

**BEFORE THE  
U.S. DEPARTMENT OF TRANSPORTATION  
OFFICE OF THE SECRETARY  
WASHINGTON, D.C.**

SIMON CYR,  
Third-Party Complainant

v.

SUNWING AIRLINES INC.,  
Respondent

Docket DOT-OST-2020-0057

**ANSWER OF SUNWING AIRLINES INC.  
TO THIRD-PARTY COMPLAINT**

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June 29, 2020

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Sunwing Airlines Inc. (Sunwing), pursuant to Rule 405 of the Department's Rules of Practice, 14 CFR § 302.405, submits the following answer to the Complaint of Simon Cyr (the Complaint). Sunwing requests that the Assistant General Counsel for Aviation Enforcement and Proceedings dismiss the Complaint in accordance with Rule 406(a)(2).

**Summary**

Sunwing is a Canadian air carrier that operates leisure travel-oriented flights between points in Canada and vacation destinations in Mexico, the Caribbean, the United States and other countries. Sunwing's international services are currently suspended due to the Covid-19 pandemic; the carrier plans to resume the flights when circumstances permit and traffic warrants. Historically and at present, the overwhelming majority of Sunwing's passengers are residents of Canada who purchase in Canada and whose travel originates in Canada.<sup>1</sup> The Complaint is based entirely on the content of web pages from Sunwing sites<sup>2</sup> marketed to Canadian consumers, not to U.S. consumers. While the Complaint alleges the policies stated

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<sup>1</sup> In the case of transportation between Canada and the United States, over 98% of Sunwing's passengers originate their travel at a Canadian point. Source: Sunwing records.

<sup>2</sup> Sunwing.ca and sunwingcares.ca.

on those pages do not comply with Covid-19 related guidance issued by the U.S. Department of Transportation (DOT or Department), the policies cited by the complainant satisfy all laws, regulations and guidance issued by the Canadian Government. The Department does not regulate websites marketed to non-U.S. consumers or the content of such sites. Nor do DOT's policy statements apply in the circumstances. The Complaint should be dismissed without further proceedings.

### **Answer**

This answer and affirmative defenses below are submitted in compliance with Rule 408(b). Any allegation of the Complaint not addressed below is denied. Paragraph references correspond to the numbered paragraphs of the Complaint.

1. Sunwing denies the allegation of non-compliance with DOT rules stated in Paragraph 1.

2. Sunwing denies the allegation stated in Paragraph 2 that it has engaged in an unfair or deceptive practice within the meaning of 49 U.S.C. § 41712.

3. Regarding Paragraph 3, Sunwing is without knowledge as to when or why the complainant, Simon Cyr, visited a Sunwing website. Sunwing neither admits nor denies the remainder of Paragraph 3 and states that Attachment 1 to the Complaint, taken from [www.sunwing.ca](http://www.sunwing.ca), speaks for itself.

4. Regarding Paragraph 4, Sunwing neither admits nor denies the allegations and states that Attachment 2 to the Complaint, taken from [www.sunwingcares.ca](http://www.sunwingcares.ca), speaks for itself.

5. Regarding Paragraph 5, Sunwing admits it is a Canadian airline authorized to operate, and that has operated flights between airports in Canada and Florida, and that it is generally subject to DOT jurisdiction vis-à-vis flights serving the United States. Sunwing denies the Department's *Enforcement Notice Regarding Refunds by Carriers Given the Unprecedented Impact of the Covid-19 Public Health Emergency on Air Travel* dated April 3, 2020 (the Enforcement Notice) applies to the subject matter of the Complaint.

6. Regarding Paragraph 6, Sunwing states that the Enforcement Notice speaks for itself.

7. Regarding Paragraph 7, Sunwing states that the Enforcement Notice speaks for itself.

8. Regarding Paragraph 8, Sunwing admits the Department's *Frequently Asked Questions Regarding Airline Ticket Refunds Given the Unprecedented Impact of the Covid-19 Public Health Emergency on Air Travel* (the DOT FAQ) was issued May 12, 2020, and states that the DOT FAQ speaks for itself.

9. Regarding Paragraph 9, Sunwing denies its policy violates the Enforcement Notice, which does not apply to the subject matter of the Complaint.

10. Regarding Paragraph 10, Sunwing denies the allegation that it has engaged in an unfair or deceptive practice within the meaning of 49 U.S.C. § 41712.

11. Paragraph 11 is a request to the Department, not an allegation. The only action taken by the Department in this matter should be dismissal of the Complaint.

