IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DANIEL BANAKUS, individually and on behalf of all others similarly situated,	)	
	)	Case No. 12-cv-6244
Plaintiff,	)	
	)	Judge John Z. Lee
v.	)	
UNITED CONTINENTAL HOLDINGS, INC. and UNITED AIR LINES, INC.,	)	
Defendants.	)	

ORDER

Before this Court is a motion to dismiss the complaint filed by Plaintiff Daniel Banakus ("Banakus"), individually and on behalf of a putative class of similarly situated "Premier" members of United Air Lines' frequent flyer program. Defendants United Continental Holdings, Inc. and United Air Lines, Inc. (collectively, "United") argue that Banakus' complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) because the plain terms and conditions of United's "Mileage Plus" frequent flyer program (the "Mileage Plus Agreement") bar his claim. Banakus responds that his status as a member of United's Premier Program was governed by a contractual agreement between him and United and not subject to the terms and conditions of the Mileage Plus program generally. Alternatively, Banakus argues that even if this Court were to find that Premier membership status was governed by the Mileage Plus Agreement, that agreement is unenforceable and unconscionable. United counters that such arguments are preempted by the Airline Deregulation Act of 1978. For the reasons set forth below, Defendants' motion is denied.

Facts As Alleged In Plaintiff's Complaint

Banakus is a Premier Member of United's Mileage Plus frequent flyer program. (Compl. ¶¶ 27, 28.) Mileage Plus Members became "Premier" when they fly 25,000 miles during the same calendar year. (*Id.* ¶ 2.) Banakus alleges that he flew more than 25,000 miles during 2011, qualifying him for Premier status during the following calendar year, 2012. (*Id.* ¶ 28.) Premier Members receive certain elevated benefits. During 2011, those benefits included free upgrades to Economy Plus seating at the time of booking and two free checked bags on each flight. (*Id.* ¶¶ 14-15.) In March 2012, after United Airlines and Continental Airlines merged, United consolidated the frequent flyer programs of both airlines into one single program, known as MileagePlus. (*Id.* ¶ 22.) Under the terms of the MileagePlus Program, Premier Members are now known as "Premium Silver Elite" Members, and their elevated benefits are somewhat reduced. For example, seat upgrades are only available at check-in, rather than at booking, and members are entitled to only one free checked bag, not two. (*Id.* ¶¶ 24-25.)

Banakus contends that he entered into a binding contract with United when he accepted a unilateral offer from United to become a Premier Member by flying 25,000 miles during the 2011 calendar year. (Compl. ¶¶ 28, 39.) Banakus further contends that United breached that contract by devaluing the member benefits he earned for the 2012 calendar year by reducing the benefits to its Premier Members not only prospectively, but retroactively. (*Id.* ¶¶ 24-25.)

United moves to dismiss this action on the grounds that there is no separate unilateral contract between it and Banakus arising out of his Premier status. Instead, United argues, the terms of service in effect in 2011 for the Mileage Plus program applied

equally to the Premier membership and permitted United to alter the benefits offered to Premier Members. This Court addresses these arguments below.

Discussion

In ruling upon a Rule 12(b)(6) motion to dismiss, federal courts must accept as true all well-pleaded facts alleged in the complaint and construe all reasonable inferences in favor of the non-moving party. *Killingsworth v. HSBC Bank*, 507 F.3d 614, 618 (7th Cir. 2007). In order to state a valid claim, a plaintiff's complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A plaintiff is not required to allege "'detailed factual allegations,'" but must plead facts that when "'accepted as true . . . state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). In order to determine whether a complaint meets this standard, the "reviewing court draw[s] on its judicial experience and common sense." *Iqbal*, 556 U.S. at 678. Where the factual allegations are well-pleaded, the Court assumes them to be true and will determine whether they plausibly give rise to an entitlement to relief. *Id.* at 679. A claim is facially plausible when its factual content allows the Court to draw a reasonable inference that the defendant is liable for the actions alleged. *Id.* at 678.

Although Banakus acknowledges in his complaint that Premier status was a tier within United's Mileage Plus program, he also expressly alleges that this status was obtained pursuant to a separate unilateral contract between him and United, offered by United through a solicitation. Banakus' complaint, however, does not attach any documentation of this alleged contract. United, by contrast, appends to its motion to

dismiss the terms and conditions that governed the Mileage Plus program in 2011 (the operative year). United argues that the Mileage Plus Agreement plainly provides that United could vary the terms of the program "in whole or in part, at any time, with or without notice, even though changes may affect the value of the mileage or certificates already accumulated." (Defs.' Mem. 5-6.) Thus, according to United, it was entirely within its rights to alter the terms of the Mileage Plus program for 2012, including those benefits accrued by Premier Members.

