

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

ANGELA DUSKO, *on behalf of herself*)
and all others similarly situated,)

Plaintiff,)

v.)

DELTA AIR LINES, INC.,)

Defendant.)

CIVIL ACTION: 1:20-cv-01664-ELR

Consolidated Cases:)

Daniels v. Delta Air Lines, Inc.,)

Case No. 1:20-cv-01664-ELR)

Dusko v. Delta Air Lines, Inc.,)

Case No. 1:20-cv-01725)

Polk v. Delta Air Lines, Inc.,)

Case No. 1:20-cv-02461)

**PLAINTIFF’S UNOPPOSED MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION SETTLEMENT**

Plaintiff Angela Dusko (“Plaintiff”) hereby submits this Unopposed Motion for Preliminary Approval of Class Action Settlement in Support of Plaintiff’s Brief.

In support of the Motion, Plaintiff submits here Memorandum in Support; the Settlement Agreement and Releases (attached as *Exhibit A* to the Memorandum), with accompanying exhibits; the Joint Declaration of Class Counsel (attached as *Exhibit B* to the Memorandum); and a proposed Order Granting Plaintiff’s

Unopposed Motion for Preliminary Approval of Class Action Settlement is attached as ***Exhibit C*** to the Memorandum.

For the reasons set forth in the Memorandum, Plaintiff respectfully request that the Court: (1) grant preliminary approval of the Settlement; (2) certify for settlement purposes the proposed Settlement Class, pursuant to Rule 23(b)(3) and (e) of the Federal Rules of Civil Procedure; (3) approve the Notice Program set forth in the Settlement Agreement, including the form and content of the Notices; (4) approve the opt-out and objection procedures set forth in the Notice Program; (5) appoint Plaintiff as Class Representative; (6) appoint as Class Counsel the law firms and attorneys listed in the Agreement; and (7) schedule a Final Approval Hearing for the week of October 2, 2023, or on a date thereafter available on the Court's calendar (allowing at least 120 days after the date of the Preliminary Approval Order).

Dated: May 26, 2023

Respectfully submitted,

/s/ Roy E. Barnes

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FONT CERTIFICATION

The undersigned hereby certifies that this Motion complies with the font requirements of L.R. 5.1 because the document has been prepared in Times New Roman, 14 point font.

This 26th day of May, 2023.

/s/ Roy E. Barnes

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this day a copy of the foregoing was filed and served using the Court's CM/ECF system which will send notification of such filing to ECF registered participants.

DATED this 26th day of May, 2023.

/s/ Roy E. Barnes

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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
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ANGELA DUSKO, on behalf of herself
and all others similarly situated,

Plaintiff,

vs.

DELTA AIR LINES, INC.

Defendant.

CIVIL ACTION: 1:20-CV-01664-
ELR

**PLAINTIFF’S MEMORANDUM IN SUPPORT OF PLAINTIFF’S
UNOPPOSED MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION SETTLEMENT**

Plaintiff, Angela Dusko, on behalf of herself and a proposed Settlement Class¹ of individuals similarly situated, with the consent of Defendant, Delta Air Lines, Inc., respectfully requests entry of an order granting Preliminary Approval of the class action settlement (“Settlement”) set forth in the Parties’ Agreement, certifying a Settlement Class for settlement purposes, appointing Plaintiff as Class Representative for settlement purposes, appointing Class Counsel, approving the Notice Program, and scheduling a date for the Final Approval Hearing.

¹ All capitalized terms herein have the same meaning as those set forth in the parties’ Settlement Agreement and Releases (the “Agreement”), attached as ***Exhibit A***.

I. INTRODUCTION

Plaintiff seeks Preliminary Approval of a proposed Settlement of claims asserted against Delta. If approved, the Settlement will resolve all claims that Plaintiff and Settlement Class Members have against Delta arising from Delta's cancelation of flights during the relevant timeframe following the COVID-19 pandemic and subsequent alleged failure to issue refunds requested by ticketholders holding non-refundable tickets on those flights. The Settlement represents an extraordinary result for the Settlement Class, as it provides Settlement Class Members with the damages that they were likely to recover at trial, avoiding further delay in providing relief and further protracted litigation with uncertain results. Specifically, Settlement Class Members may claim cash in the amount of any Unused Credit or Partial Unused Credit, plus 7% of the original ticket amount as interest. Alternatively, Settlement Class Members may submit a claim to keep the Unused Credit or Partial Unused Credit and receive a credit in the amount of 7% of the original ticket amount as interest. The Settlement is the result of arm's-length negotiations achieved with the assistance of mediator Hunter R. Hughes III, Esq. Thus, the proposed Settlement is exceedingly fair and should be preliminarily approved.

II. BACKGROUND

A. Facts

As alleged in Plaintiff's Second Amended Consolidated Class Action Complaint ("SAC") [Doc. 59], beginning in March 2020, Delta canceled as many as 80% of its scheduled flights in response to the COVID-19 pandemic. *See* SAC at ¶19. Plaintiff alleges Delta breached its contract by failing to issue refunds requested by ticketholders holding non-refundable tickets on those flights. *See, e.g.*, SAC at ¶¶ 34, 47, 66-69, 78, 98. Delta disputes Plaintiff's allegations, contending that it adhered to its contract of carriage and offered cash refunds to customers who requested a refund in the wake of the COVID-19 pandemic.

