressly informed buyers—with respect to cancelled events—that they "do not have to do anything," but will be "entitled to a full refund or a 125% voucher."

> Around late April or May 2020, Viagogo sent buyers the following email:
>
> > We apologize for any inconvenience this may cause. We ask that you only click here within 14 days of receiving this email if you are requesting a refund instead of the voucher. However, due to the unprecedented number of cancelled and postponed events worldwide, and the continuously evolving impact of the current COVID-19 pandemic on the global live events industry, it could take up to several months to process your refund.

The record reflects that for most of 2020, Viagogo did not initiate refunds for buyers who requested them until up to six months after the event was cancelled. This delay was reduced to about two months around February 2021.

D. Plaintiff's Claim

Plaintiff used Viagogo's services and paid $410.95 to purchase tickets to a Tool concert that was scheduled for April 19, 2020. The event was cancelled in response to the pandemic. Plaintiff learned through a post on the band's Facebook page that the band had cancelled all concerts scheduled for 2020. Plaintiff alleges that she contacted Viagogo on numerous occasions between April and July, 2020, requesting a refund, but Viagogo incorrectly classified the event as "postponed" or "rescheduled," and declined to provide a refund.

Plaintiff filed her initial complaint in this action on August 12, 2020, and two days later, on August 14, 2020, she received an email from Viagogo, acknowledging for the first time that the Tool concert was in fact "cancelled." On August 17, 2020, Plaintiff received an email from Viagogo stating that it would automatically issue her a voucher code for 125% of the value of her order within 72 hours. The email also stated that if Plaintiff was "requesting a refund instead of the voucher" she was required to click a link in the email, but that "it could take up to several months to process your refund." Three days later, on August 20, 2020, Viagogo issued Plaintiff a voucher code. The voucher expires on February 20, 2022.

E. Plaintiff's Proposed Classes

Plaintiff contends the following in her motion (Dkt. 50):

> All class members entered a form contract with viagogo, and viagogo's subsequent conduct towards members within each main class was materially uniform. In short, if viagogo determined an event was officially cancelled, it systematically sent all affected buyers a viagogo voucher, rather than an automatic refund. viagogo then gave buyers 14 days to request a refund through an inconspicuous link in an email. If an event was given a "postponed," or "rescheduled" status by viagogo, no refund or other compensation was offered to the buyer, even if the event's status remained that way for many months. Plaintiff is qualified to represent both classes and the subclass because she was affected by both of these practices and she is a Florida resident. This is a straightforward consumer action perfectly suited for class treatment.

Based on these contentions, Plaintiff requests certification of the following two classes:

> Cancelled Event Class: All persons residing in the United States or its territories who: 1) used viagogo to purchase tickets to an event originally scheduled to take place on or after March 1, 2020 that viagogo later classified as "cancelled"; and 2) did not receive a cash refund within 30 days after viagogo classified the event as

cancelled.

> Postponed Event Class: All persons residing in the United States or its territories who, prior to April 1, 2020, used viagogo to purchase tickets to an event: 1) that was originally scheduled to take place on or after March 1, 2020; 2) that did not occur within 90 days of the originally scheduled date; and 3) that viagogo did not classify as "cancelled" within 90 days of the originally scheduled date.

Plaintiff requests certification of these two classes with respect to the following causes of action: Count I: breach of contract (FAC ¶¶ 65–76); and—in the alternative—Count II: breach of implied contract (FAC ¶¶ 77–85); and Count V: unjust enrichment (FAC ¶¶ 104–114).

In addition, Plaintiff requests certification of the following subclass with respect to her third cause of action, violation of the FDUTPA (FAC ¶¶ 86–93):

> Florida Subclass: All Florida residents who are members of either the Cancelled Event Class or Postponed Event Class.

Plaintiff proposes to exclude from all class definitions any individuals who held tickets to a cancelled event and thereafter affirmatively indicated their preference to receive a voucher from Viagogo in lieu of a cash refund. The Court now turns to the relevant law regarding class certification.

LEGAL STANDARD

A district court is vested with broad discretion in determining whether to certify a class. *Washington v. Brown & Williamson Tobacco Corp.*, 959 F.2d 1566, 1569 (11th Cir. 1992). The party seeking class certification has the burden of proof and must affirmatively demonstrate compliance with Federal Rule of Civil Procedure 23. *Brown v. Electrolux Home Products, Inc.*, 817 F.3d 1225, 1233 (11th Cir. 2016).

