UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE SOUTHWEST AIRLINES VOUCHER LITIGATION	Case No. 11-CV-8176
	Hon. Matthew Kennelly
GREGORY MARKOW, Objector.	

GREGORY MARKOW'S OPPOSITION TO PLAINTIFFS' MOTION FOR ATTORNEYS' FEES

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INTRODUCTION

After a Seventh Circuit opinion that reduced class counsel's attorneys' fees as a sanction for failing to give the class notice, class counsel comes to this court late on the Monday night before the four-day Christmas weekend to ask for a hearing the Wednesday morning before the four-day Christmas weekend on a motion for **$1.33 million in additional fees** based on the false premises that (1) this court gave them *carte blanche* to request additional fees, rather than simply noting the unrealized possibility that the Seventh Circuit might award fees for the appeal; and (2) an order from the Seventh Circuit rejecting their cross-appeal and reducing class counsel's fees is a "success" entitling them to more fees. Even if the request didn't facially violate Rule 23(h) and misinterpret this Court's earlier order, the lodestar is wildly exaggerated: it includes hundreds of hours spent on an unsuccessful cross-appeal; it impermissibly includes hundreds of hours spent on self-serving motions for fees; and it exaggerates hours spent on tasks that surely took their opponents a fraction of that time for an appellate brief that reads as if it was written at the last minute and contains citation errors criticized by the Seventh Circuit in its opinion. Finally, if the fee request were granted, it would adversely affect the fairness of the settlement, and result in a Rule 60 motion to strike down that settlement. For all of these reasons, the motion should be denied.

Because of the holidays, counsel for Markow will not be able to attend the December 23 hearing and relies on the briefs.

Background

Markow objected to a settlement that proposed to pay the attorneys $3 million and the class a small fraction of that, especially given abusive clear-sailing and kicker clauses. (Though the settling parties refused to disclose to this Court that over 90% of the class would receive nothing, they eventually filed post-appeal evidence in this Court that the settlement would distribute only 503,000 coupons. Dkt. 264. The undisputed evidence in the record is that those coupons have a value of about $3 in the open market, Dkt. 266-1, meaning that the attorneys were seeking twice as much as

the class.) This Court initially awarded $1.35M in fees and expenses in October 2013; after a Rule 59 motion, the Court upped that to $1.67M in June 2014. Dkt. 232. That motion did not request compensation for the over **660 hours** plaintiffs now claim to have spent on a Rule 59 motion.

Plaintiffs asked for an additional 500 hours of lodestar to compensate them for defending the appeal. The Court rejected that request, but asserted that "If plaintiffs are successful on appeal, they are permitted to petition this Court for additional fees. The Seventh Circuit has in the past permitted parties to seek attorney's fees in the district court for a successful appeal." Dkt. 232 at 15. The Court then cited several cases where the Seventh Circuit ordered fees for the defense of the appeal.

Markow had previously appealed; plaintiffs now cross-appealed. A handful of telephone conferences were held at the request of the circuit mediator, totaling well under ten hours; the circuit mediator required no written submissions. Plaintiffs claim that they spent 84.7 hours—two person-weeks—on these discussions.

Markow filed his Seventh Circuit opening brief on September 6, 2014. Defendant Southwest filed its opposition to the opening brief on November 7, 2014. Plaintiffs received two extensions, and filed their principal cross-appeal and response brief on November 14, 2014. The brief (attached as Exhibit 1) was 21 pages and 7,243 words long, and relied heavily on the Southwest brief already filed. *E.g., id.* at 14. It made four arguments:

- The district court was wrong in calling the settlement a coupon settlement (pages 8-10);
- Lodestar was permissible under CAFA (pages 10-14);
- Clear-sailing agreements are good and the district court should have awarded the full $3 million in fees (pages 14-18); and
- "Fees Are Not Capped At a Fixed Percentage Of The Claims Redeemed" (pages 18-21).