B. Procedural History

On April 22, 2020, Plaintiff filed a putative Class Action Complaint on behalf of herself and all others similarly situated based on the above allegations. [Case No: 1:20-cv-01725, Doc. 1]. On July 9, 2020, the Court consolidated this Action with two related putative class actions. [Doc. 20]. The Court also instructed counsel for the plaintiffs to seek the appointment of lead counsel and ordered a consolidated amended complaint be filed. *Id.* Following competing applications, the Court entered an Order granting the Motion to Appoint Roy E. Barnes, Melissa S. Weiner, Jeff Ostrow, and Annick M. Persinger as Interim Class Counsel Pursuant to Federal

Rule of Civil Procedure 23(g). [*See generally* Doc. 39].

Thereafter, on December 3, 2020, Kevin Polk filed a Notice of Voluntary Dismissal of his action. [Doc. 42]. On December 17, 2020, Plaintiff filed a Consolidated Amended Class Action Complaint (“CAC”), asserting three claims against Delta for breach of contract, breach of the implied covenant of good faith and fair dealing, and declaratory and injunctive relief. [Doc. 44]. Elliott Daniels was not a named plaintiff in the CAC, leaving Plaintiff as the sole named plaintiff in this Action. *Id.* On June 23, 2021, Delta filed its Motion to Dismiss the CAC. [Doc. 57].

On July 23, 2021, Plaintiff filed her SAC, asserting claims for breach of contract and breach of the implied covenant of good faith and fair dealing. [Doc. 59]. On August 23, 2021, Delta filed its Motion to Dismiss the SAC. [Doc. 62]. After the motion was fully briefed [Docs. 65-65], Plaintiff filed a Notice of Supplemental Authority [Doc. 67], to which Delta responded [Doc. 68].

On March 2, 2022, the Court entered an Order granting in part and denying in part Delta’s Motion to Dismiss the SAC [Doc. 70]. Specifically, the Court denied the motion as to Plaintiff’s breach of contract claim alleging that when Plaintiff requested a refund for her flight, a Delta customer service representative told her that Plaintiff was only eligible for a travel credit. *Id.* at 15-17. The Court dismissed the other breach of contract theories and the implied covenant of good faith and fair

dealing claim. *See generally id.* On March 30, 2022, Delta filed its Answer. [Doc. 73].

On April 15, 2022, the Parties filed their Joint Preliminary Planning Report and Discovery Plan and exchanged their Initial Disclosures. [Doc. 74, 75]. On May 9, 2022, Plaintiff served Delta with her First Set of Interrogatories and First Request for Production of Documents [Doc. 78], to which Delta served its written responses on June 15, 2022. *See* Declaration of Class Counsel in Support of Preliminary Approval (“Decl.”), attached as ***Exhibit B***, at ¶ 12.

On August 10, 2022, the Parties filed their Joint Motion to Stay Proceedings Pending Mediation & Extension of Current Deadlines, which the Court granted. [Doc. 79, 80]. As a condition to mediation, Delta agreed to work with Class Counsel to produce all information Class Counsel believed was necessary to evaluate Plaintiff’s claims. *Id.* ¶ 13. On October 17, 2022, the Parties first mediated with experienced class action litigation mediator Hunter R. Hughes III, Esq. *See* Decl. ¶ 13. Before mediation, the Parties exchanged informal discovery to prepare. *Id.* ¶ 14. Although a resolution was not reached, the Parties agreed to another mediation with Mr. Hughes on November 14, 2022 with Delta to provide additional mediation discovery to Plaintiff to aid the negotiations. *Id.* ¶ 15. During the November 14, 2022 mediation session, the Parties progressed towards agreeing to material settlement

terms and agreed to continue negotiations at a third session. *Id.* ¶ 16. Before that session, the Parties exchanged additional mediation discovery. *Id.* On January 9, 2023, a third mediation session with Mr. Hughes occurred. *Id.* ¶ 17. Though the Parties did not agree to all material settlement terms that day, they continued to work to draft a confidential term sheet and to confer with the mediator to finalize agreed settlement terms. *Id.* Those efforts resulted in the Parties executing a confidential term sheet memorializing the material settlement terms effective January 13, 2023. *Id.* The Agreement was executed effective May 11, 2023. *Id.* ¶ 19.

III. MATERIAL SETTLEMENT TERMS

The following is a summary of the material terms of the Settlement.

A. The Settlement Class

The proposed Settlement establishes a Settlement Class as follows:

All ticketholders who are citizens of the United States who received a credit for a non-refundable ticket purchased with dollars on a flight scheduled to depart between March 1, 2020 through April 30, 2021 (a) that Delta cancelled; (b) who requested a refund for the ticket as reflected in Delta's Customer Care or Refund Databases; (c) did not receive a refund; and (d) who had an Unused Credit or Partial Unused Credit as of January 13, 2023.

Agreement ¶ 69.² The Settlement Class excludes Delta and its respective subsidiaries

² The Parties agree that when she filed her complaint, Plaintiff had not received a refund and, thus, satisfies each class criteria, and that for settlement purposes, the date of her initial complaint determines her membership in the Settlement Class.

and affiliates, members, employees, officers, directors, agents, and representatives and their family members; Class Counsel; the judges who have presided over the Action and their immediate family members; local, municipal, state, and federal governmental agencies; and all persons who have timely opted-out from the Settlement Class in accordance with the Court's orders. *Id.*

B. Settlement Benefits

Delta agrees to the following Settlement consideration: (a) pay Cash Settlement Payments to certain Settlement Class Members who select the Ticket Cash and Interest Cash option; (b) provide Credit Settlement Payments to certain Settlement Class Members who select the Ticket Credit and Interest Credit option; (c) pay all Settlement Administration Costs, separate and apart from the Cash Settlement Payments and Credit Settlement Payments made directly to Settlement Class Members; and (d) pay Class Counsel \$2,285,000.00 for attorneys' fees and up to \$80,000.00 for litigation costs, subject to Court approval, separate and apart from the Cash Settlement Payments and Credit Settlement Payments made directly to Settlement Class Members. Agreement ¶ 78.

