

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

Callie Stirling	)	
	)	
Third Party Complainant	)	
	)	
v.	)	Docket DOT-OST-2020-0085
	)	
Air Canada	)	
	)	

ANSWER OF AIR CANADA

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June 30, 2020

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Pursuant to 14 C.F.R. §§ 302.405(a) and 302.408(b), Air Canada hereby answers¹ the complaint (the “Complaint”) filed by Callie Stirling (“Ms. Stirling” or “the Complainant”), which alleges that Air Canada: (1) failed to comply with the Department of Transportation’s (“DOT” or the “Department”) April 2, 2020 “Enforcement Notice Regarding Refunds by Carriers Given the Unprecedented Impact of the COVID-19 Public Health Emergency on Air Travel”² (the “Enforcement Notice”); and (2) engaged in an unfair or deceptive practice within the meaning of 49 U.S.C. § 41712 by retroactively applying changes to its refund policies.³

I. Introduction

Air Canada urges the Department to decline to institute an enforcement proceeding based on Ms. Stirling’s Complaint and to dismiss the Complaint outright.⁴ There are four compelling

¹ This answer is timely filed. 14 C.F.R. § 302.408(a).

² U.S. Department of Transportation, Enforcement Notice Regarding Refunds by Carriers Given the Unprecedented Impact of the COVID-19 Public Health Emergency on Air Travel, https://www.transportation.gov/airconsumer/enforcement_notice_refunds_apr_3_2020, (April 2, 2020).

³ The Complaint also alleges that Air Canada’s refund policy changes violated the Department’s May 12, 2020 “Frequently Asked Questions Regarding Airline Ticket Refunds Given the Unprecedented Impact of the COVID-19 Public Health Emergency on Air Travel” (the “Department’s COVID-19 Refund FAQs”). U.S. Department of Transportation, Frequently Asked Questions Regarding Airline Ticket Refunds Given the Unprecedented Impact of the COVID-19 Public Health Emergency on Air Travel, <https://www.transportation.gov/sites/dot.gov/files/2020-05/Refunds-%20Second%20Enforcement%20Notice%20FINAL%20%28May%2012%202020%29.pdf> (May 12, 2020).

⁴ 14 C.F.R. § 302.406(a)(2).

reasons the Department should do so: First, Air Canada's response to the unique and unprecedented challenges posed by COVID-19 fully complied with its General Terms and Conditions of Carriage ("Conditions of Carriage") and International Tariff ("Tariff"),⁵ as well as applicable regulations, including those of its home country, and the fare rules of the Complainant's ticket. Second, the Enforcement Notice and the Department's COVID-19 Refund FAQs are guidance documents only; they were not promulgated through a formal rulemaking process under the Administrative Procedures Act, and they do not have the effect of law. Third, Air Canada's COVID-19 refund policy does not implicate 49 U.S.C. § 41712, and Air Canada's imposition of its refund policy is neither unfair nor deceptive. Finally, as the transaction at issue did not occur in the United States, any attempt to apply Department guidance or regulation to Air Canada would be an unwarranted extraterritorial application of U.S. law.

II. Answer

To the extent any factual statement or allegation is not specifically admitted or denied herein, it should be deemed to have been denied by Air Canada, as provided for in 14 C.F.R. § 302.408(b). Air Canada responds to the numbered paragraphs in the Complaint as follows:

1. This paragraph and corresponding footnote 1 set forth legal conclusions to which no answer is required. To the extent an answer is required, such conclusions in paragraph 1 and the corresponding footnote are denied. Further answering, Air Canada states that the Enforcement Notice; the regulation cited, 14 C.F.R. § 259.5(b)(5); and the Federal Register provision cited, Enhancing Airline Passenger Protections, 76 Fed. Reg. 23110-01, at 23129 (April 25, 2011), speak for themselves. To the extent paragraph 1 and/or corresponding footnote 1 are inconsistent with

⁵ Air Canada, International Tariff, General Rules Applicable to the Transportation of Passengers and Baggage, ATPCO AC-2, Issued September 20, 2019.

the statute, regulation, and/or Federal Register provision cited therein, paragraph 1 is denied. Air Canada denies any and all remaining allegations contained in paragraph 1 and corresponding footnote 1 of the Complaint.

2. This paragraph and corresponding footnote 2 set forth legal conclusions to which no answer is required. To the extent an answer is required, such conclusions in paragraph 2 and corresponding footnote 2 are denied. Further answering, Air Canada states that the statute cited, 49 U.S.C. § 41712, speaks for itself. To the extent paragraph 2 is inconsistent with 49 U.S.C. § 41712, paragraph 2 and corresponding footnote 2 are denied. Air Canada denies any and all remaining allegations contained in paragraph 2 and corresponding footnote 2 of the Complaint.

3. Answering paragraph 3 of the Complaint, Air Canada states that on November 28, 2019, Ms. Stirling purchased a ticket from Air Canada to fly from Toronto, Ontario (YYZ) to San Francisco, California (SFO) departing May 1, 2020 and returning May 5, 2020. To the extent any further answer is required, the remaining statements in paragraph 3 are denied.

4. Answering paragraph 4 of the Complaint, Air Canada states that the Complainant's flight was cancelled on April 22, 2020, for reasons outside of Air Canada's control including but not limited to COVID-19, government travel advisories and/or health and safety concerns. Air Canada further states that it notified the Complainant of the cancellation by email on April 22, 2020. Further answering, Air Canada states that the ticket purchased by the Complainant was non-refundable. The remaining statements in paragraph 4 contain characterizations of fact or legal conclusions to which no answer is required. To the extent an answer is required, the remaining statements in paragraph 4 are denied.

5. Answering paragraph 5, Air Canada states that the ticket purchased by the Complainant was non-refundable. Further answering, Air Canada states that, consistent with all

applicable regulations, fare rules, and Air Canada's Conditions of Carriage and Tariff, the value of the Complainant's non-refundable ticket was kept as credit for future travel. To the extent further answer is required, the remaining statements in paragraph 5 are denied.

