

EXHIBIT C

STATE OF SOUTH CAROLINA	)	IN THE MAGISTRATE COURT
	)	
COUNTY OF GREENVILLE	)	Case No.: 2024-CV-23-2415
	)	
Joshua Hawkins,	)	
	)	
Plaintiff,	)	BRIEF IN SUPPORT OF
	)	DEFENDANT'S MOTION TO DISMISS
vs.	)	IN LIEU OF ANSWER
	)	
Delta Air Lines, Inc.	)	
	)	
Defendant.	)	
	)	

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SC Court of Appeals

COMES NOW, Delta Air Lines, Inc. ("Delta"), by and through the undersigned counsel, and files its Brief in Support of its Motion to Dismiss Plaintiff Joshua Hawkins' Complaint in Lieu of Answer, and in support thereof, states as follows:

INTRODUCTION

The United States government has the exclusive authority to regulate commercial airlines. For international flights, the United States has ratified the Montreal Convention,¹ which provides the exclusive remedies for claims arising from international air travel. For domestic flights, the Airline Deregulation Act ("ADA")² expressly forbids the states from imposing their own standards upon the airlines. Greenville attorney Joshua Hawkins, proceeding *pro se* here, knows this already. In 2020, he sued another airline in a *pro se* action in Circuit Court and he brought similar causes

¹ The full name of the Montreal Convention is "The Convention for the Unification of Certain Rules for International Carriage by Air." Convention for the Unification of Certain Rules for Int'l Carriage by Air, May 28 1999, S. Treaty Doc. No. 106-45, 2242 U.N.T.S. 309, 1999 WL 33292734 (entered into force Nov. 4, 2003), (hereinafter, "Montreal Convention").

² 49 U.S.C. § 41713(b)(1).

of action arising from a different international flight.³ The Circuit Court recognized the clear preemptive scope of the Montreal Convention and the ADA and dismissed those causes of action for lack of subject matter jurisdiction. The Court of Appeals affirmed that decision in April.⁴ There is no reason for this Court to do any differently here.

STANDARDS OF REVIEW

I. Rule 12(b)(1), SCRPC: Lack of Subject Matter Jurisdiction.

When this Court considers its own subject matter jurisdiction, this Court is permitted to “consider[] affidavits or other evidence proving lack of jurisdiction.” *Baird v. Charleston Cnty.*, 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999). “Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.” Rule 12(h)(3), SCRPC. If the Court grants a Rule 12 Motion, the Court is not required to include specific findings of facts or conclusions of law in its order. Rule 52(a), SCRPC; *Santos v. Harris Inv. Holdings, LLC*, 439 S.C. 214, 219, 886 S.E.2d 483, 485–86 (Ct. App. 2023) (collecting cases), *reh’g denied* (May 15, 2023).

II. Rule 12(b)(6), SCRPC: Failure to Allege Facts Sufficient to State a Cause of Action.

To the extent this Court considers Delta’s Rule 12(b)(6), SCRPC motion to dismiss, this Court is limited to the facts as alleged in a plaintiff’s complaint. *Rice-Marko v. Wachovia Corp.*, 398 S.C. 301, 307, 728 S.E.2d 61, 64 (Ct. App. 2012). Nevertheless, this Court is not bound to

³ *Hawkins v. American Airlines, et al.*, Order Granting Defendant American Airlines, Inc.’s Motion to Dismiss at pp. 3-4 ¶¶ 13-14, Greenville County Court of Common Pleas, Case No. 2020-CP-23-01364 (entered August 5, 2020); *see also* Complaint at pp. 4-6, Greenville County Court of Common Pleas, Case No. 2020-CP-23-01364 (filed March 3, 2020) (bringing causes of action in Negligence, Violation of the South Carolina Unfair Trade Practices Act, and Breach of Contract Accompanied by Fraudulent Act, among others).

⁴ *Hawkins v. Am. Airlines*, No. 2020-001150, 2024 WL 1655457 (S.C. Ct. App. Apr. 17, 2024).

EXHIBIT C

rely on *unreasonable* inferences based on the facts alleged. *See Freemantle v. Preston*, 398 S.C. 186, 192, 728 S.E.2d 40, 43 (2012). Nor is this Court required to submit to conclusory allegations contained in a complaint. *See Power Prod. & Servs. Co. v. Kozma*, 379 S.C. 423, 429–30, 665 S.E.2d 660, 663–64 (Ct. App. 2008); *Jones v. Gilstrap*, 288 S.C. 525, 528, 343 S.E.2d 646, 648 (Ct. App. 1986). Again, if the Court grants a Rule 12 Motion, the Court is not required to include specific findings of facts or conclusions of law in its order. Rule 52(a), SCRCPP; *Santos*, 439 S.C. at 219, 886 S.E.2d at 485–86 (collecting cases).

III. Rule 10(c), SCRCPP: Documents Attached to or Incorporated by Reference into a Complaint Are Valid to Consider in a Rule 12 Motion.

When a plaintiff attaches a document as an exhibit to a pleading, the document “is a part thereof for all purposes[.]” Rule 10(c), SCRCPP. Consequently, if there is a conflict between the exhibit and the plaintiff’s allegations, the exhibit controls. *See Estate of Revis by Revis v. Revis*, 326 S.C. 470, 480, 484 S.E.2d 112, 118 (Ct. App. 1997); *see also Goines v. Valley Cmty. Servs. Bd.*, 822 F.3d 159, 166 (4th Cir. 2016) (“[I]f a plaintiff ‘attaches documents and relies upon the documents to form the basis for a claim or part of a claim, dismissal is appropriate if the document negates the claim.’”) (quoting *Thompson v. Illinois Dep’t of Prof’l Regulation*, 300 F.3d 750, 754 (7th Cir. 2002)).

If the plaintiff incorporates documents by reference in the complaint but fails to attach them to the complaint, the document may still be considered part of the pleading for all purposes, even if the document is only presented to the Court as part of a defendant’s Rule 12(b)(6) Motion to Dismiss. *Brazell v. Windsor*, 384 S.C. 512, 516, 682 S.E.2d 824, 826 (2009) (“In our view, allowing a trial court to consider documents that are incorporated by reference in the complaint but not actually attached thereto prevents a plaintiff from benefiting from his own oversight or from surviving a motion to dismiss by intentionally omitting documents upon which their claims

EXHIBIT C

are based.”); *see also Santos*, 439 S.C. at 221 n. 1, 886 S.E.2d at 486 n. 1; *Day v. Taylor*, 400 F.3d 1272, 1276 (11th Cir. 2005). If the Court considers such documents, the Rule 12(b)(6) Motion to Dismiss does not convert to a Rule 56 Motion for Summary Judgment. *Brazell*, 384 S.C. at 516, 682 S.E.2d at 826.

Similarly, this Court may consider documents in the public record, such as court filings, when deciding a Motion to Dismiss without automatically converting the Motion to a Motion for Summary Judgment. *See Blue Tree Hotels Inv. (Canada), Ltd. v. Starwood Hotels & Resorts Worldwide, Inc.*, 369 F.3d 212, 217 (2d Cir. 2004) (“[W]e may also look to public records, including complaints filed in state court, in deciding a motion to dismiss.”); *see also McElveen v. Cincinnati Ins. Co.*, 422 F. Supp. 3d 1068, 1075 n. 5 (D.S.C. 2019) (“The Complaint itself quotes the Order, and Plaintiff does not contest its authenticity.”); *Witthohn v. Fed. Ins. Co.*, 164 F. App’x 395, 397 (4th Cir. 2006) (“[T]he fact that Witthohn’s complaint is barred by res judicata is evident from review of the state court documents, even without consideration of the settlement agreement.”).⁵

RELEVANT PROCEDURAL HISTORY AND PLAINTIFF’S ALLEGATIONS

Delta presents the facts as alleged in the Complaint, but Delta does not admit the accuracy of same. Plaintiff’s Complaint arises from three separate flights—two of which he took while he was already suing Delta.

September 10, 2023: Domestic Flight Allegations (“September 2023 Domestic Flight”).

Plaintiff purchased a round-trip ticket for a flight with Delta from Greenville-Spartanburg International Airport to LaGuardia International Airport, departing September 7, 2023 and

⁵ “Since our Rules of Procedure are based on the Federal Rules [and] where there is no South Carolina law, we look to the construction placed on the Federal Rules of Procedure.” *Gardner v. Newsome Chevrolet-Buick, Inc.*, 304 S.C. 328, 330, 404 S.E.2d 200, 201 (1991).

