

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

IN RE SOUTHWEST AIRLINES VOUCHER  
LITIGATION

Case No. 11-CV-8176

Hon. Matthew Kennelly

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GREGORY MARKOW,

Objector.

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**OBJECTOR GREGORY MARKOW'S RESPONSE TO  
CLASS COUNSEL AND SOUTHWEST AIRLINE CO.'S  
PROPOSED SUPPLEMENTAL NOTICE REGARDING ATTORNEYS' FEES**

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On June 22, 2016, this Court granted Objector Markow's Motion for Reconsideration (Dkt. 303) and vacated its order of April 25, 2016 granting class counsel supplemental attorneys' fees. *See* Order, Dkt. 312 at 10. The Court ordered the settling parties "to provide a **proposed form of notice**, as well as a proposal for the manner of giving notice, by no later than July 6, 2016." *See id.* (emphasis added). The settling parties failed to comply with this Court's order because they filed a Proposed Supplemental Notice that did not include a proposed form of notice. *See* Class Counsel and Southwest Airline Co.'s Proposed Supplemental Notice Regarding Attorneys' Fees, Dkt. 313 ("Proposed Notice"). Instead, Exhibit A to the settling parties' proposal merely states that "**a notice** will be placed prominently on the first page of the website." *See* Proposed Notice, Dkt. 313-1 at 1 (emphasis added). But simply stating that there will be "a notice" without including the form (or *any* description) of such notice is not enough. The Court cannot determine if the notice satisfies the requirements of Rule 23(h) without reviewing the form of the notice. Accordingly, the Proposed Notice should be rejected.

While the settling parties have failed to provide the form of the notice, their Proposed Notice should also be rejected because their proposed *manner* for directing notice to the class is not reasonable. Rule 23(h)(1) provides that notice of class counsel's fee motion must be "**directed to class members**

in a reasonable manner.” Fed. R. Civ. Proc. 23(h)(1) (emphasis added).<sup>1</sup> The settling parties argue that posting a lone notice on the settlement website is reasonable under Rule 23(h). *See* Proposed Notice, Dkt. 313 at 2. But posting the fee motion on a website that has not changed since 2013 is not “reasonably calculated, under all the circumstances, to apprise interested parties.” *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). As Exhibit A to the Proposed Notice reflects, the settlement website lists important dates—including the deadline to object and to submit a claim—all of which expired over three years ago. *See* Exhibit A, Dkt. 313-1 at 3, 4. There is no reason to think (and no evidence demonstrating) that class members will return to the website. *Cf. Cobell v. Norton*, 407 F. Supp. 2d 140, 148 (D.D.C. 2005) (finding it reasonable to direct notice of interim fee petition on publication widely-read by class members and on website that was “averaging over a million hits monthly”). Posting on an old, inactive website that class members have no reason to visit is not *directing* notice to class members and thus does not meet the notice requirements of Rule 23(h). The settling parties provide several reasons for utilizing just the settlement website. All of those reasons fail.

*First*, the settling parties argue that posting the notice on the website is reasonable because class members’ rights are not affected. *See* Proposed Notice at 2. That class members’ rights are not affected is simply not true. The settling parties have entered into a new settlement agreement for \$1.35 million that provides nothing to the class where Southwest will pay fees greater than originally agreed to and greater than what the Seventh Circuit had considered. In fact, the Seventh Circuit rejected class counsel’s request for increased fees and sanctioned class counsel for their violation of Rule 23(a)(4). *In re Southwest Airlines Voucher Litig.*, 799 F.3d 701, 713, 716 (7th Cir. 2015). Class members have the due process right to adequate representation. This new agreement includes features that compromise the class’s representational interests: clear sailing (where Southwest does not challenge plaintiffs’ request for the additional \$1.35 million in fees) and reversion (where any fees not awarded to class counsel would return to Southwest). *See* Markow’s Motion to Reconsider, Dkt. 303 at 2, 8. The form

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<sup>1</sup> The settling parties’ Proposed Notice repeatedly cites to 23(h)(2) regarding notice, *see* Proposed Notice at 2, but 23(h)(2) actually discusses class members’ ability to object to class counsel’s fee request.

of the notice should include all of this information. But regardless of whether the Court views the fee motion as independently affecting class members' rights, Rule 23(h)(1) requires notice be directed to class members. Posting the fee motion on an old, inactive website is effectively providing no notice to class members in violation of Rule 23(h)(1).

*Second*, the settling parties argue that the website is appropriate because Markow did not object when the settling parties posted the Final Fee Agreement on the website. *See* Proposed Notice, Dkt. 313 at 3. As the settling parties note, the Final Fee Agreement was posted on the settlement website on January 17, 2013. *See id.* But class members received notice of this *litigation* (and the settlement) just a few days prior on January 13, 2013. *See* Decl. of Gregory Markow, Dkt. 105-1 ¶ 5. Class members were emailed directly on January 13, 2013 regarding the settlement which specifically explained that class counsel would be seeking fees and directed class members to the website for more information regarding class counsel's fee request. *See* Exhibit B to Settlement Agreement, Dkt. 88-2 at 3. Indeed, the Final Fee Agreement was posted on the website nearly three months before the deadline to object (April 11, 2013) and four months before the fairness hearing (May 21, 2013). Exhibit A, Dkt. 313-1 at 3. Regarding class counsel's initial fee request, class members received individual email notice indicating that that class counsel would be seeking fees which notice *directed them to the website* where the Final Fee Agreement was posted many months before the objection deadline. Here, by contrast, class members have no idea that class counsel is seeking additional fees and would have no reason to look to the website for a fee request they don't know exists.

