

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION**

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

*Plaintiff,*

v.

DELTA AIR LINES, INC.,

*Defendant.*

Case No. 1:20-CV-01664-ELR

**SECOND AMENDED  
CONSOLIDATED CLASS  
ACTION COMPLAINT**

**JURY TRIAL DEMANDED**

**COMPLAINT – CLASS ACTION**

Plaintiff Angela Dusko (“Ms. Dusko” or “Plaintiff”), on behalf of herself and all others similarly situated, by and through undersigned counsel, files this Second Amended Consolidated Class Action Complaint against Defendant Delta Air Lines, Inc., (“Delta” or “Defendant”), and alleges the following:

**I. INTRODUCTION AND FACTUAL BACKGROUND**

1. Delta is one of the world’s largest airlines. In 2019, it was the largest passenger air carrier in the world based on total revenue. Delta continues to profit in

2021.

2. Delta typically operates over 5,400 daily flights and serves 325 destinations in over fifty countries. But, in the wake of COVID-19, with travel limitations, virus fears, and economic uncertainties mounting, consumer demand for air travel, particularly leisure and non-essential business travel, quickly declined. In response to this declining demand, Delta canceled many flights to avoid flying planes with too many empty seats (*i.e.*, unprofitable flights).

3. Consumers faced significant economic impact in an unprecedented economic downturn, and Delta put its concern for its own financial stability ahead of its consumers by breaching express terms in its contracts with its passengers in each of the following four ways.

4. First, Delta breached its contracts under Rules 23(A) of the International Contract, and 22(A) of the Domestic Contract when it failed to operate on schedule and did not refund passengers for their cancelled flights.<sup>1</sup>

5. Second, Delta breached its contracts under Rules 20(A) and 19(A) by failing to provide refunds for the unused portion of tickets when Delta did not

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<sup>1</sup>Delta's Contracts of Carriage apply to all tickets "for travel on Delta." The International Contract of Carriage, attached as **Exhibit A**, applies to international flights, and the Domestic Contract of Carriage, attached as **Exhibit B**, applies to domestic flights within the United States. The relevant terms of both contracts are materially the same.

transport passengers on the next available flight.

6. Third, even if Delta asserts that passengers were required to request a refund when Delta cancelled their flights, Delta systematically frustrated customers' ability to do so.

7. In the face of passengers' contractual entitlement to refunds, Delta frustrated any alleged requirement to request a refund by inappropriately requiring that customers *give up their right to a refund to request a refund*, understaffed its call centers, and made it impossible to request a refund online.

8. Fourth, Delta breached its contracts under Rules 23(D) and 22(D) by failing to deliver timely refunds.

9. When Delta is contractually required to issue a refund, it must issue refunds on tickets paid by credit card to the credit card account used to purchase the ticket, typically within seven business days, and must issue refunds on tickets paid for in cash by check, typically within 20 business days. Ex. A, Rule 23(D); Ex. B, Rule 22(D).

10. Delta breached its contract and owes interest (under Rules 23(D)/22(D)) in addition to refunds that it failed to make directly to passengers when Delta failed to operate a flight on schedule (as required by Rules 23(A)/22(A)).

11. Delta breached its contract and owes interest (under Rules 23(D)/22(D)), in addition to refunds, if refunds were not provided for the remaining portions of an unused fare when Delta did not provide transportation on the next available flight (as required by Rules 20(A)/19(A)).

12. Delta breached its contract and owes interest (under Rules 23(D)/22(D)) to passengers who were provided a refund but only after an unreasonable delay beyond the contractually promised typical seven business days for refunds to credit cards, and 20 days for refunds for tickets paid for by cash or check.

13. In the alternative, Delta breached its obligation of good faith and fair dealing, which required that Delta act in good faith in issuing refunds for the cost of flights it cancelled.

14. Accordingly, Plaintiff Dusko brings claims for breach of contract and breach of the covenant of good faith and fair dealing on behalf of herself and similarly situated passengers and seeks damages in the amount of refunds and/or interest thereon.

## **II. PARTIES, JURISDICTION, AND VENUE**

15. Plaintiff is a Montana Citizen who resides in Lewis and Clark County, Montana.

16. Delta is a Delaware for-profit corporation with its principal place of business located at 1030 Delta Blvd., Atlanta, Georgia.

17. This Court has subject matter jurisdiction pursuant to the Class Action Fairness Act of 2005 (“CAFA”), 28 U.S.C. § 1332(d). The amount in controversy exceeds the sum of \$5,000,000 exclusive of interest and costs, there are more than 100 putative class members, and minimal diversity exists because many putative class members are citizens of a different state than Defendant.

18. Venue is proper in this Court pursuant to 28 U.S.C. §1391 because Delta maintains its principal place of business in this District. Delta operates its largest hub for domestic and international flights at Hartsfield-Jackson International Airport, which is located in this District. In addition, a substantial part of the events giving rise to the claims asserted herein—including Delta’s decisions and actions relating to its effective refund policy in light of COVID-19—occurred in this District.

### **III. FACTUAL ALLEGATIONS COMMON TO THE CLASS**

#### **A. Delta Dealt with Declining Demand in the Wake of COVID-19 By Failing to Refund Passengers—a Failure That Has Allowed Delta an Early Return to Profitability**

19. In response to declining demand for flight travel due to the COVID-19

pandemic, Delta reduced its service by 80% by April 14, 2020.<sup>2</sup>

20. Delta's failure to operate on schedule or refusal to transport entitles passengers to an unconditional refund "made directly" to the passengers. Rather than issue the contractually required refunds, Delta automatically provided "eCredits" that would expire. This is an express breach of contract. *See* Rules 23(A)/22(A).