Agreement ¶ 37. *C.f. Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 71, n.2 (2013) ("where a named plaintiff's claim is 'inherently transitory,' and becomes moot prior to certification, a motion for certification may 'relate back' to the filing of the complaint") (citing *County of Riverside v. McLaughlin*, 500 U.S. 44, 51–52 (1991)).

Settlement Class Members who make a valid claim and select the Ticket Cash and Interest Cash option will receive a cash refund of the entire amount of their Unused Credit or Partial Unused Credit, with an additional 7% of the original ticket amount to account for interest. *See* Agreement ¶ 105. If Settlement Class Members prefer to keep the credit, they may either do nothing and keep their existing credit on the existing terms, or they may make a claim and select the Ticket Credit and Interest Credit option to keep their Ticket Credit and obtain an additional 7% of the original ticket amount in Interest Credit. *See id.*³ Settlement Class Members who no longer have an Unused Credit or Partial Unused Credit as of the Claims Deadline will be eligible to receive either Interest Cash or Interest Credit based on the election made on the Claim Form, but they will no longer be eligible for Ticket Cash or Ticket Credit. *Id.* ¶ 105(a)(iii).

Given that Settlement Class Members may obtain a cash refund for the entire outstanding Unused Credit and Partial Unused Credit amount, plus 7% interest based on the original ticket amount, means the Settlement achieves relief similar to what

³ Settlement Class members who fail to submit claims by the Claims Deadline may redeem the Unused Credit Amount or Partial Unused Credit pursuant to Delta's then current policy, including the credit expiration date (currently passengers have until December 31, 2023 to book travel through December 31, 2024), but the failure to submit a Claim Form means there is no entitlement to Interest Cash or Interest Credit. Agreement ¶ 105(d). Any future extension of Delta's current policy for expiration of credits shall also apply to Settlement Class Members. *Id.* ¶ 105(a)(ii).

Plaintiff could have obtained for tens of thousands of Settlement Class Members had she been successful at trial. *See* Decl. ¶ 24. Accordingly, the Settlement will provide outstanding direct monetary benefits to the Settlement Class, and Delta's agreement to separately pay all Settlement Administration Costs, attorneys' fees and costs to Class Counsel also greatly benefits the Settlement Class. *Id.* ¶ 29.

C. The Notice Program

The Parties jointly selected, and Delta will retain Epiq Class Action & Claims Solutions, Inc., a third-party Settlement Administrator, to disseminate Notice and implement the Settlement following Final Approval. The Notice Program will begin no later than 45 days after entry of a Preliminary Approval Order and will conclude 87 days after entry of a Preliminary Approval Order. Agreement ¶¶ 87, 89. It includes three types of direct Notice: (1) Email Notice; (2) Postcard Notice; and (3) Long Form Notice. *Id.* ¶ 53. The forms of these Notices, agreed to by the Parties, subject to this Court's approval and/or modification, are attached to the Agreement. *See id.*, Ex. 1-3.

The Notice Program will also include a Settlement Website that will provide detailed information about the Settlement. *See* Agreement ¶ 98. Additionally, there will be a toll-free telephone number and facility to provide Settlement Class members with information and direct them to the Settlement Website. *Id.* ¶ 99. The

Long Form Notice shall be available on the Settlement Website or at the request of a Settlement Class member. *Id.* ¶ 90.

For Settlement Class members for which Delta has both an email address and postal address, the Settlement Administrator shall send a Postcard Notice via U.S. Mail and up to two reminder Email Notices to any such members who have *not* submitted a Claim Form as of the date the reminder Email Notices are scheduled to be sent. *Id.* ¶ 88(a). The Settlement Administrator shall perform reasonable address traces for Postcard Notices returned undeliverable. *Id.* ¶ 94. If the Postcard Notice is returned undeliverable, and the Settlement Administrator is unable to obtain an alternative postal address to send the initial Postcard Notice, then initial and reminder Email Notices shall be sent. *See id.* ¶ 88(a)-(b).

For Settlement Class members for which Delta has only an email address, the Settlement Administrator shall send an Email Notice and up to two reminder Email Notices to any such members who have *not* submitted a Claim Form as of the date reminder Email Notices are scheduled to be sent. *Id.* ¶ 88(b).

For Settlement Class members for which Delta has only a postal address, the Settlement Administrator shall send a Postcard Notice via U.S. Mail and one reminder Postcard Notice to any such members who have *not* submitted a Claim Form as of the date reminder Postcard Notices are scheduled to be sent. *Id.* ¶ 88(c).

To account for the possibility that Delta does not have an email address, postal address, or both, for a small minority of Settlement Class members, the Parties will work with the Settlement Administrator to obtain contact information. *Id.* ¶ 91.

The Notice Program is designed to provide Settlement Class members with important Settlement information and their rights thereunder, including a description of the material Settlement terms; the Opt-Out and Objection Deadline; the means by which Settlement Class members may submit Claim Forms and the Claims Deadline; the date on which the Final Approval Hearing is scheduled to occur; and the Settlement Website address at which Settlement Class members may access the Agreement, the electronic Claim Form, and other related documents and information. *Id.* ¶ 86. Complete opt-out and objection requirements are listed in the Agreement and in the Long Form Notice. *Id.* ¶¶ 100, 101; *id.*, Ex. 3. The Notice Program provides the best notice practicable and complies with due process and Federal Rule of Civil Procedure 23(c)(2). *See* Declaration of Cameron Azari, Esq. on Notice Program and Notice (“Admin. Decl.”), at ¶¶ 16-17, 40.

