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6 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
7 AT SEATTLE

8 COMAIR LIMITED,

9 Plaintiff,

10 v.

11 THE BOEING COMPANY, ET AL.,

12 Defendants.

CASE NO. C23-176 RSM

ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANT'S
MOTION TO DISMISS

13
14 **I. INTRODUCTION**

15 This matter is before the Court on Defendant Boeing's Motion to Dismiss. Dkt. #25.
16 Plaintiff Comair Limited opposes. Dkt. #36.

17 Comair has sued Boeing for damages related to its purchase of Boeing's 737-8 aircraft
18 (the "737 MAX"). Comair entered into a Purchase Agreement with Boeing for eight 737 MAXs
19 in September 2013. In October 2018, Lion Air Flight 610, a 737 MAX, crashed. Boeing assured
20 the public that the 737 MAX was "as safe as any aircraft in the sky." Comair accepted delivery
21 of its first 737 MAX on February 26, 2019. The rest were to be delivered over the next few years.
22 In March 2019, a second 737 MAX, Ethiopian Airlines Flight 302, crashed. After this second
23 crash, the 737 MAX was grounded by the FAA and Boeing acknowledged defects in the 737
24 MAX. The delivery of remaining 737 MAX planes to Comair was suspended. In February 2020,

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1 Comair attempted to terminate the 2013 Purchase Agreement. In May 2020, Comair “file[d] a
2 business rescue proceeding in South Africa”—essentially declaring bankruptcy. Dkt. #1 at 53.
3 Seeking to hold Boeing responsible, Comair has sued Boeing for its losses.

4 The 76-page Complaint brings the following causes of action against Boeing and
5 unnamed Doe Defendants:

- 6 1. Breach of Contract;
- 7 2. Breach of the Duty of Good Faith and Fair Dealing;
- 8 3. Fraud in the Inducement;
- 9 4. Fraudulent Concealment;
- 10 5. Fraudulent Misrepresentation;
- 11 6. Negligent Misrepresentation.

12 *See generally* Dkt. #1. In the instant Motion, Boeing only seeks dismissal of causes of action 3
13 through 6 and cause of action 2 with respect to all Defendants other than Boeing. Comair’s other
14 claims are not addressed. Having considered the issues, the Court generally finds in favor of
15 Comair but will dismiss one claim as set forth below.

16 **II. BACKGROUND**

17 The following facts are taken from the Complaint and considered true for purposes of the
18 instant Motion. The Court need not recite all alleged facts and will focus only on those necessary
19 for ruling on the instant Motion.

20 Comair is a South African commercial airline company. It operated airline services for
21 British Airways and Kulula.com. Since roughly 2003 Comair maintained an all-Boeing fleet.

22 On January 29, 2010, Boeing and Comair entered into an Aircraft General Terms
23 Agreement (“AGTA”). The purpose of the AGTA was to set forth the parties’ general contract
24

1 terms that would be incorporated by reference into the parties’ separate, subsequent purchase
2 agreements for Boeing aircraft.

3 In September 2013, Comair and Boeing signed a Purchase Agreement for eight 737 MAX
4 aircraft. The Purchase Agreement incorporated the earlier general terms of the AGTA plus
5 various “Letter Agreements.” Comair pleads that Boeing also issued a “Letter of Comfort” that
6 “allowed Comair to terminate the Purchase Agreement within 24 months of delivery of its first
7 737 MAX and receive a return of its 1% deposit against the purchase agreement price.” Dkt. #1
8 at ¶ 145. This Letter of Comfort allowed Comair to cancel the purchase by January 2017, in
9 other words “within 24 months of delivery of the first 737 MAX due in January 2019.” *Id.* at ¶
10 155. Comair does not attach the “Letter of Comfort” to the Complaint, quote any of its terms,
11 identify the date when it was issued, or plead the facts of offer and acceptance.