21. In addition, following a flight cancellation by Delta, when passengers elect to cancel by rejecting re-accommodations, and Delta does not transport the passengers on the next available flights, Delta must issue refunds to those passengers.

22. Delta also unreasonably delayed in providing refunds. *See* Rules 23(D)/22(D).

23. Delta's plan to protect its bottom line at its customers' expense—by failing to provide refunds, delaying refunds, and frustrating attempts to seek refunds—worked.

24. In April 2021, Delta announced that it achieved positive daily cash generation in March 2021 and expected positive cash generation in the coming

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<sup>2</sup> Ed Bastian, *Ed Bastian memo: Protecting our future*, DELTA NEWS HUB (April 14, 2020), <https://news.delta.com/ed-bastian-memo-protecting-our-future>.

months.<sup>3</sup> And in June 2021, Delta CEO Ed Bastian predicted record profits by 2023.<sup>4</sup>

25. In the months following the pandemic, consumers in the United States, including the passengers who did not receive refunds owed by Delta, faced hardships not seen in a generation. In just over one month at the outset of the pandemic, over 22 million people in the United States applied for unemployment benefits, and the U.S. unemployment rate climbed to over 20%—the worst since the Great Depression. At times, as many as one-third of the 40 million renters in the U.S. were unable to pay their rent, and millions of people with home mortgages were likely facing foreclosure.

26. During these months, while consumers struggled to make ends meet during an unprecedented economic downturn and skyrocketing unemployment, Delta was slated to receive an influx of \$5.4 billion in government rescue funds, in the form of grants and loans that would likely be forgiven.<sup>5</sup>

27. As a group of senators explained to Delta’s CEO, “[i]t would be

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<sup>3</sup> *Delta Air Lines Announces March Quarter 2021 Financial Results*, DELTA NEWS (Apr. 2021), available at <https://news.delta.com/sites/default/files/2021-04/delta-air-lines-march-quarter-2021-financial-results.pdf>.

<sup>4</sup> Adam Levine-Weinberg, *Delta Air Lines is Gaining Momentum*, THE MOTLEY FOOL (June 9, 2021), available at <https://www.fool.com/investing/2021/06/09/delta-air-lines-is-gaining-momentum/>.

<sup>5</sup> Ed Bastian, *Ed Bastian memo: Protecting our future*, DELTA NEWS HUB (April 14, 2020), <https://news.delta.com/ed-bastian-memo-protecting-our-future>.

unacceptable to us for your company to hold onto travelers' payments for canceled flights instead of refunding them, especially in light of the \$25 billion bailout that the airline industry just received from Congress."<sup>6</sup> However, this is exactly what Delta did.

28. Ultimately, Delta has been doing so well that it was even able to reject a Treasury Department Loan under the CARES Act that was passed in March 2021 (but that had strings attached) in favor of bonds and loans backed by its own frequent flier program.<sup>7</sup>

### **B. Delta's Contracts of Carriage**

29. Delta's Contracts of Carriage apply to all tickets "for travel on Delta." One Contract of Carriage applies for international flights, and another applies for domestic flights within the United States. *See* Ex. A; Ex. B. Delta drafted both the International and Domestic Contracts of Carriage (together, the "Contracts"). The terms of both Contracts, as relevant here, are materially the same.

30. In addition to applying to all flights operated by Delta, the Contracts

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<sup>6</sup> Letter from Senator Edward Markey *et al.* to Delta CEO Edward Bastian 10 (Mar. 31, 2020), *available at* <https://www.markey.senate.gov/imo/media/doc/Airline%20Cash%20Refunds%20or%20Coronavirus%20Cancellations.pdf>.

<sup>7</sup> Amelia Lucas, *Delta Will Use Frequent-Flyer Program to Back \$6.5 Billion in Debt*, MSN (Sept. 14, 2020), <https://www.msn.com/en-us/money/companies/delta-will-use-frequent-flyer-program-to-back-6-5-billion-in-debt/ar-BB190Nnu>.



also apply to flights operated by carriers operating under the name Delta Connection or Delta Shuttle, and to codeshare flights for which Delta markets the flights of another carrier pursuant to a codeshare agreement. Ex. A, Rule 1(A); Ex. B, Rule 1(A).

31. The Refunds Rule—Rule 23(A) of the International Contract and Rule 22(A) of the Domestic Contract—deals with “Involuntary Refunds,” at issue here, and provides that a refund directly to the passenger is required for Delta’s failure to operate on schedule or refusal to transport:

If a refund is required because of Delta’s failure to operate on schedule or refusal to transport (except as a result of passenger’s failure to comply with the contract of carriage), the following refund will be made directly to you:

- 1) If no portion of the ticket has been used, the refund will be an amount equal to the fare paid.
- 2) If a portion of the ticket has been used and termination (interruption) occurs:
  - a. At A Fare Breakpoint - The refund will be an amount equal to the fare paid for the unused transportation from the point of termination (interruption) to the destination or next Stopover point named on the ticket, or to a point at which transportation is to be resumed. No refund will apply when alternate transportation is provided by Delta and accepted by the passenger.

32. Rule 23(A) of the International Contract and Rule 22(A) of the Domestic Contract deal with “Involuntary Refunds” and are the controlling Rules in

this case. Under Rules 23(A)/22(A) a refund is “required because of Delta’s failure to operate on schedule or refusal to transport.” Whenever Delta fails to operate a flight on schedule or refuses to transport, “the following refund *will be made directly to you*: . . . If no portion of the ticket has been used, the refund will be an amount equal to the fare paid.” *Id.* (emphasis added). Delta’s failure to operate on schedule or to transport requires that a refund be unconditionally “made directly” to the passenger. Delta breached its Contracts with passengers by failing to make refunds or by untimely making the refunds.