First, the party must demonstrate the prerequisites articulated in Rule 23(a), which include establishing the following:

> (1) the class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law or fact common to the class;
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> (4) the representative parties will fairly and adequately protect the interests of the class.

Generally, these requirements are referred to as "numerosity, commonality, typicality, and adequacy of representation." *Valley Drug Co. v. Geneva Pharm., Inc.*, 350 F.3d 1181, 1188 (11th Cir. 2003) (internal quotation marks omitted). The party must be prepared to prove that there are "*in fact* sufficiently numerous parties, common questions of law or fact, typicality of claims or defenses, and adequacy of representation as required by Rule 23(a)." *Comcast Corp. v. Behrend*, 133 S.Ct. 1426, 1432 (2013).

Once the party seeking class certification meets all of Rule 23(a)'s requirements, the party must then satisfy one of Rule 23(b)'s requirements. *Id.* Here, Plaintiff relies on Rule 23(b)(3), which provides that a class action may be maintained if Rule 23(a) is satisfied and if: "(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."

The party seeking to maintain the class action must affirmatively demonstrate its compliance with Rule 23. *Dukes*, 564 U.S. at 350–51. "Failure to establish any one of these four [Rule 23(a)] factors and at least one of the alternative requirements of Rule 23(b) precludes class certification." *Valley Drug Co.*, 350 F.3d at 1188 (citation omitted). "[T]he presumption is against class certification because class actions are an exception to our constitutional tradition of individual litigation." *Brown*, 817 F.3d at 1233. "A district court that has doubts about whether the requirements of Rule 23 have been met should refuse certification until they have been met." *Id*. at 1234 (internal quotations omitted).

DISCUSSION

The Court concludes that there are too many problems with Plaintiff's proposed classes (and subclass) to meet the difficult Rule 23 standard. Plaintiff's Cancelled Event Class includes all individuals whose events were classified as cancelled by Viagogo but did not receive a refund within thirty days. The Postponed Event Class includes all individuals whose events did not occur within ninety days of the originally-scheduled date. The FDUTPA subclass includes members of the other two classes residing in Florida. Excluded are individuals "who held tickets to a cancelled event and thereafter affirmatively indicated their preference to receive a voucher."

The most critical problem with these classes is that Plaintiff's theory of liability requires Viagogo to issue refunds to buyers who received a voucher instead of a refund or who hold tickets to events rescheduled ninety-plus days after the original dates, which

includes buyers who prefer to keep their vouchers or tickets. (Jain Decl. ¶¶ 17-24). In other words, Plaintiff assumes these buyers want a refund. Plaintiff does not address the fact that Viagogo would have to cancel buyers' unused vouchers and require buyers to return tickets for their postponed events to prevent double recovery. (Jain Decl. ¶ 26).

The other problems relate specifically to the prerequisites of Rule 23(a). Plaintiff has not sufficiently shown that her claim is common and typical to the putative class.[1]

I. Requirements under Rule 23(a)

A. Commonality

"Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.'" *Wal-Mart Stores, Inc. v. Dukes,* 131 S. Ct. 2541, 2551 (2011). "This does not mean merely that they have all suffered a violation of the same provision of law." *Id.* The claims must depend upon a common contention and "be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.*

B. Typicality

Typicality requires that the class representative have the same injury as other class members. *Busby v. JRHBW Realty, Inc.,* 513 F.3d 1314, 1322 (11th Cir. 2008). "[T]ypicality measures whether a sufficient nexus exists between the claims of the named

[1] Because the Court concludes that the commonality and typicality prerequisites are not satisfied, the Court need not address the other Rule 23(a) requirements.

representatives and those of the class at large." *Id.*; s*ee Vega,* 564 F.3d at 1275. Similar to commonality, typicality may be satisfied even if there are some factual differences between the claims of the named representatives and the claims of the putative class members. *See Prado*, 221 F.3d at 1279 n. 14. Although typicality and commonality may be related, the Eleventh Circuit has distinguished the two by noting that, "commonality refers to the group of characteristics of the class as a whole, while typicality refers to the individual characteristics of the named plaintiff in relation to the class." *Piazza v. Ebsco Indus., Inc*., 273 F.3d 1341, 1346 (11th Cir. 2001).

