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Majority Opinion >

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

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HOLLY CLAMPET, Plaintiff, v. DELTA AIR LINES, INC., a foreign corporation, Defendant.

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CASE NO. 23-60799-CIV-SINGHAL

November 27, 2023, Entered on Docket

November 27, 2023, Decided

For Delta Air Lines Inc., a foreign corporation, Defendant: Denise Brody Crockett, LEAD ATTORNEY, Lazaro Fernandez Jr., Stack Fernandez & Harris P.A., Miami, FL; David L. Balsler, Julia C. Barrett, PRO HAC VICE, King & Spalding LLP, Atlanta, GA.

For Holly Clampet, on behalf of herself and all others similarly situated, Plaintiff: Alec Huff Schultz, LEAD ATTORNEY, Hilgers Graben PLLC, Miami, FL; Alyssa Helfer, PRO HAC VICE, Hilgers Graben PLLC, Lincoln, NE.

RAAG SINGHAL, UNITED STATES DISTRICT JUDGE.

RAAG SINGHAL

**ORDER**

**THIS CAUSE** is before the Court on Defendant Delta Air Lines, Inc.'s Motion to Dismiss and Incorporated Memorandum of Law ( DE [15]) (the "Motion"), filed on May 8, 2023. Plaintiff filed a Memorandum in Opposition to Defendant Delta Air Lines, Inc.'s Motion to Dismiss (DE [23]) ("Pl.'s Opp.") on May 30, 2023, and Defendant filed a Reply in support of its Motion (DE [29]) ("Reply") on June 13, 2023. This Court has also

reviewed Defendant's Notice of Supplemental Authority ( DE [42]), filed on October 2, 2023, and Plaintiff's Reply (DE [43]), filed on October 3, 2023. For the reasons discussed below, the Motion is granted.

## I. BACKGROUND

Plaintiff filed the instant putative class action against Defendant, Delta Air Lines, Inc. ("Defendant" or "Delta"), alleging that Defendant failed to disclose fees received pursuant to an agreement with AGA Service Company d/b/a Allianz Global Assistance ("AGA") for the marketing and sale of AGA's travel protection products. See (Compl. (DE [1-3])). Plaintiff purchased a flight from Delta's website on December 26, 2022 with a departure date of December 31, 2022. See *id.* at ¶ 23. While purchasing her flight on Delta's website, Plaintiff also purchased an AGA trip assistance product. See *id.* at ¶ 24. Though Plaintiff received a confirmation email from AGA with a copy of the travel assistance item purchased, Plaintiff maintains neither Delta nor AGA disclosed that a portion of her purchase price would go to Delta as a "hidden fee." See *id.*

According to the Complaint, customers encounter AGA's offerings on Delta's "booking path," or the process by which customers purchase tickets on Delta's website. (Compl. (DE [1-3] at ¶¶ 2-3)). There, customers must "make an affirmative election" as to AGA's products before they can confirm their ticket. *Id.* at ¶ 3. Plaintiff maintains that the marketing language used to promote AGA's products "leaves the consumer with the impression that the entire charge for [AGA's products] goes to cover the product's cost," such that Delta does not receive any fees in exchange for selling the products on its website. *Id.* at ¶ 4. Plaintiff takes issue with what she describes as "a large, undisclosed fee for each travel assistance product sold through the booking process" and alleges that Delta's receipt of fees violates the terms of the governing agreement between Plaintiff and Defendant, the "Contract of Carriage." *Id.* at ¶ 5. Specifically, Plaintiff contends that the parties' Contract of Carriage [\*2] provides that the agreement "shall be governed by and enforced with the laws of the United States of America and, to the extent not preempted by Federal law, the laws of the State of Georgia." *Id.* at 6 (quoting Exhibit I (DE [1-3] at 40)).<sup>1</sup> The Contract of Carriage, according to Plaintiff, "expressly adopts and incorporates all relevant provisions of federal law," including 14 C.F.R. 399.85 . *Id.* at ¶¶ 27-28. 14 C.F.R. 399.85 states, in pertinent part:

If a U.S. or foreign air carrier has a website marketed to U.S. consumers where it advertises or sells air transportation, the carrier must prominently disclose on its website information on fees for all optional services that are available to a passenger purchasing air transportation. Such disclosure must be clear, with a conspicuous link from the carrier's homepage directly to a page or a place on a page where all such optional services and related fees are disclosed. For purposes of this section, the term "optional services" is defined as any service the airline provides, for a fee, beyond passenger air transportation. Such fees include, but are not limited to, charges for checked or carry-on baggage, advance seat selection, in-flight beverages, snacks and meals, pillows and blankets and seat upgrades. In general, fees for particular services may be expressed as a range; however, baggage fees must be expressed as specific charges taking into account any factors (e.g., frequent flyer status, early purchase, and so forth) that affect those charges.

14 C.F.R. 399.85(d) . Plaintiff also underscores that, under subsection (f) of the same provision, "[t]he Department considers the failure to give the appropriate notices described in paragraphs (a) through (e) of this section to be an unfair and deceptive practice within the meaning of 49 U.S.C. 41712 ." 14 C.F.R. 399.85(f) .