EXHIBIT C

returning September 10, 2023. (Compl. at ¶¶ 10-11.) Plaintiff admits he took the first flight, using that portion of his ticket, and the first flight had no issues. (See Compl. at ¶ 11.) On September 10, 2023, when Plaintiff went to LaGuardia to use the remaining portion of his ticket, the flight was delayed and then cancelled due to weather. (See Compl. at ¶¶ 11-13.) Plaintiff refused to take the next available flight Delta offered him, which was scheduled to depart two days later. (See Compl. at ¶¶ 16-17, 19.) Instead, he voluntarily drove himself straight home through the night, which “deprived [him] of sleep, which constitutes a physical injury.” (See Compl. at ¶¶ 16-17, 19.) Plaintiff, from his observation at the airport, alleges the weather was fine and he observed “mostly clear conditions” from the ground as he drove himself home. (Compl. at ¶¶ 11, 16.) Plaintiff alleges that Delta never reimbursed him for the cost of “Uber rides, meals, a rental car, pet lodging fees, additional airport parking fees, and . . . 12 hours of personal time.” (Compl. at ¶ 16.) According to Plaintiff, Delta “[n]ever offered to correct the situation it created or damage it caused by offering compensation for . . . any other expenses and damages,” yet, Plaintiff alleges that he refused a refund of SkyMiles. (Compl. at ¶¶ 15, 19.)

September 15, 2023: Plaintiff Files a Suit for the Domestic Flight in this Magistrate Court.

Five days after the cancelled flight, Plaintiff Hawkins, an attorney, filed a lawsuit on his own behalf against Delta in this Magistrate Court. See Complaint, East Greenville Summary Court Magistrate Court, Case No. 2023CV2310304093 (filed Sept. 15, 2023). Plaintiff eventually amended his Complaint on January 24, 2024, to allege damages in excess of the Magistrate Court jurisdictional limit. A few days later, the case was transferred to the Greenville County Circuit Court. See Certificate of Transmittal, Greenville County Court of Common Pleas, Case No. 2024-CP-23-00556 (entered Jan. 26, 2024).

January 2024: New Zealand International Flight Allegations (“January 2024 New Zealand Flight”)

EXHIBIT C

Ironically, also on January 24,⁶ 2024, Plaintiff was slated to take a Delta flight out of Greenville, with several connecting flights, ultimately arriving in Auckland, New Zealand. (*See* Compl. at ¶ 22.) Delta cancelled this flight due to weather conditions. (*See* Compl. at ¶ 22.) Plaintiff alleges he lost the value of the seat on his booked flight against the seat he accepted on the next available flight to Auckland, New Zealand. (*See* Compl. at ¶ 22.) It is unclear whether that “upgraded” seat was specifically purchased by Plaintiff or was simply a complimentary seat upgrade given to Plaintiff as a part of his Delta loyalty club membership. (*See* Compl. at ¶ 22.) Connected with this cancellation, Plaintiff alleges Delta “lost one of the plaintiff’s bags containing thousands of dollars in equipment[.]” (Compl. at ¶ 22.) Because the bag was “lost,” Plaintiff had “no access to that equipment the entire time” he was on his vacation. (*See* Compl. at ¶¶ 22, 44.)

Additionally, because of the flight cancellation, Plaintiff alleges he lost a separate flight from Auckland, New Zealand to Melbourne, Australia provided by Qantas (an Australian airline). (*See* Compl. at ¶ 22.) Plaintiff similarly alleges he lost the value of the seat on his booked Qantas flight against the seat he accepted on the replacement Qantas flight to Melbourne. (*See* Compl. at ¶ 22.)

Plaintiff advised Delta about the “lost” bag, but “Delta could not accurately tell the plaintiff where his bags were.” (*See* Compl. at ¶ 46.) After Plaintiff “spent significant time on wild goose chases effectuated by Delta,” he found the “lost” bag in the possession of a third-party vendor in a “back room” at the Melbourne Airport. (*See* Compl. at ¶¶ 45-46.) Plaintiff alleges he notified Delta that this bag was damaged. (*See* Compl. at ¶ 45.) Plaintiff appears to have had no issues on his return to the United States. (*See* Compl. at ¶¶ 22, 45-46.)

⁶ The specific date was revealed in the prior case, but this Court need not consider this exact date in rendering its decision.

EXHIBIT C

March and April 2024: Second Amended Complaint, Court of Appeals Ruling, and Joint Stipulation of Dismissal.

After his vacation to New Zealand and Australia, in March 2024, Plaintiff filed a Second Amended Complaint in Circuit Court adding claims for the January 2024 New Zealand Flight. In total, Plaintiff alleged the following causes of action for both the September 2023 and January 2024 flights: (1) Negligence/Gross Negligence/Recklessness; (2) Unfair Trade Practices Act Violation; (3) Breach of Contract Accompanied by a Fraudulent Act; and (4) Montreal Convention. *See* Second Am. Compl., Greenville County Court of Common Pleas, Case No. 2024-CP-23-00556 (filed March 15, 2024). On the morning of April 9, 2024, the day Delta's Motion to Dismiss was set to be heard, Plaintiff and Delta entered into and filed a Joint Stipulation of Dismissal. In that Joint Stipulation, Plaintiff agreed to dismiss the following causes of action with prejudice (1) Negligence/Gross Negligence/Recklessness; (2) Unfair Trade Practices Act Violation; and (3) Breach of Contract Accompanied by a Fraudulent Act. (Exhibit C to Delta's Motion to Dismiss, Joint Stipulation of Dismissal without Prejudice at ¶ 1.) All other causes of action, Plaintiff dismissed without prejudice, with Plaintiff allowed to refile an action on or before October 12, 2024. (Exhibit C to Delta's Motion to Dismiss, Joint Stipulation of Dismissal without Prejudice at ¶ 3.)

Eight days later, and in a separate matter, the Court of Appeals affirmed the Circuit Court's Order dismissing a 2020 lawsuit Plaintiff Hawkins filed against American Airlines and other defendants arising from similar flight and baggage delays. *See Hawkins v. Am. Airlines*, No. 2020-001150, 2024 WL 1655457 (S.C. Ct. App. Apr. 17, 2024) (unpublished). The Court of Appeals affirmed the Circuit Court's ruling that Plaintiff could not bring his state law claims, because they were preempted by the Montreal Convention and the ADA. *See id.*

EXHIBIT C

April 2024: Portugal International Flight Allegations (“April 2024 Portugal Flight”).

At some time in April 2024, Plaintiff again chose to fly with Delta to Lisbon, Portugal. (Compl. at ¶ 23.) While this flight was not cancelled or delayed by weather, Plaintiff only alleges that Delta “failed to deliver the plaintiff’s luggage to his destination as scheduled.” (Compl. at ¶ 23.) Without this luggage, Plaintiff was “without clothing and essential items for a significant period of time.” (Compl. at ¶ 23.) Plaintiff claims the luggage was damaged, and that Delta never reimbursed him for these expenses. (Compl. at ¶¶ 23, 44, 51-52.)

June 2024: Plaintiff Files Suit In this Court, Bringing Claims He Knows Are Preempted and Claims He Voluntarily Dismissed with Prejudice.

On June 11, 2024, Plaintiff filed his new lawsuit in this Court bringing four causes of action ([1] “Montreal Convention”; [2] “Warsaw Convention”; [3] “Claim for a Declaratory Judgment and Breach of Contract”; and [4] “Fraud”) in connection with all three flights. In his Complaint, however, Plaintiff brings causes of action that he knows or should know are preempted by the Montreal Convention and/or the ADA. Further, like a Trojan horse, Plaintiff sets forth the claims he voluntarily dismissed with prejudice under the label of other causes of action. The Court should not hesitate to dismiss these claims.

LEGAL ARGUMENT

I. Rule 12(b)(1) Motion to Dismiss: This Court Lacks Subject Matter Jurisdiction Over the Majority of Plaintiff’s Complaint because Federal Law Preempts the Majority of Plaintiff’s Complaint.

This Court is not the proper tribunal to hear the majority of the causes of action in Plaintiff’s Complaint, and this Court should dismiss them.

a. Preemption is a Subject Matter Jurisdiction Issue.

If a court has “the power to hear and determine cases of the general class to which the proceedings in question belong,” then the court has jurisdiction over the subject matter of those

EXHIBIT C

cases. *McLendon v. S.C. Dep't of Highways & Pub. Transp.*, 313 S.C. 525, 525, 443 S.E.2d 539, 540 (1994). If a federal law and a state law conflict, then the “federal law prevails and state law is preempted.” *Murphy v. Nat'l Collegiate Athletic Ass'n*, 584 U.S. 453, 471, 138 S. Ct. 1461, 1476, 200 L. Ed. 2d 854 (2018) (citing U.S. Const. art. VI, cl. 2). If federal law preempts state law, then a state court does not have the power to hear and determine cases of those preempted state laws, and therefore the state court lacks subject matter jurisdiction. *See, e.g., Baker Hosp. v. Isaac*, 301 S.C. 248, 250, 391 S.E.2d 549, 551 (1990) (“The [Court of Appeals of Michigan] properly noted that the pre-emption contention was one involving subject matter jurisdiction.”).