6. Answering paragraph 6 of the Complaint, Air Canada states that the referenced policy on its website speaks for itself. To the extent paragraph 6 is inconsistent with the policy provided on Air Canada's website, paragraph 6 is denied. The remaining statements in paragraph 6 set forth legal conclusions to which no answer is required. To the extent an answer is required, such conclusions contained in paragraph 6 are denied. Air Canada denies any and all remaining allegations contained in paragraph 6 of the Complaint.

7. Answering paragraph 7 of the Complaint, Air Canada admits that it is a foreign air carrier authorized to operate flights from and to the United States. Further answering, the Enforcement Notice speaks for itself. To the extent paragraph 7 is inconsistent with the Enforcement Notice, paragraph 7 is denied. The remaining statements in paragraph 7 set forth factual characterizations and legal conclusions to which no answer is required. To the extent an answer is required, such conclusions in paragraph 7 are denied. Air Canada denies and any all remaining allegations contained in paragraph 7 of the Complaint.

8. Answering paragraph 8 of the Complaint, Air Canada states that the Enforcement Notice speaks for itself. To the extent paragraph 8 is inconsistent with the Enforcement Notice, paragraph 8 is denied. The remaining statements in paragraph 8 set forth factual characterizations and legal conclusions to which no answer is required. To the extent an answer is required, such conclusions in paragraph 8 are denied. Air Canada denies any and all remaining allegations contained in paragraph 8 of the Complaint.

9. Answering paragraph 9 of the Complaint, Air Canada states that the Enforcement Notice speaks for itself. To the extent paragraph 9 is inconsistent with the Enforcement Notice, paragraph 9 is denied. The remaining statements in paragraph 9 set forth factual characterizations and legal conclusions to which no answer is required. To the extent an answer is required, such conclusions in paragraph 9(a)-(c) are denied. Air Canada denies any and all remaining allegations contained in paragraph 9(a)-(c) of the Complaint.

10. Answering paragraph 10 of the Complaint, Air Canada states that the Department's COVID-19 Refund FAQs speaks for itself. To the extent paragraph 10 is inconsistent with the Department's COVID-19 Refund FAQs, paragraph 10 is denied. The remaining statements in paragraph 10 set forth factual characterizations and legal conclusions to which no answer is required. To the extent an answer is required, such statements in paragraph 10 are denied. Air Canada denies any and all remaining allegations contained in paragraph 10 of the Complaint.

11. This paragraph sets forth legal conclusions to which no answer is required. To the extent an answer is required, such conclusions in paragraph 11 are denied. Air Canada denies any and all remaining allegations contained in paragraph 11 of the Complaint.

12. Answering paragraph 12 of the Complaint, Air Canada states that the referenced policies on its website speak for themselves. To the extent paragraph 12 is inconsistent with the policies provided on Air Canada's website, paragraph 12 is denied. The remaining statements in paragraph 12 set forth legal conclusions to which no answer is required. To the extent an answer is required, such conclusions are denied. Air Canada specifically denies that it has engaged in any unfair or deceptive practice within the meaning of 49 U.S.C. § 41712 and denies any and all remaining allegations contained in paragraph 12 of the Complaint.

13. Air Canada lacks knowledge or information sufficient to admit or deny, and therefore denies, the allegations in paragraph 13 of the Complaint.

III. Summary

a. Background

Air Canada is a foreign air carrier subject to regulation across multiple jurisdictions, including the United States and Canada. Air Canada maintains a steadfast commitment to compliance with all applicable rules and regulations in all of the jurisdictions to which it operates and is subject to regulation.

i. Imposition Of Various Government Restrictions Related To COVID-19 Global Health Pandemic

The COVID-19 global health pandemic unfolded quickly and unpredictably, and Air Canada was compelled to adapt to the unprecedented circumstances. Government measures have deprived and continue to deprive significant numbers of Air Canada's passengers of their privilege to move across borders. As the crisis unfolded in the U.S., the President declared a national emergency beginning March 1, 2020,⁶ imposed a sweeping series of travel bans that defeated the ability of large portions of the world's population to enter the country, including those transiting via Canada from restricted areas.⁷ For those passengers who could continue to the U.S. but had recently visited banned areas, Air Canada was required to reroute them to enter the U.S. via a limited number of select screening airports.⁸ Several U.S. states also imposed strict quarantine orders for arriving interstate and international travelers that essentially defeated the purpose of

⁶ Proclamation No. 9994, Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak, 85 Fed. Reg. 15,337 (March 13, 2020).

⁷ See 85 Fed. Reg. 6709 (February 5, 2020) (suspending entry of foreign nationals recently present in China); 85 Fed. Reg. 12,855 (Mar. 4, 2020) (Iran, same); 85 Fed. Reg. 15,045 (March 16, 2020) (the European Schengen Area); 85 Fed. Reg. 15,341 (March 18, 2020) (the U.K. and Ireland); 85 Fed. Reg. 31,993 (May 28, 2020) (Brazil).

⁸ See, e.g., 85 Fed. Reg. 31,957 (May 28, 2020) (Department of Homeland Security ("DHS") arrival notice regarding screening airports).

many passengers' travel plans.⁹ The Centers for Disease Control and Prevention ("CDC") warned against all international travel and encouraged all returning U.S. citizens to self-isolate for 14 days.¹⁰

In Canada, similar restrictions went into effect. Non-Canadian nationals, including U.S. citizens, were largely banned from entering the country. Those who could enter, as well as Canadian citizens, were subject to legally-enforceable quarantine or isolation on arrival, and air carriers were directed to deny boarding to passengers crossing the border for non-essential purposes such as tourism, recreation, and entertainment.¹¹ At the border, similarly, all but essential travel was blocked.¹² The Public Health Agency of Canada urged its citizens to avoid all international travel.¹³

Against this backdrop, the worldwide pandemic and the resultant interruptions to worldwide travel were indisputably outside of Air Canada's control. Much of Air Canada's schedule to and from the U.S. was rendered meaningless or impossible to operate as a direct consequence. Following the initial announcement of U.S.-Canada travel restrictions, Air Canada maintained limited service to 11 U.S. destinations from its three Canadian hubs, primarily to

⁹ See, e.g., State of Alaska Health Mandate 010; Interstate and International Travel, (June 3, 2020), <https://covid19.alaska.gov/health-mandates/> (generally mandating a 14-day self-quarantine for arriving travelers from out of state).