In conclusion, plaintiffs stated "For the reasons set forth above, Plaintiffs respectfully request that this Court remand for an upward adjustment of attorneys' fees, affirm the district

court's order granting final approval to the Settlement, and grant such further relief that the Court deems appropriate." Plaintiffs Br. 21.

Plaintiffs filed an eight-page 2,412-word surreply brief in support of their cross-appeal on December 29, 2014. Ex. 2. It focused entirely on their fees, and once again concluded "For the reasons set forth above, Plaintiffs respectfully request that this Court remand for an upward adjustment of attorneys' fees, affirm the district court's order granting final approval to the Settlement, and grant such further relief that the Court deems appropriate."

Class counsel claims they devoted over 512 hours to generate these 9,655 words of briefing, and another 134.9 hours to preparation for the oral argument; the oral argument was split with Southwest counsel.

In the meantime, the Seventh Circuit issued three opinions adopting Markow's position that a settlement with clear-sailing and kicker clauses that paid class counsel more than the class received violated Rule 23(e) when the class was not fully compensated. *Pearson v. NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014); *Redman v. RadioShack Corp.*, 768 F.3d 622 (7th Cir. 2014); *Eubank v. Pella Corp.*, 753 F.3d 718 (7th Cir. 2014). The Seventh Circuit nevertheless affirmed in this case, giving credit to this Court's holding that the class was fully compensated. The Seventh Circuit rejected class counsel's argument that this was not a coupon settlement, but adopted the district court's reasoning on the interpretation of 28 U.S.C. § 1712.

The Seventh Circuit rejected plaintiffs' cross-appeal. Slip op. 21-22. The bulk of its discussion was devoted to a lengthy footnote expressing "disappointment with class counsel's briefing" for a misleading ellipses and "baseless" characterization of a Ninth Circuit opinion. Slip op. 22 n.4.

The Seventh Circuit was further critical of class counsel's failure to disclose an improper relationship with the class representative to the district court, and ultimately ordered that class counsel's fees be reduced $15,000, and revoked one of the class representative awards.

Class counsel neither requested fees for the defense of the appeal in any of its appellate briefs nor in a separate motion before the Seventh Circuit. The Seventh Circuit did not award fees; it did award costs. Class counsel missed the 14-day deadline for seeking costs in the Seventh Circuit (which would have been restricted to a few hundred dollars under Seventh Circuit local rules) and did not request costs.

Markow's petition for rehearing noted, *inter alia*, that this Court's finding that the class received "complete relief" was made without knowing that the class would receive only 503,000 coupons in compensation for the 5.8 million coupons alleged to have been improperly revoked, and that this Court made its fairness determination without the benefit of *Eubank*, *Redman*, and *Pearson*, and thus applied the wrong legal standard. The Seventh Circuit denied the petition without comment and without requiring a response.

Class counsel claims to have devoted 231.1 hours to "review and analysis of Seventh Circuit decision," or more than eight hours per page of the 28-page slip opinion.

1. This Court's earlier Rule 59 order did not contemplate a free-standing right to request fees on appeal.

Class counsel previously requested fees in anticipation of the appeal in its Rule 59 motion. The Court denied the request, but noted that "The Seventh Circuit has in the past permitted parties to seek attorney's fees in the district court for a successful appeal," and therefore "If plaintiffs are successful on appeal, they are permitted to petition this Court for additional fees." It then cited several opinions where the Seventh Circuit specifically awarded fees for the defense of the appeal.

Perhaps our understanding is incorrect, but we read the Court's opinion as simply noting the possibility that the Seventh Circuit would award fees for a successful defense of an appeal, rather than giving class counsel *carte blanche* to come back and ask for fees if the settlement approval were affirmed. The Seventh Circuit never awarded fees for the defense of the appeal; class counsel did not even ask it too, perhaps understanding that that would have been futile. For this reason alone, the motion should be denied.