C. Analysis

The record reflects that commonality and typicality are not established because it is entirely unclear whether the class members suffered the same injury with respect to the class as a whole and with respect to Plaintiff's individual situation. To summarize, the crux of Plaintiff's legal claim is that she did not receive a timely refund for a cancelled event that was initially classified as postponed for an unreasonable period of time. As stated above, after Viagogo marked an event as "cancelled," buyers who had purchased tickets to that event were sent an email informing them of the issuance of a voucher worth 125% of the initial ticket price, and providing them with a link to decline the voucher and request a refund (the "survey email"). The record reflects that approximately 60%-70% of buyers who received a survey email as of approximately April 21, 2020, clicked the link requesting a refund instead of a voucher, and approximately 30%-40% did not. Plaintiff assumes that all of the buyers who accepted a voucher suffered damages and should have

received a refund in lieu of a voucher. But this assumption ignores (a) the economic value of receiving a voucher worth 125% of the original purchase price and (b) growth in voucher redemption rates.

An individual inquiry would be required to determine if each of the proposed class members that accepted a voucher wanted a refund instead of a voucher. The buyers who did not opt for refunds in the survey email received a voucher worth 125% of the amount they paid for their original ticket. The Declaration of Deepak Jain, Defendant's expert, is instructive on this matter.[2] He states:

> For example, if a buyer spends $500 on tickets for an event that was subsequently cancelled, then viagogo offered the buyer two options. a. Option 1: The buyer could request a full refund of the $500 purchase price. b. Option 2: The buyer could obtain a voucher worth $625 ($500 x 125%) to use on future events listed on viagogo's website. By choosing a voucher in this example, the buyer benefits by having $125 or 25% more buying power on viagogo's website. Depending on the buyer, the voucher may provide economic benefits that exceed a refund.

(Jain Decl. ¶¶ 34-35). Notably, the record reflects that some buyers already used their vouchers for events that already occurred and some buyers redeemed their vouchers for events that are scheduled to occur soon.

With respect to postponed events, Plaintiff again assumes that buyers are similar to her because they would have preferred a refund but this too is entirely speculative. Plaintiff also does not address the fact that the Postponed Event Class members may no

[2] Jain's Declaration states that Defendant retained him to offer opinions regarding "(a) ticket and event data produced by viagogo covering events scheduled between March 1, 2020 and May 17, 2021, and (b) the calculation of damages, assuming liability." (Dkt. 55 at 65).

longer possess their tickets—the postponed event tickets could have been resold or gifted. An individual inquiry would be required to determine whether a class member controls the postponed event ticket in order to calculate damages. Further, to prevent double recovery, class members would have to return the ticket or, for electronic tickets, provide some assurance that they have not transferred the ticket.

Another impediment to class treatment is that Plaintiff fails to acknowledge that she has fundamental conflicts with putative class members–she seeks to force them to give up something of value (a 125% voucher or tickets to a valid event) without regard to their preferences or desires. Notably, Plaintiff testified that she does not know whether people prefer the voucher or a refund and that the decision is a personal choice. She also indicated that, in order to determine a buyer's preference, each buyer would need to be contacted.

These individual inquires make clear that Plaintiff's class definitions are overbroad and fail to meet Rule 23(a)'s rigorous analysis. Indeed, and as Viagogo points out in its response, Plaintiff's proposed classes include many buyers who suffered zero injury. To be sure, the Eleventh Circuit has suggested that the mere presence of uninjured class members does not necessarily preclude class certification. *See Cordoba*, 942 F.3d at 1275–76. However, "a class should not be certified if it is apparent that it contains *a great many* persons who have suffered no injury at the hands of the defendant." *Id.* at 1276 (quoting *Kohen v. Pacific Inv. Mgmt. Co. LLC*, 571 F.3d 672, 678 (7th Cir. 2009)) (emphasis in original). Such is the case here.

Although the Court may end its analysis here because Plaintiff failed to establish all of Rule 23(a)'s requirements, the Court briefly discusses the requirements of Rule 23(b)(3), which are also not met for the same reasons.

II. Rule 23(b)(3) Requirements

To certify a class action under Rule 23(b)(3), Plaintiff must establish: (1) "that the questions of law or fact common to class members predominate over any questions affecting only individual members, and (2) that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *Vega*, 564 F.3d at 1277.