¹⁰ See CDC, Global COVID-19 Pandemic Notice, (originally posted March 27, 2020), <https://wwwnc.cdc.gov/travel/notices/warning/coronavirus-global>.

¹¹ See *Minimizing the Risk of Exposure to COVID-19 in Canada Order (Prohibition of Entry into Canada from the United States)*, (Mar. 20, 2020), <https://orders-in-council.canada.ca/attachment.php?attach=38958&lang=en>; COVID-19: Guidance material for air operators managing travellers during the check-in procedure at transborder (U.S.) airports, Transport Canada (June 6, 2020), <https://www.tc.gc.ca/en/initiatives/covid-19-measures-updates-guidance-tc/covid-19-guidance-material-air-carriers-managing-travellers-check-in-procedure-transborder-us-airports.html>.

¹² See *Notification of Temporary Travel Restrictions Applicable to Land Ports of Entry and Ferries Service Between the United States and Canada*, 85 Fed. Reg. 16,548, 16,549 (March 24, 2020) (outlining U.S. border closure and noting that "U.S. and Canadian officials have mutually determined that non-essential travel between the United States and Canada poses additional risk of transmission and spread of COVID-19 and places the populace of both nations at increased risk of contracting COVID-19.").

¹³ See *Pandemic COVID-19 all countries: avoid non-essential travel outside Canada*, (April 19, 2020), <https://travel.gc.ca/travelling/health-safety/travel-health-notices/221>.

facilitate the repatriation of Canadians.¹⁴ Many states, localities, and countries were effectively shut down, preventing people from doing nearly anything outside of their homes, including international air travel. The actions taken by Air Canada were thus a necessary response to the most significant global health crisis of the past century.

ii. Air Canada's Response To COVID-19 And Related Government Restrictions

As the global COVID-19 pandemic evolved and began to impact countries in North America, Air Canada, like many other foreign air carriers, was forced to adjust its service offerings and policies based on an emergency regulatory scheme that was constantly evolving, all the while maintaining its primary commitment to the health and safety of its customers and crew. With the mounting concerns relating to the spread of COVID-19 and pursuant to a number of government directives (both of which were outside of Air Canada's control), Air Canada was forced to cancel many international flights between the United States and Canada and to focus its operations on repatriation flights.

Because of the unanticipated cancellations and shift toward repatriation efforts, Air Canada was forced to scale back on certain goodwill customer service policies that may have been available before and at the beginning stages of the pandemic. Specifically, Air Canada had to scale its customer service refund policy back to the terms provided in its Conditions of Carriage and Tariff. Certain customers with reservations for flights that were cancelled due to events outside of Air Canada's control (including COVID-19) before March 19, 2020 may, as a goodwill gesture, have generously been offered a refund despite having booked reservations at a non-refundable fare. This approach was established as a matter of goodwill for customers, but was at no time

¹⁴ News Release, Air Canada to Temporarily Suspend Transborder U.S. Flights, (April 21, 2020), <https://aircanada.mediaroom.com/2020-04-21-Air-Canada-to-Temporarily-Suspend-Transborder-U-S-Flights>.

required under Air Canada's Conditions of Carriage, Tariff, Canadian Transportation Agency ("CTA") regulations or, in the case of non-refundable tickets, the applicable fare rules.

Unfortunately, due to the continued impact of COVID-19 and an ever-growing number of governmental travel restrictions, Air Canada was unable to continue to offer customers with non-refundable tickets this additional flexibility for flights cancelled after March 19, 2020. Rather, in accordance with the terms of Air Canada's Conditions of Carriage and Tariff, applicable fare rules, and CTA regulations, Air Canada uniformly provides customers whose **non-refundable** flight reservations were cancelled on or after March 19, 2020 due to COVID-19 with flight vouchers.¹⁵ The use of vouchers has been approved by CTA,¹⁶ and Air Canada's voucher policy is considerably more generous than the industry standard. For instance, vouchers for flights cancelled due to COVID-19 are now fully transferrable, have no expiry date, and may be used multiple times.¹⁷

iii. The Complainant's Non-Refundable Ticket

The Complainant purchased a non-refundable ticket on November 28, 2019, for an Air Canada flight from Toronto, Ontario to San Francisco, California departing on May 1, 2020.¹⁸ The sale was made in Canadian Dollars (CAD). On April 22, 2020, the Complainant's scheduled flight

¹⁵ Air Canada has provided, and continues to provide refunds for customers who purchased refundable tickets for flights that were cancelled as a result of COVID-19, regardless of whether the relevant flights were cancelled before or after March 19, 2020.

¹⁶ Specifically, on March 25, 2020, CTA released a "Statement on Vouchers," stating:

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).

Canadian Transportation Agency, "Statement on Vouchers," <https://otc-cta.gc.ca/eng/statement-vouchers> (March 25, 2020).

¹⁷ See Air Canada, Cancellation options, "Air Canada has already cancelled my booking," <https://www.aircanada.com/us/en/aco/home/fly/customer-support/cancellation-options.html#/current-booking> (accessed on June 24, 2020).

¹⁸ See Complaint ¶ 3.

was cancelled due to events outside of Air Canada's control, including the impact of COVID-19, government travel advisories and/or health and safety concerns which had been implemented by the Canadian government.

Consistent with Air Canada's Conditions of Carriage, Tariff, CTA regulations, and the applicable fare rules of the Complainant's ticket, the Complainant's unused non-refundable ticket was kept as credit for future travel.

IV. Argument

a. Air Canada's COVID-19 Response Complied With All Applicable Regulations

Air Canada's response to the challenges posed by COVID-19 complied with all applicable Department and CTA regulations, as well as health and safety requirements imposed by other U.S. and Canadian federal and/or state agencies. Specifically, Air Canada's post-COVID-19 policy of providing travel vouchers for the value of cancelled, non-refundable flights ("contractual refund policy") is consistent with Air Canada's Conditions of Carriage, Tariff, all applicable fare rules, Air Passenger Protection Regulations ("APPR") requirements, and CTA policies.

