

**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)

**DELTA AIR LINES, INC.’S MEMORANDUM
IN SUPPORT OF ITS MOTION TO DISMISS**

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INTRODUCTION

During the COVID-19 pandemic, Delta Air Lines, Inc. (“Delta”), unlike several of its competitors, chose to honor its contractual obligation to provide customers with refunds for cancelled flights. Notwithstanding Delta’s provision of over \$3 billion in COVID-19 related refunds—including a refund to Plaintiff Angela Dusko—Plaintiff asserts claims on behalf of herself and a putative class for breach of contract, breach of the implied covenant of good faith and fair dealing, and for declaratory and injunctive relief. Plaintiff claims Delta breached its contracts of carriage by failing to provide “prompt” refunds and failing to adequately inform customers about their contractual refund rights. But Plaintiff fails to point to *any* contractual provision that Delta actually breached. Rather, Plaintiff attempts to impose additional obligations on Delta *not included* in the contract of carriage. Under the broad preemption provision in the Airline Deregulation Act (“ADA”), however, Plaintiff may only seek recovery for a breach of Delta’s “own, self-imposed undertakings.” *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 228-29 (1995). As explained below, Plaintiff’s failure to allege a breach of any obligation actually contained in Delta’s contract of carriage requires dismissal of all her claims.

Beyond this threshold defect, Plaintiff’s claims suffer additional fatal flaws. *First*, Plaintiff’s breach of implied covenant claim fails because her contract with

Delta expressly disclaims any such covenant. *Second*, Plaintiff’s claim for declaratory relief should be dismissed because Plaintiff fails to allege any uncertainty with respect to any future conduct. *Finally*, Plaintiff’s injunctive relief claim is preempted by the ADA and fails because she cannot establish any likelihood of future injury or the inadequacy of legal remedies. Consequently, Plaintiff’s Complaint fails to state a claim for relief and should be dismissed in its entirety.

PLAINTIFF’S ALLEGATIONS

I. The COVID-19 Pandemic and Delta’s Operations

As Plaintiff’s Amended Complaint makes clear, the COVID-19 pandemic hit the airline industry hard. In response to the onset of the pandemic, “federal, state and local governments implemented temporary travel restrictions and guidelines advising against [non]essential travel.” Am Compl. ¶ 7, Dkt. No. 44. Specifically, at the start of the pandemic, the United States limited travel from China, Europe, and the United Kingdom, “permitting only the return of U.S. citizens and permanent residents.” *Id.* Then, the Department of State advised citizens to “temporarily avoid all international travel—including to Mexico, one of the most popular international destinations for American tourists.” *Id.*

State and local governments also issued orders restricting travel. For example, “[o]n March 16, 2020, seven counties in the San Francisco, California area

announced shelter-in-place orders to reduce local traffic to activities necessary to perform ‘essential’ activities.” *Id.* ¶ 8. Indeed, according to Plaintiff’s allegations, “at least **316 million people** in the United States were living under such [shelter-in-place] orders (or advisories).” *Id.* (emphasis added).

The pandemic did not spare Delta. As Chief Executive Officer Ed Bastian wrote to employees in a March 18, 2020 memorandum: “Following the national emergency that was declared by the U.S. President, demand for travel has dropped significantly. Revenue for the month of March is now expected to decline by almost **\$2 billion** over last year, with our projection for April falling even more.” See Ed Bastian, *Ed Bastian memo: Delta taking additional steps to protect our future*, Delta News Hub (Mar. 18, 2020), <https://news.delta.com/ed-bastian-memo-delta-taking-additional-steps-protect-our-future> (emphasis added) (as cited in Am. Compl. ¶ 14 n.4).¹ To weather this unprecedented challenge, Bastian stated that Delta would “continue to make significant capacity reductions with a 70 percent systemwide

¹ This memorandum is attached hereto as Exhibit A. The Court may consider this memorandum without converting the motion to one for summary judgment because Plaintiff explicitly refers to the memorandum in the Amended Complaint and it is central to Plaintiff’s claims regarding Delta’s actions in the wake of the pandemic. See *Brooks v. Blue Cross Blue Shield of Fla., Inc.*, 116 F.3d 1364, 1369 (11th Cir. 1997) (“[W]here the plaintiff refers to certain documents in the complaint and those documents are central to the plaintiff’s claim, then the Court may consider the documents part of the pleadings for purposes of Rule 12(b)(6) dismissal.”).

pullback planned until demand starts to recover,” including an 80 percent reduction in international operations. *See id.* Thus, the COVID-19 pandemic forced Delta to cancel “scores” of flights. *See id.* ¶ 2; *see also id.* ¶¶ 13-16 (describing Delta’s flight reductions in mid-March 2020).