D. Claim Form Submission Process and Calculation

Settlement Class Members will receive Settlement Benefits on a claims-made basis. Agreement ¶ 103. Settlement Class Members must submit Claim Forms by the Claims Deadline. *Id.* ¶ 104; *see also supra* § III.B. As soon as practicable, but

no later than 90 days after the Effective Date, Delta shall provide Interest Credit to eligible Settlement Class Members. *Id.* ¶ 112. As soon as practicable, but no later than 15 days after the Effective Date, Delta shall send the Settlement Administrator the funds necessary to fully pay the Cash Settlement Payment to Settlement Class Members whose approved Claim Forms require such payments. *Id.* ¶ 113. As soon as practicable, but no later than 60 days after the Effective Date, the Settlement Administrator shall pay the Cash Settlement Payment to all Settlement Class Members entitled to Ticket Cash and/or Interest Cash. *Id.* ¶ 114.

E. Funds Remaining from Uncashed and Undeliverable Checks

Settlement Class Members who receive a Cash Settlement Payment by check shall have 180 days from the date on the checks to negotiate their checks. *Id.* Any uncashed or undeliverable checks remaining 210 days after final issuance, and any electronic payments not successfully delivered, shall be paid to *cy pres* recipients subject to the agreement of the Parties and approval of the Court. The Parties shall each propose a *cy pres* recipient to receive 50% of the residual funds. *Id.* ¶ 117.

F. Settlement Administrator

The proposed Settlement Administrator is a well-respected and reputable administrator. *See* Admin. Decl. ¶¶ 2-6. It was selected following a competitive bidding process that involved solicitation of two notice and claims administration

proposals, and a determination that engaging the Settlement Administrator was in the Settlement Class's best interests. Decl. ¶ 28. Settlement Administration Costs will be paid by Delta separate and apart from the Settlement Benefits to Settlement Class Members. Agreement ¶ 78(c).

G. Opt-Out and Objection Procedures

Consistent with the Agreement's opt-out procedures, the Long Form Notice details that Settlement Class members who do not wish to participate in the Settlement may opt-out up to 35 days prior to the Final Approval Hearing. *Id.* ¶ 100.

The Agreement and Long Form Notice also specify how Settlement Class Members may object to the Settlement and/or the application for attorneys' fees, costs, and/or the Service Award and instruct them to file or mail the objection to the Clerk of the Court and mail it to the Settlement Administrator who will provide it to Class Counsel and the Defendant's Counsel. *See id.* ¶¶ 101-102 and Ex. 3 thereto.

H. Release of Claims

Plaintiff and Settlement Class Members who do not timely and validly opt-out of the Settlement Class will be bound by the terms of the Settlement, including the Releases that discharge the Released Claims against the Settlement Class Members, Class Representative, and Delta. *See* Agreement § XI. The Released Claims are narrowly tailored and only "relate to or arise from Delta's cancellation

of flights scheduled to depart between March 1, 2020 and April 30, 2021 and subsequent failure to issue refunds requested by the ticketholders holding non-refundable tickets on those flights.” *Id.* ¶ 63.

I. Class Counsel Fees and Costs and Plaintiff’s Service Award

Delta has agreed to separately pay Class Counsel \$2,285,000.00 in attorneys’ fees, and to reimburse them up to \$80,000.00 in costs, subject to Court approval. *Id.* ¶ 127. These separate payments ensure that Settlement Class Members receive 100% of the direct Settlement Payments they claim. *Id.* Further, Plaintiff may make an application to the Court to have Delta separately pay the Class Representative a Service Award of up to \$3,000.00. *Id.* ¶ 130. Service awards are currently prohibited by Eleventh Circuit law. *See Johnson v. NPAS Sols., LLC*, 975 F.3d 1244, 1260 (11th Cir. 2020). Absent a change in Eleventh Circuit jurisprudence before filing the application, Class Counsel will seek a Service Award on behalf of Plaintiff pursuant to Georgia substantive law. *See Roth v. GEICO Gen. Ins. Co.*, No. 16-62942, 2020 WL 10818393, at *3 (S.D. Fla. Oct. 8, 2020) (granting service awards to each named plaintiff under Florida law and finding *Johnson* should not be extended to diversity cases where governing state law permits service awards, particularly where they are to be paid separately and will not impact the recovery of any class member); *South et al. v. Progressive Sel. Ins. Co., et al.*, Nos. 19-21760-CIV and 19-21761-CIV

(S.D. Fla. Apr. 3, 2023), D.E. 258 (same); *see also Wheatly v. Moe's Southwest Grill, LLC*, 580 F. Supp. 2d 1324 (N.D. Ga. 2008) (stating that under the *Erie*, “when a federal court adjudicates state law claims in a diversity of citizenship action, the court is obligated to apply the state substantive law and federal procedural law,” and applying Georgia law regarding attorneys’ fees). In *Am. Home Servs., Inc. v. A Fast Sign Co., Inc.*, 322 Ga. App. 791, 797 (2013), the Georgia Court of Appeals did not criticize such payments awarded to representatives. *Id.* at 792.⁴ Delta has reserved its rights with respect to Plaintiff’s proposed application for a Service Award and will pay it if the Court approves it. Class Counsel will file their application for attorneys’ fees and costs and a Service Award when they move for Final Approval. Agreement ¶ 46.

IV. THE PROPOSED SETTLEMENT WARRANTS PRELIMINARY APPROVAL

Federal Rule of Civil Procedure 23(e) requires judicial approval of any settlement agreement that will bind absent class members. This involves a two-step process. Manual for Compl. Lit., § 21.632 (4th ed. 2022). First, the court makes a preliminary fairness evaluation of the proposed settlement terms. *Id.* Second,

⁴ Georgia’s trial courts continue to grant service awards to class representatives. *See Roberson v. ECI Group, Inc.*, No. 2017-A-64506-4 (GA. Sup. Ct. DeKalb Cty. May 21, 2021).

following preliminary approval, class members are provided notice of a fairness hearing. *Id.* At the fairness hearing, arguments and evidence may be presented in support of, or opposition to, the settlement. *Id.* at § 21.634.