The CTA developed the APPR to establish airline obligations toward passengers, including minimum compensation levels and standards of treatment in different circumstances.¹⁹ Airlines are required to follow the obligations set forth in the APPR and could be subject to administrative monetary penalties of up to \$25,000 per incident for non-compliance.²⁰

Section 10 of the APPR, *Obligations—Situations Outside Carrier's Control*, sets forth those circumstances where a flight has been delayed or cancelled for reasons beyond a carrier's control:

¹⁹ See CTA, Air passenger protection regulations ("APPR"), Date modified: 2019-07-08, <https://otc-cta.gc.ca/eng/consultation/air-passenger-protection-regulations>.

²⁰ *Id.*

(1) This section applies to a carrier when there is delay, cancellation or denial of boarding due to situations outside the carrier's control, including but not limited to the following:

- (a) war or political instability;
- (b) illegal acts or sabotage;
- (c) meteorological conditions or natural disasters that make the safe operation of the aircraft impossible;
- (d) instructions from air traffic control;
- (e) a NOTAM, as defined in subsection 101.01(1) of the Canadian Aviation Regulations;
- (f) a security threat;
- (g) airport operation issues;
- (h) a medical emergency;
- (i) a collision with wildlife;
- (j) a labour disruption within the carrier or within an essential service provider such as an airport or an air navigation service provider;
- (k) a manufacturing defect in an aircraft that reduces the safety of passengers and that was identified by the manufacturer of the aircraft concerned, or by a competent authority; and
- (l) an order or instruction from an official of a state or a law enforcement agency or from a person responsible for airport security.²¹

Cancellations due to circumstances beyond the carrier's control are subject to the following obligations set forth in Section 10(3):

(3) When there is delay, cancellation or denial of boarding due to situations outside the carrier's control, it must

- (a) provide passengers with the information set out in section 13;
- (b) in the case of a delay of three hours or more, provide alternate travel arrangements, in the manner set out in section 18, to a passenger who desires such arrangements; and
- (c) in the case of a cancellation or a denial of boarding, ***provide alternate travel arrangements*** in the manner set out in section 18.²²

²¹ *Id.*

²² *Id.* (emphasis added).

Section 18(1) requires carriers to “provide the following alternate travel arrangements free of charge to ensure that passengers complete their itinerary as soon as feasible.”²³ Section 18 **does not require a refund** for cancellations beyond the control of the carrier.²⁴

Consistent with the requirements set forth by the APPR, Section 2 of Air Canada’s Conditions of Carriage, Alternative Travel Arrangements, addresses flight delays that are caused by circumstances beyond Air Canada’s control:

If your flight is delayed by more than three hours or cancelled because of a situation that’s outside of our control, here’s how your travel plans will be accommodated:

- We’ll rebook you on the next available Air Canada, Air Canada Rouge or Air Canada Express flight or on one of our partner airlines on a reasonable route from the same airport, within 48 hours of the end of the event that caused the delay or cancellation; or
- If we cannot do this, we’ll re-route you on any carrier via any reasonable air route to your destination or re-route you from another airport that is within a reasonable distance of your departure airport to your destination (if any). If your new departure is from such an airport, Air Canada will arrange for your transportation to that other airport.
- We can also change your return to match the same length of stay if necessary.
- Should you refuse the alternate travel arrangements offered because your travel no longer serves a purpose, please note that any refund is subject to the fare rules applicable.²⁵

The applicable fare rules (including rules on refundability) are contained in Air Canada’s International Tariff, on its website, and are provided via email to each passenger who purchases a ticket on Air Canada’s website as part of the website-generated itinerary-receipt.

Air Canada’s contractual refund policy is consistent with all applicable requirements under Canadian law for cancellations that were clearly beyond Air Canada’s control. As shown above,

²³ See APPR, Section 18(1), <https://laws.justice.gc.ca/eng/regulations/SOR-2019-150/page-4.html#docCont>.

²⁴ Customers whose flights are cancelled due to circumstances *within* a carrier’s control, such as a safety or mechanical event, have the right to request a refund. See APPR, Section 11, Section 12. However, the Complaint does not allege that cancellation of the Complainant’s flights was voluntary or within Air Canada’s control.

²⁵ See Air Canada Conditions of Carriage, “In the event of an extended delay or a cancellation,” Section 2, <https://www.aircanada.com/us/en/aco/home/legal/conditions-carriage-tariffs.html>.

the COVID-19 pandemic meets this standard, and Air Canada was forced to cancel flights due to the myriad reasons identified by Section 10(1) of the APPR: airport operation issues (subsection g), medical emergency (subsection h), as well as various orders and instructions from a variety of governmental agencies and organizations (subsection l). Moreover, the APPR and CTA only require that airlines ensure passengers can complete their journeys.²⁶ In addition, CTA has approved the use of travel credits or vouchers during the COVID-19 epidemic.²⁷ Accordingly, Air Canada's position is consistent with the APPR, CTA guidance, as well as Air Canada's Conditions of Carriage and Tariff. Further, there are no Department regulations specifying the manner or form in which refunds must be provided to customers; to the contrary, as discussed below, carriers have the ability to establish their own methods of providing refunds in their Conditions of Carriage and Tariffs.

b. Neither The Enforcement Notice Nor The Department's COVID-19 Refund FAQs Have The Force Of Law

Importantly, both the Enforcement Notice and the Department's COVID-19 Refund FAQs constitute agency guidance documents, as opposed to properly issued regulations under the Administrative Procedures Act. As mere guidance, they cannot overrule or supersede the Department's well-established regulatory framework, as instituting a new regulation²⁸ requires public notice and comment.²⁹ Indeed, the Department's COVID-19 Refund FAQs document

²⁶ See APPR, Section 10(3)(c).

²⁷ See CTA, "Statement on Vouchers," <https://otc-cta.gc.ca/eng/statement-vouchers> (March 25, 2020).

²⁸ By way of example, the Department has recently issued a Notice of Proposed Rulemaking with respect to Defining Unfair or Deceptive Practices. See DOT-OST-2019-0182, Notice of Proposed Rulemaking – Defining Unfair or Deceptive Practices, <https://www.transportation.gov/sites/dot.gov/files/2020-02/UDP%20NPRM%20-%20final.pdf> (February 20, 2020).

²⁹ See Administrative Rulemaking, Guidance, and Enforcement Procedures; Final Rule (confirming that DOT guidance documents "are not legally binding"), 84 Fed. Reg. 71714 at 71715 (December 27, 2019)).

