

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

**IN RE SOUTHWEST AIRLINES
VOUCHER LITIGATION,**

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CASE NO. 11-cv-8176

**On appeal to the United States
Court of Appeals for the Seventh
Circuit, Case No. 16-3002**

**CLASS COUNSEL AND SOUTHWEST AIRLINES CO.
JOINT STATUS REPORT CONCERNING SETTLEMENT**

Class Counsel and Southwest Airlines Co. (“Southwest”) provide the following joint status report to the Court regarding the status of the settlement negotiations referenced in the Parties’ prior filing and, specifically, to inform the Court of an agreement-in-principle between the Parties and Objector Markow. As detailed below, this settlement – assuming the Court approves it – will resolve all disputes before this Court and also will resolve Objector Markow’s pending appeal at the Seventh Circuit.

PROCEDURAL BACKGROUND

1. On August 26, 2013, the Court approved the class action settlement in this case. *See* Dkt. Nos. 140, 141. The settlement between Southwest and Class Counsel is contained in the Amended Stipulation of Settlement (Dkt. No. 88) and the Agreement on Attorneys’ Fees (Dkt. No. 90).

2. On October 3, 2013, the Court awarded attorneys’ fees to Class Counsel. *See* Dkt. No. 152. On June 20, 2014, the Court modified its award of attorney’s fees and expenses. *See* Dkt. No. 232.

3. Objector Gregory Markow appealed the Court's Memorandum Opinion and Order Granting Final Approval and Incentive Awards (Dkt. No. 141), Memorandum Opinion and Order Granting Plaintiffs' Petition for Attorneys' Fees in Part (Dkt. No. 152), Final Judgment (Dkt. No. 156), and Memorandum Opinion and Order Granting in Part Plaintiffs' Motion to Alter or Amend (Dkt. No. 232). *See* Dkt. No. 241.

4. On October 8, 2014, Southwest filed a Motion to Correct and/or Modify the Record on Appeal (Dkt. No. 264) (the "Motion to Supplement"), which attached as Exhibit A thereto an Affidavit (the "First Garcia Affidavit") from David Garcia (the Settlement Administrator) which made a representation that "[a]fter verification and removal of fraudulent claims, Class Members submitted Claims for 503,396 replacement vouchers under the Settlement Agreement and the Court's Final Judgment before the Claim Form Deadline [September 2, 2013]." *See* Dkt. No. 264-1.

5. The Court granted Southwest's Motion to Supplement. *See* Dkt. No. 269.

6. On August 20, 2015, the Seventh Circuit Court of Appeals affirmed (a) this Court's order approving the Settlement and (b) most of the Court's judgment and award of attorney's fees and expenses to Class Counsel, holding that the Court did not err when it "award[ed] class counsel an attorney fee based on the lodestar method rather than the value of the redeemed coupons." *In re Southwest Airlines Voucher Litig.*, 799 F.3d 701, 704 (7th Cir. 2015); *see also* Dkt. Nos. 284, 286. The Seventh Circuit did, however, reduce the fee award (to Class Counsel) and an incentive award (to a lead Plaintiff) by \$15,000 each. *In re Southwest*, 799 F.3d at 715.

7. On December 21, 2015, Class Counsel filed a motion seeking a supplemental award of attorney's fees of \$1.35 million for its post-judgment Rule 59 motion and Seventh Circuit appeal. *See* Dkt. No. 287.

8. On April 25, 2016, the Court granted in part Plaintiff's Motion for Supplemental Attorney's Fees and awarded \$455,294 in additional fees and \$3,528 in additional expenses. *See* Dkt. No. 302.

9. On June 22, 2016, the Court granted in part Objector Markow's Motion for Reconsideration and vacated its April 25, 2016 Order awarding additional attorney's fees. *See* Dkt. No. 312. The Court denied in part Markow's Motion to Reconsider Supplemental Fee Order and to Alter or Amend Final Judgment. *Id.* Additionally, the Court Ordered that Plaintiff and Defendant cooperate to provide supplemental notice to the Class regarding Plaintiff's supplemental request for fees and expenses. *Id.*; *see also* Dkt. No. 316.

10. On July 21, 2016, Objector Markow appealed the Court's denial in part of Markow's Motion to Reconsider Supplemental Fee Order and to Alter or Amend Final Judgment. *See* Dkt. No. 321.

11. On December 22, 2016, the Court approved the Parties' proposed plan to provide supplemental notice to the Class regarding Class Counsel's supplemental fee request, including the directive that the process begin "as soon as practicable." Dkt. No. 348.

12. After the Court Ordered that the parties provide supplemental notice to the class regarding Class Counsel's supplemental fee request, the Parties (including Objector Markow) discussed possible frameworks to resolve Markow's still-pending objections to both the supplemental fee request and the settlement itself (the latter objection also being the subject of the pending appeal before the Seventh Circuit). *See* Dkt. No. 349.

13. On January 7, 2017, the Court "[gave] the parties and Mr. Markow the requested 14 days to try to come to a resolution, but no more than that (barring unforeseen circumstances) given the age of the case and the long-approved settlement." Dkt. No. 350.