### **Affirmative Defenses**

1. The Department considers the content of carrier websites marketed primarily to non-U.S. consumers to be outside the scope of DOT regulatory authority. See *Answers to Frequently Asked Questions Concerning the Enforcement of the Second Final Rule on Enhancing Airline Passenger Protections (EAPP #2)*, updated through December 12, 2016, at 17-18 (Item VI.3), 23 (Item IX.1) and 33 (Item X.24a). The Sunwing sites relied upon in the Complaint utilize a ".ca" suffix, designating a Canadian site, and users may choose to view the sites in English or French (the official languages of Canada). Sunwing.ca offers and sells transportation in Canadian currency only, and promotions are focused on outbound service from Canada to various foreign destinations.<sup>3</sup> DOT does not regulate such websites, just as it does

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<sup>3</sup> The other site referenced in the Complaint, sunwingcares.ca, is not a sales portal but, rather, a customer care site.

not regulate other aspects of air transport whose “center of gravity” is foreign. Prominent examples include inapplicability of DOT’s denied boarding compensation, tarmac delay and public charter rules to foreign-originating U.S.-bound travel; see 14 CFR §§ 250.2, 259.4(a) and 380.3(c).

2. Extraterritorial application of DOT consumer-protection rules, regulations or policies would be unacceptable from a variety of perspectives.<sup>4</sup> Chief among them in the present circumstances is that the Government of Canada is best suited to address the interests of Canadian consumers and air carriers – and it has done so. On March 25, 2020, the Canadian Transportation Agency (CTA) – Canada’s DOT equivalent – issued the *Statement on Vouchers* appended as Attachment A. Per the CTA statement:

The COVID-19 pandemic has caused major disruptions in domestic and international air travel.

For flight disruptions that are outside an airline's control, the *Canada Transportation Act* and *Air Passenger Protection Regulations* only require that the airline ensure passengers can complete their itineraries. Some airlines' tariffs provide for refunds in certain cases, but may have clauses that airlines believe relieve them of such obligations in force majeure situations.

\* \* \*

While any specific situation brought before the CTA will be examined on its merits, the CTA believes that, generally speaking, an appropriate approach in the current context could be for airlines to provide affected passengers with vouchers or credits for future travel, as long as these vouchers or credits do not expire in an unreasonably short period of time (24 months would be considered reasonable in most cases).

Even more to the point is *FAQs: Statement on Vouchers* issued by the CTA on April 22, 2020 (appended as Attachment B). The FAQs include the following:

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<sup>4</sup> See, e.g., *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010), in which the Supreme Court held that U.S. law against securities fraud does not apply to investment transactions occurring outside the United States, even if they have a domestic impact or effect. “When a statute gives no clear indication of an extraterritorial application, it has none.” 561 U.S. at 255.

Why did the CTA talk about vouchers when US and EU regulators have said that airlines should give refunds?

The American and European legislative frameworks set a minimum obligation for airlines to issue refunds when flights are cancelled for reasons outside their control. Canada's doesn't. That's the reason for the difference in the statements. Some jurisdictions have relaxed the application or enforcement of requirements related to refunds in light of the impacts of the COVID-19 pandemic, including European countries that have approved the issuance of vouchers instead of refunds.

These CTA statements directly reflect Canada's *Air Passenger Protection Regulations* (APPR), available at <https://laws-lois.justice.gc.ca/eng/regulations/SOR-2019-150/page-1.html#docCont>. Sections 10 and 18 of the APPR establish that where a flight cancellation results from a situation outside a carrier's control, alternate travel arrangements may be provided rather than a refund – hence the CTA statements.<sup>5</sup>

An attempt by the Department to assert jurisdiction over transactions governed by foreign consumer-protection rules, regulations or policies would create an impossible compliance situation, forcing carriers to choose, at their peril, whose rules to follow. As noted above, DOT does not regulate aspects of air transport whose center of gravity is foreign. Moreover, the Department's authority to regulate abroad is limited by 49 USC § 40120(b), which requires an international agreement and the active approval of the president for such regulation to occur. Neither condition has been met.

3. The DOT Enforcement Notice and related FAQ document cited in the Complaint are statements of policy or guidance and do not have the force or effect of law. Whether non-compliance with the Enforcement Notice and FAQ would constitute a violation of 49 USC § 41712, as the Department asserts, has not been adjudicated; as such, the outcome of a neutral

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<sup>5</sup> Confirming Canada's policy a few weeks after the CTA's issuance of *FAQs: Statement on Vouchers*, Transport Minister Marc Garneau stated: "I have said many times that I have enormous sympathy for those who would have preferred to have a cash refund in these difficult circumstances. It is far from being an ideal situation. At the same time, if airlines had to immediately reimburse all cancelled tickets, it would have a devastating effect on the air sector, which has been reeling since the COVID 19 pandemic started." Source: <https://www.cbc.ca/news/politics/transport-minister-airlines-survival-versus-refunds-1.5590392> (May 29, 2020). Note that Canadian carriers have received nothing comparable to the federal grants and loans their U.S. counterparts have received under the CARES Act.

assessment of the issue is unknown.<sup>6</sup> Nor were the Enforcement Notice and FAQ subjected to public comment or other Administrative Procedure Act requirements prior to their issuance.<sup>7</sup> Thus, even if the Enforcement Notice and FAQ were somehow deemed to affect the content of the Sunwing websites or policies cited in the Complaint, any noncompliance with those pronouncements would not be probative of, much less establish a violation.