Whether a court has subject matter jurisdiction is “fundamental,” and therefore no one can “waive” a court’s lack of subject matter jurisdiction. *Anderson v. Anderson*, 299 S.C. 110, 115, 382 S.E.2d 897, 900 (1989). Even this Court has the responsibility to examine its own subject matter jurisdiction and may do so at any time upon the Court’s own motion. *Tatnall v. Gardner*, 350 S.C. 135, 137, 564 S.E.2d 377, 378 (Ct. App. 2002); *Nix v. Columbia Staffing, Inc.*, 322 S.C. 277, 280, 471 S.E.2d 718, 719 (Ct. App. 1996); Rule 12(h)(3), SCRPC.

b. The Montreal Convention Preempts All Claims Related to International Travel.

Treaties are “the law of the land” and are construed as federal laws. *See El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 167, 119 S. Ct. 662, 671, 142 L. Ed. 2d 576 (1999).⁷ For

⁷ The *Tseng* Court interpreted the preceding Warsaw Convention, upon which the Montreal Convention was based. *See, e.g., Yoly Farmers Corp. v. Delta Air Lines, Inc.*, No. 15 CIV. 2774 BMC, 2015 WL 4546744, at *3 (E.D.N.Y. July 28, 2015). Consequently, cases interpreting substantively similar provisions of the Warsaw Convention are persuasive authority for interpretations of relative Montreal Convention provisions. *We CBD, LLC*, 109 F.4th at 302 n. 4; *Nwokeji*, 2017 WL 4167433, at *8 (collecting cases); *Yoly Farmers Corp.*, 2015 WL 4546744, at *3 (collecting cases).

EXHIBIT C

lawsuits surrounding international flights,⁸ the Montreal Convention governs:

In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable.

Montreal Convention, art. 29 (emphases added). If a claim “falls within one of the Montreal Convention’s three damage provisions,” then that claim is preempted by the Montreal Convention. *We CBD, LLC v. Planet Nine Priv. Air, LLC*, 109 F.4th 295, 303 (4th Cir. 2024) (quoting *Badar v. Swissport USA, Inc.*, 53 F.4th 739, 744 (2d Cir. 2022)). To determine whether a claim falls within the scope of the Montreal Convention, the Court must step back and take “an ‘assessment of the total circumstances’—which assesses the spatial and temporal proximity of and the causal connection between the events giving rise to the claim.” *We CBD, LLC*, 109 F.4th at 303 (quoting *Eid v. Alaska Airlines, Inc.*, 621 F.3d 858, 873 (9th Cir. 2010)). “A passenger whose claim implicates, but is not compensable under the Montreal Convention, has no recourse to an alternate remedy.” *Nwokeji v. Arik Air*, No. CV 15-10802-MLW, 2017 WL 4167433, at *9 (D. Mass. Sept. 20, 2017) (citing *Tseng*, 525 U.S. at 171-72, 119 S. Ct. at 672–73).

i. The Montreal Convention Preempts Causes of Action II through IV as to Both International Flights.

Because Plaintiff’s two international flights implicate the Montreal Convention, all non-Montreal Convention causes of action are preempted. For the January 2024 Flight to New Zealand,

⁸ The United States, New Zealand, and Portugal are all signatories to the Montreal Convention. See International Civil Aviation Organization, Current Lists of Parties to Multilateral Air Law Treaties, Convention for the Unification of Certain Rules for International Carriage by Air, Done at Montreal on 28 May 1999 (available at www.icao.int/secretariat/legal/List%20of%20Parties/Mtl99_EN.pdf).

EXHIBIT C

Plaintiff alleges Delta delayed a flight and such delay caused one of his bags to be delayed. (Compl. at ¶ 22.) Articles 19 and 22 of the Montreal Convention govern disputes related to the delay of passengers and baggage. Therefore, any non-Montreal Convention cause of action arising from Plaintiff's January 2024 flight to New Zealand/Australia is preempted by the Montreal Convention.

For the April 2024 Flight to Portugal, Plaintiff alleges Delta delayed one of Plaintiff's bags and damaged the bag while handling it. (Compl. at ¶ 23.) Again, Articles 19 and 22 of the Montreal Convention govern disputes surrounding baggage delays, and Articles 17 and 22 govern disputes surrounding damage of checked baggage. Likewise, any non-Montreal Convention cause of action arising from Plaintiff's April 2024 flight to Portugal is also preempted by the Montreal Convention.

In other words, because the "total circumstances" of the alleged injuries surrounding these two flights was allegedly caused by a flight delay, baggage delays, and damage to a bag, these two flights are governed by the Montreal Convention only. Each non-Montreal Convention cause of action falls within the Montreal Convention's sweep.

Plaintiff's second cause of action—"Warsaw Convention"—is preempted because the Montreal Convention replaced the Warsaw Convention. "The Montreal Convention is a multilateral treaty negotiated and signed in 1999 . . . to harmonize the private international air laws and also to amend important provisions of the predecessor Warsaw Convention, which was signed in October 1929." *We CBD, LLC*, 109 F.4th at 301. Because the Montreal Convention replaced the Warsaw Convention, this Court lacks subject matter jurisdiction to entertain Plaintiff's causes of action under the Warsaw Convention.

Plaintiff's third cause of action, "Claim for a Declaratory Judgment and Breach of

EXHIBIT C

Contract,” is also preempted by the Montreal Convention. Again, Article 29 catches this third cause of action in its sweep: “In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention[.]” Montreal Convention, art. 29 (emphasis added). In this “hybrid” cause of action, Plaintiff attempts to escape Article 29 by attacking the “fairness” of the International Contract of Carriage, with respect to these two international flights. (Compl. at ¶¶ 64-65.) However, the “total circumstances” of this controversy boil down to Plaintiff’s grievances surrounding his international flight delay and alleged baggage delays and damage. The Montreal Convention squarely governs these international flights and preempts this third cause of action.⁹

Finally, Plaintiff’s fourth cause of action for Fraud is also preempted by the Montreal Convention, because the alleged fraud is directly connected to the flight/baggage delays and baggage damage. This cause of action, vaguely pleaded, appears to allege that Delta lied to Plaintiff about the loss of his luggage in the international flight(s). (See Compl. at ¶ 71.) Again, in the “total circumstances,” this alleged “fraud” or “lying” directly relates to Delta’s “decisions to **cancel flights** and mislead the plaintiff . . . about **loss and damage related to luggage**[.]” (Compl. at ¶ 71 (emphases added).) This cause of action falls clearly within the scope of the Montreal Convention and is thus preempted by the Montreal Convention.

Plaintiff should know his non-Montreal Convention causes of action are preempted. In a recent case where Plaintiff Hawkins sued American Airlines and others over another international flight, the Greenville County Circuit Court dismissed his state law claims. *Hawkins v. American*

⁹ The ADA, as discussed below, likewise prevents the Court from considering this claim if the Montreal Convention does not apply.

Airlines, et al., Order Granting Defendant American Airlines, Inc.’s Motion to Dismiss at pp. 2-3 ¶¶ 4-8, Greenville County Court of Common Pleas, Case No. 2020-CP-23-01364 (entered Aug. 5, 2020); *see also* Complaint at pp. 4-6, Greenville County Court of Common Pleas, Case No. 2020-CP-23-01364 (filed March 3, 2020) (bringing causes of action in Negligence, Violation of the South Carolina Unfair Trade Practices Act, and Breach of Contract Accompanied by Fraudulent Act, among others). The South Carolina Court of Appeals affirmed that Order in April 2024, writing: “Specifically, we hold the circuit court did not err in finding Hawkins’s tort and Unfair Trade Practices Act (UTPA) claims for damages due to flight delays and delayed baggage were preempted by the Montreal Convention.” *Hawkins v. Am. Airlines*, No. 2020-001150, 2024 WL 1655457, at *1 (S.C. Ct. App. Apr. 17, 2024) (footnote omitted) (unpublished).

Likewise, this Court has no subject matter jurisdiction over the three non-Montreal Convention causes of action with respect to Plaintiff Hawkins’ two international flights. This Court should dismiss them accordingly.

c. The Airline Deregulation Act Preempts All State Law Claims Relating to an Airline’s Price, Route, or Service.

With respect to Plaintiff’s September 2023 Domestic Flight, all Plaintiff’s state law causes of action are preempted by the Airline Deregulation Act (“the ADA”). *See* 49 U.S.C. § 41713(b)(1). The ADA expressly preempts “a State” from “enforc[ing] a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier[.]” 49 U.S.C. § 41713(b)(1). The United States Supreme Court outlined the preemptive scope of the ADA:

[T]he Court determined: (1) that “[s]tate enforcement actions having a connection with, or reference to,” carrier “‘rates, routes, or services’ are pre-empted,” (2) that such pre-emption may occur even if a state law’s effect on rates, routes, or services “is only indirect,” (3) that, in respect to pre-emption, it makes no difference whether a state law is “consistent” or “inconsistent” with federal regulation, and (4) that pre-emption occurs at least where state laws have a “significant impact” related to

EXHIBIT C

Congress' deregulatory and pre-emption-related objectives[.]

