

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

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

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

**ORDER GRANTING UNOPPOSED MOTION FOR FINAL APPROVAL
OF CLASS ACTION SETTLEMENT AND APPLICATION FOR
ATTORNEYS' FEES AND COSTS AND A SERVICE AWARD**

Plaintiff Angela Dusko and Defendant Delta Air Lines, Inc. have entered into a proposed Settlement Agreement and Releases (the “Agreement”) as of May 11, 2023, for the purpose of settling this action.¹ On June 2, 2023, this Court preliminarily approved the Settlement and ordered that Notice be sent to Settlement

¹ Terms and phrases used in this Final Approval Order and Judgment not otherwise defined herein shall have the same meanings ascribed to them in the Agreement.

Class members. [Docs. 100, 101]. On July 27, 2023, in accordance with the schedule set by the Court, Class Counsel filed Plaintiff's "Unopposed Motion for Final Approval of Class Action Settlement and Application for Attorneys' Fees and Costs and a Service Award" (the "Motion"). [Doc. 105]. A Final Approval Hearing was held on October 5, 2023.

Plaintiff's Motion is now before the Court. The Parties have requested that the Court grant Final Approval of the Settlement, grant Class Counsel's application for attorneys' fees and costs and a Service Award for the Class Representative, and enter a final judgment.

Having reviewed and considered the Motion, declarations, and other submissions by the Parties, **IT IS ORDERED AND ADJUDGED:**

1. The Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332(d)(2) and personal jurisdiction over the Class Representative, Settlement Class Members, and Delta. Additionally, venue is proper in this District pursuant to 28 U.S.C. § 1391(b).

I. MATERIAL TERMS OF THE SETTLEMENT

A. The Settlement Class

2. The proposed Settlement Class is defined 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.

See Agreement ¶ 69.

B. Settlement Benefits

3. In accordance with the Agreement, Delta shall: (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 the Class Representative a \$3,000.00 Service Award and Class Counsel \$2,285,000.00 for attorneys' fees and \$51,300.80 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. *Id.* ¶ 78.

4. Since 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, *id.* ¶ 105, the Settlement achieves relief similar to what

Plaintiff could have obtained for approximately 74,346 Settlement Class members had she been successful at trial. Thus, the Court finds the Settlement includes outstanding direct monetary benefits to the Settlement Class. The Court also finds Delta's agreement to separately pay all Settlement Administration Costs and attorneys' fees and costs to Class Counsel greatly benefits the Settlement Class.

5. In exchange for the Settlement Benefits conferred by the Settlement, Plaintiff and Settlement Class Members will, upon entry and by operation of this Final Approval Order and Judgment, provide Delta with a full and final release for each and every Released Claim. *See id.* § XI. Additionally, upon the Effective Date of the Agreement, all claims by Plaintiff and Settlement Class Members will be dismissed with prejudice.

C. The Notice Program, Claims Process, Settlement Payments, and Cy Pres Payment

6. The Notice Program began on July 17, 2023, and concluded on August 28, 2023. It included: (1) Email Notice; (2) Postcard Notice; (3) Long Form Notice; (4) a Settlement Website providing detailed information about the Settlement; and (5) a toll-free telephone number and facility to provide Settlement Class members with information and direct them to the Settlement Website. *Id.* ¶¶ 88, 98, 99. Each facet of the Notice Program was timely and properly accomplished.

7. Settlement Class Members will receive Settlement Benefits on a

claims-made basis. *Id.* ¶ 103. Settlement Class Members were required to submit Claim Forms by the Claims Deadline (*i.e.*, September 15, 2023). *Id.* ¶ 104. No later than 90 days after the Effective Date, Delta shall provide Interest Credit to eligible Settlement Class Members. *Id.* ¶ 112. 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. No later than 60 days after the Effective Date, the Settlement Administrator shall pay the Cash Settlement Payment to all Settlement Class Members entitled thereto. *Id.* ¶ 114.

8. 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, which the Parties proposed in the Motion to be Public Justice and United Way of Greater Atlanta, each to receive 50% of the residual funds. *Id.* ¶ 117.

II. THE SETTLEMENT WARRANTS FINAL APPROVAL

9. For the reasons set forth below, the Court finds the Settlement is fair, adequate, and reasonable, and should be finally approved.