33. The rule pertaining to remaining unused fares, Rule 20(A) of the International Contract and Rule 19(A) of the Domestic Contract, provides customers the right to cancel their remaining fare and receive a refund instead of keeping their remaining ticket and taking Delta’s next available flight when Delta cancels, diverts, or delays:

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 Contracts’ Refunds Rule]. If the passenger does not request cancellation and refund of the remaining portion of the ticket, Delta will transport the passenger to the destination on Delta’s next flight on which seats are available in the class of service originally purchased.

Ex. A, Rule 20(A); Ex. B, Rule 19(A).

34. Under Rules 20(A)/19(A), after a flight cancellation, diversion, or delay, if a customer cancels by, for example, not accepting a re-accommodation proposed by Delta, then the passenger is entitled to a refund. By providing credits to customers who did not accept a re-accommodation proposed by Delta and/or who were not provided with transportation on the next available flight that Delta was obligated to provide under Rules 20(A)/19(A), Delta breached its Contracts. Rules 20(A)/19(A) provide Delta with only two options: providing transportation on the next available flight, or a refund. Where Delta did not provide either, Delta breached its Contracts.

35. Regardless of whether a refund is owed under Rules 23(A)/22(A) because of Delta's failure to operate on schedule or transport or, under Rules 20(A)/19(A) because a passenger does not accept re-accommodation (*i.e.*, instead choosing to cancel the remaining unused ticket) or Delta is unable to provide accommodation on the next available flight, Delta's Contracts also require timely refunds. Part D of the Refunds Rule provides that passengers can reasonably expect a refund within seven business days if they purchased by credit card, and within 20 business days if they paid by cash or check:

Tickets paid by credit card will be refunded to the credit card account used to purchase the ticket, typically within seven business days of Delta's initial receipt of refund request. . . . Tickets paid for by cash . .

. will be refunded by check . . . typically within 20 business days of Delta’s receipt of initial refund request.

Ex. A, Rule 23(D)(1); Ex. B, Rule 22(D)(1).

36. A refund, as described in the Contracts, is a refund to the original form of payment (or by check, in the case of a cash payment). Ex. A, Rule 23(D); Ex. B, Rule 22(D).

37. Delta’s Legal Notices section of its website explains that even in cases in which a flight delay or cancellation is “due to circumstances beyond [Delta’s] control,” Delta’s liability to the customer under the Contracts is “to refund [the customer’s] ticket price.”<sup>8</sup>

38. For both the flights that Delta fails to operate on schedule under Rules 23(A)/22A, and for the remaining portion of the tickets for customers with multi-flight trips under Rules 20(A)/19(A), the Contract terms do not give Delta the option of providing customers with a “credit” for future travel on the airline instead of a refund, yet that is what Delta did in breach of the Contracts.

39. Guidance from the U.S. Department of Transportation (“DOT”) supports the plain reading of Rules 23(A)/22(A) as requiring that Delta provide a refund directly to the passenger when Delta fails to operate a flight on schedule.

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<sup>8</sup> Delta Air Lines, Legal Notices – Liability for Delay or Cancellation (last updated Jan. 1, 2020), <https://www.delta.com/us/en/legal/notices/overview>.

40. When numerous customers complained about Delta's (and other airlines') practice in the wake of COVID-19 of failing to directly issue refunds when it failed to operate a flight on schedule, the DOT issued an Enforcement Notice Regarding Refunds by Carriers Given the Unprecedented Impact of the COVID-19 Public Health Emergency on Air Travel ("DOT Notice") that reiterated the longstanding policy governing the airline industry, under which they must refund tickets if they cancel or significantly delay flights:

The U.S. Department of Transportation's Office of Aviation Enforcement and Proceedings (Aviation Enforcement Office), a unit within the Office of the General Counsel, is issuing this notice to remind the traveling public, and U.S. and foreign carriers, operating at least one aircraft having a seating capacity of 30 or more seats, that passengers should be *refunded promptly* when their scheduled flights are cancelled or significantly delayed. Airlines have long provided such refunds, including during periods when air travel has been disrupted on a large scale, such as the aftermath of the September 11, 2001 attacks, Hurricane Katrina, and presidentially declared natural disasters. Although the COVID-19 public health emergency has had an unprecedented impact on air travel, *the airlines' obligation to refund passengers for cancelled or significantly delayed flights remains unchanged.*

The Department is receiving an increasing number of complaints and inquiries from ticketed passengers, including many with non-refundable tickets, who describe having been denied refunds for flights that were cancelled or significantly delayed. In many of these cases, the passengers stated that the carrier informed them that they would receive vouchers or credits for future travel. But many airlines are dramatically reducing their travel schedules in the wake of the COVID-19 public

health emergency. As a result, passengers are left with cancelled or significantly delayed flights and vouchers and credits for future travel that are not readily usable.

Carriers have a longstanding obligation to provide a prompt refund to a ticketed passenger when the carrier cancels the passenger's flight or makes a significant change in the flight schedule and the passenger chooses not to accept the alternative offered by the carrier. The longstanding obligation of carriers to provide refunds for flights that carriers cancel or significantly delay does not cease when the flight disruptions are outside of the carrier's control (e.g., a result of government restrictions). The focus is not on whether the flight disruptions are within or outside the carrier's control, but rather on the fact that the cancellation is through no fault of the passenger. Accordingly, the Department continues to view any contract of carriage provision or airline policy that purports to deny refunds to passengers when the carrier cancels a flight, makes a significant schedule change, or significantly delays a flight to be a violation of the carriers' obligation that could subject the carrier to an enforcement action.<sup>9</sup>

**C. Delta Failed to Provide Refunds That It Was Required to Pay Directly to Passengers When It Failed to Operate a Flight on Schedule**

41. When Delta cancels a flight or fails to operate it on schedule, the airline's uniform Contracts promise that Delta will provide a full refund to the original form of payment. Ex. A, Rule 22(A); Ex. B, Rule 23(A).