The December 2018 amendments to Rule 23 specify a uniform standard for settlement approval. *See* Fed. R. Civ. P. 23(e), Committee Notes on Rules – 2018 Amendment. The amended rule states that, at the preliminary approval stage, the court must determine whether it “will likely be able to: (i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal.” Fed. R. Civ. P. 23(e)(1)(B). Rule 23(e)(2), in turn, specifies the following factors the court should consider at the final approval stage in determining whether a settlement is “fair, reasonable, and adequate”:

- (A) the class representatives and class counsel have adequately represented the class;
- (B) the proposal was negotiated at arm’s length;
- (C) the relief provided for the class is adequate, taking into account:
 - (i) the costs, risks, and delay of trial and appeal;
 - (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
 - (iii) the terms of any proposed award of attorney’s fees, including timing of payment; and (iv) any agreement required to be identified under Rule

23(e)(3); and

(D) the proposal treats class members equitably relative to each other.

The 2018 amendment's stated goal is to "focus the court ... on the core concerns of procedure and substance that should guide the decision whether to approve the proposal." Fed. R. Civ. P. 23(e), Committee Notes on Rules – 2018 Amendment.

The ultimate decision of whether to approve a proposed class action settlement is "committed to the sound discretion of the district court." *In re U.S. Oil & Gas Litig.*, 967 F.2d 489, 493 (11th Cir. 1992). However, in exercising this discretion, courts are mindful of the "strong judicial policy favoring settlement," as well as "the realization that compromise is the essence of settlement." *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984). As discussed below, Rule 23(e)(2)'s requirements are satisfied and Preliminary Approval should be granted.

A. The Adequacy of Representation

Adequacy of representation is an issue traditionally considered in connection with class certification and involves two questions: "(1) whether the class representatives have interests antagonistic to the interests of other class members; and (2) whether the proposed class' counsel has the necessary qualifications and experience to lead the litigation." *Columbus Drywall & Insulation, Inc. v. Masco*

Corp., 258 F.R.D. 545, 555 (N.D. Ga. 2007). Here, Plaintiff has the same interest as other Settlement Class members. She asserted claims in the SAC for Delta's denial of requested refunds resulting in the same alleged injuries to the Settlement Class members. Moreover, she has pursued this Action vigorously by actively seeking out counsel, approving her pleadings, and monitoring the lawsuit in an effort to obtain the maximum recovery for both herself and for the other Settlement Class members.

Class Counsel's adequacy is presumed absent specific proof to the contrary. *Diakos v. HSS Sys., LLC*, 137 F. Supp. 3d 1300, 1309 (S.D. Fla. 2015). Throughout this Action, Class Counsel has acted with diligence, skill, and professionalism, beginning with their appointment by the Court as interim class counsel. Class Counsel continue to be experienced in complex class litigation involving breach of contract claims. *See* Decl., Ex. 1-4 (firm resumes).

B. The Settlement Was Negotiated at Arm's Length

The Settlement is the result of extensive, arm's-length negotiations between experienced attorneys who are familiar with class action litigation and with the legal and factual issues at the center of this Action. Decl. ¶ 20. Class Counsel are particularly experienced in the litigation, certification, trial, and settlement of class action cases. *Id.* ¶ 21. This experience proved beneficial to Plaintiff and the Settlement Class during Settlement negotiations. *Id.* Class Counsel ensured that

informal discovery conducted prior to and during mediation, would enable them to understand the evidence related to central issues in the Action, including damages and liability, and conduct well-informed settlement negotiations. *Id.* ¶ 22. Delta responded to detailed lists of questions prepared by Class Counsel. *Id.* For example, Class Counsel was able to learn details about Delta's policies regarding refunds to customers, and its volume and ability to process requested refunds over time. *Id.* This information helped formulate the Class Period set forth in the Agreement. *Id.* Class Counsel was also able to learn how Delta could identify those individuals who may have requested a refund from the cancellation of flights with nonrefundable tickets, who had an Unused Credit or Partial Unused Credit. Further, Class Counsel was able to learn what sort of information Delta maintained about these individuals in their customer service databases, and how this information might be retrieved. Class Counsel also learned the approximate number of individuals who fit the Settlement Class definition. *Id.*

The Settlement was reached in the absence of collusion and is the product of good-faith, informed, and arm's-length negotiations by competent counsel with the assistance of a well-respected and experienced mediator, Hunter R. Hughes, III. *Id.* ¶¶ 14, 20. The extensive mediation and other negotiations were conducted over several months and three formal sessions at arm's-length. *See Ingram v. The Coca-*

Cola Co., 200 F.R.D. 685, 693 (N.D. Ga. 2001) (“The fact that the entire mediation was conducted under the auspices of Mr. Hughes, a highly experienced mediator, lends further support to the absence of collusion.”); Decl. ¶¶ 13-17. Moreover, attorneys’ fees and costs and a Service Award were not discussed until the Parties agreed to all other material Settlement terms. *Id.* ¶ 18.

C. The Adequacy of the Settlement Relief

Class Counsel, a group with significant experience in class action litigation, strongly believe the Settlement Benefits are fair, reasonable, and adequate. *Id.* ¶¶ 21, 23. Indeed, the Settlement is more than reasonable, given that every Settlement Class Member who wants a cash refund for any Unused Credit or Partial Unused Credit can receive one, plus 7% of the original ticket amount in interest. Thus, Settlement Class Members will essentially recover all of the damages that they could have recovered at trial. *Id.* at ¶ 24.