10. A court has broad discretion over the settlement approval process. *See,*

e.g., *In re Motorsports Merch. Antitrust Litig.*, 112 F. Supp. 2d 1329, 1333 (N.D. Ga. 2000). In exercising this discretion, courts in this Circuit historically analyzed a class settlement using the so-called *Bennett* factors. *See, e.g.*, *Columbus Drywall & Insulation, Inc. v. Masco Corp.*, 258 F.R.D. 545, 558–59 (N.D. Ga. 2007); *Ault v. Walt Disney World Co.*, 692 F.3d 1212, 1217 (11th Cir. 2012) (court must make findings that settlement “is not the product of collusion” and “that it is fair, reasonable and adequate”). The *Bennet* factors include: (1) the likelihood of success at trial; (2) the range of possible recovery; (3) the range of possible recovery at which a settlement is fair, adequate, and reasonable; (4) the anticipated complexity, expense, and duration of litigation; (5) the opposition to the settlement; and (6) the stage of proceedings at which the settlement was achieved.

11. The 2018 amendments to Rule 23 similarly make clear that the Court should “[focus] on the primary procedural considerations and substantive qualities that should always matter to the decision whether to approve the proposal.” *See* FED. R. CIV. P. 23(e), advisory committee’s notes to 2018 Amendment. The specific considerations include whether (1) the class was adequately represented; (2) the settlement was negotiated at arm’s length; (3) the relief is adequate, taking into account the costs, risks, and delay of trial and appeal, how the relief will be distributed, the terms governing attorney’s fees, and any side agreements; and (4)

whether Class Members are treated equitably relative to each other. *See* FED. R. CIV. P. 23(e).² In the findings that follow, the Court addresses the more recently-enacted Rule 23(e) factors and the *Bennett* factors in concert.

A. The Class Was Adequately Represented

12. 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.*, 258 F.R.D. at 555.

13. As it found at the Preliminary Approval stage, the Court finds Plaintiff is an adequate class representative. She has interests and injuries similar to other Settlement Class members. She has also 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. Pursuant to Rule 23, the Court confirms the appointment of Plaintiff

² This framework tracks the traditional approach, and since the 2018 amendments, courts in this Circuit have continued to weigh the *Bennett* factors. *See, e.g., Berman v. General Motors, LLC*, 2019 WL 6163798, at *3 (S.D. Fla. Nov. 18, 2019); *Gumm v. Ford*, 2019 WL 2017497, at *2 (M.D. Ga. May 7, 2019).

Angela Dusko as Class Representative of the Settlement Class.

14. As to the adequacy of Class Counsel, “the adequacy of class counsel 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 complex Action, Class Counsel has acted with diligence, skill, and professionalism. Class Counsel are experienced in complex class litigation and have successfully prosecuted similar cases throughout the country. Further, this Court has already appointed them as Class Counsel in connection with this Settlement. In addition, Delta does not challenge Class Counsel’s adequacy to serve as Class Counsel.

15. Pursuant to Rule 23(g), the Court confirms the appointment of Jeff Ostrow, Esq. of Kopelowitz Ostrow P.A., Melissa S. Weiner, Esq. of Pearson Warshaw, LLP, Annick M. Persinger, Esq. of Tycko & Zavareei, LLP, and Roy E. Barnes, Esq. of Barnes Law Group, LLC as Class Counsel.

B. The Settlement Was Negotiated as Arm’s Length

16. The Court concludes that this Settlement was negotiated at arm’s length and without collusion based on the terms of the Settlement itself, the length and difficulty of the negotiations, and the oversight of a well-respected and experienced mediator, Hunter R. Hughes III, over several months and three formal sessions. *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.”). Moreover, attorneys’ fees and costs and a Service Award were not discussed until the Parties agreed to all other material Settlement terms.