4. The complainant, Simon Cyr, does not claim to have purchased a ticket from Sunwing nor does he allege having suffered any harm. Further, upon information and belief, Mr. Cyr resides in Canada and is a citizen of Canada.<sup>8</sup> Undaunted, Mr. Cyr implores the Department, a U.S. regulatory agency, to involve itself in an academic complaint of a Canadian citizen against a Canadian carrier's policies stated on its Canadian website. It is difficult to imagine a more obvious and inappropriate drain on the Department's resources. DOT should dismiss the Complaint summarily to avoid further waste of its resources and to deter the filing of such spurious pleadings by Mr. Cyr and other parties in the future.

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<sup>6</sup> Indeed, the Department itself has recently acknowledged the existence of ambiguity in this respect: "[T]he standards for unfairness and deception [under § 41712] should be specified and an explanation of how any prohibited or required actions meet those standards should be provided for clarity and to ensure consistency with the statute." *Notice of Proposed Rulemaking - Defining Unfair or Deceptive Practices*, 85 Fed. Reg. 11881, 11883 col. 1 (Feb. 28, 2020).

<sup>7</sup> It is a well-established principle of administrative law that policy statements and guidance do not have the force and effect of law. *Perez v. Mortgage Bankers Association*, 575 U.S. \_\_\_, 135 S.Ct. 1199, 1208 (2015). Similarly, see the DOT General Counsel's February 2019 *Memorandum for Secretarial Officers and Heads of Operating Administrations* confirming that DOT will follow the Department of Justice's advice stating, in pertinent part, that "prosecuting attorneys may not use noncompliance with guidance documents as a basis for proving violations of applicable law. The Department should not treat a party's noncompliance with an agency guidance document as presumptively or conclusively establishing that the party violated the applicable statute or regulation." Memorandum from Associate Attorney General, U.S. Department of Justice, *Limiting Use of Agency Guidance Documents in Affirmative Civil Enforcement Cases* (January 25, 2018), available at <http://src.bna.com/vY4>.

<sup>8</sup> Compare the Department's dismissal of a third-party complaint filed by a dual U.S.-foreign citizen in which the complainant "ha[d] not offered a single instance in which he suffered harm" resulting from the carrier policy at issue. *Parker v. Saudi Arabian Airlines*, Order 2018-2-20 at 6, March 1, 2018. The same result should obtain here.

Sunwing Airlines Inc. requests that the Assistant General Counsel for Aviation Enforcement and Proceedings, in accordance with Rule 406(a)(2), issue an order dismissing the Complaint in its entirety.

Respectfully submitted,



Aaron A. Goerlich  
Garofalo Goerlich Hainbach PC

*Counsel for Sunwing Airlines Inc.*

June 29, 2020

#### **CERTIFICATE OF SERVICE**

I certify that on June 29, 2020, I served the foregoing answer (including Attachments A and B) by electronic mail upon:

simon.cyr.ft@outlook.com

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Aaron A. Goerlich



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## Statement on Vouchers

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The COVID-19 pandemic has caused major disruptions in domestic and international air travel.

For flight disruptions that are outside an airline's control, the *Canada Transportation Act* and *Air Passenger Protection Regulations* only require that the airline ensure passengers can complete their itineraries. Some airlines' tariffs provide for refunds in certain cases, but may have clauses that airlines believe relieve them of such obligations in force majeure situations.

The legislation, regulations, and tariffs were developed in anticipation of relatively localized and short-term disruptions. None contemplated the sorts of worldwide mass flight cancellations that have taken place over recent weeks as a result of the pandemic. It's important to consider how to strike a fair and sensible balance between passenger protection and airlines' operational realities in these extraordinary and unprecedented circumstances.

On the one hand, passengers who have no prospect of completing their planned itineraries with an airline's assistance should not simply be out-of-pocket for the cost of cancelled flights. On the other hand, airlines facing huge drops in passenger volumes and revenues should not be expected to take steps that could threaten their economic viability.