2. Class counsel is judicially estopped from asserting that the fee order is not a final judgment, and thus cannot treat the Rule 59 order as an interim award of fees.

But even if class counsel's reading of the Rule 59 order is correct, then the motion still must be denied, because class counsel is judicially estopped from claiming that the Rule 59 order is an interim order permitting a request for fees.

The Seventh Circuit, in response to Markow's appeal and class counsel's cross-appeal, ordered that class counsel's fees be reduced by $15,000 from the $1.7M they were awarded. Class counsel is asking this Court to instead award it an additional $1.3 million, or $1.3 million more than the Seventh Circuit thought appropriate.

Class counsel's argument for doing so is an assertion that this Court's previous fee order was interim and entitled it to apply for additional fees later. But this contradicts class counsel's position in the Seventh Circuit cross-appeal, where it argued that the Court's fee order was a final judgment and "disposed of" "all Parties' claims."

Class counsel's claim that this Court's order anticipated future fee claims contradicts its position in the Seventh Circuit. Finality requires that the district court dissociate itself from the case. *Moore v. Mote*, 368 F.3d 754, 755 (7th Cir. 2004) (no finality when district court order "explicitly contemplates the court's continuing involvement in the case"). With limited exceptions not applicable here, interim awards of attorneys' fees are not appealable. *Compare Dupuy v. Samuels*, 423 F.3d 714, 717-18 (7th Cir. 2005), *and People Who Care v. Rockford Bd. of Educ.*, 272 F.3d 936, 937 (7th Cir. 2001), with *Gautreaux v. Chicago Hous. Auth.*, 491 F.3d 649, 654 (7th Cir. 2007). There would thus be no jurisdiction over the cross-appeal unless this court had issued a final order on fees; any other result would give class counsel an impermissible two bites at the apple. *Cf. First Health Group Corp. v. BCE Emergis Corp.*, 269 F.3d 800, 802 (7th Cir. 2001); *JTC Petroleum Co. v. Piasa Motor Fuels, Inc.*, 190 F.3d 775, 776-77 (7th Cir. 1999).

Having successfully led the Seventh Circuit to believe it had appellate jurisdiction and thus obtaining a ruling on its cross-appeal, class counsel is judicially estopped to now claim that the order

it told the Seventh Circuit was final is actually an interim order permitting it to make a second request for fees. Judicial estopped does not permit class counsel to have it both ways. Having successfully persuaded the Seventh Circuit that it had appellate jurisdiction over its cross-appeal, class counsel cannot now claim that the Rule 59 order was interim, rather than final. For this reason alone the motion must be denied.

3. The motion violates Rule 23(h).

Fees cannot be awarded to class counsel unless class counsel complies with Fed. R. Civ. Proc. 23(h)(1), which requires notice of a request for fees to be "directed to class members in a reasonable manner." A motion made solely on a docket with 36 hours notice "after the deadline set by the court for objections to the settlement had expired" plainly violates that rule. *Redman*, 768 F.3d at 637-38. This is an independent reason to reject the motion.

4. Class counsel's appeal was unsuccessful.

The district court's decision was affirmed because of Southwest's briefing, which class counsel entirely deferred to to defend the Rule 23(e) arguments Markow made on appeal. Instead, class counsel focused on a cross-appeal seeking to win another $1.3 million in fees, a position (along with class counsel's position on the definition of "coupon") that the Seventh Circuit gave the back of its hand. It is beyond audacious *chutzpah* to claim that class counsel is entitled to collect $1.3 million in fees to account for the effort spent in an unsuccessful attempt to win $1.3 million for themselves. Indeed, class counsel's fee was *reduced* on appeal when they requested a remand for an increased fee for their breach of fiduciary duty.

