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

In re Southwest Airlines Voucher Litigation	)	No. 11-CV-8176
	)	
	)	Hon. Matthew Kennelly
	)	

PLAINTIFFS' MEMORANDUM IN SUPPORT OF
MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

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Pursuant to Fed. R. Civ. P. 23, Plaintiffs Adam J. Levitt ("Levitt") and Herbert C. Malone ("Malone") (collectively "Plaintiffs"), by their counsel, respectfully submit the following Memorandum in Support of their Motion for Preliminary Approval of Proposed Class Settlement and move for an Order (1) preliminarily approving the Agreement as being fair, reasonable, and adequate; (2) preliminarily approving the form, manner, and content of the Full Notice, Publication Notice, Email Notice, Internet Posting, and Claim Form; (3) setting the date and time of the Fairness Hearing for between 135 and 145 days from the date preliminary approval is granted; (4) provisionally certifying the Class under Rule 23 of the Federal Rules of Civil Procedure for settlement purposes only ("Settlement Class"); (5) provisionally appointing Plaintiffs as representatives of the Settlement Class; and (6) provisionally appointing Joseph J. Siprut and his law firm, Siprut PC, as Class Counsel.

I. INTRODUCTION

Plaintiffs and Defendant Southwest Airlines Co. ("Southwest") (collectively, the "Parties") have entered into a Settlement Agreement in the above-referenced matter. (Exhibit 1 hereto.) The Settlement Agreement – a product of extensive negotiations and multiple mediation sessions with a retired federal judge – settles the dispute that arose out of Southwest's decision, effective August 1, 2010, to no longer accept Vouchers without a printed expiration date, to retroactively void all previously-issued Vouchers, and to accept Vouchers issued with the purchase of a Business Select ticket on the date of ticketed travel only. Southwest disputes and denies that it has violated any laws.

Although both sides believe their respective positions in the action are meritorious, they have concluded that, due to the uncertainties and expense of protracted litigation, it is in the best interest of Plaintiffs, the putative settlement Class, and Southwest to resolve this action on the terms provided in the proposed Settlement Agreement attached hereto. As detailed below, and

based on empirical data supplied by Southwest, ***the Settlement is valued conservatively between $29 million and $58 million.***

II. PROCEDURAL HISTORY

A. This Action was originally filed on November 16, 2011. On December 20, 2011, Plaintiffs filed an Amended Complaint in this Action, narrowing the proposed class to: "All persons who reside in the United States and who procured unredeemed Southwest Airline Vouchers with the purchase of one or more Business Select tickets from Southwest." (Docket No. 23, at p. 5). Southwest moved to stay this Action based on the pendency of another lawsuit filed against Southwest in Alabama, also relating to Vouchers. *Grimsley v. Southwest Airlines Co.*, No. 2:11-cv-3420-LSC, (N.D. Ala.). (Docket No. 11.) Unlike the present case, however (which pertains to the Southwest Business Select program), the *Grimsley* action pertained to Southwest's Rapid Rewards ("frequent flyer") program. Southwest also moved to dismiss certain counts of the Complaint, contending that Plaintiffs' claims were preempted by the Airline Deregulation Act. (Docket No. 14.)

B. On March 5, 2012, the Court denied Southwest's motion to stay, and granted, in part, Southwest's motion to dismiss, dismissing all claims with prejudice except for the breach of contract claim. (Docket No. 46.) This ruling made the prosecution of Plaintiffs' claims against the Defendants significantly more challenging on the merits. Plaintiffs also filed a Motion to Strike Southwest's Affirmative Defenses on January 25, 2012. (Docket No. 30.) The Court granted Plaintiffs' Motion to Strike all but one of Southwest's affirmative defenses on January 31, 2012. (Docket No. 32.)

C. As discovery commenced, the Parties negotiated the terms of an extensive Protective Order. (Docket No. 57.) Over the course of the next several months, Plaintiffs were each deposed – Levitt in Chicago and Malone in Philadelphia. Five Southwest employees were

also deposed, with four depositions taking place in Dallas and one taking place in Denver. In addition, the Parties each propounded and responded to Interrogatories and Requests for Documents, and produced and reviewed thousands of pages of documents.

D. After fact discovery was substantially completed, the Parties began discussing in earnest the possibility of settlement. After weeks of back-and-forth discussions between themselves, the Parties engaged in two full days of arm's length – and often spirited – mediation sessions over the course of two weeks with the Mediator, Judge Wayne Anderson (Ret.), in Chicago, Illinois. Judge Andersen is a former federal judge on the United States District Court for the Northern District of Illinois.