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acknowledges that it “does not have the force and effect of law and is not meant to bind the regulated entities in any way.”³⁰

The President has recently underscored the importance of agencies respecting the boundaries of their regulatory authority in the current post-COVID-19 climate: “Agencies may impose legally binding requirements on the public only through regulations and on parties on a case-by-case basis through adjudications, and only after appropriate process, except as authorized by law or as incorporated into a contract.”³¹

Any application of agency guidance in this instance would also be patently inconsistent with the Executive Administration’s expressly stated policy concerning the economic impact of regulations following COVID-19. On May 19, 2020, President Trump issued an Executive Order on Regulatory Relief to Support Economic Recovery, wherein he stated explicitly that:

It is the policy of the United States to combat the economic consequences of COVID-19 with the same vigor and resourcefulness with which the fight against COVID-19 itself has been waged. ***Agencies should address this economic emergency by rescinding, modifying, waiving, or providing exemptions from regulations and other requirements that may inhibit economic recovery,*** consistent with applicable law and with protection of the public health and safety, with national and homeland security, and with budgetary priorities and operational feasibility. They should also give businesses, especially small businesses, the confidence they need to re-open by providing guidance on what the law requires; by recognizing the efforts of businesses to comply with often-complex regulations

³⁰ The Department’s COVID-19 Refund FAQs, *supra* note 3.

³¹ Exec. Order No. 13891, 84 Fed. Reg. 55235, Promoting the Rule of Law Through Improved Agency Guidance Documents, (October 9, 2019), <https://www.whitehouse.gov/presidential-actions/executive-order-promoting-rule-law-improved-agency-guidance-documents/>.

in complicated and swiftly changing circumstances; and by committing to fairness in administrative enforcement and adjudication.³²

As the Department's guidance documents do not constitute binding authority, the Complainant's allegations that Air Canada's response to COVID-19 somehow violated the Department's guidance is not an appropriate basis for DOT to institute an enforcement proceeding, and the Complaint should therefore be dismissed.

c. The Enforcement Notice Contradicts Department And Case Law Precedent

In addition to constituting unenforceable guidance, as opposed to a regulation, the Enforcement Notice is inconsistent with, and reflects a significant departure from, longstanding Departmental precedent, Department policy, and U.S. case law, all of which generally provide that an air carrier or foreign air carrier's Conditions of Carriage and Tariff govern its contractual relationship with its passengers. Accordingly, insofar as the Complaint alleges that Air Canada's COVID-19 response policy violated the Enforcement Notice, it should be dismissed without further Departmental action.

The Enforcement Notice could not, and did not, supersede the contractual relationship between Air Canada and its ticketed passengers. Department precedent recognizes that the contractual relationship, which is provided by Air Canada's Conditions of Carriage and Tariff,

³² Exec. Order 13924, 85 Fed. Reg. 31353, 31353-31354 (May 19, 2020), Regulatory Relief to Support Economic Recovery, <https://www.whitehouse.gov/presidential-actions/executive-order-regulatory-relief-support-economic-recovery/> (emphasis added); see also DOT Memorandum for Secretarial Officers and Heads of Operating Administration (February 15, 2019), in which DOT General Counsel Stephen Bradbury confirms that DOT will follow the Department of Justice's advice on the use of guidance. That guidance, in relevant part, provides that "prosecuting attorneys may not use non-compliance 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." See Mem. From Associate Attorney General, U.S. Dept. of Justice, "Limiting Use of Agency Guidance Documents in Affirmative Civil Enforcement Cases" (January 25, 2018), available at <http://src.bna.com/vY4>. (emphasis added).

generally controls in matters of refunds and schedule changes.³³ The Department's COVID-19

Refund FAQs appear to clarify this point:

Airlines and ticket agents can offer consumers alternatives to a refund, such as credits or vouchers, so long as the option of a refund is also offered and clearly disclosed ***if the passenger is entitled to a refund***. Further, any restrictions that apply to the credits and vouchers, such as the period in which credits must be used or any fees charged for using the credit, must be clearly disclosed to consumers.³⁴

Indeed, the Department has no specific regulation governing the form in which refunds to passengers must be provided following a cancellation, delay, or schedule irregularity. The Department considered imposing a strict standard for what constitutes a “significant flight delay” for purposes of refunding non-refundable tickets in a 2011 rulemaking (Consumer Rule 2), but the Department was ultimately persuaded by industry commenters not to impose such a standard.³⁵ Rather, the issues of refunds and cancellations traditionally are reviewed by the Department on a case-by-case basis and generally are addressed by the terms of a carrier's Conditions of Carriage and Tariff.³⁶ U.S. courts have likewise confirmed that the contractual relationship between a carrier and its passengers is governed by the carrier's Conditions of Carriage and Tariff.³⁷

³³ See *Third Party Complaint of Benjamin Edelman v. American Airlines, Inc.*, DOT Order 2016-12-12 (December 14, 2016) at 6-7, 8 (noting proper forum for breach of contract claims based on carrier's International Tariff was state or federal court of competent jurisdiction); *Petition for Rulemaking and Third-Party Complaint of Donald L. Pevsner, Esq.*, DOT-OST 2012-0109, Order 2012-11-4 (noting that carrier's Tariff provided notice of conditions restricting refunds and that “[t]he Department imposes no further independent obligation on carriers in the case of cancelled flights or delayed departures.”).

³⁴ See The Department's COVID-19 Refund FAQs, *supra* note 3 (emphasis added).

³⁵ See 76 Fed. Reg. 23110.

³⁶ See, e.g., *Petition for Rulemaking and Third-Party Complaint of Donald L. Pevsner, Esq.*, DOT-OST 2012-0109, Order 2012-11-4; *Third Party Complaint of Benjamin Edelman v. American Airlines, Inc.*, DOT Order 2016-12-12 (December 14, 2016) (declining to comment on merits of contract dispute); *Petition for Rulemaking of Joel Kaufman*, DOT-OST 2003-14334, Order 2003-3-11 (March 18, 2003).