5. The lodestar is wildly exaggerated.

Class counsel's lodestar request includes hundreds of hours spent on two separate fee petitions and the unsuccessful cross-appeal, and over **650 hours** on the Rule 59 motion solely relating to fees. The 650 hours claimed on that motion seem an implausible exaggeration by itself (especially after over 150 hours are being billed for the initial fee request).

But even if class counsel really did spend 650 hours on a Rule 59 motion, it shows the degree to which they prioritized their own fees over everything else. At least 800-1400 hours (and perhaps more, if one includes "responses to objectors" defending the fee request) of the 5000 or so total lodestar hours were spent on fee requests, a disproportionate rate. This is the "tail wagging the dog." *Johnson v. G.D.F., Inc.*, 2014 U.S. Dist. LEXIS 14446, 26-28 (N.D. Ill. Feb. 5, 2014) (citing *Ustrak v. Fairman*, 851 F.2d 983, 987-88 (7th Cir. 1988)). *See also* Alan Hirsch and Diane Sheehey, Federal Judicial Center, *Awarding Attorneys' Fees and Managing Fee Litigation* 75-76 (2d ed. 2005) ("[F]ees for time spent preparing the fee application and litigating fee disputes . . .are not compensable in common fund cases. Such efforts do not serve the beneficiaries."). Class counsel should not be rewarded extra for inflating their lodestar making four separate requests for fees: the initial request; the Rule 59 motion; the cross-appeal; and now this motion.

But other lodestar entries are fishy:

- The Seventh Circuit held fewer than ten hours of mediation, all of which took place by telephone, without any written submission. (Markow made no demands at the mediation; the only question was whether the parties were going to disclose the secret data about the claims rate of the settlement, and whether that claims rate would be large enough to persuade Markow to withdraw his appeal.) Class counsel claim they spent 84.7 hours on the Seventh Circuit mediation—almost as much as they spent negotiating the underlying settlement in this case. This is implausible, verging on impossible unless there were secret meditations excluding Markow, the only appellant to produce a brief.
- Class counsel does not segregate the hours spent on briefing relating to Markow's appeal from the briefing relating to the unsuccessful cross-appeal seeking to expand fees, but claims they spent over 510 hours—more than half of those by the experienced $585/hour partner—on "drafting and preparation" of 30 pages and under 10,000 words of appellate briefing, much of which was cut-and-paste from existing district-court briefs. *E.g.,* Dkt. 125 at 43; Dkt. 127 at 12. This is implausible, especially given the claims

made by class counsel that they needed extensions on the briefing because of other contemporaneous commitments.

- Class counsel bills 230.1 hours to "Review and analysis of Seventh Circuit decision and preparation of next steps, motions before district court." If this includes the latest motion for an additional $1.3 million in fees, it is non-recoverable time. Otherwise, 230.1 hours spent reviewing a 28-page slip opinion is questionable inefficiency that no paying client would tolerate at best, and fraudulent at worst.

Markow notes that if the appellate time is either so exaggerated or spent so inefficiently, it raises questions about the legitimacy of the initial lodestar claims.

6. Expenses are wildly exaggerated.

Class counsel seeks reimbursement for:

- The $505 filing fee and $11,920 in moot-court expenses for their unsuccessful cross-appeal; and
- $1,016.80 in copying costs, far in excess of what the Federal Rules of Appellate Procedure permit, after missing the deadline to seek costs in the Seventh Circuit.

These line-items are small, but typical of the *chutzpah* of the motion and the questionability of the entire request.

CONCLUSION

For the foregoing reasons, plaintiffs' Motion should be denied.

Dated: December 22, 2015.

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Certificate of Service

The undersigned certifies she electronically filed the foregoing Response to Plaintiffs' Motion to Alter via the ECF system for the Northern District of Illinois, thus effecting service on all attorneys registered for electronic filing. Additionally, she placed a copy of the foregoing in the U.S. mail addressed to:

Hon. Matthew F. Kennelly
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Dated: December 22, 2015.

/s/ Melissa A. Holyoak