II. Delta’s Obligations to Customers Under Its Contracts of Carriage

In relevant part, Delta’s domestic and international contracts of carriage state: “If there is a flight cancellation, diversion, delay of greater than 90 minutes, or that will cause a passenger to miss connections, Delta will *(at passenger’s request)* cancel the remaining ticket and refund the unused portion of the ticket and unused ancillary fees in the original form of payment in accordance with [the Contract’s Refund Rule].” *See* Am. Compl. ¶ 34 (emphasis added); *see also id.* Ex. A, Delta Int’l Contract of Carriage, Rule 20(A), Dkt. No. 44-1; *id.* Ex. B, Delta Domestic Contract of Carriage, Rule 19(A), Dkt. No. 44-2. The contracts’ Refund Rule, in turn, states simply that refunds for credit card payments will “typically” be made within seven business days and refunds for cash payments will “typically” be made within twenty business days. *See* Am. Compl. ¶ 36; *id.* Ex. A, Int’l Rule 23(D)(1)-(2); *id.* Ex. B, Domestic Rule 22(D)(1)-(2).

III. Plaintiff's Individual Allegations and Claims Against Delta

In December 2019, Plaintiff and her husband purchased four roundtrip tickets from Helena, Montana to Cancun, Mexico, departing March 27, 2020 and returning April 3, 2020. Am. Compl. ¶ 48. On March 25, 2020, Plaintiff received an email notification that her outbound flight had been cancelled; the next day, Delta informed Plaintiff that her family had been rebooked for a flight departing March 28, 2020. *Id.* ¶¶ 49-50. On March 26—at the height of Delta's unprecedented pandemic-related flight cancellations—Plaintiff called Delta's customer service hotline, informing the representative that she did not want to be rebooked and instead wanted a full refund. *Id.* ¶ 51. The representative allegedly told Plaintiff that if she and her family did not want to be rebooked, then they were entitled only to travel credits. *Id.* ¶ 52. However, Delta later fully refunded Plaintiff on May 12, 2020. *Id.* ¶ 53.

On April 22, 2020, Plaintiff filed a purported class action complaint asserting claims for breach of contract and breach of the implied covenant of good faith and fair dealing against Delta based on Delta's alleged failure to comply with its contract of carriage in connection with pandemic-related flight cancellations. *See* Case No. 1:20-cv-01725, Dkt. No. 1 (N.D. Ga.) (“*Dusko*”). On July 9, 2020, the Court consolidated *Dusko* with two related putative class actions. *See* Case No. 1:20-cv-

01664, Dkt. No. 20 (N.D. Ga.) (consolidating with cases filed by Elliot Daniels and Kevin Polk). The Court then appointed lead counsel and ordered Plaintiffs to file a Consolidated Amended Complaint. *Id.*

On December 17, 2020, Plaintiff filed a Consolidated Amended Complaint asserting three claims against Delta.² First, Plaintiff claims that Delta breached its contract of carriage by “failing to provide prompt refunds” and “by attempting to coerce passengers into accepting travel credits rather than promptly providing refunds for cancelled tickets to the original form of payment.” *See* Am. Compl. ¶¶ 72-73. Second, Plaintiff claims Delta breached the implied covenant of good faith and fair dealing by “unreasonably inhibiting” passengers’ refund rights. *See id.* ¶ 80; *see generally id.* ¶ 80(a)-(g). Specifically, Plaintiff alleges Delta failed to include “clear statements of the policies and procedures” for obtaining a refund on Delta’s website. *Id.* ¶ 24. Instead, Plaintiff claims Delta made “information on refunds for Delta-cancelled flights difficult to find” by “burying the information.” *Id.* ¶ 42. Finally, Plaintiff seeks declaratory and injunctive relief based on these claims. *See generally id.* ¶¶ 83-87.