³⁷ See, e.g., *Seisay v. Compagnie Nationale Air France*, No. 95 CIV. 7660 (JFK), 1997 WL 431084, at *3 (S.D.N.Y. July 30, 1997) (“It is well established that tariffs on file with the DOT constitute the contract of carriage between the passenger and the airline that governs the rights of airline passengers.”); see also *Clemente v. Philippine Airlines*, 614 F. Supp. 1196, 1199 (S.D.N.Y. 1985); *Edem v. Ethiopian Airlines Enter.*, No. 08 CV 2597 RJD LB, 2009 WL 4639393, at *8 (E.D.N.Y. Sept. 30, 2009), *aff'd*, 501 Fed. App'x 99 (2d Cir. 2012); *Brunwasser v. Trans World Airlines, Inc.*, 541 F. Supp. 1338, 1341 (W.D. Pa. 1982).

Here, there is no dispute that the Conditions of Carriage and Tariff in effect on the date of Ms. Stirling's ticket purchase control. They, along with the fare rules for the Complainant's non-refundable ticket, were appropriately disclosed and available to the Complainant. Air Canada's contractual refund policy is provided for and consistent with these documents. Under Air Canada's contractual refund policy, which complies with all applicable laws and regulations, Ms. Stirling was entitled to a voucher, not a refund. The terms of the contractual agreement govern. To the extent the Complaint urges the Department to read regulatory effect into the Enforcement Notice where none exists, Department precedent and U.S. case law appropriately counsel that the Department must defer to the properly disclosed terms of the contract between passenger and carrier.

d. Air Canada's COVID-19 Policy Does Not Implicate 49 U.S.C. § 41712

Section 41712 prohibits unfair or deceptive trade practices in air transportation or the sale of air transportation. The Department generally considers a practice to be unfair to consumers if it causes or is likely to cause substantial harm, the harm cannot reasonably be avoided, and the harm is not outweighed by any countervailing benefits to consumers or to competition.³⁸ A practice is deceptive "if it misleads or is likely to mislead a consumer acting reasonably under the circumstances with respect to a material issue."³⁹

Recognizing the potential vagueness of the terms "unfair" and "deceptive," the Department issued a Notice of Proposed Rulemaking regarding an attempt to codify definitions for these terms.⁴⁰ According to the Department, "The proposal is intended to provide regulated entities and

³⁸ See, e.g., *Third Party Complaint of Benjamin Edelman v. American Airlines, Inc.*, DOT Order 2016-12-12 at 6 (December 14, 2016).

³⁹ *Id.*

⁴⁰ See DOT-OST-2019-0182, Notice of Proposed Rulemaking – Defining Unfair or Deceptive Practices, <https://www.transportation.gov/sites/dot.gov/files/2020-02/UDP%20NPRM%20-%20final.pdf> (February 20, 2020).

other stakeholders with greater clarity and certainty about the Department’s interpretation of unfair or deceptive practice in the context of aviation consumer protection rulemaking and enforcement actions.”⁴¹ Where no specific regulation exists that would require certain conduct, the proposal would also prohibit DOT from relying on a vague “unfair and deceptive” standard without explaining its reasoning.⁴²

Notwithstanding the Department’s own recently-initiated undertaking to clearly define the type of conduct proscribed by § 41712 through formal regulation, the Department introduced some additional ambiguity by way of the Department’s COVID-19 Refund FAQs document, which purports to provide guidance on airline refund policies.⁴³

As explained *supra*, Air Canada’s contractual refund policy is provided for in its Conditions of Carriage and Tariff. Air Canada’s separate and more generous goodwill customer service policy, in effect for a limited time for certain flights cancelled prior to March 19 (before and at the earliest stages of the pandemic), extended more options and flexibility to customers than Air Canada was contractually obligated to provide. As a result of the COVID-19 health pandemic and resulting restrictions and economic landscape, Air Canada made the responsible business decision to stop providing refunds where it was not contractually obligated to do so. The act of reducing benefits provided as a matter of customer service, especially in reaction to a global health crisis and impending recession, is neither unfair nor deceptive.

⁴¹ *Id.* (summary).

⁴² *See id.* at 1 (“This proposal would also require the Department to articulate in future enforcement orders the basis for concluding that a practice is unfair or deceptive where no existing regulation governs the practice in question, state the basis for its conclusion that a practice is unfair or deceptive when it issues discretionary aviation consumer protection regulations, and apply formal hearing procedures for discretionary aviation consumer protection rulemakings.”).

⁴³ *See* The Department’s COVID-19 Refund FAQs, *supra* note 3.

Moreover, in today's deregulated environment, the Department has consistently acknowledged the public benefits that stem from giving carriers the ability to offer both full refundable and non-refundable fare types. In 2012, the Department confirmed that:

Absent compelling evidence of consumer deception or unfair methods of competition, we have allowed the marketplace to govern carrier decisions regarding fares and their associated conditions. Thus, the lower price for non-refundable tickets is a trade-off for passengers agreeing to a restriction that allows a carrier to manage its inventory and cash flow. The public benefits in low fares found to exist under our present deregulated fare environment could be undone by the government intrusion requested by petitioner.⁴⁴

Consumers have the ability to choose the fare they would like; however, that choice comes with consequences. Non-refundable fares, which are typically sold at a lower price point, carry certain risks in the event the consumer is unable to travel. If, on the other hand, consumers wish to ensure they are fully protected from potential loss, they are free to purchase a refundable fare option at a higher price point. Thus, the lower price for non-refundable tickets is a trade-off for passengers agreeing to a restriction that allows a carrier to manage its inventory and cash flow. The Department has consistently recognized and sanctioned this trade-off.

As explained above, Air Canada's contractual refund policy is consistent with its Conditions of Carriage and Tariff. To the extent that the Complaint alleges that Air Canada's implementation of its contractual refund policy, which scales back options that may have been available to certain customers before COVID-19 under Air Canada's goodwill customer service policy, constitutes an unfair or deceptive practice based on the Department's COVID-19 Refund FAQs, the Complaint is without merit or support.⁴⁵

⁴⁴ See *Petition for Rulemaking and Third-Party Complaint of Donald L. Pevsner, Esq.*, DOT-OST 2012-0109, Order 2012-11-4; see also *Petition for Rulemaking of Joel Kaufman*, DOT-OST 2003-14334, Order 2003-3-11 (March 18, 2003).