12 Boeing’s agreement to sell 737 MAX aircraft to Comair was publicly announced on
13 March 19, 2014. On February 26, 2019—four months after the Lion Air Flight 610 crash—
14 “Comair proudly accepted delivery of its first 737 MAX 8 from Boeing.” *Id.* at ¶ 176. Under
15 the terms of the Purchase Agreement, the second airplane was to be delivered in 2019, the third
16 in 2020, the fourth in 2021, the fifth and sixth in 2022, the seventh in 2023, and the eighth in
17 2024. Following the crash of Ethiopian Airlines Flight 302, “Boeing suspended all 737 MAX
18 deliveries, including the seven remaining aircraft” that Comair had purchased. *Id.* at ¶ 191. In
19 February 2020, Comair unilaterally purported to terminate the 2013 Purchase Agreement. *Id.* at
20 ¶ 233. The parties disagree about the scope and lawfulness of Comair’s termination, but Boeing
21 agreed to cancel the second and third 737 MAX deliveries. *See id.* at ¶ 235. In February 2021,
22 Comair rejected Boeing’s attempts to deliver the fourth 737 MAX. *Id.*

23 In May 2020, Comair “file[d] a business rescue proceeding in South Africa.” *Id.* at ¶ 234.
24 On February 3, 2021, Comair filed a Verified Chapter 15 Petition for Recognition of a Foreign
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1 Main Proceeding in the U.S. Bankruptcy Court for the Southern District of New York. *Id.* at ¶
2 236; *see also In re Comair Limited (In Business Rescue)*, Case No. 21-10298-JLG (Bankr.
3 S.D.N.Y.). Comair ceased to operate in June 2022 and is now “in provisional liquidation and is
4 being administered by the joint provisional liquidators.” *Id.* at ¶ 234.

5 The instant lawsuit was brought on February 6, 2023.

6 III. DISCUSSION

7 A. Legal Standard

8 Dismissal under Federal Rule of Civil Procedure 12(b)(6) “can be based on the lack of a
9 cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.”

10 *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990); *see also* FED. R. CIV. P.

11 8(a)(2). While considering a Rule 12(b)(6) motion, the court accepts all facts alleged in the
12 complaint as true and makes all inferences in the light most favorable to the non-moving party.

13 *Baker v. Riverside Cnty. Office of Educ.*, 584 F.3d 821, 824 (9th Cir. 2009) (citations omitted).

14 The court is not required, however, to accept as true a “legal conclusion couched as a factual
15 allegation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*,

16 550 U.S. 544, 555 (2007)). “Determining whether a complaint states a plausible claim for relief

17 will . . . be a context-specific task that requires the reviewing court to draw on its judicial
18 experience and common sense.” *Id.* at 679 (citations omitted).

19 “To survive a motion to dismiss, a complaint must contain sufficient factual matter,
20 accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Id.* at 678 (quoting

21 *Twombly*, 550 U.S. at 570). This requirement is met when the plaintiff “pleads factual content

22 that allows the court to draw the reasonable inference that the defendant is liable for the

23 misconduct alleged.” *Id.* (quoting *Twombly*, 550 U.S. at 556). The complaint need not include

24 detailed allegations, but it must have “more than labels and conclusions, and a formulaic

1 recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555. “The
2 plausibility standard is not akin to a probability requirement, but it asks for more than a sheer
3 possibility that a defendant has acted unlawfully. . . . Where a complaint pleads facts that are
4 merely consistent with a defendant’s liability, it stops short of the line between possibility and
5 plausibility of entitlement to relief.” *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556,
6 557). Absent facial plausibility, a plaintiff’s claims must be dismissed.

7 **B. Fraud and Negligent Misrepresentation Claims (Claims 3 through 6)**

8 Boeing asserts that claims three through six “rely on virtually the same set of allegations”
9 and can therefore be addressed together. Dkt. #25 at 14 n.6. The Court generally agrees.

10 Comair’s third through fifth causes of action assert that Boeing acted fraudulently in
11 omitting and/or misrepresenting material facts related to the 737 MAX’s similarity to recent
12 iterations of Boeing’s 737 aircraft, the need for substantial pilot training on the 737 MAX, and
13 the existence and operation of the MCAS system and the dangers posed by the system. Comair’s
14 sixth claim asserts Boeing negligently misrepresented such facts. This Court has previously
15 considered the propriety of such claims in the context of Boeing’s actions as they relate to the
16 737 MAX and MCAS. *See Wilmington Tr. Co. v. The Boeing Co.*, Case No. 20-cv-402-RSM,
17 2021 WL 754030 (W.D. Wash. Feb. 26, 2021); *Polskie Linie Lotnicze LOT S.A. v. The Boeing*
18 *Co.*, Case No. 21-cv-1449-RSM Dkt. #39 (Sep. 30, 2022). In *Wilmington*, this Court determined
19 that the similarities between the claims meant that they could be considered together, that both
20 claims should be subjected to Rule 9(b)’s heightened pleading standard, and that both claims
21 could proceed on the basis that Boeing had omitted, either fraudulently or negligently, material
22 facts. 2021 WL 754030 at *4–6. Boeing maintains that the same result is not appropriate here
23 because Comair cannot point to any misrepresentations or omissions prior to the date it entered
24