STATUS UPDATE

14. The Parties conferred with Objector Markow and have a tentative agreement for which they seek the Court's approval. The Parties also request that the Court Order a slightly modified supplemental notice be provided to the class, to comport with the tentative agreement.

15. Pursuant to the terms of the tentative agreement:

a. Class Counsel will receive, in supplemental fees related to its work following an appeal from the Court's approval of the class action settlement and fee award, \$227,647.00¹ and \$3,529.68 in out-of-pocket expenses, for a total of \$231,176.68;

b. Southwest will remit – in addition to providing each Entitled Class Member with “one (1) Replacement Voucher for *each* Eligible Drink Voucher issued prior to August 1, 2010 to the Entitled Class Member, in connection with the purchase of an Eligible Drink Voucher through the purchase of a Business Select ticket or otherwise, that was not redeemed by the Entitled Class Member, with no artificial limit or cap on the number of Replacement Vouchers per Entitled Class Member” (Dkt. No. 88, at III.B.1) – two (2) *additional* Replacement Vouchers for each one (1) to be remitted to each Entitled Class Member;² and

c. Objector Markow will dismiss his challenges related to the settlement, including his pending appeal to the Seventh Circuit Court of Appeals.

¹ The Parties note that this is exactly 50% of the amount previously awarded by the Court, *see* Dkt. No. 302, and is significantly less than the amount initially requested by Class Counsel, *see* Dkt. No. 287.

² For the avoidance of doubt, Southwest will provide three (3) total vouchers (one (1) pursuant to the original terms of the Settlement Agreement plus two (2) pursuant to the new tentative agreement discussed herein) for each one (1) that is validly claimed by an Entitled Class Member, as determined by the Settlement Administrator upon completion of the Claims Process, pursuant to the Settlement Agreement.

16. Relatedly, in the course of finalizing the claims audit process and preparing for a distribution of the vouchers, the Parties have now determined (and wish to note for the Court) that the number of replacement vouchers is less than the figure provided in the First Garcia Affidavit that was submitted pursuant to the Settlement Agreement and the Final Judgment. That reduction is due to (a) additional claims that were determined to be fraudulent, duplicates, or inflated, but also (b) because the First Garcia Affidavit unintentionally included a test record entry (the “Test Record”) input by Epiq Systems, Inc. (the Settlement Administrator in this litigation) which incorrectly increased the total number of replacement vouchers by 342,342.

17. Southwest recently confirmed with the Settlement Administrator that the Test Record would be changed to a status of “Invalid” prior to distribution of replacement vouchers to the Class, and the replacement vouchers for that entry would not be distributed.³

18. Thus, after removing the Test Record and removing or limiting other claims the Settlement Administrator has determined to be fraudulent, duplicates, or inflated, the Settlement Administrator submits that the total number of replacement vouchers that would be sent to the class, pursuant to the Claims Process and Audit to date, and without the benefit of the above-discussed agreement, would be 137,605.

19. This number remains subject to (a) the Settlement Administrator completing the ongoing Claims Process and (b) Southwest completing its audit based upon claimants’ actual flight

³ According to the Settlement Administrator, the criteria used to compile the report for the First Garcia Affidavit did not filter on claim status. As such, the Test Record was inadvertently included in the total of replacement vouchers provided in the First Garcia Affidavit. Without the Test Record included in the calculation of replacement vouchers, the Second Garcia Affidavit, attached hereto as Exhibit A, states that “prior to the Claim Form Deadline [September 2, 2013] Class Members submitted Claims for 161,054 replacement vouchers under the Settlement Agreement and the Court’s Final Judgment.”

histories, as agreed by the parties and approved by the Court in Sections VI.B.1(b) and VI.C.2 of the Settlement Agreement (the “Audit”). *See* Dkt. No. 88.

20. The Parties note, however, that as part of the new settlement between the Parties and Objector Markow described Paragraph 15 (*supra*), Southwest will actually increase the number of Replacement Coupons that will be distributed to the Entitled Class Members by a factor of three. Under the above-discussed agreement, and subject to completion of the Audit and the Claims Process, Southwest would provide approximately 275,210 additional Vouchers. Class counsel’s additional fees and expenses of \$231,176.68 are proportionate to the additional class relief that is estimated at \$825,630.⁴ *See Redman v. RadioShack*, 768 F.3d 622, 630 (7th Cir. 2014).

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⁴ \$825,630 was calculated by multiplying the approximately 275,210 additional vouchers by \$3, the approximate market value of the Vouchers. *See In re Southwest Airlines Voucher Litigation*, No. 13-3264, Dkt. No. 2-1 at 28-29.

Dated: January 20, 2017

Respectfully Submitted,

/s/ Leonard A. Gail
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CERTIFICATE OF SERVICE

I hereby certify that on this the 20th day of January, 2017, I electronically filed the foregoing with the Clerk of the court using the CM/ECF system, which will send notification of such filing to counsel of record registered on the CM/ECF system.

/s/ Leonard A. Gail