⁴⁵ Indeed, the Department has previously rejected arguments that a carrier may not use its discretion with respect to enforcing its own rules. In *Petition for Rulemaking and Third-Party Complaint of Donald L. Pevsner, Esq.*, DOT-OST 2012-0109, Order 2012-11-4 at 5, the Department noted:

Any interpretation of the foregoing conduct as an unfair or deceptive practice would also be internally inconsistent with the Department's COVID-19 Refund FAQs. Specifically, the Department's COVID-19 Refund FAQs acknowledged that a carrier may provide more options to a customer than the carrier is required to do.⁴⁶ Determining that later scaling back on these goodwill policies constitutes an unfair or deceptive practice would interfere with carriers' valid contracts, and would disincentivize carriers from ever providing customers more than the very minimum level of flexibility guaranteed in their Conditions of Carriage. Air Canada continues to strive to provide flexible options to customers whose non-refundable flight reservations have been cancelled due to COVID-19, such as vouchers that are fully transferrable and have no expiry date.

For these reasons, the Complainant's claim that Air Canada's implementation of its contractual refund policy constituted an unfair or deceptive trade practice should be dismissed without investigation.

e. The Department May Not Initiate An Enforcement Action Based On The Complaint Because Of Extraterritoriality Concerns And Conflicting Foreign Laws

Importantly, here, the transaction at issue appears to have taken place online between Air Canada, a foreign air carrier, and Ms. Stirling, who, upon information and belief, is a Canadian

Mr. Pevsner's dispute is not with Delta's disclosure of the \$150 change penalty, but is with the carrier's use of discretion in enforcing the rule. As long as the condition or rule is properly disclosed to a passenger, we do not agree that the use of discretion by Delta or any other carrier by choosing not to enforce the condition or rule as Delta did in this case amounts to what he characterizes as "gastronomic jurisprudence" that would justify our exceeding our statutory authority by imposing the rule proposed by Petitioner. To do so, would amount to our unwisely precluding non-discriminatory relaxation of carrier rules when found to be appropriate by the carrier. To require carriers, as the petitioner urges, to offer full refunds or a penalty-free ticket change for any schedule change would represent an unwarranted intrusion into the operational decisions of air carriers and would not be in the public interest.

The Complaint here urges a similar, inappropriate intrusion, which the Department should decline.

⁴⁶ See The Department's COVID-19 Refund FAQs, *supra* note 3, Response to FAQ 2 ("Although not required, many airlines are providing travel credits or vouchers that can be used for future travel for those passengers electing to cancel their travel due to health or safety concerns related to COVID-19.").

citizen residing in Canada. To the extent the transaction did not occur in the United States or via a website that was marketed to U.S. consumers, any attempt to apply the Enforcement Notice or 49 U.S.C. § 41712 to the Complainants' purchase would be an unwarranted extraterritorial application of U.S. law. Accordingly, the Department should dismiss the Complaint outright without initiating any further investigation or enforcement proceeding.

The Department's attempt to apply its Enforcement Notice to foreign air carriers, and especially to sales that may have occurred outside of the United States via websites that are not marketed to U.S. consumers, raises significant extraterritoriality concerns and arguably violates longstanding and well-established principles of comity and reciprocity. The U.S. Supreme Court has consistently held that U.S. law cannot be imposed on conduct abroad⁴⁷ where there is no substantial effect from such conduct in the United States or on United States' foreign commerce, or where Congress has not expressly provided that the law or regulation shall have extraterritorial effect.⁴⁸

Moreover, only in specific circumstances, not relevant here, may the Department proscribe conduct abroad. The Department's limited authority to regulate abroad is set forth in § 40120(b) of Title 49 of the U.S. Code, which provides as follows:

⁴⁷ In *Morrison v. National Australia Bank Ltd.*, 130 S.Ct. 2869 (2010), the U.S. Supreme Court recently explained:

It is a longstanding principle of American law that legislation of Congress, unless a contrary intent appears, **is meant to apply only within the territorial jurisdiction of the United States**. Thus, unless there is the affirmative intention of the Congress clearly expressed to give a statute extraterritorial effect, we must presume it is primarily concerned with domestic conditions. The canon or presumption applies regardless of whether there is a risk of conflict between the American statute and a foreign law. **When a statute gives no clear indication of an extraterritorial application, it has none.**

130 S.Ct. at 2877-78 (emphasis added) (quotations omitted).

⁴⁸ See *id.*; *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993); *Equal Employment Opportunity Commission v. Arabian American Oil Company*, 499 U.S. 244 (1991); *Foley Bros., Inc. v. Filardo*, 336 U.S. 281 (1949); *Timberlane Lumber Co. v. Bank of America, N.T. and S.A.*, 549 F.2d 597 (9th Cir. 1976). See also Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C.A. § 6a; Atwood, Brewster & Waller, *Antitrust and American Business Aboard*, Chapter 6, Jurisdiction to Prescribe (3rd Ed. 2003); ABA Section of Antitrust Law, *Antitrust Law Developments*, pp. 1169-1185 (6th Ed. 2007).

The President may extend (in the way and for periods the President considers necessary) the application of this part to outside the United States when (1) an international arrangement gives the United States Government authority to make the extension; and (2) the President decides the extension is in the national interest.⁴⁹

With respect to the Enforcement Notice, there are no international agreements nor is there any Presidential or Congressional action that authorizes the Department to regulate foreign air carriers in this manner.

While Congress could have provided the Department with authority to regulate this type of issue abroad, it did not. Instead, Congress explicitly directed the Department to consider principles of international comity when exercising its functions generally. Indeed, 49 U.S.C. § 40105(B)(1) states that: “In carrying out this part, the Secretary of Transportation and the Administrator -- (A) shall act consistently with obligations of the United States Government under an international agreement; (B) shall consider applicable laws and requirements of a foreign country.”⁵⁰

Here, Air Canada is acting in full compliance with the APPR’s refund provisions, and with the CTA’s statements on vouchers. Any attempt by DOT to impose additional or conflicting mandates on Air Canada runs counter to the statutory language of § 40105(B).