42. Rules 22(A)/23(A) require a full refund to the original form of payment

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<sup>9</sup> U.S. Dep't of Transportation, Enforcement Notice Regarding Refunds by Carriers given the Unprecedented Impact of the COVID-19 Public Health Emergency on Air Travel (Apr. 3, 2020), [https://www.transportation.gov/sites/dot.gov/files/2020-04/Enforcement%20Notice%20Final%20April%203%202020\\_0.pdf](https://www.transportation.gov/sites/dot.gov/files/2020-04/Enforcement%20Notice%20Final%20April%203%202020_0.pdf) (emphasis added).

when Delta fails to operate on schedule and transport the passenger and does not require that any action be taken by the customer. If Delta fails to operate on schedule or transport the passenger, Delta promises a refund.

43. Delta's failure to automatically provide refunds for flights it failed to operate on schedule or transport passengers breached its Contracts.

**D. Delta Failed to Provide Refunds When It Did Not Provide Transportation on the Next Available Flight**

44. Because a failure to operate one flight on schedule could affect the rest of a passenger's travel plans or ability to make a connection, Delta's Contracts also promise passengers the right to request cancellation of the remaining unused portion of their fare (*i.e.*, portions of the fare that Delta continues to operate on schedule). Ex. A., Rule 20(A); Ex. B, Rule 19(A). If a passenger does not request cancellation of a remaining unused fare, then Rules 20(A)/19(A) require that Delta transport the passenger on the next available flight.

45. If a customer requests cancellation of their remaining unused fare, then that customer is entitled to a refund for the remaining unused fare under Rules 20(A)/19(A).

46. The refund that Delta owes a passenger under Rules 20(A)/19(A) for the remaining unused fare upon the passenger's cancellation of that remaining fare

is in addition to the “Involuntary Refund” that Delta automatically owes passengers under Rules 23(A)/22(A) for a particular flight that it fails to operate on schedule.

47. By making passengers choose between accepting a re-accommodation and an eCredit, Delta breached its Contracts. When passengers do not accept re-accommodation on the next available flight they are also, in fact, cancelling. When passengers do not choose re-accommodation (*i.e.* when passengers choose to cancel), they are entitled to a refund. When Delta gave passengers a choice between a re-accommodation and an eCredit, Delta breached its Contracts because every passenger who did not accept re-accommodation (*i.e.* every passenger who did not choose the re-accommodation option and thereby canceled) was entitled to a refund, not an eCredit. In short, under Rules 20(A)/19(A), when Delta offered customers re-accommodation and they did not accept it, those customers canceled, and Delta owed them a refund, not a credit.

**E. Delta Failed to Provide Refunds in the Time Set Forth in the Contracts.**

48. For those customers who were ultimately able to obtain refunds, Delta breached its Contracts when it failed to provide said refunds in the time provided by the Contracts:

Tickets paid by credit card will be refunded to the credit card account used to purchase the ticket, typically within seven business days of



Delta's initial receipt of refund request. Tickets paid for by cash . . . will be refunded by check issued to the person named as a passenger on the ticket, typically within 20 business days of Delta's receipt of initial refund request.

Ex. A, Rule 23(D)(1)-(2); Ex. B, Rule 22(D)(1)-(2).

49. With respect to the passengers who are still owed refunds for flights that Delta failed to operate on schedule (Rules 23(A)/22(A)), and passengers who are still owed refunds for the remaining unused portions of their fare that they chose to cancel (not affected by Delta's failure to operate on schedule), Delta is also in breach of its Contracts and owes these passengers interest, which remains unpaid and continues to accrue. *See* Ex. A, Rule 23(D); Ex. B., 22(D).

**F. Although No Request for an “Involuntary Refund” Is Required, Delta Also Frustrated Customers’ Attempts to Request Refunds, As Well as Their Attempts to Request Cancellation of Remaining Unused Fares**

50. Delta also systematically frustrated customers' ability to access the refunds to which they were contractually entitled by implementing system-wide obstacles to making refund requests.

51. These obstacles applied equally to (i) those customers who were entitled to, but were not provided, an automatic refund for Delta's failure to operate on schedule under Rules 23(A)/22(A), and (ii) to those customers who were entitled to a refund after they elected to reject Delta's re-accommodation, or to otherwise

cancel the remaining unused portion of their fare (that Delta was still operating on schedule) under Rules 20(A)/19(A).

52. Delta made it nearly impossible for a reasonable consumer to request a refund. Customers who attempted to request a refund online were met with a labyrinth of confusing and even contradictory forms, and, most importantly, a requirement that they check a box agreeing to give up their contractual right to a refund in exchange for allowing them to request the refund to which they were unconditionally entitled.

53. Those who sought a refund telephonically were faced with long waits, hang-ups, call backs in the middle of the night, and, if they did manage to reach a human being, refusal to process refunds.

54. Delta's online information page regarding travel in the wake of COVID-19 states that cancellation fees may be deducted from the original cost of the flight and eCredits will be given for the remainder of the value. Delta's statement to all customers, that individuals who attempt to access a refund will have to pay cancellation fees and can only receive eCredits, frustrated customers' ability to request both refunds and cancellation.