The Court is entitled to rely upon the judgment of experienced counsel. *See, e.g., Nelson v. Mead Johnson & Johnson Co.*, 484 F. App’x 429, 434 (11th Cir. 2012) (“Absent fraud, collusion, or the like, the district court should be hesitant to substitute its own judgment for that of counsel.”) (internal quotations omitted). That the Settlement Benefits are fair, reasonable, and adequate is further confirmed by considering Rule 23(e)(2)’s four enumerated factors.

1. The Costs, Risks, and Delay of Trial and Appeal

Any settlement requires the parties to balance the merits of the claims and defenses asserted against the attendant risks of continued litigation and delay. Decl. ¶ 33. Class Counsel believe that the claims asserted are meritorious and that Plaintiff would prevail if this matter proceeded to trial, particularly given Plaintiff's success on Delta's motion to dismiss. *Id.* However, they are also pragmatic and aware that there are uncertainties in any litigation. *Id.* ¶ 34. Delta denies liability, wrongdoing, and damage, denies that the Action may be maintained as a class action (except for settlement purposes), and has shown a willingness to continue vigorous litigation. *Id.* To achieve relief similar to the Settlement Benefits, if Plaintiff were to continue litigating, she would have to overcome several obstacles—including obtaining class certification, surviving summary judgment, and prevailing at trial. And, even if Plaintiff and the Settlement Class ultimately prevailed at trial, recovery could be delayed for years by an appeal. *Lipuma v. American Express Co.*, 406 F. Supp. 2d 1298, 1322 (S.D. Fla. 2005) (likelihood that appellate proceedings could delay class recovery “strongly favor[s]” approval of a settlement). All that is certain is that with continued litigation, the putative class would face a notably longer wait before receiving any potential recovery, if they received any recovery at all. Decl. ¶ 34. Thus, in Class Counsel's experience and informed judgment, the Settlement

represents an excellent recovery for the Settlement Class, and the Settlement Benefits outweigh risks and uncertainties of continued litigation, including the risks, time, and expenses associated with completing a trial and any appellate review. *Id.* 35.

2. The Effective Method of Distributing Relief and Processing Claims

The proposed method for claim submission and distributing the Settlement Benefits is fair, convenient, and effective. Settlement Class Members will promptly receive (a) Cash Settlement Payments for Ticket Cash and Interest Cash by check or electronic payment issued by the Settlement Administrator or (b) Credit Settlement Payments directly from Delta if they elect Ticket Credit and Interest Credit. Appointing the Settlement Administrator reinforces the efficacy of the relief process because a qualified entity will be designated to manage the entire process.

3. The Reasonable Terms Relating to Attorneys' Fees

Whether the attorneys' fees are reasonable on their own terms is a Rule 23(h) analysis. By contrast, under Rule 23(e), the analysis is not of the fee amount in a vacuum, but rather whether attorneys' fees impact the other settlement terms. *See Pinon v. Daimler AG*, No. 1:18-CV-3984, 2021 WL 6285941, at *7 (N.D. Ga. Nov. 30, 2021) (finding class relief adequate where the parties negotiated attorneys' fees for class counsel only after reaching agreement on the terms of the class relief, and

the payment of fees did not impact the amount of relief available to the class members, among other things). Here, after Preliminary Approval, Class Counsel will apply for \$2,285,000.00 in attorneys' fees, to be paid separately by Delta, meaning there will be no reduction or impact whatsoever on Settlement Class Members' Settlement Benefits. Decl. ¶ 25 Also, Settlement Class Members' receipt of Settlement Benefits is not conditioned on the Court's attorneys' fee award to Class Counsel. Agreement ¶ 127. Indeed, the Parties negotiated attorneys' fees and the \$80,000.00 of litigation costs only after agreeing to the Settlement Benefits. Decl. ¶ 18. Subject to the Court's consideration of a detailed fee application, the proposed award of attorneys' fees is also fair. *See* Fed. R. Civ. P. 23(e)(2)(C)(iii).

4. The Agreements Identified Pursuant to Rule 23(e)(3)

Rule 23(e)(3) states that “[t]he parties seeking approval must file a statement identifying any agreement made in connection with the proposal.” Fed. R. Civ. P. 23(e)(3). There are no other agreements with Delta other than the Agreement, which weighs in favor of a finding that the Agreement is fair and adequate.

D. The Equitable Treatment of Settlement Class Members Relative to Each Other

The proposed Settlement treats all Settlement Class members equally. Accordingly, each is eligible to receive the same benefits. No Settlement Class members are favored over another and, therefore, the treatment is equitable.

V. CLASS CERTIFICATION IS APPROPRIATE

In granting Preliminary Approval, the Court should also certify the Settlement Class for settlement purposes. “A class may be certified ‘solely for purposes of settlement where a settlement is reached before a litigated determination of the class certification issue.’” *Figueroa v. Sharper Image Corp.*, 517 F. Supp. 2d 1292, 1318 n.19 (S.D. Fla. 2007); *see also, e.g., In re Home Depot, Inc. Customer Data Sec. Breach Litig.*, No. 1:14-md-02583, 2016 WL 6902351 (N.D. Ga. Aug. 23, 2016) (certifying class for settlement purposes). Solely for settlement purposes, the Parties stipulate and agree to the Action proceeding as a Rule 23 class action. Certification of the Settlement Class is appropriate because the Rule 23(a) and 23(b)(3) requirements are satisfied. *See, e.g., Cox v. Spirit Airlines, Inc.*, 341 F.R.D. 349, 364 (E.D.N.Y. 2022), *amended on reconsideration in part*, No. 17-CV-5172, 2023 WL 1994201 (E.D.N.Y. Feb. 14, 2023) (certifying class of airline passengers).