C. The Adequacy of Relief Provided by the Settlement

17. Class Counsel, a group with significant experience in class action litigation, strongly believe the Settlement Benefits are fair, reasonable, and adequate, particularly given Settlement Class Members will essentially recover all the damages that they could have recovered at trial. The Court may rely upon the judgment of experienced counsel. *See, e.g., In re Equifax Inc. Customer Data Sec. Breach Litig.*, 999 F.3d 1247, 1274 (11th Cir. 2021) (trial judge “should be hesitant to substitute its own judgment for that of counsel”) (internal quotations omitted). Rule 23(e)(2)(C)’s enumerated factors also show the Settlement is fair, reasonable, and adequate.

i. The Risks, Costs, and Delay of Continued Litigation

18. The risks, costs, and delay of continued litigation are substantial given that 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. To achieve relief similar to the

Settlement Benefits, if Plaintiff were to continue litigating, she would have to overcome the obstacles of obtaining class certification, surviving summary judgment, and winning at trial. Even a successful trial might not yield more favorable results than the Settlement terms already achieved, and recovery might be delayed for years by an appeal. *See Lipuma v. Am. Express Co.*, 406 F. Supp. 2d 1298, 1322 (S.D. Fla. 2005) (likelihood appellate proceedings could delay class recovery “strongly favor[s]” approval of a settlement). All that is certain is that with continued litigation, the Settlement Class would face a notably longer wait before receiving any potential recovery, if they received any recovery at all.

ii. An Effective Method of Distributing Relief

19. The Claim Form Submission Process and distribution of Settlement Benefits is fair, convenient, and effective. Settlement Class Members will promptly receive (a) Cash Settlement Payments for Ticket Cash and Interest Cash by electronic payment or check issued by the Settlement Administrator or (b) Credit Settlement Payments directly from Delta if they elect Ticket Credit and Interest Credit. And the Court-approved Settlement Administrator is highly qualified to manage the entire process. *See Pinon v. Daimler AG*, No. 1:18-cv-3984-MHC, 2021 WL 6285941, at *7 (N.D. Ga. Nov. 30, 2021) (noting importance of an experienced administrator).

iii. The Reasonable Terms Relating to Attorneys' Fees

20. Whether the attorneys' fees are reasonable on their own terms is a Rule 23(h) analysis. By contrast, under Rule 23(e), the question is not of the fee amount in a vacuum, but rather whether attorneys' fees impact the other settlement terms. *See Pinon*, 2021 WL 6285941, at *7 (finding class relief adequate where attorneys' fees negotiated only after reaching agreement on terms of class relief, and payment of fees did not impact amount of relief available to class members, among other things). Here, Class Counsel requests \$2,285,000.00 in attorneys' fees and \$51,300.80 for costs, which by agreement will be paid separately by Delta, meaning there will be no reduction or impact whatsoever on Settlement Class Members' Settlement Benefits. Also, Settlement Class Members' receipt of Settlement Benefits is not conditioned on the attorneys' fee award to Class Counsel. Indeed, the Parties negotiated attorneys' fees and litigation costs only after agreeing to the Settlement Benefits. Thus, and as discussed in detail below, *see infra*, § IV, Class Counsel's requested attorneys' fee award is reasonable in the context of granting Final Approval of the Settlement.

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

21. Rule 23(e)(3) states that “[t]he parties seeking approval must file a statement identifying any agreement made in connection with the proposal.” Here,

there are no other agreements between the Parties.

D. The Equitable Treatment of Settlement Class Members Relative to Others

22. Each Settlement Class member is eligible to receive the same benefits, choosing only between cash or credit. Accordingly, the proposed Settlement treats all Settlement Class members equitably.

23. Thus, applying Rule 23(e), in conjunction with the *Bennett* factors, the Court finds the Class Representative and Class Counsel have adequately represented the Settlement Class, finds the Settlement is a product of extensive arms-length negotiations by seasoned counsel, and that it is fair, reasonable, and adequate.

III. THE COURT CERTIFIES THE SETTLEMENT CLASS

24. The Court hereby finally certifies the following Settlement Class for settlement purposes only pursuant to Federal Rule of Civil Procedure 23(a) and (b)(3):

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, 2023.³

A. The Settlement Class Is Sufficiently Numerous

25. Rule 23(a)(1) requires that the class be so numerous that individual joinder of all plaintiffs is impracticable. There is no rigid standard for determining numerosity, but the Eleventh Circuit has held that, generally, “less than twenty-one is inadequate, more than forty adequate.” *See Sanchez-Knutson v. Ford Motor Co.*, 310 F.R.D. 529, 536 (S.D. Fla. 2015) (quoting *Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir. 1986)).