Plaintiff reads 14 C.F.R. 399.85 to mean that Delta is required to disclose its fees from AGA as well as the amount of fees received. Delta's failure to do so, Plaintiff maintains, constitutes a breach of the parties' Contract of Carriage.

Defendant removed this action to this Court on May 1, 2023 and moved to dismiss the Complaint on May 8, 2023. (See Notice of Removal (DE [1]); Motion to Dismiss (DE [15])). Defendant characterizes Plaintiff's Complaint as a "transparent attempt" to revive her prior putative class action lawsuit against Delta based on the Racketeer Influenced and Corrupt Organizations Act ("RICO"), Florida's Deceptive and Unfair Trade Practices Act ("FDUTPA"), and for unjust enrichment. See (Mot. (DE [15] at 2)). In the prior case, *Donoff v. Delta Air Lines, Inc.*, [2020 BL 89447], 2020 U.S. Dist. LEXIS 41408 , [2020 BL 89447], 2020 WL 1226975 (S.D. Fla. Mar. 6, 2020) ("*Donoff*"), Judge Middlebrooks granted Delta's motion for summary judgment and denied Plaintiff's Motion for class certification, finding that Delta's alleged failure to disclose fees received from AGA was not deceptive as a matter of law. See [2020 BL 89447], 2020 U.S. Dist. LEXIS 41408 , [WL] at \*7-8. Here, however, Plaintiff asserts no RICO, FDUTPA, or unjust enrichment claims. Plaintiff's sole claim is for an alleged breach of the parties' Contract of Carriage.

In the instant Motion, Defendant argues that Plaintiff's Complaint warrants dismissal for five separate reasons: (i) 14 C.F.R. is not enforceable as a term of the Contract of Carriage; (ii) Plaintiff [\*3] is precluded from bringing a breach of contract claim premised on 14 C.F.R. 399.85 ; (iii) 14 C.F.R. 399.85(d) does not apply to travel protections sold by a third party; (iv) even if enforceable, Delta did not violate 14 C.F.R. 399.85(d) ; and (v) Plaintiff's claim fails for insufficiently alleged damages. The Court is persuaded by Defendant's first argument which, for the reasons discussed herein, is case dispositive.

## II. LEGAL STANDARD

### A. Motion to Dismiss

At the pleading stage, a complaint must contain "a short and plain statement of the claim showing the [plaintiff] is entitled to relief." Fed. R. Civ. P. 8(a) . Although Rule 8(a) does not require "detailed factual allegations," it does require "more than labels and conclusions . . . a formulaic recitation of the cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 , 555 , 127 S. Ct. 1955 , 167 L. Ed. 2d 929 (2007). To survive a motion to dismiss, "factual allegations must be enough to raise a right to relief above the speculative level" and must be sufficient "to state a claim for relief that is plausible on its face." *Id.* at 555 . "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662 , 678 , 129 S. Ct. 1937 , 173 L. Ed. 2d 868 (2009).

In considering a Rule 12(b)(6) motion to dismiss, the court's review is generally "limited to the four corners of the complaint." *Wilchombe v. TeeVee Toons, Inc.*, 555 F.3d 949 , 959 (11th Cir. 2009) (quoting *St. George v. Pinellas Cty.*, 285 F.3d 1334 , 1337 (11th Cir. 2002)). Courts must review the complaint in the light most favorable to the plaintiff, and it must generally accept the plaintiff's well-pleaded facts as true. *Hishon v. King & Spalding*, 467 U.S. 69 , 73 , 104 S. Ct. 2229 , 81 L. Ed. 2d 59 (1984); *Am. United Life Ins. Co. v. Martinez*, 480 F.3d 1043 , 1057 (11th Cir. 2007). However, pleadings that "are no more than conclusions are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Iqbal*, 556 U.S. at 679 .

### III. DISCUSSION

#### A. Delta's Contract of Carriage Does Not Incorporate 14 C.F.R. 399.85

Plaintiff's one-count complaint alleges that Delta breached its Contract of Carriage by violating the disclosure requirements set forth in 14 C.F.R. 399.85 . See (Compl. (DE [1-3] at ¶ 47). Plaintiff's breach of contract theory is simple: the choice of law provision in the parties' Contract of Carriage incorporates all U.S. federal laws, including 14 C.F.R. 399.85 , which creates a contractual right enforceable by passengers for such violations. See (Pl.'s Opp. (DE [23] at 9)).

Defendant argues that Plaintiff's choice of law provision is mere boilerplate language that fails to incorporate any specific federal regulations, including 14 C.F.R. 399.85 . See (Mot. (DE [15] at 9-11)). Defendant further maintains that the choice of law provision constitutes the "entire agreement" between the Parties, which forecloses Plaintiff's argument that the provision incorporates all U.S. federal laws. See *id.* at 9-10. This Court agrees.