A. The Settlement Class Satisfies the Rule 23(a) Requirements

Certification under Fed. R. Civ. P. 23(a) requires:

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

Each of these requirements is met here.

Numerosity. Rule 23(a) numerosity is satisfied because the Settlement Class has tens of thousands of members, and joinder of all such persons is impracticable. *See* Decl. ¶¶ 22, 36; Fed. R. Civ. P. 23(a)(1); *Kilgo v. Bowman Trans.*, 789 F.2d 859, 878 (11th Cir. 1986) (numerosity satisfied where plaintiffs identified at least 31 class members “from a wide geographical area”).

Commonality. “Commonality requires the plaintiff to demonstrate that the class members ‘have suffered the same injury,’” and the plaintiff’s common contention “must be of such a nature that it is capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 131 S. Ct. 2541, 2551 (2011) (citation omitted); *see also Williams v. Mohawk Indus., Inc.*, 568 F.3d 1350, 1356 (11th Cir. 2009) (describing plaintiff’s commonality burden as a “low hurdle” that does not require all questions of law and fact raised to be common). Here, commonality is readily satisfied. Plaintiff has asserted multiple common questions of law and fact for the Settlement Class, centering on whether ticketholders holding non-refunding tickets on flights scheduled to depart between March 1, 2020 and April 30, 2021 that were canceled by Delta and who requested a refund for their tickets should have been given refunds

as opposed to credits for future travel. Answers to those questions will generate common answers for the Settlement Class members who are alleged to have been injured in the same or similar way. Additionally, Plaintiff asserts that all Settlement Class members were subject to the same contract terms that form the basis of the breach of contract claim. “When viewed in light of Rule 23, claims arising from interpretations of a form contract appear to present the classic case for treatment as a class action, and breach of contract cases are routinely certified as such.” *Kleiner v. First Nat. Bank of Atlanta*, 97 F.R.D. 683, 692 (N.D. Ga. 1983). There will be no issue demonstrating Settlement Class members have suffered the same injury.

Typicality. Typicality is satisfied where claims “arise from the same event or pattern or practice and are based on the same legal theory.” *Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1337 (11th Cir. 1984). It measures whether a “significant nexus” exists between the claims of the Class Representatives and those of the class at large. *Columbus Drywall & Insulation, Inc.*, 258 F.R.D. at 555 (quoting *Hines v. Widnall*, 334 F.3d 1253, 1256 (11th Cir. 2003)). Typicality does not mandate that all class members share identical claims, rather they must share only the same “essential characteristics” of the larger class. *Id.* Typicality may be judged at the time of the complaint’s filing. *See Doe v. Wolf*, 424 F. Supp. 3d 1028, 1043 (S.D. Cal. 2020) (invoking relation back doctrine) (citations omitted). Here,

Plaintiff's claims alleged in her original complaint share the essential characteristics of the Settlement Class members' claims because she asserts that, in response to her request for a cash refund, Delta breached its contract with her by offering credit for future travel instead of refunding her for the non-refundable ticket she purchased for a flight that Delta canceled, just as Delta did to her fellow Settlement Class members.

Adequacy. Plaintiff and Class Counsel also satisfy the adequacy of representation requirement. Rule 23(a)(4) adequacy relates to: (1) whether the proposed class representative has interests antagonistic to the class; and (2) whether the proposed class counsel has the competence to undertake the litigation. *Dickens v. GC Servs. Ltd. P'ship*, 706 F. App'x 529, 535 (11th Cir. 2017). The determinative factor "is the forthrightness and vigor with which the representative party can be expected to assert and defend the interests of the members of the class." *Lyons v. Georgia-Pacific Corp. Salaried Employees Ret. Plan*, 221 F.3d 1235, 1253 (11th Cir. 2000) (internal quotations omitted). The class representative may be adequate even "upon expiration of the named plaintiff's substantive claim" after filing a complaint but before certification. *See J.M. by & through Lewis v. Crittenden*, 337 F.R.D. 434, 451 (N.D. Ga. 2019) (citing *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 398 (1980) and *Gerstein v. Pugh*, 420 U.S. 103, 95 (1975)); *see also Zeidman v. J. Ray McDermott & Co., Inc.*, 651 F.2d 1030, 1044, 1050 (5th Cir. 1981) (finding

plaintiffs satisfied adequacy requirement despite their claims having been tendered and disapproving of defendants having “the option to preclude a viable class action from ever reaching the certification stage” by tendering amount of plaintiffs’ claims).

As discussed above, *see* § IV(A) *supra*, Plaintiff’s interests are coextensive with, not antagonistic to, the Settlement Class’s interests, as Plaintiff asserted claims in her original complaint arising from Delta’s denial of requested refunds, resulting in the same injuries to Plaintiff and the Settlement Class members. The absent Settlement Class members have no diverging interests. Further, Plaintiff and the Settlement Class will be represented by qualified and competent Class Counsel, who the Court already appointed as interim class counsel. Each firm is a leader in the class action field, and each attorney has extensive experience prosecuting complex class actions, which has helped them to vigorously litigate on behalf of the Settlement Class thus far. Class Counsel has devoted substantial time and resources and will continue to do so. *See* Decl. ¶ 40.

B. The Settlement Class Satisfies the Rule 23(b)(3) Requirements

Rule 23(b)(3) requires that “questions of law or fact common to class members predominate over any questions affecting only individual members,” and that class treatment is “superior to other available methods for fairly and efficiently

adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3). It requires a “direct impact” of common issues of law and fact “on every class member’s effort to establish liability that is more substantial than the impact of individualized issues in resolving the claim or claims of each class member.” *Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc.*, 601 F.3d 1159, 1170 (11th Cir. 2010) (internal quotations omitted). Rule 23(b)(3) predominance is readily satisfied because liability questions common to all Settlement Class members substantially outweigh any possible issues that are individual to some Settlement Class member.