26. Here, numerosity is satisfied because the Settlement Class has approximately 74,346 members, and joinder of all such persons is impracticable.

B. Questions of Law and Fact Are Common to the Settlement Class

The second prerequisite to class status requires questions of law or fact common to the class. *See Fed. R. Civ. P. 23(a)(2)*. Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349–50 (2011); *see also Williams v. Mohawk Indus., Inc.*, 568 F.3d 1350, 1356 (11th Cir. 2009) (describing plaintiff’s

³ The Settlement Class excludes Delta and its respective subsidiaries 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.

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 by multiple common questions of law and fact for the Settlement Class members, centering on whether ticketholders holding non-refundable tickets on flights scheduled to depart between March 1, 2020, and April 30, 2021, that Delta cancelled and who requested a ticket refund 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 alleged to have been injured in the same or similar way. *See Kleiner v. First Nat. Bank of Atlanta*, 97 F.R.D. 683, 692 (N.D. Ga. 1983) (“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.”). The Court finds the commonality requirement is met.

C. Plaintiff’s Claims Are Typical of Settlement Class Members’ Claims

The third prerequisite to class status mandates that the claims of the putative Class Representatives be typical of the claims held by the broader class, which is not a demanding test. *See* FED. R. CIV. P. 23(a)(3); *Cnty. of Monroe, Fla. v. Priceline.com, Inc.*, 265 F.R.D. 659, 667 (S.D. Fla. 2010). 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 representative 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)). Furthermore, the typicality requirement 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 the Second Amended 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. The Court finds the typicality requirement is met.

D. Plaintiff and Class Counsel Are Adequate Representatives

27. As explained in more detail above in assessing the Settlement’s fairness, adequacy, and reasonableness, the Court finds Plaintiff and Class Counsel satisfy the adequacy of representation requirement. Plaintiff does not have

antagonistic interests to the Settlement Class, and Class Counsel possess the necessary experience and qualifications to lead this litigation. Accordingly, the final prerequisite of class status is also met. *See* FED. R. CIV. P. 23(a)(4); *Columbus Drywall & Insulation, Inc.*, 258 F.R.D. at 555.

E. The Settlement Class Meets the Requirements of Rule 23(b)(3)

28. 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). “Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial.” *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997).

29. The predominance requirement “tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.” *Id.* at 623. “Common issues of fact and law predominate if they have a direct impact on every class member’s effort to establish liability and on every class member’s entitlement to . . . relief.” *Carriuolo v. GM Co.*, 823 F.3d 977, 985 (11th Cir. 2016). Here, Rule 23(b)(3) predominance is readily satisfied because the Contract of Carriage breach of contract liability questions common to all Settlement Class members substantially

outweigh any possible issues that are individual to some Settlement Class member.

30. Further, the Settlement Class members – and their ticket information – are identified from Delta’s records. 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. Thus, there is no risk of individual questions related to damages predominating over common issues *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).

31. Similarly, the simple queries into Delta’s databases make the case administratively feasible and, therefore, weigh in favor of the superiority of a class action here. *See Cherry v. Dometic Corp.*, 986 F.3d 1296, 1303 (11th Cir. 2021). The inquiry into whether the class action is the “superior” method for a particular case focuses on increased efficiency. *Id.* Here, resolution of over 74,000 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).

F. The Notice Program Complied with Due Process and Rule 23

32. In two declarations filed with the Court, the Settlement Administrator advised that the Notice Program was executed in accordance with the Agreement and the Preliminary Approval Order. [Docs. 105-4, 106]. As declared by the Settlement Administrator, the Notice Program reached 88.2% of the Settlement Class and approximately 19% of Settlement Class members (14,096) responded by submitting Claims to the Settlement Administrator. [Doc. 106]. The Settlement Administrator also advised that one Settlement Class member opted out and zero Settlement Class Members objected to the Settlement. *Id.* The name of the opt-out, who will not be bound by the Agreement, is listed in the attached *Exhibit A*.

33. The Notice furnished to Settlement Class members was reasonably calculated, under the circumstances, to apprise 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 the requested attorneys' fees, costs, and Service Award; how to make a claim; and how to obtain additional Settlement information.

34. The Court finds the Settlement Class received the best notice practicable under the circumstances in compliance with due process and Federal Rules of Civil Procedure 23(c)(2) and (e)(1).