55. Even when Delta finally provided a link to "Apply for a Refund for a Delta Canceled Flight"—a link buried within an irrelevant section regarding

passenger-initiated cancellations of non-refundable fares on Delta’s refunds and cancellations webpage—the linked form does not clearly offer the refunds to which customers are entitled. First, although the form ultimately allows customers to request refunds only for flight cancellations, service downgrades, or flight delays—*i.e.*, refunds for involuntary cancellations—the page does not clearly signify that it is the form to be used in such instances. Instead, the form submission page is vaguely titled “Cancel and Refund Form,” and explains it is for requesting refunds *or credits* “[i]f you were unable to fly with us.”<sup>10</sup> Customers would not reasonably understand that this form would be used to access the refunds to which they were entitled, given its title, frustrating their ability to request refunds.

56. The form also repeatedly highlights supposed limitations that have no bearing on refund requests prompted by Delta’s flight cancellations or other failures to operate flights as scheduled. For instance, the refund request form’s explanatory text states that Delta “will make every effort to process eligible credits and refunds within 7 days. . . . Refunds and credits will be issued according to the fare rules of your ticket and applicable waivers.” But the Contracts’ refund provisions for involuntary refunds (*i.e.*, refunds for cancellations prompted by Delta’s flight

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<sup>10</sup> Delta Air Lines, Cancel and Refund Form (last visited December 15, 2020), <https://www.delta.com/contactus/iropForm>.

cancellation, diversion, or delay) make no mention of credits or limitations imposed by fare rules. *See* Ex. A, Rule 23(A); Ex. B., Rule 22(A). Instead, credits and fare rules only relate to voluntary refunds (*i.e.*, refunds for passenger-initiated cancellations not prompted by Delta’s failure to operate according to its flight schedule). *See* Ex. A, Rule 23(B); Ex. B, Rule 22(B).

57. Delta also systematically frustrated customers’ attempts to access the refunds to which they were entitled because it told every customer seeking a refund online that, to request a refund, they would paradoxically have to give up the right to a refund, which would naturally have the effect of eliminating customers’ ability to reasonably request those refunds. Delta requires that customers agree to additional *non-contract* terms that unfairly seek to alter customers’ right to a refund *as a condition of exercising their right to a refund*. Specifically, the Cancel and Refund Form requires customers to agree to additional “Terms and Conditions” that state that “refund request[s] will be reviewed by the Passenger Refunds Department to determine refund eligibility and amount of the refund. After the review, a refund may not be authorized. Unless otherwise specified, refund eligibility will be based on the rules of the fare purchased or SkyMiles program ticket rules, and all

applicable cancellation or penalty fees will be applied.”<sup>11</sup>

58. To make the process of requesting a refund even more complex and difficult, for those customers who sought to cancel the remaining portion of their unused fare and decline offered re-accommodation, Delta required them first to fill out a separate form to request and obtain an eCredit for future travel on Delta before they could attempt to request a refund. Specifically, a pop-up page added to the Cancel and Refund Form directs customers to first obtain an eCredit and to use the Cancel and Refund Form only if, as relevant here, the customer’s “flight was significantly delayed or canceled by Delta and: You have an eCredit from that flight . . . .” In other words, in breach of the Contracts, Delta is forcing customers with Delta-canceled flights to obtain and accept eCredits in the first instance before they may even request a refund. This multiple-step process is not contemplated by the Contracts and further evidences Delta’s frustration of passengers’ right to a refund as well as Delta’s bad faith in performing under the Contracts (or providing the necessary cooperation for customers to perform), particularly as the Contracts impose a time limit for customers to obtain the refunds to which they are entitled.

59. Given the Delta-imposed roadblocks to an online refund request—and

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<sup>11</sup> *Terms and Conditions*, DELTA.COM, [https://www.delta.com/contactus/pages/irop/irop\\_terms\\_conditions.jsp](https://www.delta.com/contactus/pages/irop/irop_terms_conditions.jsp) (last visited July 23, 2021).

Delta's insistence that customers agree that they might not get a refund at all in order to request one—many customers sought refunds by calling Delta instead.

60. However, these customers were likewise thwarted in their attempts to obtain refunds. Delta's inadequate telephone systems left many customers to face long hold times of up to twelve hours, and had their calls terminated without being able to speak to anyone.<sup>12</sup> Some who were able to request a "call back" received that call in the middle of the night and were forced to start the process over again when they did not answer.<sup>13</sup> Multiple customers were only able to access a refund, sometimes months later, when professional consumer advocates or the Better Business Bureau contacted the airline on their behalf.<sup>14</sup>

61. Delta failed to staff its call centers sufficiently to handle refund requests

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<sup>12</sup> Reviews of Delta Air Lines, TRIP ADVISOR (2020), [https://www.tripadvisor.com/ShowUserReviews-g1-d8729060-r753524062-Delta\\_Air\\_Lines-World.html](https://www.tripadvisor.com/ShowUserReviews-g1-d8729060-r753524062-Delta_Air_Lines-World.html) (describing hold times of up to 12 hours); *Complaints: Delta Air Lines*, BETTER BUSINESS BUREAU, <https://www.bbb.org/us/ga/atlanta/profile/airlines/delta-air-lines-0443-3049/complaints> (multiple complaints of long hold times and hang-ups).

<sup>13</sup> May 14, 2020 Review of Delta Air Lines, TRIP ADVISOR (2020), [https://www.tripadvisor.com/ShowUserReviews-g1-d8729060-r753524062-Delta\\_Air\\_Lines-World.html](https://www.tripadvisor.com/ShowUserReviews-g1-d8729060-r753524062-Delta_Air_Lines-World.html).