1 its contracts with Boeing in 2013. Boeing favorably cites *Smartwings, a.s. v. Boeing Co.*, No.
2 C21-918 RSM, 2022 WL 6747997, at *2 (W.D. Wash. October 11, 2022). Dkt. #25 at 17.

3 In response, Comair argues:

4 Comair’s complaint here is different, so the result should be
5 different as well. Boeing selectively cites only those allegations that
6 are arguably similar to those the Court rejected in *Smartwings* as
7 “too general” and “puffery.” Mot. at 9:24–10:6. But it wholesale
8 ignores the additional and more detailed allegations in Comair’s
9 complaint that refer to representations by specific Boeing
10 representatives to specific Comair representatives in late 2012 and
11 2013, *before* Comair signed the Purchase Agreement in September
12 2013 (two months after *Smartwings* did). Compl. ¶¶ 12–13, 129–
13 131, 133–37. Boeing’s argument therefore does not follow.

14 Dkt. #36 at 20 (emphasis in original).

15 The Court agrees with Comair. The Complaint alleges that Boeing made the following
16 representations prior to September 18, 2013:

- 17 a. The 737 MAX would retain the basic design and “unparalleled”
18 safety record of the 737 NG, the 737’s previous version;
- 19 b. Pilots qualified to fly the 737 NG would need only minimal
20 transition training for the 737 MAX;
- 21 c. The commonality between the 737 NG and 737 MAX was so
22 significant there was no requirement for a new 737 MAX
23 simulator;
- 24 d. The 737 MAX Aircraft would not require pilot training in a
simulator; and
- e. The training to transition pilots from the 737 NG to the 737
MAX would be one day of Level B training, which is computer-
based training or classroom instruction;

and “knew or should have known the [foregoing] statements were false.” *Id.* at ¶¶ 265, 270.

These details satisfy Rule 9(b)’s heightened pleading standard for fraud. The knowledge of their
falsity is plausibly plead given the allegations in paragraphs 64–70 of the Complaint.

Later, Comair argues that Boeing represented that the 737 MAX was “a variant of the
safe, reliable, and time-tested 737 family of aircraft,” with “new fuel-efficient engines,” “very
deliberate” design enhancements that posed “minimal risk,” and that required “nominal pilot

1 training to safely operate.” *Id.* at ¶ 284. The Court agrees with Boeing that *these* statements are
2 too general to support fraudulent inducement or omission claims under Rule 9(b). Rather, the
3 statements are akin to “general praise of goods sold known as sales talk or puffing.” *See Baughn*
4 *v. Honda Motor Co.*, 107 Wn.2d 127, 150, 727 P.2d 655, 668 (1986)). If this was all that Comair
5 had to support its fraud and negligent misrepresentation claims, it would have a problem.

6 Comair also pleads that Boeing represented that the 737 MAX was accurately described
7 in the Detail Specification, which was part of the parties’ AGTA and Purchase Agreement, but
8 that the Detail Specification made no mention of MCAS. Dkt. #1 at ¶ 288. This supports a claim
9 of fraudulent omission with specificity.

10 The Court finds that the pre-contract facts are sufficient to bring these claims. This is not
11 a basis to dismiss claims three through six.

12 Focusing on claim six, Boeing argues that Washington law does not recognize pre-
13 contract negligent misrepresentation based on promises of future performance. Dkt. #25 at 20-
14 21. Comair responds to this in a footnote, stating “[n]o one disputes that a mere opinion about
15 possible future events would not be actionable, but that is not what the allegations here describe.”
16 Dkt. #36 at 23 n.2.