*Third*, the settling parties argue that the class is "well aware" of the website because the notices directed the class members to the website and the claim forms were contained on the website. *See* Proposed Notice, Dkt. 313 at 3-4. Again, while the class members may have been directed to the website three and a half years ago, nothing is directing them to that website now. Context and timing is everything, and thus "notice required will vary with circumstances and conditions." *Jones v. Flowers*, 547 U.S. 220, 227 (2006) (internal quotation omitted). Class members now have no independent reason to redirect themselves to the website and thus would not receive notice of the Supplemental Fee Motion.

Finally, the settling parties justify using the website because it is less expensive than the \$143,000 it would cost for individualized notice. *See* Proposed Notice, Dkt. 313 at 4 & n.1. The cost of individualized notice is just 10% of the \$1.35 million fees plaintiffs are seeking. *Accord Banks v. Nissan N. Am.*, No. 11-cv-2022-PJH, 2016 U.S. Dist. LEXIS 35499, at \*8 (N.D. Cal. Mar. 17, 2016) (“[T]he court notes that the estimated notice cost (\$364,962) is nearly ten times smaller than the amount of the proposed attorneys’ fees (\$3,425,000).”). More important, the settling parties cannot justify the use of a less expensive means of notice when that means is ineffective. Utilizing the website would be inappropriate regardless of cost because it does not *direct* notice to the class members as required by Rule 23(h).

Southwest and plaintiffs disagree whether Southwest should be required to pay for the additional notice and thus the settling parties threaten: either use our website proposal or there’s going to be more litigation. *See* Proposed Notice, Dkt. 313 at 5. Any disagreement the settling parties may have as to who will foot the bill for the notice costs does not make their ineffectual proposal a “reasonable manner.” Southwest argues that paying for the notice would conflict with the Settlement Agreement because Southwest is not responsible for any additional “administrative costs, expense of attorneys[] fees in settlement of this Action.” *See* Proposed Notice, Dkt. 313 at 5 (quoting Section III.D. of Settlement Agreement). The irony is that Southwest may have to pay further additional monies because it agreed to pay \$1.35 million additional fees that class counsel is seeking in the Supplemental Fee Motion. The Supplemental Fee Motion is a separate request from the initial fee request under the Settlement and represents *different* work performed with a *different* lodestar; the form of notice directed to class members should describe these differences. *See Redman v. RadioShack Corp.*, 768 F.3d 622 (7th Cir. 2014) (holding that Rule 23(h) required “details of class counsel’s hours and expenses” as well as “rationale that would be offered for the fee request”). While Southwest may have slept on their right to challenge this new request, the class must be protected by requiring individualized email notice regarding the Supplemental Fee Motion.

Plaintiffs failed to comply with Rule 23(h)(1) notice requirements when they filed their Supplemental Fee Motion and the Court could have denied their Motion on that basis. Markow

opposed their Supplemental Fee Motion arguing that they had failed to comply with Rule 23(h)(1) notice requirements, but plaintiffs argued notice was not required. The Court could have again denied class counsel's Motion on that basis. After Markow moved to reconsider the Court's order regarding the Supplemental Fee Motion, the Court ordered class counsel to explain what Rule 23(h)(1) notice is required, and class counsel again argued that notice was not required. *See* Plaintiffs' Supplemental Memorandum on Rule 23(h) Notice, Dkt. 310 at 1. The Court could have again denied class counsel's Supplemental Fee Motion on that basis. The Court vacated its Order granting the Supplemental Fee Motion and ordered the settling parties to submit a *proposed form of notice* and manner of notice. Order, Dkt. 312 at 10. Plaintiffs failed to comply with this Court's Order and did not submit a form of notice. The Court has given plaintiffs multiple chances to get this right. It's time to put an end to this and deny plaintiffs' Supplemental Fee Motion.

### CONCLUSION

For the foregoing reasons, Class Counsel and Southwest Airline Co.'s Proposed Supplemental Notice Regarding Attorneys' Fees (Dkt. 313) should be rejected and Plaintiffs' Motion for Supplemental Attorneys' Fees (Dkt. 287) should be denied.

Dated: July 13, 2016

/s/ M. Frank Bednarz

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**CERTIFICATE OF SERVICE**

The undersigned certifies she electronically filed the foregoing Response to Class Counsel and Southwest Airline Co.'s Proposed Supplemental Notice Regarding Attorneys' Fees via the ECF system for the Northern District of Illinois, thus effecting service on all attorneys registered for electronic filing.

Dated: July 13, 2016

/s/ M. Frank Bednarz