Rowe v. New Hampshire Motor Transp. Ass'n, 552 U.S. 364, 370–71, 128 S. Ct. 989, 995, 169 L. Ed. 2d 933 (2008) (emphases omitted) (citations omitted) (citing and quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 112 S. Ct. 2031, 119 L. Ed. 2d 157 (1992)).

“To determine whether a claim has a connection with, or reference to an airline’s prices, routes, or services, we must look at the facts underlying the specific claim.” *Smith v. Comair, Inc.*, 134 F.3d 254, 259 (4th Cir. 1998). If a claim has such a connection, then the claim is preempted by the ADA. *See id.* Like the Montreal Convention, the ADA preemptive scope has a broad sweep, covering state laws like consumer fraud / unfair trade practices acts,¹⁰ causes of action in

¹⁰ Courts routinely dismiss these types of claims. *Román v. Spirit Airlines, Inc.*, No. 19-CIV-61461-RAR, 2020 WL 255202, at *3 (S.D. Fla. Jan. 14, 2020) (“[T]he Court finds that Plaintiffs’ [Florida Deceptive and Unfair Trade Practices Act] claim is preempted by the [Airline Deregulation Act][.]”); *Ferrell v. Air EVAC EMS, Inc.*, 900 F.3d 602, 606 (8th Cir. 2018) (“In our view, preemption applies most obviously to Ferrell’s Second Cause of Action” for violations of the Arkansas Deceptive Trade Practices Act.); *Rivera v. JetBlue Airways Corp.*, No. 3:17-CV-00960 (JAM), 2018 WL 264735, at *2 (D. Conn. Jan. 2, 2018) (“Because a [Connecticut Unfair Trade Practices Act (“CUTPA”)] violation involves a state-imposed regulation that exceeds the obligations imposed by the parties’ contract, the [Airline Deregulation Act] clearly preempts plaintiff’s CUTPA claim.”); *Levitt v. Sw. Airlines Co.*, 846 F. Supp. 2d 956, 960 (N.D. Ill. 2012) (holding Airline Deregulation Act preempted claims brought under the Illinois Consumer Fraud Act and the Pennsylvania Consumer Fraud Act); *Shulick v. United Airlines*, No. CIV.A. 11-1350, 2012 WL 315483, at *4–6 (E.D. Pa. Feb. 2, 2012) (holding the Airline Deregulation Act preempted claim under Pennsylvania Unfair Trade Practices and Consumer Protection Law arising out of flight delays); *Blackwell v. SkyWest Airlines, Inc.*, No. 06CV0307DMSAJB, 2008 WL 5103195, at *20 (S.D. Cal. Dec. 3, 2008) (holding Airline Deregulation Act preempted claim brought under California’s Unfair Business Practices Act); *De Jesus v. Am. Airlines, Inc.*, 532 F. Supp. 2d 345, 355 (D.P.R. 2007) (“[T]he laws and regulations of Puerto Rico prohibiting and regulating deceptive advertising of airline fares are totally preempted by the Airline Deregulation Act.”) (emphasis added); *In re Am. Airlines, Inc., Priv. Litig.*, 370 F. Supp. 2d 552, 563 (N.D. Tex. 2005) (holding action brought under Texas Deceptive Trade Practices-Consumer Protection Act, among other claims, “are expressly preempted because they relate to at least one of American’s services”); *Howell v. Alaska Airlines, Inc.*, 99 Wash. App. 646, 648, 652–53, 994 P.2d 901, 902, 905 (2000) (finding claim under Washington’s Consumer Protection Act preempted by the Airline Deregulation Act). *See also UPS Store, Inc. v. Hagan*, No. 14CV1210, 2015 WL 9256973, at *3 (S.D.N.Y. Nov. 18, 2015) (relying on *Wolens’* interpretation of Airline Deregulation Act preemptive scope to hold New York’s anti-deceptive acts and practices act, New York General

EXHIBIT C

negligence or fraud,¹¹ false imprisonment,¹² intentional infliction of emotional distress,¹³ and declaratory judgment.¹⁴ Again, the Court of Appeals recently affirmed an Order dismissing Plaintiff Hawkins' claims against American Airlines based on the ADA. *See Hawkins*, 2024 WL 1655457, at *1 (unpublished) ("As to Hawkins's claims regarding insufficient services rendered, the circuit court properly found these claims were preempted by the Airline Deregulation Act of 1978 (ADA). . . . Here, it is clear Hawkins's claims relating to airport staffing and the failure to credit him airline rewards miles fall within the scope of claims preempted by the ADA.").

i. The Wolens Exception.

Only certain breach of contract claims are excepted from the ADA's preemptive scope: Those where the plaintiff seeks the Court to enforce "a term the airline itself stipulated." *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 232–33, 115 S. Ct. 817, 826, 130 L. Ed. 2d 715 (1995). This exception is sometimes referred to as the "*Wolens* Exception" and is narrow in its scope. *See*,

Business Law § 349, was preempted by Federal Aviation Administration Authorization Act); *Delta Air Lines, Inc. v. Black*, 116 S.W.3d 745, 757 (Tex. 2003) (finding negligent misrepresentation claim preempted by Airline Deregulation Act because negligent misrepresentation regulates trade conduct comparably to a state consumer fraud act).

¹¹ *See e.g., Wolens*, 513 U.S. at 235, 115 S. Ct. at 827 (Steves, J., concurring in part and dissenting in part) (" . . . I do not agree with the Court's disposition of their consumer-fraud claims. In my opinion, private tort actions based on common-law negligence or fraud, or on a statutory prohibition against fraud, are not pre-empted.").

¹² *See Smith v. Comair, Inc.*, 134 F.3d 254, 259 (4th Cir. 1998).

¹³ *See Smith*, 134 F.3d at 259.

¹⁴ *See In re LATAM Airlines Grp. S.A.*, No. 20-11254 (JLG), 2022 WL 3965697, at *16 (Bankr. S.D.N.Y. Aug. 31, 2022) ("Put simply, if the Court granted Plaintiff relief under Count One [for declaratory judgment] and declared the No-Show Policy void, or found that LATAM has an affirmative duty to obtain the consent of its passengers prior to the cancellation of return flights, that would have a significant effect on LATAM's prices because it would not be able to resell the cancelled seats."), *aff'd sub nom. In re Latam Airlines Grp. S.A.*, No. 22-CV-8068 (ER), 2023 WL 4741335 (S.D.N.Y. July 25, 2023).

EXHIBIT C

e.g., *Buck v. Am. Airlines, Inc.*, 476 F.3d 29, 35 (1st Cir. 2007) (“[I]n order to avoid preemption, the plaintiffs in this case must demonstrate either that their state-law claims do not constitute state enforcement related to airline prices or services, or that they can navigate the straits of the *Wolens* exception.”). In *Wolens*, the Court held that a state court may entertain a plaintiff’s claim asking the court to enforce a contract provision in an airline’s contract as is, but the state court *cannot* entertain a breach of contract claim asking the state court to apply a law, policy, or “enlargement or enhancement based on state laws or policies external to the agreement.” *See Wolens*, 513 U.S. at 233, 115 S. Ct. at 826.

For example, the Supreme Court disallowed a breach of contract claim based on the theory of breach of the implied covenant of good faith and fair dealing. *See Northwest, Inc. v. Ginsberg*, 572 U.S. 273, 288, 134 S. Ct. 1422, 1433, 188 L. Ed. 2d 538 (2014). In *Ginsberg*, Minnesota law provided that a covenant of good faith and fair dealing was implied in every contract. *Id.*, 572 U.S. at 286–87, 134 S. Ct. at 1432. That is, no party could contract around that covenant of good faith and fair dealing. *Id.* Because that covenant was imposed on every contract by operation of state law, the Supreme Court held that the covenant of good faith and fair dealing was not a term that “the airline itself stipulated” but a term “external to the agreement.” *See id.*; *see also Wolens*, 513 U.S. at 232–33, 115 S. Ct. at 826. In effect, Minnesota law, as applied to the airline’s contract, acted as a state regulation of the airline’s price, route, or services. *See Ginsberg*, 572 U.S. at 283, 134 S. Ct. at 1430. Therefore, that breach of contract cause of action did not meet the *Wolens* Exception and was preempted by the ADA. *Id.*, 572 U.S. at 287, 134 S. Ct. at 1432.

Similarly, a “breach of contract” claim where a plaintiff asks a state court *not* to enforce the terms of the airline’s contract is also preempted. After all, in such a case, the state court would be doing the *opposite* of enforcing a term “the airline itself [not a state] stipulated.” *See Wolens*,

513 U.S. at 232–33, 115 S. Ct. at 826. The Bankruptcy Court in the Southern District of New York put it like this:

The Plaintiff's unjust enrichment claim is not based upon a breach of contract. The Plaintiff is not seeking to enforce LATAM's self-imposed contractual obligations. Rather, it seeks a determination that the No-Show Policy in the Transport Agreement is unenforceable. Further, the unjust enrichment claim is a creature of Florida state common law. Therefore, such claim is within the scope of the ADA's preemption provision. . . . Plaintiff's claims seek the opposite of effectuating the parties' intentions; it maintains that it would be unjust enrichment to allow the No-Show Policy to be effectuated as written and communicated.