<sup>14</sup> *Complaints: Delta Air Lines*, BETTER BUSINESS BUREAU, <https://www.bbb.org/us/ga/atlanta/profile/airlines/delta-air-lines-0443-3049/complaints>; Michelle Couch-Friedman, *Can Delta Just Ignore a Refund Request Like This?*, ELLIOTT ADVOCACY (July 13, 2020), <https://www.elliott.org/airline-problems/delta-air-lines-ignores-refund-request-coronavirus/>.

and failed to put in place a system that would reasonably allow customers to request a refund over the phone.

62. Delta therefore made it impossible for many customers to request a refund either online or by phone.

63. In short, there are numerous examples of Delta's practice of frustrating customers' attempts to request refunds for flights that Delta canceled or otherwise failed to operate on schedule, and customers' ability to cancel remaining unused fares, which also entitles them to a refund. These many examples evidence Delta's breaches of its contractual promise to provide refunds.

**IV. Plaintiff's Allegations: Delta Failed to Adhere to Its Contract Terms and to Conduct Itself in Good Faith with Respect to Providing Ms. Dusko With a Refund**

64. On or about December 11, 2019, Plaintiff and her husband purchased four roundtrip tickets for their family to travel from Helena, Montana, to Cancun, Mexico, on March 27, 2020, and return travel on April 3, 2020. Plaintiff purchased the flights directly from Delta's website and paid cash fares totaling \$2,783.24, using a joint credit card she shares with her husband.

65. On March 25, 2020, Plaintiff received an email notification from Delta that her outbound flight to Cancun had been canceled by the airline. At that point, Delta owed Plaintiff an "Involuntary Refund." Since no portion of the fare had been

used, as Plaintiff had not begun to travel on the ticket, Delta owed Plaintiff a refund in the amount equal to the fare paid. *See* Rules 23(A)/22(A) (“If a refund is required because of Delta’s failure to operate on schedule or refusal to transport (except as a result of passenger’s failure to comply with the contract of carriage), the following refund will be made directly to you: (1) If no portion of the ticket has been used, the refund will be an amount equal to the fare paid.”). Delta breached its Contract with Plaintiff when it failed to provide a refund directly to her when Delta cancelled her flight.

66. Instead of providing the refund she was owed, the email notification stated that Delta was currently attempting to rebook Plaintiff and her family on another flight and would notify her again once a rebooking was completed. The email also provided a link that would allow Plaintiff to take “more immediate action” by selecting her own rebooking option. Neither the flight cancellation email nor the links therein provided information to Plaintiff about how to receive the refund to which she was contractually entitled.

67. On March 26, 2020, Plaintiff received a second email from Delta that notified her that the airline had rebooked Plaintiff and her family on a flight scheduled to depart on March 28, 2020—a day after her ticketed departure.

68. After receiving the cancellation and rebooking notifications, Plaintiff



called Delta's customer service hotline to exercise her right to reject the re-accommodation Delta had offered, cancel her remaining unused fare, and receive a refund (Rules 20(A)/19(A)). Ms. Dusko called and informed Delta that she and her family did not want to be rebooked onto the March 28, 2020 flight and instead would like a full refund for all four round-trip tickets, given the airline's cancellation. Delta breached its Contract with Plaintiff when it failed to provide her a refund—a breach in addition to its breach of Contract for failing to pay an “Involuntary Refund” when Delta canceled her flight to Cancun and did not provide her a refund in the amount equal to the fare paid (since no portion of her ticket has been used). Instead of beginning to immediately process a refund, Delta's customer service representative denied Ms. Dusko's request for a full refund.

69. Breaching its Contract with Plaintiff, Delta customer service instead explained (incorrectly) to Plaintiff that, if she chose not to take the rebooked flight on March 28, 2020, Plaintiff and her family were entitled only to flight vouchers (meaning credits) for travel on Delta within a 12-month validity period, not a full refund.

70. Delta intentionally misinformed Plaintiff regarding her refund rights as part of its common practice to frustrate attempts to request refunds for canceled/changed flights and attempts to cancel and receive a refund for an unused

fare so that it could avoid or delay paying refunds for the scores of flights Delta canceled.

71. After breaching the Contract by denying her a refund, Delta ultimately refunded Plaintiff on or about May 12, 2020, for the four tickets for the canceled flights. Delta provided this refund only after she filed this lawsuit—more than six weeks after Plaintiff’s refund request had been wrongly refused.

72. In sum, despite the fact that Plaintiff and her family could not take the flight Plaintiff booked because Delta canceled it, Delta breached its obligation to provide her a refund when it cancelled flight her to Cancun, to refund her the remaining unused portion of her ticket when she elected to cancel, and to act in good faith with respect to her right to a refund.

## **V. CLASS ACTION ALLEGATIONS**

73. Pursuant to N.D. Ga. LR 23.1(A)(2)(a) and (b), Plaintiff brings her claims as a class action under Fed. R. Civ. P. 23(a), (b)(1), (b)(2) and (b)(3), on behalf of herself and all others similarly situated. Plaintiff seeks certification of the following nationwide Class:

All persons in the United States who purchased tickets for travel on a Delta Air Lines, Delta Connection, or Delta Shuttle flight scheduled to operate from March 1, 2020, through the date of a class certification order, whose flight(s) were canceled by Delta, and who were not reaccommodated and transported to their ticketed destination (“Class” or “Proposed Class”).

74. Excluded from the Class are Defendant, any entity in which Defendant has a controlling interest, and Defendant's officers, directors, legal representatives, successors, subsidiaries, and assigns. Also excluded from the Class are any judicial officer presiding over this matter, members of their immediate family, and members of their judicial staff, and any Judge sitting in the presiding court system who may hear an appeal of any judgment entered.