² Both Elliot Daniels and Kevin Polk have dismissed and/or dropped their claims against Delta and are no longer named plaintiffs in the Consolidated Amended Complaint. *See* Case No. 1:20-cv-01664, Dkt. No. 42 (N.D. Ga.) (Polk’s Notice of Voluntary Dismissal); *see also id.* Dkt. No. 44 (amended complaint containing only Dusko).

MOTION TO DISMISS STANDARD

When considering a 12(b)(6) motion to dismiss, the Court must accept as true the allegations set forth in the complaint drawing all reasonable inferences in the light most favorable to the plaintiff. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007); *U.S. v. Stricker*, 524 F. App’x 500, 505 (11th Cir. 2013) (per curiam). Even so, a complaint offering mere “labels and conclusions” or “a formulaic recitation of the elements of a cause of action” is insufficient. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 555); *accord Fin. Sec. Assurance, Inc. v. Stephens, Inc.*, 500 F.3d 1276, 1282–83 (11th Cir. 2007). To survive a motion to dismiss, a complaint must contain “sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). In determining whether a complaint satisfies this pleading standard, a court must rely on its “judicial experience and common sense” to perform the “context-specific task” of determining whether the non-conclusory allegations amount to a “plausible” claim. *Id.* at 679.

ARGUMENT AND CITATION TO AUTHORITY

The Court should dismiss Plaintiff’s Amended Complaint in its entirety. First, Plaintiff’s breach of contract claim fails because she cannot identify any provision of the contract of carriage Delta breached and because the ADA preempts Plaintiff’s

attempt to base her claim on obligations not contained in Delta's contract of carriage. Second, Plaintiff's breach of implied covenant claim fails because Plaintiff cannot establish a breach of contract and because the contract expressly disclaims the implied covenant. Third, Plaintiff's claims for declaratory and injunctive relief also fail in the absence of a viable breach of contract claim and for additional, independent reasons.

I. Plaintiff's Breach of Contract Claim Should Be Dismissed Because Plaintiff Fails to Allege a Breach of Any Express Provision of the Contract.

A breach of contract claim under Georgia law requires "(1) a valid contract; (2) material breach of its terms; and (3) damages arising therefrom." *Doe v. Emory Univ.*, No. 1:20-CV-2002-TWT, 2021 WL 358391, *4 (N.D. Ga. Jan. 22, 2021). "A plaintiff asserting a breach of contract claim must allege a particular contractual provision that the defendants violated to survive a motion to dismiss." *Bryant v. Progressive Mountain Ins. Co.*, 243 F. Supp. 3d 1333, 1340 (M.D. Ga. 2017).

Here, Plaintiff's breach of contract claim fails because Plaintiff cannot show a breach of any express obligation in Delta's contract of carriage. As explained above, when Delta cancelled a flight due to the pandemic, Delta's contracts of carriage required only that "Delta will *(at passenger's request)* cancel the remaining ticket and refund the unused portion of the ticket and unused ancillary fees in the

original form of payment in accordance with [the Contract’s Refund Rule].” Am. Compl. ¶ 34 (emphasis added). And the Refund Rule states only that refunds for credit card or cash payments will “typically” be made within seven or twenty business days, respectively. *See id.* ¶ 36; *id.* Ex. A, Int’l Rule 23(D)(1)-(2); *id.* Ex. B, Domestic Rule 22(D)(1)-(2). The contract does not include an express obligation to refund passengers within a particular time frame. Nor does it include any requirement that Delta notify passengers of their right to a refund instead of a credit. Delta’s only obligation under the contract is to provide Plaintiff a refund upon request. Because Plaintiff concedes she received a refund, she cannot demonstrate any breach by Delta.³

At bottom, what Plaintiff alleges is that Delta did not timely provide a refund (Am. Compl. ¶ 72), or make it sufficiently clear that customers could request refunds in the event of a cancellation (*id.* ¶¶ 40-44). But because Delta cannot breach obligations that the contract does not impose, Plaintiff’s breach of contract claim necessarily fails. *See Brooks v. Branch Banking & Tr. Co.*, 107 F. Supp. 3d 1290,

³ Delta has no obligation to notify its customers about their own rights under the contracts of carriage. *See Wright v. Safari Club Int’l, Inc.*, 745 S.E.2d 730, 736 (Ga. Ct. App. 2013) (“Parties to a contract are presumed to have read their provisions and to have understood the contents. One who can read, must read, for he is bound by his contracts.”) (quoting *Wyatt v. Hertz Claim Mgm’t Corp.*, 511 S.E.2d 630, 632 (Ga. Ct. App. 1999)).