In re LATAM Airlines Grp. S.A., 2022 WL 3965697, at *12-13. Again, the *Wolens* Exception must stay within the bounds of the ADA's language that a "State . . . may not . . . enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier[.]" 49 U.S.C. § 41713(b)(1) (emphasis added). The State does not offend this statute by enforcing the parties' own contract as is, since neither party is "a State." *See Wolens*, 513 U.S. at 228–29, 115 S. Ct. at 824.

Ultimately, for a breach of contract cause of action to survive under the *Wolens* Exception, the claim must clearly demonstrate that the Court will be asked only to enforce a specific term of the contract itself as is—not asked to impose a term outside of the contract nor asked to modify the contract. Plaintiff's Complaint asks for far more.

ii. The Airline Deregulation Act Preempts Causes of Action III and IV¹⁵ as to the September 2023 Domestic Flight.

¹⁵ It does not appear Plaintiff includes the September 2023 Domestic Flight in his first two causes of action for "Montreal Convention" and "Warsaw Convention." As explained above, the Montreal Convention supersedes the Warsaw Convention, and the Montreal Convention only applies to *international* flights, including domestic flights that are ultimately part of an international trip. *See* Montreal Convention, art. 1(2)-(3). The September 2023 Domestic Flight was wholly domestic.

As noted earlier, to the extent the Montreal Convention fails to preempt any non-Montreal Convention cause of action for Hawkins' two other international flights, the ADA's preemptive scope would still apply to such claims.

EXHIBIT C

In Plaintiff's catchall third cause of action, labeled "Claim for a Declaratory Judgment and Breach of Contract," Plaintiff asks this Court to do everything but enforce the Domestic Contract of Carriage with respect to Plaintiff's September 2023 Domestic Flight. Plaintiff begins this cause of action by alleging that "Delta's terms and contract of carriage does not allow a bargained-for exchange, is wholly one-sided and unfair, is not presented in a fair way, is unconscionable, and presents a contract of adhesion." (*See* Compl. at ¶ 59.) The subsequent allegations further repeat these allegations and include a general allegation that "Delta engaged in . . . [a] [v]iolation and breach of general duties of good faith and fair dealing." (Compl. at ¶ 65.) Of course, *Ginsberg* squarely applies to this cause of action because the Supreme Court held that state-imposed covenants of good faith and fair dealing, such as South Carolina's, are preempted by the ADA. *See Ginsberg*, 572 U.S. at 287, 134 S. Ct. at 1432 ("When the law of a State does not authorize parties to free themselves from the covenant, a breach of covenant claim is pre-empted under the reasoning of *Wolens*."); *Com. Credit Corp. v. Nelson Motors, Inc.*, 247 S.C. 360, 366–68, 147 S.E.2d 481, 484 (1966) (South Carolina law) ("[T]here exists in every contract an implied covenant of good faith and fair dealing."); *see also Stuart Enterprises Int'l, Inc. v. Peykan, Inc.*, 252 Ga. App. 231, 233, 555 S.E.2d 881, 883–84 (2001) (Georgia law)¹⁶ ("The implied covenant of good faith and fair dealing in performing a contract has a basis in both statutory and common law. . . . There is also a common law duty to diligently and in good faith seek to comply with all portions of the terms of a contract."). Plaintiff asks this Court to violate such clear and established precedent in this shotgun cause of action.

Moreover, Plaintiff asks for a general, non-particularized "declaration as to the rights and

¹⁶ The Contracts of Carriage are governed by Georgia law. (Exhibit A to Delta's Motion to Dismiss, Contract of Carriage, Rule 24 at p. 25; Exhibit B to Delta's Motion to Dismiss, Contract of Carriage, Rule 26 at p. 31.)

EXHIBIT C

obligations of the parties affected by Delta's terms and its contract of carriage," "the validity of Delta's terms and contract, which conduct is governed by Delta's terms and contract, and whether Delta's conduct and rules adhere to governing law." (See Compl. at ¶¶ 62-68.) Plaintiff ultimately asks this Court to declare that "Delta's contract and its terms should be ruled to be void and unconscionable." (Compl. at ¶ 60.) This third cause of action is preempted by the ADA because it asks the Court to apply South Carolina policy to the Domestic Contract of Carriage rather than objectively applying its written terms as is. See *In re LATAM Airlines Grp. S.A.*, 2022 WL 3965697, at *12-13. This cause of action fails to meet the *Wolens* Exception and remains preempted by the ADA.

Equally, Plaintiff's fourth cause of action for Fraud is preempted because it directly relates to Delta's prices, routes, and/or services. Plaintiff sets forth a vague Fraud cause of action, which, as far as is applicable to the September 2023 Domestic Flight, alleges that Delta canceled Plaintiff's return flight from New York without a valid reason. (See Compl. at ¶ 71.) This direct connection to the flight service is fatal: Because the "Fraud" directly relates to the provision of a flight, the ADA preempts it.

Other tort claims are similarly preempted when they have a direct connection to the provision of an airline's flight service.¹⁷ For example, when a man was not permitted to board a flight without having any identification, the U.S. Court of Appeals for the Fourth Circuit determined that the ADA preempted the man's false imprisonment and intentional infliction of

¹⁷ Only tort claims that have a genuinely attenuated connection to the flight service are exempt, such as a UPS delivery person's stacking of boxes previously delivered by air. *Eggleston v. United Parcel Serv., Inc.*, 428 S.C. 373, 382, 834 S.E.2d 713, 717 (Ct. App. 2019) (citing New York case against UPS where such claim was not preempted by ADA). Plaintiff's claims here, and his alleged injuries, directly relate to the allegedly wrongful flight delay and cancellation. In other words, if the Court entertained Plaintiff's tort claim, the Court would be directly regulating how Delta decides to delay or cancel flights in the face of weather.

EXHIBIT C

emotional distress claims. *See Smith v. Comair, Inc.*, 134 F.3d 254, 256, 259 (4th Cir. 1998). As referenced above, the Fourth Circuit evaluated the suit using the logical case-by-case test: “To determine whether a claim has a connection with, or reference to an airline’s prices, routes, or services, we must look at the facts underlying the specific claim.” *Id.* at 259. The tort claims in *Smith* were based on the airline’s refusal to let the man board the flight, and as a result, the Fourth Circuit found that “[u]ndoubtedly, boarding procedures are a service rendered by an airline[,] . . . [t]herefore[,] to the extent Smith’s claims are based upon Comair’s boarding practices, they clearly relate to an airline service and are preempted under the ADA.” *Id.*

Here, Plaintiff’s Fraud claim is based on Delta’s flight service, specifically Delta’s justification for delaying and cancelling Plaintiff’s September 2023 Domestic Flight. After all, Plaintiff alleges that Delta wrongfully blamed the cancellation on the weather. Compl. at ¶ 71. Under the *Smith* test, in order for this cause of action for Fraud to survive preemption, it must *not* have any genuine connection with or reference to Delta’s services as an airline. *Smith*, 134 F.3d at 259. The facts surrounding these allegations of fraud, however, directly relate to the provision of Delta’s service—a *flight*. As a result, Plaintiff’s cause of action for Fraud is preempted by the ADA and should be dismissed by this Court.

Ultimately, this Court is not the proper tribunal for Plaintiff to bring the claims preempted by the ADA. And contrary to the fallacy that no relief in *this* Magistrate Court is no relief at all, the Supreme Court listed the ADA’s intended tribunals to regulate the airlines: (1) the court of public opinion and (2) the Department of Transportation:

The ADA is based on the view that the best interests of airline passengers are most effectively promoted, in the main, by allowing the free market to operate. If an airline acquires a reputation for mistreating the participants in its frequent flyer program (who are generally the airline’s most loyal and valuable customers), customers can avoid that program and may be able to enroll in a more favorable rival program.

Federal law also provides protection for frequent flyer program participants. Congress has given the Department of Transportation (DOT) the general authority to prohibit and punish unfair and deceptive practices in air transportation and in the sale of air transportation, 49 U.S.C. § 41712(a), and Congress has specifically authorized the DOT to investigate complaints relating to frequent flyer programs. *See* FAA Modernization and Reform Act of 2012, § 408(6), 126 Stat. 87. Pursuant to these provisions, the DOT regularly entertains and acts on such complaints.

Ginsberg, 572 U.S. at 288–89, 134 S. Ct. at 1433 (2014) (Alito, J., writing for unanimous Court).¹⁸

II. Rule 12(b)(6) Motion to Dismiss: Plaintiff's Complaint Fails to Allege Facts Sufficient to Constitute Valid Causes of Action.