75. Plaintiff reserves the right to amend or modify the Class definition with greater specificity or division after having had an opportunity to conduct discovery.

76. The Class meets the criteria for certification under Rule 23(a) and (b)(3).

77. **Numerosity. Fed. R. Civ. P. 23(a)(1).** Consistent with Rule 23(a)(1), the members of the Class are so numerous and geographically dispersed that the joinder of all members is impractical. Under N.D.Ga. LR 23.1(A)(2)(b), Plaintiff states that the exact number of Class members is unknown to Plaintiff at this time but may be ascertained through Defendant's records. Based on the thousands of flights canceled by Defendant, Defendant's failure to issue refunds as required by the Contracts, and Defendant's systemic practices frustrating Class members' ability to access refunds and to request cancellation of remaining unused fares, the Class likely comprises tens of thousands if not hundreds of thousands of members

geographically dispersed throughout the United States. Affected consumers' names and addresses are available from Defendant's records, and Class members may be notified of the pendency of this action by recognized, court-approved notice dissemination methods, which may include electronic mail, U.S. Mail, internet notice, and/or published notice.

**78. Predominance of Common Issues. Fed. R. Civ. P. 23(a)(2) and (b)(3).** Consistent with Rule 23(a)(2) and with 23(b)(3)'s commonality and predominance requirements, and pursuant to N.D.Ga. LR 23.1(A)(2)(d), Plaintiff states that this action involves common questions of law and fact that predominate over any questions affecting individual Class members. Delta entered into uniform Contracts of Carriage with customers, and Delta breached those Contracts pursuant to uniform policies applicable to customers whose flights were canceled by the airline. Common questions of law and fact include:

- a. Whether Defendant's conduct breaches its Contracts;
- b. Whether Defendant is required to give a refund, rather than credit on a future flight, when it cancels a flight and does not actually transport the canceled passenger within a reasonable time of the original flight schedule on rebooked accommodations accepted by the passenger;

c. Whether Defendant's onerous system for accessing refunds frustrated customers' attempts to get the refunds to which they were contractually entitled;

d. Whether Delta breached its obligation of good faith and fair dealing; and

e. Whether Plaintiff and members of the Class are entitled to damages, costs, or attorneys' fees from Defendant.

79. **Typicality. Fed. R. Civ. P. 23(a)(3).** Plaintiff's claims are typical of other Class members' claims because Plaintiff and members of the Class were subjected to the same unlawful conduct and damaged in the same way. Defendant's conduct that gave rise to the claims of Plaintiff and other Class members (*i.e.*, canceling flights and failing to provide or delaying paying refunds in breach of Delta's Contracts, as applicable) is the same for all members of the Class.

80. **Adequacy. Fed. R. Civ. P. 23(a)(4).** Consistent with Rule 23(a)(4) and N.D.Ga. LR 23.1(A)(2)(c), Plaintiff is an adequate representative of the Class because Plaintiff is a member of the Class and is committed to pursuing this matter against Defendant to obtain relief for the Class. Plaintiff has no conflicts of interest with the Class. Plaintiff's counsel are competent and experienced in litigating class actions, including extensive experience in litigating consumer claims. Plaintiff

intends to vigorously prosecute this case and will fairly and adequately protect the interests of the Class.

81. **Superiority. Fed. R. Civ. P. 23(b)(3).** Consistent with Rule 23(b)(3) and N.D.Ga. LR 23.1(A)(2)(e), a class action is superior to any other available means for the fair and efficient adjudication of this controversy, and no unusual difficulties are likely to be encountered in the management of this class action. The purpose of the class action mechanism is to permit litigation against wrongdoers even when damages to individual plaintiffs and Class members may not be sufficient to justify individual litigation. Here, the damages suffered by Plaintiff and the Class members are relatively small compared to the burden and expense required to individually litigate their claims against Defendant, and thus, individual litigation to redress Defendant's wrongful conduct would be impracticable. Individual litigation by each Class member would also strain the court system. Moreover, individual litigation creates the potential for inconsistent or contradictory judgments and increases the delay and expense to all parties and the court system. By contrast, the class action device presents far fewer management difficulties and provides the benefits of a single adjudication, economies of scale, and comprehensive supervision by a single court.

82. Pursuant to N.D. Ga. LR 23.1(A)(2)(f), Plaintiff alleges that, based on Defendant's cancellation of thousands of flights governed by standard contracts and Defendant's enactment and application of uniform policies to only offer credits where refunds are due, the total claims of individual Class members in this action exceed \$5,000,000.00 in the aggregate, exclusive of interest and costs.

**COUNT I - BREACH OF CONTRACT**

**(brought by Plaintiff on behalf of herself and the Proposed Class)**

83. Plaintiff realleges and reincorporates the allegations in paragraphs 1 through 82 above as if fully set forth herein.

84. This claim for breach of contract is based on Delta's breaches of its Contracts.

85. Plaintiff, along with all putative Class members, entered into the Contracts with Delta for the provision of air travel in exchange for payment. These Contracts were drafted by Delta.

86. Plaintiff, and all putative members of the Class, performed under the Contracts, specifically, by paying for tickets on Delta flights or flights marketed by Delta and operated by its codeshare partners, and by complying with all conditions precedent under the Contracts.

87. Due to Delta's cancellation of their flights, Plaintiff and all putative Class members could not use their airline tickets through no fault of their own and

they are not getting the remedy that Delta promised to them.