E. In addition to these in-person sessions, the Parties also engaged in numerous telephonic and written communications over the course of two months with the Mediator and between themselves, including submitting comprehensive letter briefs to the Mediator on specific areas on which they reached impasse. Throughout the mediation process, Southwest continued to deny any wrongdoing. Notwithstanding that fact, Plaintiffs and Southwest were eventually able to reach a settlement in principle on class-wide relief. Negotiations on attorneys' fees and incentive awards began *only* after an agreement was first reached on the material terms of class-wide relief. The Parties continued negotiations over the next month on the amount of attorneys' fees and expenses, but were unable to resolve that issue.

III. THE PROPOSED SETTLEMENT

After reaching agreement on the material terms of the class-wide settlement structure, the Parties then spent several more weeks exchanging drafts of a final, written settlement agreement. After many exchanges of drafts and edits, the Parties were finally able to agree to the form and content of a settlement agreement that has now been fully executed and attached hereto.

The proposed settlement provides the following:

A. Certification of the Proposed Settlement Class

The Plaintiff requests that the Court, for the purposes of settlement, certify a Settlement Class defined as:

> All Southwest customers who purchased an Eligible Drink Voucher through the purchase of a Business Select ticket or otherwise, during the time period before August 1, 2010, but who did not redeem the Eligible Drink Voucher.
>
> The Class does not include Southwest customers who obtained drink vouchers or drink coupons through the Southwest Rapid Rewards program or as a result of being a member of the Southwest Rapid Rewards program, unless those customers separately purchased, but did not redeem, Eligible Drink Vouchers through the purchase of a Business Select ticket or otherwise.

B. Class Relief

1. Replacement Vouchers

Each Entitled Class Member[1] shall receive one (1) Replacement Voucher for *each* and *every* Eligible Drink Voucher an Entitled Class Member received prior to August 1, 2010, in connection with the purchase of a Business Select ticket or otherwise, that was not redeemed by the Entitled Class Member. There is ***no limit or cap on the number*** of Replacement Vouchers per Entitled Class Member. Thus, the Settlement allows Entitled Class to recover *one hundred cents on the dollar* – a complete and total recovery. And, the Eligible Vouchers are freely transferable.

To become an Entitled Class Member, and, thus, to receive one or more Replacement Vouchers, the Class Member must submit a claim that is (a) timely, and (b) valid as determined

[1] All defined terms in this brief are intended to have the definitions assigned to them in the Settlement Agreement.

by the Settlement Administrator, based upon the Claims Process set forth in Section C of the Settlement Agreement.[2]

Because Southwest has agreed to satisfy claims for *all* unredeemed Vouchers, the Settlement is valued – conservatively – between $29 million (at an absolute minimum) and $58 million. Southwest launched its Business Select program in October 2007, and stopped honoring (and retroactively invalidated) the Vouchers with no expiration date on August 1, 2010. (*See* Affidavit of Joseph J. Siprut, attached hereto as Exhibit 2, ¶¶ 15-16.) During that roughly three-year time period, Southwest sold 11.6 million Business Select tickets – and, thus, 11.6 million Vouchers. *Id.* Although Southwest failed to track exactly how many of those Vouchers were redeemed, Southwest's empirical and statistical modeling suggests that approximately half, or 50%, of the Vouchers were redeemed. *Id*. Thus, as of August 1, 2010, approximately 5.8 million Vouchers had not been redeemed by Class Members. Each Voucher is valued at $5 – the price of a premium or alcoholic beverage on a Southwest flight *without* a Voucher – which means that the Settlement provides for not less than $29 million worth of direct benefits to the Settlement Class.

2. Injunctive Relief

In addition to allowing Entitled Class Members the ability to recover *all* of their unredeemed Vouchers, the Settlement also provides for meaningful injunctive relief. With respect to all Vouchers issued to Business Select customers after the date of settlement ("Post-Settlement Vouchers"), Southwest has agreed to implement and/or maintain the following business practices:

[2] Businesses functioning as transaction agent(s), including but not limited to travel agents or agencies, which only purchased Southwest Business Select tickets on behalf of their customers who were the actual Southwest passengers, are not Entitled Class Members.

a) If Southwest includes expiration dates on the Post-Settlement Vouchers, Southwest agrees to honor the expiration dates on those Vouchers and neither retroactively invalidate them nor shorten the expiration period.

b) If Southwest restricts or limits use of the Post-Settlement Vouchers to the day of the flight for which the ticket was purchased, then Southwest agrees to include express, conspicuous language printed on the Post-Settlement Drink Voucher, stating that the Post-Settlement Drink Voucher may only be redeemed on the day of the flight, or that it is valid only on a specific date.

c) If Southwest fails to include expiration dates on the Post-Settlement Drink Voucher, then the Post-Settlement Vouchers may be redeemed on a Southwest flight at any point in time.