To the extent portions of Plaintiff's Complaint survive the preemptive scope of the Montreal Convention or the Airline Deregulation Act, several of Plaintiff's causes of action should be dismissed.

a. Montreal Convention Cause of Action Cannot Provide for Plaintiff's "Inconvenience."

With regard to his flight and baggage delays, Plaintiff places great weight on the allegation that he did not have access to his delayed bag while he was in New Zealand/Australia (Compl. at ¶¶ 22, 44) or in Portugal (Compl. at ¶¶ 23, 44). These delays allegedly caused Plaintiff to suffer "some or all of the following," including "psychological trauma," "mental anguish," "mental distress," "anxiety," "emotional injury," "discomfort and inconvenience," "loss of enjoyment of

¹⁸ In Paragraph 38 of the Complaint Plaintiff appeals to the Federal Aviation Act's "savings clause," which predated the ADA, arguing that it provides an exception to the broad preemptive effect of the ADA. The Supreme Court dispensed with this:

[W]e have described the Federal Aviation Act saving clause as "a relic of the pre-ADA/no pre-emption regime." . . . That provision applies to the entire, sprawling Federal Aviation Act, and not just to the ADA, and as we held in *Morales*, this "general 'remedies' saving clause cannot be allowed to supersede the specific substantive pre-emption provision."

Ginsberg, 572 U.S. at 282–84, 134 S. Ct. at 1430 (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 385, 112 S. Ct. 2031, 2037, 119 L. Ed. 2d 157 (1992)).

EXHIBIT C

life,” and “inconvenience.” (See Compl. at ¶¶ 28, 50.) These damages are not recoverable.

The Montreal Convention replaced the Warsaw Convention but cases interpreting the Warsaw Convention’s similarly worded provisions are honored as persuasive authority. *See, e.g., We CBD, LLC*, 109 F.4th at 302 n. 4 (joining five other circuit courts of appeals in recognizing such authority). Under the Warsaw Convention, the United States Supreme Court held that a plaintiff could “not allow recovery for purely mental injuries.” *E. Airlines, Inc. v. Floyd*, 499 U.S. 530, 534, 111 S. Ct. 1489, 1493, 113 L. Ed. 2d 569 (1991). “Purely mental injuries” includes “inconvenience damages” and “emotional distress damages.” *See Lee v. Am. Airlines Inc.*, 355 F.3d 386, 387 (5th Cir. 2004) (affirming partial judgment on the pleadings dismissing claims for “inconvenience” and finding the loss of a “full day of a memorable refreshing vacation” not recoverable); *see Seshadri v. Brit. Airways PLC*, No. 3:14-CV-00833-BAS, 2014 WL 5606542, at *10 (S.D. Cal. Nov. 4, 2014) (collecting cases). Of course, as quoted in full above, Article 29 of the Montreal Convention forecloses Plaintiff from recovering any “non-compensatory damages” for a delay in persons or baggage. Montreal Convention, art. 29. He cannot recover for this “loss.”

Accordingly, this Court should dismiss Plaintiff’s Montreal Convention claim to the extent it seeks recovery for “inconvenience.”

b. Any Warsaw Convention Cause of Action Is No Longer Valid.

Plaintiff cannot bring a cause of action under the Warsaw Convention, because each international flight consisted of travel between two Montreal Convention countries: (1) the United States and New Zealand, and (2) the United States and Portugal. (See Compl. at ¶¶ 22-23.) As a result, the Montreal Convention governs exclusively, and there is no cause of action available for Plaintiff under the Warsaw Convention. *See* Montreal Convention, arts. 1(2), 29. To the extent Plaintiff seeks recovery under the Warsaw Convention for his wholly domestic September 2023 Flight, the Warsaw Convention provides no relief to him. *See* Warsaw Convention (“Convention

EXHIBIT C

& Additional Protocol Between the United States of Am. & Other Powers Relating to Int'l Air Transportation"), ch. I ("Scope-Definitions"), art. 1, 49 Stat. 3000, 1934 WL 29042 (Oct. 29, 1934). As a result, this cause of action should be dismissed in its entirety.

c. The "Declaratory Judgment and Breach of Contract" Cause of Action Fails to Allege Sufficient Facts to State Any of the Claims in this Catchall Cause of Action.

To the extent any portion of this catchall cause of action survives the preemptive scope of the Montreal Convention or the ADA, Plaintiff fails to state a claim that this Court can entertain.

i. This Court Cannot Provide a Declaratory Judgment on a Contract Regulated Exclusively by the Federal Government.

Plaintiff asks this South Carolina Magistrate Court to declare Delta's Domestic and International Contracts of Carriage both are "void and unconscionable." (Compl. at ¶ 60.) Of course, the ADA already prevents this Court from applying South Carolina's standards of conscionability upon these contracts. *See In re LATAM Airlines Grp. S.A.*, 2022 WL 3965697, at *12-13. Independently, however, this Court may not evaluate the propriety or "validity" of these Contracts under a declaratory judgment action, because they are regulated by the Department of Transportation (or consumer preference). *See Ginsberg*, 572 U.S. at 288–89, 134 S. Ct. at 1433 (citing 49 U.S.C. § 41712(a)).

For example, in *Slocum v. Delaware, L. & W.R. Co.*, the United States Supreme Court evaluated whether a New York court had the authority to adjudicate a declaratory judgment action regarding a railroad labor agreement. 339 U.S. 239, 240, 70 S. Ct. 577, 577–78, 94 L. Ed. 795 (1950). Under the Railway Labor Act, Congress gave the National Railway Adjustment Board the authority to interpret such agreements and to enforce them. *Id.* Nevertheless, once a dispute arose in an existing agreement, a railroad company filed suit for declaratory judgment in New York, which the labor union opposed. *Id.*, 339 U.S. at 241, 70 S. Ct. at 578. The New York court retained

EXHIBIT C

the case. *Id.* The Supreme Court reversed. *Id.*, 339 U.S. at 245, 70 S. Ct. at 580.

The entire purpose of Railway Labor Act's establishment of the National Railway Adjustment Board was to have a designated tribunal comprised of "members [who] understand railroad problems and speak the railroad jargon" render uniform, national decisions. *Id.*, 339 U.S. at 243, 70 S. Ct. at 579. Without such uniformity, states could render various interpretations of the same agreement, leading to regional strikes and disputes affecting the rail industry in various parts of the country. *See id.*, 339 U.S. at 242–43, 70 S. Ct. at 579. In fact, this purpose was demonstrated by the very dispute itself: At the time of the *Slocum* decision, the Supreme Court issued a separate decision in a companion South Carolina case "because it sharply points up the conflicts that could arise from state court intervention in railroad-union disputes." *Ord. of Ry. Conductors of Am. v. S. Ry. Co.*, 339 U.S. 255, 256, 70 S. Ct. 585, 586, 94 L. Ed. 811 (1950).

Like the railroad in the *Slocum* case, the railroad in the *Ord. of Ry. Conductors of Am.* case filed suit for declaratory judgment in a South Carolina state court, asking the court to interpret the collective bargaining agreement. *Id.*, 339 U.S. at 255–57, 70 S. Ct. at 585–86. The South Carolina Supreme Court allowed this declaratory judgment to proceed, but the United States Supreme Court reversed its decision. *Id.* The United States Supreme Court recognized that allowing all states to entertain declaratory judgment actions on nationally regulated contracts for the railways would lead to conflicting rulings and forum shopping: "Sustaining the state court's action would invite races of diligence whenever a carrier or union preferred one forum to the other. And if a carrier or a union could choose a court instead of the [National Railway Adjustment] Board, the other party would be deprived of the privilege conferred by . . . the Railway Labor Act[.]" *Id.*, 339 U.S. at 256, 70 S. Ct. at 586.

Here, Plaintiff asks this state court, instead of the Department of Transportation, to interpret

a national airline's Domestic and International Contracts of Carriage. Plaintiff thinks the terms in those contracts are "wholly one-sided and unfair, [] not presented in a fair way, [] unconscionable, and present[] . . . contract[s] of adhesion." (*See* Compl. at ¶ 59.). As the Supreme Court acknowledged in *Ginsberg*, however, a state court is not the proper tribunal to make that policy decision. *See Ginsberg*, 572 U.S. at 288–89, 134 S. Ct. at 1433 (Alito, J., writing for unanimous court). Instead, the proper tribunal to determine the fairness and validity of the airlines' contracts and other trade practices is the national Department of Transportation. *Id.* As a result, this Court should refrain from giving a declaratory judgment here, to the extent such cause of action is not already preempted by the Montreal Convention or the ADA.

ii. With Respect to His International Flights, Plaintiff Fails to Identify the Provisions of the Contract Delta Allegedly Breached.