17 There is no need for Comair to be coy. The Court would prefer Comair to respond in
18 greater detail to Boeing’s argument. However, the Court agrees with Comair that the lengthy
19 and detailed allegations in the Complaint are sufficient. The Washington Supreme Court has
20 held that “a promise of future performance is . . . not an actionable statement” for purposes of “a
21 negligent misrepresentation claim.” *Glacier Nw., Inc. v. Int’l Bd. Of Teamsters Loc. Union No.*
22 *174*, 500 P.3d 119, 136 (Wash. 2021) (citing *Havens v. C & D Plastics, Inc.*, 876 P.2d 435, 448
23 (Wash. 1994)). Instead, a plaintiff must plausibly allege a “false representation as to a presently
24 existing fact.” *Micro Enhancement Int’l, Inc. v. Coopers & Lybrand, LLP*, 40 P.3d 1206, 1219

1 (Wash. Ct. App. 2002). Comair has plausibly alleged many false representations based on
2 presently existing facts as to the development of the 737 MAX, even though the delivery would
3 occur years later. This was a complex transaction. It is not entirely clear, at the pleading stage,
4 which allegations of representations can be considered “presently existing facts” as opposed to
5 “promises of future performance,” and the Court declines to reach a final ruling now on this
6 distinction. Although these claims are plausible, with further development of the factual record
7 it is possible that this claim may not survive summary judgment.

8 **C. Claims based on Post-Contractual Misrepresentations or Omissions**

9 Boeing next argues that Comair’s claims of fraud or negligent misrepresentation should
10 fail to the extent they arise out of Boeing’s alleged misrepresentations or omissions to Comair
11 *after* the parties entered into the Purchase Agreement in September 2013. Dkt. #25 at 21.

12 Comair responds that this Court has previously allowed post-contractual fraud and
13 misrepresentations claims to survive a motion to dismiss in a case brought by another 737 MAX
14 Plaintiff, Smartwings, *see* Case No. C21-918RSM, Dkt. #37 at 13–14, as well as with another
15 737 MAX Plaintiff, Timearo. Dkt. #36 at 25–26. Boeing replies that it “recognizes this Court’s
16 prior finding that 737 MAX customers can state fraud and misrepresentation claims based on
17 Boeing’s alleged misrepresentations and omissions in and after 2016,” citing the Smartwings and
18 Timearo cases, but argues that “unlike the plaintiffs in those cases, Comair cannot plausibly
19 allege that it detrimentally relied on Boeing’s alleged post-contractual misrepresentations and
20 omissions.” Dkt. #42 at 14. Boeing asserts that Comair’s detrimental reliance allegations rely
21 on a phantasmal “letter of comfort” and otherwise lack particularity. *Id.* at 14–16.

22 As with prior cases, this Court declines to give a thumbs up or thumbs down to individual
23 misrepresentations at this early stage. Boeing has failed to articulate a satisfactory legal basis for
24 dismissing allegations of fraud or negligent misrepresentation based on statements made after

1 initial contracts were signed given the plausible ongoing nature of the relationship between the
2 parties and their contractual obligations, with or without a letter of comfort. This issue is best
3 raised again at the summary judgment stage once the factual record has been adequately
4 developed.

5 **D. Claim for Breach of an Implied Covenant of Good Faith and Fair Dealing as**
6 **brought against Doe Defendants**

7 Comair alleges in a single sentence that Boeing breached the covenant of good faith and
8 fair dealing implied in the parties' AGTA, Purchase Agreement, and Letter Agreements. *See*
9 Dkt. #1 at ¶ 253. Because Boeing and Comair are the only parties to these agreements, Boeing
10 argues that this claim cannot be brought against the Doe Defendants. Dkt. #25 at 28. Comair
11 does not dispute this. *See* Dkt. #36 at 15. The Court agrees. This claim will be dismissed as to
12 Doe Defendants.

13 **IV. CONCLUSION**

14 Having reviewed the Motion, the relevant briefing, and the remainder of the record, the Court
15 hereby finds and ORDERS that Defendant Boeing's Motion to Dismiss (Dkt. #25) is
16 GRANTED in part and DENIED in part as set forth in this Order. Plaintiff's claim for breach of
17 the implied covenant of good faith and fair dealing, against the Doe Defendants is DISMISSED.
18 All other claims remain.

19 DATED this 25th day of September, 2023.

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22 RICARDO S. MARTINEZ
23 UNITED STATES DISTRICT JUDGE
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