Although defendants are generally not permitted to introduce external documents to support a motion to dismiss without converting it to a motion for summary judgment, United contends that this Court is entitled to consider the Mileage Plus Agreement pursuant to established Seventh Circuit precedent, most notably *Rosenblum v. Travelbyus.com, Ltd.*, 299 F.3d 657, 661 (7th Cir. 2002). *Rosenblum* provides that this Court in its discretion may consider documents attached to a Rule 12(b)(6) motion to dismiss "if they are referred to in the plaintiff's complaint and are central to his claim," and that this exception applies to "cases interpreting, for example, a contract." 299 F.3d at 661 (internal citations omitted).

For his part, Banakus argues that the Court should not consider the Mileage Plus Agreement because he expressly alleges that the Premier membership is pursuant to a unilateral agreement between himself and United, and not the Mileage Plus Agreement. *Rosenblum* teaches, however, that the Court may consider the Mileage Plus Agreement in deciding this motion to dismiss. There, the Seventh Circuit explained:

> Although Mr. Rosenblum [the plaintiff] did not refer explicitly to the Employment Agreement in his complaint, that agreement nevertheless falls within the exception. From Travelbyus' [the defendant's] point of view, the contract under review is the combination of the Acquisition Agreement and the Employment Agreement. In moving to dismiss on the ground that the contract, read in this matter, requires that the parties resort to arbitration, Travelbyus is entitled to take the position that Mr. Rosenblum has appended only a part of the relevant instrument and to append what it contends is the remainder. It would have been impossible for the district court or for this court to evaluate the disagreement between the parties without having all of the documentation. It is impossible to render the necessary adjudication without reference to the Employment Agreement.

Id. at 661-62 (citing *Venture Assocs. Corp. v. Zenith Data Sys. Corp*., 987 F.2d 429, 431 (7th Cir. 1993)). Likewise, here, United is "entitled to take th[e] position" that the relationship between it and Banakus was controlled by the Mileage Plus Agreement, and this Court cannot resolve this motion without reference to that contract. However, the Court's consideration of the Mileage Plus Agreement does not ineluctably result in the dismissal of Banakus' complaint.

As Banakus points out, the 2011 Mileage Plus Agreement makes no mention of Premier status. Nor does it specifically state that Premier membership is governed by the terms and conditions of the Mileage Plus Agreement. United provides no other documentation to this Court (at this stage, at least) explicitly establishing that this was the case. Based on the current record, and considering the allegations in the complaint in a light favorable to Plaintiff, this Court cannot conclude as a matter of law that the terms and conditions of the Mileage Plus Agreement in effect in 2011 also govern the Premier membership program. *See Lagen v. United Continental Holdings, Inc.*, No. 12 C 4056, 2013 WL 375213, at **2-4 (N.D. Ill. Jan. 31, 2013).

For the foregoing reasons, this Court is constrained from adopting United's arguments in favor of dismissal.[1] United's motion is denied.

Conclusion

For the reasons set forth above, Defendants United Continental Holdings, Inc.'s and United Airlines, Inc.'s Motion to Dismiss [10] is denied. Because this Court does not reach the arguments addressed in Plaintiff's Motion for Leave to File Supplemental Authority [28], that motion is denied as moot. The status hearing previously set for 3/14/13 at 9:00 a.m. is to stand. The parties should conduct a Fed. R. Civ. P. 26(f) conference and jointly submit a proposed discovery plan to this Court at least three business days prior to the status hearing.

SO ORDERED **ENTER: 3/1/13**

JOHN Z. LEE
U.S. District Judge

[1] To the extent this Court were inclined to grant the motion to dismiss on the grounds urged by United, Banakus argues that, to the extent the Mileage Plus Agreement controls, it is unenforceable for two reasons. First, he asserts that the modification clause that allows United to terminate its obligations without notice is unenforceable under Illinois law. Second, Banakus contends that the modification clause is both substantively and procedurally unconscionable. United responds that these arguments are preempted by the Airline Deregulation Act of 1978 (the "ADA"). *See American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995). The Court's decision above renders consideration of these arguments premature.