The allegations in Plaintiff's third cause of action in no way state a breach of contract but instead attempt to set forth a declaratory judgment cause of action. (*See* Compl. at ¶¶ 58-68.) The allegations in Paragraphs 59 to 68 simply challenge the validity of Delta's Domestic and International Contracts of Carriage or accuse Delta of committing torts *outside of* the terms of those contracts. This clearly is not a breach of contract cause of action and fails to plead the essential element: the contract's breach. *See Hotel & Motel Holdings, LLC v. BJC Enterprises, LLC*, 414 S.C. 635, 652, 780 S.E.2d 263, 272 (Ct. App. 2015). Even so, should this Court find that the third cause of action also states a cause of action for breach of contract, Plaintiff fails to allege facts sufficient to state a valid claim.

With regard to his two international flights, Plaintiff fails to identify the specific provisions of the International Contract of Carriage Delta allegedly breached. Both South Carolina law, and Georgia law—the law governing the International Contract of Carriage—require this level of specificity. *See Jones v. Gilstrap*, 288 S.C. 525, 528, 343 S.E.2d 646, 648 (Ct. App. 1986) (“[I]t

is essential in setting forth a breach of contract, either that the substance of the instrument be averred in the pleading, or that the contract itself be set forth.”) (quoting 61A Am. Jur. 2d *Pleading* Section 92 (1981)); *Brooks v. Branch Banking & Tr. Co.*, 107 F. Supp. 3d 1290, 1296 (N.D. Ga. 2015) (“Defendant is correct that a plaintiff asserting a breach of contract claim must allege a particular contractual provision that the defendants violated to survive a motion to dismiss.”) (internal quotations omitted) (applying Georgia law). None of the allegations in this cause of action cite a specific provision of the International Contract of Carriage that was breached with respect to either the January 2024 flight to New Zealand or the April 2024 flight to Portugal. (See Compl. at ¶¶ 22-23, 31-32, 58-68.) Therefore, Plaintiff fails to state a cause of action on these facts.

iii. For the Domestic Flight, Plaintiff’s Alleged Breach of Contract Is Contradicted by the Contract of Carriage’s Clear Terms.

Again, in the third cause of action, Plaintiff fails to actually set forth a breach of contract cause of action but instead attempts only to set forth a declaratory judgment action. (See Compl. at ¶¶ 58-68.) If this Court deems Plaintiff to allege a claim for breach of contract arising from the September 2023 Domestic Flight, a simple reading of the Domestic Contract of Carriage negates Plaintiff’s claim. Consequently, that cause of action should be dismissed.

Plaintiff alleges that he booked a round-trip flight, took the first flight with no issue, but the return flight was cancelled due to weather. (See Compl. at ¶¶ 11-13.) The next available return flight was one scheduled to depart two days later. (See Compl. at ¶¶ 16-17, 19.) Instead, Plaintiff drove himself home and decided to drive through the night, incurring costs to do so. (See Compl. at ¶¶ 16-17, 19.) Plaintiff alleges that Delta never reimbursed Plaintiff for the costs Plaintiff incurred in driving himself home and Plaintiff refused a refund in SkyMiles for the unused portion of his ticket. (See Compl. at ¶¶ 15, 19). A plain reading of the Domestic Contract of Carriage, which Plaintiff quotes in part in his Complaint (see Compl. at ¶¶ 19-21), demonstrates that Delta’s

EXHIBIT C

actions, as alleged, complied fully with the Domestic Contract of Carriage. Thus, the Domestic Contract of Carriage negates Plaintiff's claim that Delta breached it.

The following provisions of the Domestic Contract of Carriage clearly outline the procedure in the event a flight is cancelled due to weather or threats of weather. First, the Domestic Contract of Carriage explicitly states the obvious expectation of the basic logistics of flying: published schedules cannot be guaranteed. Rule 2 ("Schedules and Operations") states:

Delta will exercise reasonable efforts to transport you and your baggage from your origin to your destination with reasonable dispatch, **but published schedules, flight times, aircraft types, seat assignments, and similar details reflected in the ticket or Delta's published schedules are not guaranteed** and form no part of this contract. **Delta may substitute alternate Carriers or aircraft, change its schedules, delay or cancel flights, change seat assignments, and alter or omit stopping places shown on the ticket as required by its operations in Delta's sole discretion. Delta's sole liability in the event of such changes is set forth in Rule 22. Delta is not responsible or liable for making connections, failing to operate any flight according to schedule, changing the schedule or any flight, changing seat assignments or aircraft types, or revising the routings by which Delta carries the passenger from the ticketed origin to destination**

(Exhibit A to Delta's Motion to Dismiss, Contract of Carriage, Rule 2 at p. 2 (emphasis added).)

With the expectations outlined, the Domestic Contract of Carriage provides the procedure in the event a flight is cancelled or delayed:

RULE 19: FLIGHT DELAYS/CANCELLATIONS

A. Delta's Liability in the Event of Schedule Changes, Delays and Flight Cancellations

If there is a flight cancellation . . . , 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 Rule 22. 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**. At Delta's sole discretion and if acceptable to the passenger, Delta may arrange for the passenger to travel on another Carrier If acceptable to the passenger, Delta may provide transportation in a lower class of service If space on the next available flight is available only in a higher class of service than

EXHIBIT C

purchased, Delta will transport the passenger on the flight . . . **Delta will not be liable under any circumstances for any special, incidental or consequential damages arising from the foregoing.**

B. Delta's Liability for Additional Amenities in the Event of Schedule Changes, Delays and Flight Cancellations

Except as provided above, Delta shall have no liability if the flight cancellation, diversion or delay was due to force majeure. As used in this rule, "force majeure" means actual, **threatened** or reported:

(1) **Weather conditions** or acts of God;

...

(4) Government regulation, demand, directive or requirement; [or]

...

(6) **Any other condition beyond Delta's control** or any fact not reasonably foreseen by Delta.

However, **when a passenger's travel is interrupted for more than 4 hours . . . as a result of flight cancellation or delay on the date of travel other than from force majeure**, Delta will provide the passenger with the following additional amenities during the delay: [hotel, ground transportation to another nearby airport, or amenities for special needs passengers.]

(Exhibit A to Delta's Motion to Dismiss, Contract of Carriage, Rule 19 at pp. 17-18 (emphasis added; "other than" underlined in original).) Rule 22 outlines the following procedure for compensating a passenger for a cancelled flight:

RULE 22: REFUNDS

A. Involuntary Refunds

If a refund is required because of Delta's failure to operate on schedule . . . , the following refund will be made directly to you:
...

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 No refund will apply when alternate transportation is provided by Delta and accepted by the passenger.

EXHIBIT C

(See Exhibit A to Delta's Motion to Dismiss, Contract of Carriage, Rule 22(A)(2)(a) at p. 23 (emphasis added).) If cash or credit card were not used to purchase the ticket originally, the refund will be "issued back to the original form of payment." (See Exhibit A to Delta's Motion to Dismiss, Contract of Carriage, Rule 22(D)(5) at pp. 24-25 (emphasis added).)

In sum, if a flight is cancelled due to actual or threatened weather conditions, then Delta will automatically offer the passenger a seat on the next available flight, and if this is refused, Delta will refund the passenger for the unused portion of the ticket. Yet, Plaintiff complains—and alleges—that Delta did *exactly* that. Delta offered him the next available flight—it is of no consequence in the breach analysis of when that next flight was scheduled to depart. (Compl. at ¶¶ 12, 19, 21.) This is not a breach.

Plaintiff next complains that, when he refused to take that flight, Delta *offered* to refund him in SkyMiles, which Plaintiff alleges *he* refused. Again, this is not a breach by Delta but Delta's fulfilment of Rules 19 and 22. He also complains that Delta did not offer him a hotel or other accommodations. (Compl. at ¶ 21.) But the Domestic Contract of Carriage never obligated Delta to do so, because the flight was cancelled due to a force majeure: actual or threatened weather conditions. (See Compl. at ¶¶ 13, 16.) There is no breach here.

Finally, Plaintiff complains that Delta did not reimburse Plaintiff for the expenses he incurred when he decided to drive himself to Greenville non-stop from New York. (Compl. at ¶ 16.) All these expenses are incidental or consequential damages, and the Domestic Contract of Carriage clearly states: "Delta will not be liable under any circumstances for any special, incidental or consequential damages arising from the foregoing [schedule changes, delays and flight cancellations]." (Exhibit A to Delta's Motion to Dismiss, Contract of Carriage, Rule 19(A) at p. 17.) A similar limitation of liability is included in Rule 24: "Delta shall not be liable for any

EXHIBIT C

punitive, consequential or special damages arising out of or in connection with carriage or other services performed by Delta, whether or not Delta had knowledge that such damage might be incurred.” (Exhibit A to Delta’s Motion to Dismiss, Contract of Carriage, Rule 24 at p. 25.) Delta’s refusal to reimburse Plaintiff for his numerous alleged incidental or consequential damages is not a breach of the contract.