Further, to the extent DOT is attempting to apply the Enforcement Notice to conduct occurring outside of the United States, the Department is ignoring the foundational principle that a law, without an authorizing express provision of Congress, or an international agreement, shall not have extraterritorial effect. This principle is rooted in a nation’s limited power to make laws governing only conduct applicable within its borders. It is also engrained in the practical considerations of comity, *i.e.*, that the United States should not try to impose its laws abroad any

⁴⁹ 49 U.S.C. § 40120(b).

⁵⁰ 49 U.S.C. § 40105(B)(1).

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more than a foreign nation should legislate conduct in the United States absent agreement between the nations involved.

The Department's attempt to apply its Enforcement Notice to conduct occurring outside of the United States also runs contrary to critical U.S. international agreements. In both the Chicago Convention and in the various air transport agreements the United States has entered into with over 100 countries, including Canada, the United States has explicitly agreed to limit the application of U.S. regulations to its own territory.⁵¹

The Department has correctly acknowledged these longstanding principles for more than a half century, dating back to the Civil Aviation Board ("CAB").⁵²

Post-deregulation, the Department has continued this trend, albeit in a more limited fashion. For example, in the rulemaking for DOT's regulation on the non-discriminatory treatment of passengers with disabilities in air travel, Part 382, the Department confirmed it's "obligation

⁵¹ For example, the Chicago Convention, to which the United States is a signatory, notes that each Contracting State has "complete and exclusive sovereignty over the airspace above its territory" and that Contracting States may issue regulations "relating to the admission to, or departure from its territory of aircraft engaged in international air navigation, or to the operation and navigation of such aircraft while within its territory...." but not beyond. See Chicago Convention, Articles 1 and 11. Likewise, in Article 12 of the Air Transport Agreement between the Government of the United States of America and the Government of Canada dated March 12, 2007, the United States has agreed that its laws and regulations govern flights when in the borders of United States and that Canada's laws and regulations govern flights when in the borders of Canada. The Department's application of the Enforcement Notice appears to violate this key provision of the agreement between the governments of the United States and Canada.

⁵² In 1970, after adopting a rule making U.S. and foreign airlines responsible for funds collected by agents in connection with charter flights, CAB limited the scope of the rule to U.S. originating charters. See *Responsibility of Air Carriers for Amount Collected by Travel Agents in Payment for Charter Flights – Limitation of Rule to U.S.-Originated Charters*, 35 Fed. Reg. 13573 (August 26, 1970). This limitation still stands today, where in 14 C.F.R. Part 380 DOT waives jurisdiction over foreign charter operators offering public charter programs originating outside of the United States. 14 C.F.R. § 380.3(c). Similarly, with respect to advertising requirements relating to denied boarding compensation being imposed on foreign airlines, see *Advertising Disclosure of Noncompliance with Oversale Rules*, 43 Fed. Reg. 50164 (October 27, 1978), CAB stated that "in the interest of maintaining good reciprocal relations within the international community" it would withdraw the requirements and allow foreign airlines to follow their home country oversales regulations for all inbound flights." *Disclosure by Foreign Carriers*, 44 Fed. Reg. 2165, 2166 (January 10, 1979). CAB took a similar stance with respect to tariff requirements in 1983, noting that, "it would be in the best interest of international comity not to impose unreasonably high costs and burdens on the airlines for extraterritorial application of a requirement..." *Terms of Contract of Carriage*, 48 Fed. Reg. 54589, 54590 (December 6, 1983).

and commitment to giving due consideration to foreign law where it applies.”⁵³ The Department took a similar position in its Accessible Website and Automated Kiosk rule, noting that “[DOT’s] intention...is and continues to be to exempt both U.S. and foreign carriers’ Web sites that market air transportation to consumers outside the U.S.”⁵⁴ The majority of the Department’s website-based consumer protections (*e.g.*, full fare advertising rule, etc.) also apply only to the extent that a foreign carrier marketed to U.S. consumers.⁵⁵

Thus, there are many reasons for the Department, consistent with a specific Congressional mandate, to consider the applicable laws and requirements of Canada, and Canadian airlines’ obligations to comply with such laws and regulations, while exercising the Department’s regulatory functions. Moreover, DOT’s extraterritorial application of the Enforcement Notice on foreign carriers stifles competition and could disincentivize such airlines from entering the United States air transportation market at all. It could also result in the imposition by foreign governments of similar extraterritorial rules on U.S. airlines, thereby increasing the risk of conflicts with U.S. laws and regulations and, again, suppressing competition.

V. Affirmative Defenses

1. The Complaint fails to state a claim upon which relief may be granted.
2. The Complainant lacks a private right of action under 49 U.S.C. § 41712.
3. The Complainant has not suffered any harm.

⁵³ Nondiscrimination on the Basis of Disability in Air Travel, 73 Fed. Reg. 27614, 27616 (May 13, 2008).

⁵⁴ Nondiscrimination on the Basis of Disability in Air Travel: Accessibility of Web Sites and Automated Kiosks at U.S. Airports, 76 Fed. Reg. 71914, 71915-16 (November 21, 2011).

⁵⁵ Enhancing Airline Passenger Protections, 76 Fed. Reg. at 23123. In evaluating whether a website markets to U.S. consumers DOT evaluates a number of factors, which are considered on a case-by-case basis, including: (1) if the website is in English; (2) if tickets are sold in U.S. dollars; (3) if it lists flights to or from the U.S.; (4) whether sales are blocked for customers with U.S. addresses or telephone numbers; and (5) even if a site is in a language other than English, if the site is marketed toward a particular segment of the U.S. market (*e.g.*, a website in Spanish and geared toward consumers in Miami). See DOT Answers to Frequently Asked Questions Concerning the Enforcement of the Second Final Rule on Enhancing Airline Passenger Protections (EAPP #2), at 17 https://www.transportation.gov/sites/dot.gov/files/docs/EAPP_2_UPDATE%20FAQ_2.pdf

4. The Complainant lacks standing.

5. The Complaint is moot.

VI. Conclusion

WHEREFORE, for the reasons stated above, Air Canada respectfully requests that the Department decline to initiate an enforcement proceeding and that the Department dismiss the Complaint outright.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I have on this date electronically served a copy of the foregoing Answer on the following persons:

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June 30, 2020

A handwritten signature in black ink, appearing to be 'Drew M. Derco', written over a horizontal line.

Drew M. Derco