1296 (N.D. Ga. 2015) (dismissing breach of contract claim “because Plaintiff never alleged a contractual provision Defendant breached”); *Am. Casual Dining, L.P. v. Moe’s Sw. Grill, L.L.C.*, 426 F. Supp. 2d 1356, 1369 (N.D. Ga. 2006) (“Because [Plaintiff] cannot point to any contractual provision that [Defendant] breached . . . [Plaintiff] cannot state a claim for breach of contract based on these allegations); *Adkins v. Cagle Foods JV, LLC*, 411 F.3d 1320, 1327 (11th Cir. 2005) (applying Georgia law and dismissing breach of contract claim when plaintiffs “can point to no contractual provision which [Defendant] has breached”).

Moreover, Plaintiff’s attempt to impose additional obligations on Delta beyond the express terms of the contract of carriage runs afoul of the ADA. The ADA broadly preempts state-imposed obligations—including common law claims—related to an airline’s “rates, routes, or services.” *See Nw., Inc. v. Ginsberg*, 572 U.S. 273 (2014). Plaintiff’s claims based on Delta’s refund policies and procedures indisputably relate to Delta’s rates and services. *See, e.g., Buck v. Am. Airlines, Inc.*, 476 F.3d 29, 36 (1st Cir. 2007) (“[M]ost of the courts to have considered suits for refunds of government fees associated with air travel have found those suits preempted.”); *Statland v. Am. Airlines, Inc.*, 998 F.2d 539, 542 (7th Cir. 1993) (“We think it obvious that canceled ticket refunds relate to rates.”); *Miller v. Delta Air Lines, Inc.*, No. 4:11–CV–10099–JLK, 2012 WL 1155138, *1-3 (S.D. Fla. Apr. 5,

2012) (ADA preempted claims challenging airline’s failure to inform customers of their right to reimbursement for lost, damaged, or delayed baggage). The only claims that can escape the preemptive bar of the ADA, therefore, are claims “for the airline’s alleged breach of its own, self-imposed undertakings” in its contracts of carriage. *Wolens*, 513 U.S. at 228-29.

As explained above, the contracts of carriage contain no obligation for Delta to provide refunds in a particular time frame or to conspicuously notify customers of their contractual refund rights. Indeed, Plaintiff’s conclusory allegation that a customer service representative “intentionally misinformed Plaintiff regarding her refund rights,” in order to “delay paying” her refund (Am. Compl. ¶ 53) sounds in tort rather than contract.⁴ The Court should reject Plaintiff’s attempt to circumvent the preemptive bar of the ADA with tort-like claims pled under the guise of breach of contract. To the extent Plaintiff seeks recovery for breach of obligations beyond

⁴ The same is true for much of the Amended Complaint, which appears to broadly challenge Delta’s business practices during the COVID-19 pandemic. *See, e.g.*, Am. Compl. ¶ 21 (Delta made it “onerous for many customers to even request refunds”); *id.* ¶ 24 (Delta “failed to include . . . clear statements” on its website “of the policies and procedures for cases where the airline has cancelled a customer’s flight”); *id.* ¶ 38 (Delta employed “strategies to convince Plaintiff and other customers to accept a credit for use on a future Delta flight”). Claims based on an airline’s alleged business practices are precisely the type of claims that are preempted by the ADA because they have the “inherent” “potential for intrusive regulation of airlines’ business practices.” *Wolens*, 513 U.S. at 227.

the express terms of the contract of carriage, she not only fails to state a claim for breach of contract, but her claims are preempted by the ADA.

In sum, Plaintiff cannot state a claim within the bounds of the ADA for breach of an express obligation in Delta's contract of carriage because Delta complied with its only obligation to Plaintiff: Delta provided Plaintiff a refund at her request. Plaintiff's breach of contract claim should be dismissed.