Because Plaintiff’s theory of breach for the September 2023 Domestic Flight is negated by the terms of the Domestic Contract of Carriage, Plaintiff fails to state facts sufficient to constitute a cause of action for breach of contract, and the cause of action should be dismissed.

iv. Because Plaintiff Fails to Allege an Express Breach of Contract, He Cannot Bring a Claim for Breach of the Covenant of Good Faith and Fair Dealing.

Again, in the third cause of action, Plaintiff fails to actually set forth a breach of contract cause of action but instead attempts to only set forth a declaratory judgment action. (*See* Compl. at ¶¶ 58-68.) In this catchall cause of action, Plaintiff includes an allegation that Delta “breach[ed] general duties of good faith and fair dealing[.]” (Compl. at ¶ 65(a).) Whether this Court applies South Carolina law or applies the law of the Contracts of Carriage, which is Georgia law, Plaintiff fails to state a claim for the breach of covenant of good faith and fair dealing.¹⁹ Both states require a Plaintiff to first allege a specific breach of an express term of the contract. *TRB Mellichamp LLC v. Concrete Supply Co., LLC*, No. CV 2:20-4413-RMG, 2021 WL 6206582, at *3 (D.S.C. Mar. 5, 2021) (“Courts applying South Carolina law regularly dismiss a breach of implied covenant claim where there is no breach of contract claim into which it can be subsumed.”); *Brooks v. Branch Banking & Tr. Co.*, 107 F. Supp. 3d 1290, 1296 (N.D. Ga. 2015) (same) (applying Georgia law). As demonstrated in the prior section, Plaintiff fails to state a claim for breach of contract with

¹⁹ Again, this Court has no authority to entertain a claim for breach of covenant of good faith and fair dealing, because South Carolina and Georgia law cannot impose such requirements on these airline contracts. *See Ginsberg*, 572 U.S. at 287, 134 S. Ct. at 1432.

EXHIBIT C

regard to the September 2023 Domestic Flight. As for both international flights, Plaintiff fails to cite any provision of the International Contract of Carriage that Delta breached. (Compl. at ¶¶ 22-23.) As a result, Plaintiff's Complaint does not support a claim for breach of the covenant of good faith and fair dealing, and this third cause of action should be dismissed accordingly.

v. This Cause of Action Is *Res Judicata* Because It Re-Alleges the Same Theory of Liability that Plaintiff Voluntarily Dismissed with Prejudice.

In the prior action, Plaintiff brought, and voluntarily dismissed with prejudice, a cause of action for "breach of contract accompanied by a fraudulent act." (Exhibit C to Delta's Motion to Dismiss, Joint Stipulation of Dismissal without Prejudice at ¶ 1(c).) The substance of a claim for breach of contract accompanied by a fraudulent act is "fraudulent intent relating to the breaching of the contract and not merely to its making." *Ball v. Canadian Am. Exp. Co.*, 314 S.C. 272, 276, 442 S.E.2d 620, 623 (Ct. App. 1994).

Here, Plaintiff's blended cause of action for "Declaratory Judgment and Breach of Contract" alleges the same theory: "... Delta engage in . . . [f]raud and tortious conduct, including violation of rules and governing policies promulgated by itself, administrative bodies, or other entities . . . and [o]ther tortious, unfair, and deceptive conduct[.]" (Compl. at ¶ 65(b), (e).) No matter the label Plaintiff gives this new cause of action, the substance of the cause of action is one that Plaintiff chose to dismiss with prejudice. This Court should not allow Plaintiff to escape his voluntary dismissal by entertaining this Trojan horse cause of action.

d. **The Fraud Cause of Action Is Insufficiently Pleaded and It Is *Res Judicata* because It Alleges the Same Facts as the Breach of Contract Accompanied By a Fraudulent Act Claim that Plaintiff Stipulated to Dismiss with Prejudice.**

To the extent any portion of Plaintiff's Fraud cause of action survives the preemptive scope of the Montreal Convention or the Airline Deregulation Act, Plaintiff fails to state a valid claim for Fraud.

EXHIBIT C

- i. The Fraud Cause of Action Should Be Dismissed as Alleged because it Does Not State the Circumstances of the Alleged Fraud with Particularity, Required by Rule 9(b), SCRCP.

Despite Plaintiff's claim that the Fraud cause of action "is stated with particularity in this paragraph and the other paragraphs of the [C]omplaint," (Compl. at ¶ 70), the Fraud cause of action is anything but particular. The cause of action is simply a recitation of the elements of fraud with Plaintiff's name and Delta's name filled in: No specific details are provided to describe the circumstances surrounding the alleged fraud. (*See* Compl. at ¶ 70). This is fatal to Plaintiff's claim for Fraud.

Rule 9(b), SCRCP requires that "the circumstances constituting fraud . . . shall be stated with particularity." Rule 9(b), SCRCP. This requires Plaintiff to plead the: the who, what, when, where, and how of the alleged fraud. *See, e.g., Coker v. Norwich Com. Grp., Inc.*, No. CV 3:20-03071-MGL, 2021 WL 4037472, at *3 (D.S.C. Sept. 3, 2021) ("[S]outh Carolina Rule of Civil Procedure 9(b) is similar to Federal Rule of Civil Procedure 9(b)"); *U.S. ex rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d 370, 379 (4th Cir. 2008) (applying Fed. R. Civ. P. 9(b) and requiring the "who, what, when, where, and how" of the alleged fraud).

Plaintiff alleges Fraud arising from three separate flights but gives no details about the statements he was given surrounding each flight or the connection of those statements to his alleged damages. This Rule 9(b) requirement cannot simply be met by telling this Court and Delta, in essence, to "figure it out" by sifting through the prior 70 paragraphs of allegations. Rule 9(b), SCRCP requires Plaintiff to identify and describe the particular facts that constitute the claim.

- ii. The Fraud Cause of Action Is *Res Judicata* because It Realleges the Same Theory of Liability as the Cause of Action Plaintiff Voluntarily Dismissed with Prejudice.

Again, in the prior action, Plaintiff brought, and voluntarily dismissed with prejudice, a cause of action for "breach of contract accompanied by a fraudulent act." (Exhibit C to Delta's

EXHIBIT C

Motion to Dismiss, Joint Stipulation of Dismissal without Prejudice at ¶ 1(c).) The substance of a claim for breach of contract of contract accompanied by a fraudulent act is “fraudulent intent relating to the breaching of the contract and not merely to its making.” *Ball*, 314 S.C. at 276, 442 S.E.2d at 623.

Here, Plaintiff’s Fraud cause of action alleges that Delta “breach[ed] . . . the adhesion contracts from which it sought to profit” by “cancel[ling] flights and mislead[ing] the plaintiff” and by lying “about luggage it had lost.” (*See* Compl. at ¶ 71.) This cause of action clearly attempts to set forth “fraudulent intent relating to the breaching of the contract” that is characteristic of the claim for breach of contract accompanied by a fraudulent act. *Ball*, 314 S.C. at 276, 442 S.E.2d at 623. This Court should not allow Plaintiff to circumvent his own voluntary stipulation to dismiss this claim with prejudice by allowing the same claim to proceed with a different label.

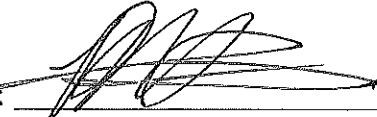
CONCLUSION

Plaintiff should know these claims cannot survive the Montreal Convention’s and the ADA’s preemptive scope. With respect to the International Flights, the Montreal Convention preempts causes of action II through IV. The “Montreal Convention” cause of action is further limited by Plaintiff’s inability to recover for his “inconvenience.” With respect to the Domestic Flight, the ADA preempts causes of action III and IV because they relate to Delta’s flight service and Plaintiff does not ask the Court to enforce the Domestic Contract of Carriage as is. To the extent Plaintiff’s third cause of action is not preempted, Plaintiff fails to show any breach under the terms of the Domestic Contract of Carriage. The majority of Plaintiff’s Complaint may be dismissed by this Court outright.

WHEREFORE, Delta respectfully requests an Order dismissing the aforementioned causes of action in Plaintiff’s Complaint.

EXHIBIT C

September 23, 2024

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EXHIBIT C

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Joshua Hawkins,

Plaintiff,

vs.

Delta Air Lines, Inc.,

Defendant.

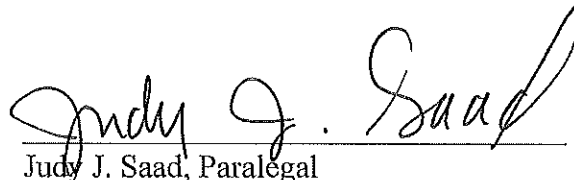
IN THE MAGISTRATE'S COURT

Case No.: 2024-CV-23-2415

CERTIFICATE OF SERVICE

I certify that on **September 23, 2024**, I caused to be served a true and correct copy of the foregoing *Brief in Support of Defendant's Motion to Dismiss in Lieu of Answer* via U.S. Mail, postage pre-paid, and E-mail, addressed as follows:

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SEP 25 2024

EAST GREENVILLE
SUMMARY COURT