35. In addition, the notice given by Delta to state and federal officials

pursuant to 28 U.S.C. § 1715 fully and timely satisfied the requirements of that statute.

IV. APPLICATION FOR ATTORNEYS' FEES AND COSTS

36. Class Counsel request an attorneys' fees award of \$2,285,000.00 and \$51,300.80 for litigation costs incurred in the prosecution of the Action and in connection with the Settlement, to be paid separately by Delta. The Parties negotiated and reached agreement regarding attorneys' fees and costs only after reaching agreement on all other material Settlement terms. The Court finds the requested fee is within the range of reason under the factors listed in *Camden I Condo. Ass'n v. Dunkle*, 946 F.2d 768 (11th Cir. 1991) ("*Camden I*").

37. It is well established that counsel whose work results in a substantial benefit to a class are entitled to a fee under the common benefit doctrine. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). The doctrine serves the "twin goals of removing a potential financial obstacle to a plaintiff's pursuit of a claim on behalf of a class and of equitably distributing the fees and costs of successful litigation among all who gained from the named plaintiff's efforts." *In re Gould Sec. Litig.*, 727 F. Supp. 1201, 1202 (N.D. Ill. 1989). The doctrine also ensures those who benefit are not "unjustly enriched." *Van Gemert*, 444 U.S. at 478. The controlling authority in the Eleventh Circuit is *Camden I*, which holds that fees in common fund

cases must be calculated using the percentage rather than the lodestar approach. *Camden I* does not require any particular percentage. The court stated: “There is no hard and fast rule . . . because the amount of any fee must be determined upon the facts of each case.” 946 F.2d at 774; *see also, e.g., Waters v. Int’l. Precious Metals Corp.*, 190 F.3d 1291, 1294 (1999).

38. Since the Agreement requires Delta to separately pay Class Counsel’s attorneys’ fees, as approved by the Court, it does not provide a finite fund from which attorneys’ fees will be deducted. Rather, regardless of the amount claimed or number of claimants, Settlement Class Members will be eligible to make claims from the total sum of \$27,312,667.22, inclusive of available refunds for Unused Credits or Partial Unused Credits and 7% interest on the original ticket value. Unlike with a limited fund, there will be no prospect of a *pro rata* deduction, nor will there be a deduction from the fund to account for attorneys’ fees. “Where class action settlements are concerned, courts will often classify the fee arrangement as a ‘constructive common fund’ that is governed by common-fund principles even when the agreement states that fees will be paid separately.” *In re Home Depot, Inc., Customer Data Sec. Breach Litig.*, 931 F.3d 1065, 1080 (11th Cir. 2019). This methodology may apply when the amount of attorney’s fees for class counsel is capped by agreement, as here. *Id.*

39. Notably, the Eleventh Circuit confirmed that attorneys' fee awards to class counsel should be included in the calculation of a constructive common fund. *See id.* at 1092 n.26 ("The formula would read like this: (percentage) x (payment to class + expected payment to counsel) = actual payment to counsel."). Settlement Administration Costs are also properly considered to be part of the Settlement Benefit. *See In re Equifax Customer Data Sec. Breach Litig.*, 2020 WL 256132, at *37 (N.D. Ga. Mar. 17, 2020) ("It has long been the practice in this Court to use the gross amount of a common fund in calculating a percentage-based fee award without deducting the costs of notice or administration because notice and administration costs inure to the benefit of the class.") *aff'd in part, rev'd in part*, 999 F. 3d 1247, 1284 (11th Cir. 2021) (affirming "rulings in their entirety, except as to the narrow issue of incentive awards").

40. Additionally, Eleventh Circuit precedent clearly states the calculation should include all the potential relief made available to the class, not just the amount Settlement Class Members choose to claim and what Delta actually pays. *See Waters*, 190 F.3d at 1297 (for purposes of calculating attorneys' fees, approving valuation based on total value of relief available, as "[t]he fact that there were a reduced number of claimants had no effect at all on the amount each class member received"). Indeed, "[t]he Supreme Court has approved the practice of basing

attorneys’ fees off the total possible amount recoverable by members of the class, not the total amount actually recovered, as the ‘right to share the harvest of the lawsuit upon proof of their identity, whether or not they exercise it, is a benefit in the fund created by the efforts of the class representatives and their counsel.’” *Arkin v. Pressman, Inc.*, 38 F.4th 1001, 1006 n.4 (11th Cir. 2022) (citing *Van Gemert*, 444 U.S. at 480); *see also Poertner v. Gillette Co.*, 618 F. App’x 624, 628 n.2 (11th Cir. 2015) (“While no published opinion of ours extends *Camden I*’s percentage-of-recovery rule to claims-made settlements, no principled reason counsels against doing so . . .”).