II. Plaintiff's Implied Covenant Claim Fails.

Next, Plaintiff's breach of implied covenant claim fails because Plaintiff cannot establish a violation of any actual term of the contract and because Delta's contract of carriage expressly disclaims the implied covenant.

First, it is well-settled under Georgia law that the implied covenant is "not an independent source of duties for the parties to a contract." *Am. Casual Dining*, 426 F. Supp. 2d at 1370. Instead, the covenant "modifies the meaning of all explicit terms in a contract, preventing a breach of those explicit terms *de facto* when performance is maintained *de jure*." *Id.* (quoting *Stuart Enters., Int'l, Inc. v. Peykan, Inc.*, 555 S.E.2d 881, 884 (Ga. Ct. App. 2001)). Consequently, "to state a claim for breach of the implied duty of good faith and fair dealing, a plaintiff must set forth facts showing a breach of an actual term of an agreement." *Id.* "General allegations of

breach of the implied duty of good faith and fair dealing not tied to a specific contract provision are not actionable.” *Id.*

Here, as explained above, Plaintiff fails to allege facts showing a breach of any actual term of Delta’s contract of carriage. Her implied covenant claim should accordingly be dismissed. *Id.* (dismissing implied covenant claim because “alleged misrepresentations” on which it was based did “not establish a breach of any contract provision,” and thus plaintiff “cannot show a failure to act in good faith based on these allegations”); *see also Brooks*, 107 F. Supp. 3d at 1296-97 (“[T]o the extent that Plaintiff attempts to state a claim for breach of the implied covenant of good faith and fair dealing based on Defendants’ alleged wrongdoing, that claim fails absent a breach of an express term of the contract.”); *Back Bay Resorts SWF, LLC v. Holiday Hosp. Franchising, LLC*, No. 1:14-CV-02521-ELR, 2015 WL 13120060, at *5 (N.D. Ga. Nov. 19, 2015) (dismissing implied covenant claim seeking to enlarge defendant’s express contractual obligations).⁵

⁵ As described above, Plaintiff’s attempt to engraft additional obligations on Delta beyond the express terms of Delta’s self-imposed undertakings also runs afoul of the broad preemption provision in the ADA. *See supra* at 10-11; *see also In re JetBlue Airways Corp. Privacy Litig.*, 379 F. Supp. 2d 299, 315 (E.D.N.Y. 2005) (holding claim was preempted under ADA because it was “a direct effort to regulate the manner in which JetBlue communicates with its customers in connection with reservations and ticket sales”); *Xiaoyun Lucy Lu v. AirTran Airways, Inc.*, 631 F. App’x 657, 662 (11th Cir. 2015) (per curiam) (dismissing implied covenant claim when the claim “necessarily requires inquiry . . . external to her carriage contract”).

Second, Delta's contract of carriage expressly disclaims the implied covenant. As Plaintiff's Amended Complaint explains, the implied covenant of good faith and fair dealing "is implied in all contracts *unless* the parties contract out of the implied covenant by agreeing to other terms that disclaim, waive, or override the covenant such as by granting one party absolute discretion." Am. Compl. ¶ 76 (emphasis added); *see also* *Hunting Aircraft, Inc. v. Peachtree City Airport Auth.*, 636 S.E.2d 139, 142 (Ga. Ct. App. 2006) ("The principle is that the duty of good faith is implied in all contracts, which is the overarching presumption. The exception to this general rule occurs only if the contract expressly (not impliedly) provides otherwise.").

Here, Rule 26 of Delta's international contract and Rule 24 of Delta's domestic contract contain the following language: "This Contract of Carriage, including the Ticket and Fare Rules, represents the entire agreement between the parties relating to transportation by the Carrier . . . *No other covenants, warranties, undertakings or understandings may be implied, in law or in equity.*" *See* Am. Compl. Ex. A, Int'l Rule 26 (emphasis added); *see also id.* Ex. B, Domestic Rule 24 (same). Plaintiff's breach of implied covenant claim fails for this additional reason. *See Wright v. Safari Club Int'l, Inc.*, 745 S.E.2d 730, 735 (Ga. Ct. App. 2013) ("[A]s a general matter, disclaimers are enforceable under Georgia law unless they violate public policy.") (internal citations omitted); *cf. Ginsberg*, 572 U.S. at 288 ("A State's

implied covenant rules will escape [ADA] pre-emption only if the law of the relevant State permits an airline to contract around those rules in its frequent flyer program agreement, and if an airline's agreement is governed by the law of such a State, the airline can specify that the agreement does not incorporate the covenant.”).