While any specific situation brought before the CTA will be examined on its merits, the CTA believes that, generally speaking, an appropriate approach in the current context could be for airlines to provide affected passengers with vouchers or credits for future travel, as long as these vouchers or credits do not expire in an unreasonably short period of time (24 months would be considered reasonable in most cases).

The CTA will continue to provide information, guidance, and services to passengers and airlines as we make our way through this challenging period.

**For more information, please visit [FAQs: Statement on Vouchers](#)**

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## FAQs: Statement on Vouchers

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*The CTA has been asked a number of questions about its Statement on Vouchers. Below are answers to the most frequently-posed questions.*

### What is the purpose of the Statement on Vouchers?

The Statement on Vouchers, although not a binding decision, offers suggestions to airlines and passengers in the context of a once-in-a-century pandemic, global collapse of air travel, and mass cancellation of flights for reasons outside the control of airlines.

This unprecedented situation created a serious risk that passengers would simply end up out-of-pocket for the cost of cancelled flights. That risk was exacerbated by the liquidity challenges faced by airlines as passenger and flight volumes plummeted.

For flights cancelled for reasons beyond airlines' control, the *Air Passenger Protection Regulations*, which are based on legislative authorities, require that airlines ensure passengers can complete their itineraries but do not obligate airlines to include refund provisions in their tariffs.

The statement indicated that the use of vouchers could be a reasonable approach in the extraordinary circumstances resulting from the COVID-19 pandemic, when flights are cancelled for reasons outside airlines' control and passengers have no prospect of completing their itineraries. Vouchers for future travel can help protect passengers from losing the full value of their flights, and improve the odds that over the longer term, consumer choice and diverse service offerings -- including from small and medium-sized airlines -- will remain in Canada's air transportation sector. Of course, as noted in the statement, passengers can still file a complaint with the CTA and each case will be decided on its merits.

### Why did the CTA talk about vouchers when US and EU regulators have said

## that airlines should give refunds?

The American and European legislative frameworks set a minimum obligation for airlines to issue refunds when flights are cancelled for reasons outside their control. Canada's doesn't. That's the reason for the difference in the statements.

Some jurisdictions have relaxed the application or enforcement of requirements related to refunds in light of the impacts of the COVID-19 pandemic, including European countries that have approved the issuance of vouchers instead of refunds.

## Do I have to accept a voucher if I think I'm owed a refund?

The Statement on Vouchers suggests what could be an appropriate approach in extraordinary circumstances, but doesn't affect airlines' obligations or passengers' rights.

Some airline tariffs might not provide for a refund and others might include *force majeure* exceptions to refund provisions.

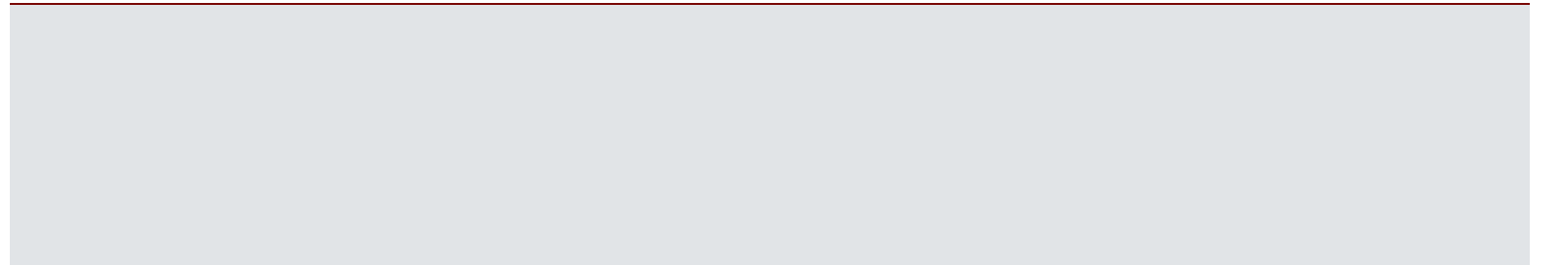
If you think that you're entitled to a refund for a flight that was cancelled for reasons related to the COVID-19 pandemic and you don't want to accept a voucher, you can ask the airline for a refund.

Sometimes, the airline may offer a voucher that can be converted to a refund if the voucher hasn't been used by the end of its validity period. This practice reflects the liquidity challenges airlines are facing as a result of the collapse of air travel while giving passengers added protection in the event that they ultimately can't take advantage of the voucher.

If you think you are entitled to a refund and the airline refuses to provide one or offers a voucher with conditions you don't want to accept, you can file a complaint with the CTA, which will determine if the airline complied with the terms of its tariff. Each case will be decided on its merits.

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