88. Under the terms of the Contracts drafted by Delta, Plaintiff and putative Class members are entitled to refunds under Rules 23(A)/22(A) because Delta canceled their flights and did not provide “Involuntary Refunds,” and, under Rules 20(A)/19(A) to the extent that they had additional unused portions of their tickets, did not provide refunds as they were obligated to do or upon the customer’s rejection of a re-accommodation/cancellation of a remaining unused fare.

89. Delta has breached its Contracts by failing to provide refunds to the original form of payment when passengers were not reaccommodated on another flight to their destination, and by failing to provide refunds in the time set by the Contracts. Ex. A, Rule 23(D)(1); Ex. B, Rule 22(D)(1).

90. Delta has further breached its Contracts by frustrating passengers’ ability to obtain refunds instead of travel credits by, *inter alia*, preventing them from requesting refunds online, by requiring that they give up the right to refund as a condition precedent to asking for a refund, and/or by making it nearly impossible to reach Delta over the phone.

91. As a result of Delta’s breaches of Contracts, Plaintiff and the putative Class members have incurred damages in an amount to be proven at trial, including refunds and/or the interest that accrued during any periods during which refunds



were wrongfully delayed, denied, and withheld from Plaintiff and putative Class members.

**COUNT II - BREACH OF CONTRACT - COVENANT OF GOOD FAITH  
AND FAIR DEALING**

**(brought by Plaintiff on behalf of herself and the Proposed Class)**

92. Plaintiff realleges and reincorporates the allegations in paragraphs 1 through 91 above as if fully set forth herein.

93. Delta's Contracts with its customers are subject to an implied covenant of good faith and fair dealing, which is implied in all contracts unless the parties contract out of the implied covenant by agreeing to other terms that explicitly disclaim, waive, or override the covenant such as by granting one party absolute discretion. The parties to the Contracts had the ability to expressly disclaim, waive, or override the covenant in the Contracts, but they did not do so. The parties thus voluntarily entered into the Contracts, including the covenant of good faith and fair dealing implied therein.

94. Plaintiff and Class members have performed all conditions, covenants, and promises required to be performed on their part in accordance with the terms and conditions of the Contracts.

95. When Delta unilaterally canceled flights, the terms of the Contracts only allowed it to (a) at a passenger's request, refund the unused portion of a ticket

for a canceled flight in the original form of payment, or (b) for those passengers who did not request cancellation and a refund, transport the passengers to the destination on Delta's next available flight accepted by the passengers. *See* Ex. A, Rules 20(A); Ex. B, Rules 19(A). Therefore, the Contracts did not allow Delta to unilaterally issue credits instead of refunds when it canceled flights.

96. Under the implied covenant, Delta was obligated to act fairly and in good faith to perform the terms of the Contracts when it unilaterally canceled flights; when it had not received a request for a cancellation and refund; and when it was unwilling or unable to transport the passenger to the destination on the next available flight. Under these circumstances, good faith required that Delta issue refunds for the cost of the canceled flights, even if the passenger had not explicitly requested a refund.

97. Instead, Delta breached the implied covenant by taking opportunistic advantage of a gap in ambiguous contractual language by retaining the air fare paid by Plaintiff and Class members for flights that Delta canceled.

98. Delta has further exhibited bad faith in its dealings with the Plaintiff and the Class by:

- a. first insisting that canceled customers who were not reaccommodated and transported on alternate flights agreed to by the

customers were entitled only to vouchers or credits, not refunds;

b. automatically converting Delta-canceled tickets to eCredits for future travel on Delta, even though credits are not contemplated by the Contracts, and/or forcing customers on flights canceled by Delta to first request and accept eCredits instead of refunds;

c. emailing Plaintiff and the Class after a flight cancellation to notify them that their tickets could be used to rebook on a later flight or else would be converted into eCredits for future use on Delta flights, with no mention of the contractual right to a refund at the customer's option;

d. telling customers whose flights were cancelled that they *may* "in some instances" be entitled to request a refund, when the Contracts provide that such customers *are* entitled to refund at their option;

e. asking canceled customers to agree to purported additional "Terms and Conditions" as a condition of exercising their contractual rights to request a refund, which "Terms and Conditions" contradict the Contracts and state or imply that Delta has discretion to deny a request for a refund; and

f. failing to provide adequate procedures to allow customers to exercise their contractual rights to request refunds where refunds are due.

99. As a result of Delta's failures to deal fairly or in good faith, Plaintiff

and the putative Class members have incurred damages in an amount to be proven at trial, including the amount in withheld refunds and/or the interest that accrued during any periods during which Delta failed to issue timely refunds following Delta's cancellations of flights.

**REQUEST FOR RELIEF**

**WHEREFORE**, Plaintiff, individually and on behalf of all putative Class members, respectfully requests that the Court enter judgment in their favor and against Defendant as follows:

- A. For an Order determining at the earliest possible time that this matter may proceed as a class action under Rule 23 and certifying this case as such;
- B. For herself and each Class member their actual compensatory damages;
- C. For reasonable attorneys' fees and costs of suit;
- D. For pre-judgment interest; and
- E. Such further and other relief the Court deems reasonable and just.

**JURY DEMAND**

Plaintiff, on behalf of herself and the Class of all others similarly situated, hereby demands a trial by jury on all issues so triable pursuant to Rule 38 of the Federal Rules of Civil Procedure.

Dated: July 23, 2021.

Respectfully submitted,

/s/Roy E. Barnes

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this day a copy of the foregoing **SECOND AMENDED CONSOLIDATED COMPLAINT – CLASS ACTION** was filed and served using the Court’s CM/ECF system which will send notification of such filing to ECF registered participants.

DATED this 23<sup>rd</sup> day of July, 2021.

/s/ Roy E. Barnes  
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