III. Plaintiff's Declaratory and Injunctive Relief Claims Fail on Multiple Grounds.

Plaintiff's claims for equitable relief in the form of a declaratory judgment and injunction fail because the allegations in the Amended Complaint are insufficient to state a valid claim and thus do not reflect any actual controversy between the parties. *See Giles v. SunTrust Mortg. Inc.*, No. 1:13-CV-2992-RWS, 2014 WL 2779527, *3 (N.D. Ga. June 19, 2014) (dismissing claims for equitable relief, including injunctive and declaratory relief, “[b]ecause Plaintiff's substantive claims are without merit” and therefore “he is not entitled to the relief he seeks”); *Crespo v. Soldwell Banker Mortg.*, 599 F. App'x 868, 873-74 (11th Cir. 2014) (per curiam) (dismissing injunctive and declaratory relief claims where the plaintiff “had no chance of success on the merits” and thus “could not have presented the court with a ‘case’ or ‘controversy’”). Moreover, as explained below, both claims should be dismissed for independent reasons.

A. Plaintiff Fails to Sufficiently Plead a Claim for Declaratory Relief.

Plaintiff's declaratory relief claim should be dismissed because she fails to allege any uncertainty as required for such a remedy. A party seeking a declaratory judgment must "show it is in a position of uncertainty as to an alleged right." *Pinnacle Benning LLC v. Clark Realty Capital, LLC*, 724 S.E.2d 894, 898 (Ga. App. 2012). "In this regard, a party seeking declaratory judgment must show facts or circumstances whereby it is in a position of uncertainty or insecurity because of a dispute and of *having to take some future action* which is properly incident to its alleged right, and which future action without direction from the court might reasonably jeopardize its interest." *Id.* (emphasis in original) (internal quotation marks omitted).

Here, Plaintiff seeks a declaration that Delta's conduct was "unlawful and in material breach of its agreements and duties." Am. Compl. ¶ 86. But while Plaintiff alleges that "[a]n actual controversy has arisen" concerning the "respective rights and duties of the parties under the Contracts," *id.* ¶ 84, she alleges no uncertainty associated with the contract that a court must resolve "as to any right or future conduct on her part." *U-Haul Co. of Ariz. v. Rutland*, 824 S.E.2d 644, 653 (Ga. Ct. App. 2019); *see also United Specialty Ins. Co. v. Cardona-Rodriguez*, 835 S.E.2d 1,

4 (Ga. Ct. App. 2019) (“[D]eclaratory judgment is not available where a judgment cannot guide and protect the petitioner with regard to some future act.”).

Instead, Plaintiff simply seeks a declaration that Delta breached its contract of carriage. This claim is wholly duplicative of her breach of contract claim and should be dismissed. *See, e.g., HM Peachtree Corners I, LLC v. Panolam Indus. Int’l, Inc.*, 1:17-cv-1000-WSD, 2017 WL 3700304, at *3 (N.D. Ga. Aug. 28, 2017) (“It is common in our Circuit for District Courts to dismiss requests for declaratory judgment when a plaintiff asserts a corresponding claim for breach of contract.”); *Mun. Elec. Auth. of Ga. v. JEA*, No. 1:18-CV-4295-MHC, 2019 WL 5586550, *4 (N.D. Ga. April 9, 2019) (“A petition seeking declaratory judgment that alleges breach of duties and obligations under the terms of a contract and asks the court to declare those terms breached is nothing more than a petition claiming breach of contract.”); *Eisenberg v. Standard Ins. Co.*, No. 09-80199-CIV, 2009 WL 3667086, at *2 (S.D. Fla. Oct. 26, 2009) (“A petition seeking declaratory judgment that alleges breach of duties and obligations under the terms of a contract and asks the court to declare those terms breached is nothing more than a petition claiming breach of contract.”).