41. In selecting the percentage in a particular case, a district court should apply the 12 factors from *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717 (5th Cir. 1974), as well any other pertinent factors. *Camden I*, 946 F.2d at 776.⁴ In *Camden I*, although the court noted that awards typically range from 20% to 30%, it stated: “There is no hard and fast rule . . . because the amount of any fee must be determined upon the facts of each case.” *Id.* at 774; *see also, e.g., Waters*, 190 F.3d

⁴ The *Johnson* factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions involved; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the “undesirability” of the case; (11) the nature and the length of the professional relationship with the client; and (12) awards in similar cases. *See Camden I*, 946 F.2d at 772 n.3 (citing *Johnson*, 488 F.2d at 717–19).

at 1294. Awards of up to 25% of the common fund are presumptively reasonable in the Eleventh Circuit. *See Arkin*, 38 F.4th at 1005 n.3.

42. Finally, when analyzing the various factors, a lodestar cross-check is unnecessary. *See, e.g., Shiyang Huang v. Equifax Inc. (In re Equifax Customer Data Sec. Breach Litig.)*, 999 F.3d 1247, 1280 n.26 (11th Cir. 2021). In fact, in the Eleventh Circuit, the lodestar approach should not “impose” the lodestar approach “through the back door.” *See, e.g., SEC v. Davison*, No. 8:20-cv-325-MSS-MRM, 2023 WL 2931641, at *3 (M.D. Fla. Mar. 8, 2023) (citations omitted).” The Eleventh Circuit “made clear in *Camden I* that percentage of the fund is the exclusive method for awarding fees in common fund class actions.” *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d at 1362 (emphasis added) (citing Alba Conte, ATTORNEY FEE AWARDS § 2.7, at 91 n.41 (“The Eleventh . . . Circuit[] repudiated the use of the lodestar method in common-fund cases.”)). Lodestar “encourages inefficiency” and “creates an incentive to keep litigation going in order to maximize the number of hours included in the court’s lodestar calculation.” *Id.* at 1362–63. Thus, “courts in this Circuit regularly award fees based on a percentage of the recovery, without discussing lodestar at all.” *Id.* at 1363; *see also Reyes v. AT&T Mobility Servs., LLC*, No. 10-20837, at *6 (S.D. Fla. Jun. 21, 2013); *In re Takata Airbag Prods. Liability Litig.*, No. 15-02599, at *9–10 (S.D. Fla. Nov. 1, 2017).

43. In light of these factors, the arguments made by Class Counsel, and Class Counsel's Declaration, all submitted with the Motion, the Court finds that Class Counsel's request for an award of attorney's fees in the amount of \$2,285,000.00, *i.e.*, approximately 7.6% of the total value (\$29,895,433.02) of the benefits to the Settlement Class—\$27,312,667.22, inclusive of available refunds and 7% interest to be claimed by Settlement Class Members; attorneys' fees of \$2,285,000.00 to be paid by Delta; \$51,300.80 for litigation costs to be paid by Delta; and \$246,465.00 for estimated Settlement Administration Costs to be paid by Delta—is reasonable and warranted.