Further, the Settlement Class members are identified from Delta’s records, making the Settlement Class ascertainable. Decl. ¶ 41. To administer the Settlement’s relief, all that is required is (1) retrieving the amount of credit outstanding for the Ticket Cash or Ticket Credit, and (2) multiplying the amount of the original ticket by 7% to calculate the Interest Cash or Interest Credit. *See Klay v. Humana, Inc.*, 382 F.3d 1241, 1259–60 (11th Cir. 2004) (“Particularly where damages can be computed according to some formula, statistical analysis, or other easy or essentially mechanical methods, the fact that damages must be calculated on an individual basis is no impediment to class certification.”) (citations omitted). The inquiry into whether the class action is the “superior” method for a particular case focuses on “increased efficiency.” *Agan v. Katzman & Korr, P.A.*, 222 F.R.D. 692,

700 (S.D. Fla. 2004). Here, resolution of tens of thousands of claims in one action is far superior to individual lawsuits, because it promotes consistency and efficiency of adjudication. *See* Fed. R. Civ. P. 23(b)(3). For these reasons, the superiority element is satisfied.

C. The Court Should Approve the Proposed Notice Program

Rule 23(e)(1)(B) states:

The court must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing that the court will likely be able to (i) approve the proposal under Rule 23(e)(2), and (ii) certify the class for purposes of judgment on the proposal.

Fed. R. Civ. P. 23(e)(1)(B). “Notice must be reasonably calculated, under all circumstances, to apprise the interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 172 (1974) (internal quotations omitted). *See also Twigg v. Sears, Roebuck & Co.*, 153 F.3d 1222, 1227 (11th Cir. 1998) (substantive claims must be adequately described and the notice must also contain information reasonably necessary to decide to remain a class member and be bound by the final judgment or opt-out of the action); Manual for Compl. Lit., § 21.31 (4th ed. 2022) (listing notice requirements). “Individual notice must be provided to those class members who are identifiable through reasonable effort.” *Eisen*, 417 U.S. at 175.

The Notice Program satisfies the foregoing criteria. As described above, the Notice Program will inform Settlement Class members of the Settlement's substantive terms; their options for remaining part of the Settlement Class, for opting out, and for objecting to the Settlement and/or Class Counsel's application for attorneys' fee and costs and a Service Award for the Class Representative; how to elect Settlement Benefits by submitting Claim Forms; and how to obtain additional information about the Settlement. Decl. ¶ 30. The Notice Program is designed to directly reach a very high percentage of Settlement Class members using Settlement Class members' contact information readily available to Delta. Admin. Decl. ¶¶ 17, 38. Thus, the Court should approve the Notice Program, including the form and content of the Notices. *See id.* at Ex. 1-3, 5.

VI. PROPOSED SCHEDULE OF EVENTS

In connection with Preliminary Approval, the Court should also set the Final Approval Hearing date and time. Other deadlines in the Settlement approval process, including the deadlines to opt-out or object, will be determined based on the Final Approval Hearing date. Class Counsel propose the following schedule:

Delta shall provide Class List to Settlement Administrator	No later than 10 days after Preliminary Approval Order
Notice Deadline (initial Email and Postcard Notices go out)	No later than 45 days after Preliminary Approval Order

Notice Program Shall be Completed (including any first and second reminder notices)	87 days after Preliminary Approval Order
Deadline to Submit Claim Form (Claims Deadline)	60 days after the Notice Deadline (i.e., 105 days after Preliminary Approval Order)
Deadline to file Motion for Final Approval and Application for Attorneys' Fees and Costs and Service Award	No later than 70 days prior to the Final Approval Hearing
Deadline for Settlement Class members to Opt-Out	No later than 35 days prior to the Final Approval Hearing
Deadline for Settlement Class Members to Object	No later than 35 days prior to the Final Approval Hearing
Deadline to file response to Objection	No later than 14 days prior to the Final Approval Hearing
Deadline for Class Counsel to File List of Opt-Outs Supplemental Declaration from Settlement Administrator	No later than 3 days prior to the Final Approval Hearing
Final Approval Hearing	The week of October 2, 2023 (at least 120 days after Preliminary Approval Order)

VII. CONCLUSION

Based on the foregoing, Plaintiff and Class Counsel respectfully request that the Court: (1) grant Preliminary Approval of the Settlement; (2) certify for settlement purposes the proposed Settlement Class, pursuant to Rule 23(b)(3) and (e) of the

Federal Rules of Civil Procedure; (3) approve the Notice Program, including the form and content of the Notices; (4) approve the opt-out and objection procedures set forth in the Notice Program; (5) appoint Plaintiff as Class Representative; (6) appoint as Class Counsel the law firms and attorneys listed in the Agreement; and (7) schedule a Final Approval Hearing for the week of October 2, 2023, or on a date thereafter available on the Court's calendar (allowing at least 120 days after the date of the Preliminary Approval Order). A Proposed Preliminary Approval Order is attached as *Exhibit C*.

Dated: May 26, 2023

Respectfully submitted,

/s/ Roy E. Barnes

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FONT CERTIFICATION

The undersigned hereby certifies that this Motion complies with the font requirements of L.R. 5.1 because the document has been prepared in Times New Roman, 14-point font.

This 26th day of May, 2023.

/s/ Roy E. Barnes

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this day a copy of the foregoing was filed and served using the Court's CM/ECF system which will send notification of such filing to ECF registered participants.

DATED this 26th day of May, 2023.

/s/ Roy E. Barnes

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