B. Plaintiff's Claim for Injunctive Relief is Preempted and Otherwise Insufficient.

First, as a threshold matter, Plaintiff's request for an injunction enjoining Delta "from failing to directly notify Class members of their right to a prompt refund and from engaging in conduct otherwise discouraging such refunds" (Am. Compl. ¶ 87), is preempted by the ADA. *See Chanze v. Air Evac EMS, Inc.*, No. 5:18CV89, 2018 WL 5723947, *5 (N.D. W. Va. Nov. 1, 2018) (holding ADA preempted claim for injunctive relief which "amounts to a remedy which falls outside the *Wolens* exception to ADA preemption"); *Barber Auto Sales, Inc. v. United Parcel Servs., Inc.*, 494 F. Supp. 2d 1290, 1294 (M.D. Ala. 2007) (applying ADA preemption rules to the preemption provision of the Federal Aviation Administration Authorization Act and holding that injunctive relief claim was preempted because it "would constitute an enlargement or enhancement of the parties' obligations" and "go beyond the remedies available in a 'routine breach of contract action'") (citing *Wolens*, 513 U.S. at 232).

Nothing in Delta's contract of carriage requires Delta to "directly notify" passengers of any alleged rights or obligations under the contract of carriage. And enforcing extra-contractual obligations on Delta with respect to how Delta communicates with its customers in relation to airline reservations and refunds falls squarely within the "broad pre-emptive purpose" of the ADA. *Morales v. Trans*

World Airlines, Inc., 504 U.S. 374, 383-84 (1992); *see also Branche v. Airtran Airways, Inc.*, 342 F.3d 1248, 1256-57 (11th Cir. 2003) (“Elements of the air carrier service bargain include items such as ticketing, boarding procedures, provision of food and drink, and baggage handling.”); *supra* at 10-11 (citing cases holding that claims related to refunds are preempted by the ADA). Because Plaintiff’s claim for injunctive relief directly relates to Delta’s rates and services and seeks to enlarge Delta’s obligations under its contracts of carriage, Plaintiff’s injunctive relief claim is preempted by the ADA. *Wolens*, 513 U.S. at 232.

Even setting aside ADA preemption, Plaintiff’s claim for injunctive relief still fails. To be entitled to injunctive relief, Plaintiff “must show a sufficient likelihood that [s]he will be affected by the allegedly unlawful conduct in the future.” *Houston v. Marod Supermarkets, Inc.*, 733 F.3d 1323, 1328 (11th Cir. 2013); *see also Dombrowski v. Pfister*, 380 U.S. 479, 485 (1965) (“Injunctive relief looks to the future.”). Plaintiff makes no allegation that Delta is likely to undertake any allegedly unlawful conduct in the future. Nor could she. The basis for Plaintiff’s claims is the unprecedented events of the COVID-19 pandemic. Plaintiff does not contend she is likely to be subject to any allegedly unlawful conduct in connection with any future Delta flight. Indeed, because Plaintiff is aware of her right to request a refund in the event of a cancelled flight, she cannot plausibly allege any future violation of her

contractual right to a refund—even assuming Plaintiff booked a future flight that was subsequently cancelled by Delta.

Finally, even if Plaintiff could plausibly allege a likelihood of future injury (she cannot), her claim for injunctive relief would still fail because Plaintiff cannot demonstrate that her remedies at law are inadequate. *See Clark v. Aaron's, Inc.*, 914 F. Supp. 2d 1301, 1307 (N.D. Ga. 2012) (“To obtain injunctive relief, it is well-settled a plaintiff must demonstrate that her remedies at law are inadequate.”); *Besser v. Rule*, 510 S.E.2d 530, 531-32 (Ga. 1999) (affirming denial of injunctive relief because “[t]he availability of money damages affords [plaintiff] an adequate and complete remedy, precluding the entry of injunctive relief”).

CONCLUSION

For these reasons, Delta respectfully requests that Plaintiff’s Consolidated Amended Complaint be dismissed for failure to state a claim.

Respectfully submitted this 23rd day of June 2021.

/s/ David L. Balser

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RULE 7.1(D) CERTIFICATION

The undersigned counsel certifies that this document has been prepared with one of the font and point selections approved by the Court in Local Rule 5.1(C).

/s/ David L. Balser

David L. Balser

(Ga. Bar. No. 035835)

Counsel for Defendant

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 23rd day of June, 2021.

/s/ David L. Balser

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