V. APPLICATION FOR SERVICE AWARD

44. The Court finds that Class Counsel's request for a Service Award in the amount of \$3,000.00 to be paid to the Class Representative is distinguishable from the type of service award prohibited by *Johnson v. NPAS Solutions, LLC*, 975 F.3d 1244 (11th Cir. 2020), and thus finds that it is appropriate, and the amount requested is reasonable. As courts in the Eleventh Circuit have explained, state law governs the issue of Service Awards in this diversity action. *See, e.g., Roth v. Geico Gen. Ins. Co.*, No. 16-cv62942WPD, 2021 U.S. Dist. LEXIS 23105, at *37 (S.D. Fla. Feb. 8, 2021) (citations omitted); *see also Wheatly v. Moe's Southwest Grill, LLC*, 580 F. Supp. 2d 1324 (N.D. Ga. 2008) (pursuant to *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). Here, Georgia law permits providing Service Awards to class representatives. *See, e.g., Anderson v. Pub. Sch. Emps. Ret. Sys. of Ga.*, Fulton Co. Superior Court, Business Case Div., 2009 Ga. Super. LEXIS 72, *13 (July 8, 2009) (granting request for fees and incentive payment pursuant to Georgia law); *Eaves v. Earthlink, Inc.*, No. 2005-cv-97274, Fulton Co. Superior Court, Business Case Div., 2010 Ga. Super. LEXIS 1532, *26 (granting awards of \$7,500) (June 7, 2010); *Clark v. Bway Holding Co.*, Case No. 2010CV183869, Fulton Co. Superior Court, Business Case Div., 2010 Ga. Super. LEXIS 1518, *9 (Oct. 10, 2010); *see also Roberson v. ECI Group, Inc.*, No. 2017-A-64506-4 (Ga. Sup. Ct. DeKalb Cty. May 21, 2021) (authorizing service award post NPAS).

VI. MISCELLANEOUS

45. Pursuant to Rule 23(c)(3)(B), the Court finds that all Settlement Class Members who did not opt out of the Settlement are bound by the Agreement and this Final Approval Order and Judgment.

46. The Court confirms its earlier appointment of Epiq Class Action & Claims Solutions, Inc. as the Settlement Administrator.

47. The Court finally approves the distribution plan set forth in the

Agreement as a fair and reasonable method to allocate the Settlement Benefits among Settlement Class Members. The Court directs that the Settlement Administrator effectuate the distribution plan according to the terms of the Agreement. The Court reaffirms that any Settlement Class Members who failed to submit a Claim in accordance with the requirements and procedures specified in the Notice shall be forever barred from making a claim, but will in all other respects be subject to and bound by the provisions in the Agreement, the Releases included in that Agreement, and this Final Approval Order and Judgment.

48. By operation of this Final Approval Order and Judgment, as of the Effective Date, the Releases set forth in Section XI of the Agreement shall be given full force and effect.

49. Settlement Class Members are hereby barred and enjoined from asserting any of the Released Claims and pursuing any Released Claims against Delta or its affiliates at any time, including during any appeal from the Final Approval Order.

50. Delta is hereby barred and enjoined from pursuing any of the claims Delta released against Settlement Class Members.

51. The Parties are ordered to implement each and every obligation set forth in the Agreement in accordance with the terms and provisions of the Agreement.

The Court retains jurisdiction over this Action and the Parties, Settlement Class Members, attorneys, and all objectors, and other appointed entities, for all matters relating to this Action, including (without limitation) the administration, supervision, construction, interpretation, effectuation, or enforcement of the Agreement, this Court's injunctions, and this Final Approval Order and Judgment.

52. There is no just reason to delay entry of this Final Approval Order and Judgment and immediate entry by the Clerk of the Court is directed pursuant to Federal Rule of Civil Procedure 54(b).

VII. CONCLUSION

53. In sum, the Court **GRANTS** Plaintiff's "Unopposed Motion for Final Approval of Class Action Settlement and Application for Attorneys' Fees and Costs and a Service Award." [Doc. 105]. Accordingly, the Court **APPROVES** the Agreement. Additionally, the Court **GRANTS** Class Counsel's requested \$3,000.00 Service Award to the Class Representative; \$51,300.80 for costs; and \$2,285,000.00 in attorneys' fees to Class Counsel, all to be paid separately by Delta in accordance with the Agreement. The Court also approves the proposed *cy pres* recipients: Public Justice and United Way of Greater Atlanta, who shall each receive 50% of the residual funds in accordance with the Agreement.

Further, in accordance with the Agreement, the Court **DISMISSES WITH**

PREJUDICE this Action and **DIRECTS** the Clerk to **ENTER JUDGMENT**.

SO ORDERED, this 5th day of October, 2023.

Eleanor L. Ross

ELEANOR L. ROSS
UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF GEORGIA

EXHIBIT A

Leah Arndt