The "central and overriding prerequisite of a Rule 23(b)(3) class" is the predominance of common questions over individual questions. *Id.* at 1278. Predominance is "far more demanding than the commonality requirement found in Rule 23(a)(2), and tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Carriuolo v. Gen. Motors Co.*, 823 F.3d 977, 985 (11th Cir. 2016) (citing *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623–24 (1997)). The party seeking certification must show that "the issues in the class action that are subject to generalized proof and thus applicable to the class as a whole, [ ] predominate over those issues that are subject only to individualized proof." *Babineau v. Fed. Exp. Corp.*, 576 F.3d 1183, 1191 (11th Cir. 2009) (citing *Kerr v. City of W. Palm Beach*, 875 F.2d 1546, 1558 (11th Cir. 1989)).

In *Cherry v. Dometic Corp.*, 986 F.3d 1296, 1302 (11th Cir. 2021), the Eleventh Circuit recently clarified the issue of administrative feasibility, noting that whether a class

is adequately defined and "ascertainable" is relevant to the "manageability" balancing test of Rule 23(b)(3). *Cherry* is a departure from prior Eleventh Circuit precedent that treated administrative feasibility as a threshold issue. The Eleventh Circuit acknowledged that, while no longer a threshold issue, whether a proposed class is ascertainable is still important because, "without an adequate definition for a proposed class, a district court will be unable to ascertain who belongs in it." 986 F.3d at 1302 (citation omitted).

Defendant argues in its response that Plaintiff's proposed classes are not ascertainable because whether an individual falls within one of the proposed classes depends on subjective criteria—preference. This includes an individual's preference for a voucher as opposed to a refund (in the case of a cancelled event) and a usable ticket as opposed to a refund (in the case of a postponed event). *See* (Jain Decl. ¶ 4) ("The calculation of damages for both the Postponed Event Class and the Cancelled Event Class in this matter would require an individual inquiry for each of the 50,208 buyer transactions potentially at issue in this matter. As discussed in this Declaration, each class member has individualized issues impacting the calculation of damages. A spreadsheet cannot be used as a substitute for performing these individual inquiries for the purposes of calculating damages.").

Plaintiff's definition also requires an assessment of whether someone in any class "affirmatively indicated" her preference to receive a voucher without explaining what it means to express such an affirmation. The survey email informed buyers that they did not need to take any action if they preferred a voucher. So, as Defendant points out, is taking

no action to express a preference for a voucher akin to affirmatively indicating a preference? The Court agrees with Defendant that all of these uncertainties render the proposed classes unmanageable.

The proposed classes are also not ascertainable because the definitions are based on arbitrary criteria. The proposed classes assume that buyers should have received refunds within thirty days of cancellation or that Viagogo should have marked an event cancelled if it had not occurred within ninety days of the original date. But Plaintiff does not discuss in her motion how she determined these periods of time. And Plaintiff's own actions belie these arbitrary deadlines. (Jain Decl. ¶ 21) ("Plaintiff's arbitrary 90 day cutoff to determine whether a postponed event should have been cancelled by viagogo is inconsistent with [her] own actions. Ms. Shiflett testified that in November 2019 she purchased tickets to the Electric Daisy Carnival Orlando, which was originally scheduled to take place in November 2020. When the event was cancelled, Ms. Shiflett was given an option to obtain a refund or attend the event a year later in November 2021 (effectively postponing her attendance). Ms. Shiflett chose to forgo a refund, so that she could attend the event <u>one year after the original event date</u>.") (emphasis in original).

In sum, there are significant individual questions that arise from Plaintiff's proposed classes and these questions predominate over any common issues of fact or law. The most glaring individualized question relates to the uncertainty of the buyers' damages, which is naturally related to the issue of determining liability for the legal claims. For example, if a buyer prefers a voucher to a refund how could she have been deceived under FDUPTA

and how would that amount to any breach of contract or unjust enrichment? Relatedly, how is a buyer damaged if he prefers keeping his ticket to an event that was postponed? Plaintiff attributes zero value to a voucher or a ticket for a postponed event, forgetting that the current climate is experiencing surging demand for live events. Rule 23's requirements are rigorous and the presumption is against class certification. Plaintiff has not met the high burden to establish the superiority of proceeding as a class action.

It is therefore ORDERED AND ADJUDGED that:

1. Plaintiff's Motion for Class Certification (Dkt. 50) is denied.

DONE and **ORDERED** in Tampa, Florida, this July 16, 2021.

JAMES S. MOODY, JR.
UNITED STATES DISTRICT JUDGE

Copies furnished to:
Counsel/Parties of Record