Numerous courts have considered and rejected Plaintiff's argument in finding that a choice of law provision does **not** incorporate all relevant federal laws by reference. See *e.g.*, *Spencer v. Delta Air Lines, Inc.*, No. 5:23-cv-00920, 2023 U.S. Dist. LEXIS 177364 (C.D. Cal. Oct. 2, 2023) (recent dismissal of similar breach of contract claim against Delta Airlines where choice [\*4] of law provision created no contractual duty absent specific incorporation by reference); *Shrem v. Sw. Airlines Co.*, [2017 BL 136629], 2017 U.S. Dist. LEXIS 62865 , [2017 BL 136629], 2017 WL 1478624 , \*2 (N.D. Cal. Apr. 25, 2017), *aff'd*, 747 F. App'x 629 (9th Cir. 2019) (holding that contract "subject to applicable laws, regulations and rules imposed by [the] U.S." did not "incorporate[] all applicable laws, regulations, and rules" as contract terms); see also *Subramanyam v. KLM Royal Dutch Airlines*, 2021 U.S. Dist. LEXIS 77941 , [2021 BL 149941], 2021 WL 1592664 , \*8 (E.D. Mich. Apr. 23, 2021) (finding "DOT regulations cannot be incorporated into carrier contracts through boilerplate provisions."). Under Eleventh Circuit precedent, to incorporate a law or regulation by reference into a contract, such law "must be referenced in a way that establishes a 'reasonably clear and ascertainable meaning.'" See *Bates v. JPMorgan Chase Bank, NA*, 768 F.3d 1126 , 1131-32 (11th Cir. 2014). Defendant argues that the Contract of Carriage at issue here makes neither specific nor general reference to 14 C.F.R. 399.85 , such that it can be enforceable as a contract term. See (Mot. (DE [15] at 10)) (citing *Brown v. Progressive Mountain Ins. Co.*, 2022 U.S. Dist. LEXIS 238953 , [2022 BL 480793], 2022 WL 18777475 , \*5 n.2 (N.D. Ga. Aug. 15, 2022) (finding that a "[r]egulation itself cannot serve as the basis for a breach of contract claim unless it is referenced or incorporated in the [contract]")). Rather, as Defendant argues, the same provision Plaintiff cites to states that the Contract of Carriage represents the "entire agreement between the parties" and "[n]o other covenants, warranties, undertakings or understandings may be implied." See (Mot. (DE [15] at 10)).

Plaintiff cites no authority to the contrary. Plaintiff relies upon *Interface Kanner, LLC v. JPMorgan Chase Bank, N.A.*, 704 F.3d 927 , 932 (11th Cir. 2013) and *Arndt v. Twenty-One Eighty-Five, LLC*, 448 F. Supp. 3d 1310 , 1315-16 (S.D. Fla. 2020) to argue that choice of law provisions are enforceable. While Plaintiff is correct that choice of law provisions are consistently upheld, the cases relied upon by Plaintiff do not find that all applicable laws are then enforceable as contract terms. Accordingly, Plaintiff has not demonstrated that she can assert a breach of contract claim based on an external provision of federal law through the Contract of Carriage's choice of law provision.

The recent dismissal of a similar action, *Spencer v. Delta Air Lines, Inc.*, is instructive. See 5:23-cv-00920, 2023 U.S. Dist. LEXIS 177364 (C.D. Cal. Oct. 2, 2023) (ECF 45). The plaintiff in *Spencer* argued as Plaintiff does here that the choice of law provision in Delta's Contract of Carriage incorporates by reference all laws of the United States. See *id.* at 3. As such, plaintiff argued that Delta breached its Contract of Carriage by failing to comply with an applicable federal regulation. See *id.* In dismissing plaintiff's complaint, the *Spencer* court found that "[c]ase law in [the Central District of California] and nationwide is clear that boilerplate language in an airline ticket does **not** incorporate all applicable laws." *Id.* at 5. Absent any indication by plaintiff that Delta had incorporated the applicable federal regulation into the Contract of Carriage, the court held that Plaintiff failed to establish a claim for breach of contract. *Id.*

Here too, Plaintiff's breach of contract cannot succeed where 14 C.F.R. 399.85 has not been incorporated into the parties' [\*5] agreement. While leave to amend should be freely granted, a court "may decline to grant leave to amend if the amendment would be futile." *Doe v. Kik Interactive, Inc.*, 482 F. Supp. 3d 1242 , 1252 (S.D. Fla. 2020) (citing *Burger King Corp. v. Weaver*, 169 F.3d 1310 , 1320 (11th Cir. 1999)). Because Plaintiff asserts only a breach of contract claim and states no other private right of action for Defendant's alleged violation of the disclosure requirements in 14 C.F.R. 399.85 , the Court finds that Plaintiff's Complaint, even if amended, would be subject to dismissal.

**ORDERED** and **ADJUDGED** that Defendant Delta Air Lines, Inc.'s Motion to Dismiss and Incorporated Memorandum of Law ( DE [15]) is **GRANTED** and Plaintiff's Complaint (DE [1-3]) is **DISMISSED WITH PREJUDICE**. The Clerk of Court is directed to **CLOSE** this case and **DENY** any pending motions.

**DONE AND ORDERED** in Chambers, Fort Lauderdale, Florida this 27th day of November 2023.

/s/ Raag Singhal

RAAG SINGHAL

UNITED STATES DISTRICT JUDGE

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