C. Class Notice

Subject to the Court granting Preliminary Approval of the Class Settlement and Provisional Class Certification, Southwest and its retained Claims Administrator – Epiq Systems, Inc. – will provide the Settlement Class with notice of the proposed settlement by the following methods.

- **Internet Posting**. Starting no later than sixty (60) calendar days after entry of the Preliminary Approval Order, the Claims Administrator will set up an Internet website (the "Website") and post the relevant documents, including but not limited to, all applicable deadlines; the Class Notices; instructions on how to submit Claims online or by mail or facsimile; FAQs and answers; orders of the Court pertaining to the Settlement; this Agreement and all supporting exhibits; a toll-free telephone number and addresses to contact the Settlement Administrator by e-mail and mail. The Website will be active for a period of one hundred and forty (140) consecutive calendar days. The Website shall be designed and constructed to accept electronic Claim Form submission.

- **E-mail Notice.** Subject to the Court granting Preliminary Approval of this Settlement Agreement, Southwest or the Settlement Administrator will send, via email, the Class

Email Notice to each person named on the List of Potential Class Members. The List of Potential Class Members shall include, if the information is reasonably available to Southwest, the Settlement Class Member's name and the email address provided by the Settlement Class Member to Southwest. If Southwest sends the Class Email Notice, the Settlement Administrator will assist Southwest with this e-mail notice process, if necessary. The Class E-mail Notice will among other things inform Settlement Class Members of the Settlement, that a Claim Form is available on the website, and of the Class Benefits available. The Class E-mail Notice will be substantially similar to the form submitted separately as Exhibit B.

Moreover, the Settlement Notice Plan provides a procedure for the Class E-mail Notice and other follow-up notice, if necessary. For example, if an email to a Settlement Class Member is returned undeliverable, the Settlement Administrator will attempt to send notice to that Settlement Class Member by First Class U.S. Mail, if the mailing address is known to Southwest. (The Settlement Notice Plan, agreed to by the Parties, will be submitted separately as Exhibit G.)

- **Publication Notice.** Subject to the Preliminary Approval Order, the Settlement Administrator will begin Publication Notice. The Publication Notice shall inform Settlement Class Members that they may obtain a Class Notice Package (as defined in V.C of the Settlement Agreement) and Claim Form by any one of several methods including by calling a toll-free telephone number and/or by accessing the Website. Publication Notice, as set forth in the Settlement Notice Plan, shall constitute an advertisement placed in USA Today in the daily edition. (The written Publication Notice will be submitted separately as Exhibit H.)

D. Service Awards to Class Representatives

Subject to Court approval, each of the two class representatives will request a service award of $15,000 in recognition of their contributions to the Class and the risk they incurred in commencing the action, both financial and otherwise.

E. Attorneys' Fees and Expenses

Despite their best efforts, to date, the Parties have been unable to reach agreement on Attorneys' Fees and Expenses. Plaintiffs will submit a motion supporting their request for attorneys' fees pursuant to the Court's Preliminary Approval Order. Importantly, the Attorneys' Fees and Expenses will not be paid out of the Settlement Class benefits achieved by the Settlement, and will not dilute or reduce the Class benefits in *any* way. Rather, Fees and Expenses will be paid directly by Southwest, in addition to and separate from the Settlement Class benefits.

If the Parties are ultimately unable to reach an agreement as to Attorneys' Fees and Expenses, then the Parties respectfully request the Court decide that issue, after briefing by the Parties, subject to the following provisions: the Parties agree that Southwest shall pay Class Counsel no more than $7 million in fees (the "Ceiling"), but no less than $1.75 million in fees (the "Floor"), and will request the Court to order an Attorneys' Fees and Expenses award that is either the Ceiling, the Floor, or somewhere in between. The Parties have agreed that in no event shall Southwest pay fees less than the Floor or more than the Ceiling. The notice to the Class of this Settlement Agreement notifies the Class of Class Counsel's request for fees, giving the Class the opportunity to object to it.

The Parties have further agreed that either Party may appeal the Attorneys' Fees and Expenses award, even if between the Floor and Ceiling. So that the appeal will not delay the Final Settlement Date, the Parties request that the Court enter a Rule 54(b) order as to the Final Order and Judgment, while separately entering an order on the issue of Attorneys' Fees and Expenses.

IV. THE PROPOSED SETTLEMENT IS FAIR AND SHOULD BE PRELIMINARILY APPROVED.

A. The Proposed Settlement Satisfies The Fairness Criteria.

Both judicial and public policies strongly favor the settlement of class action litigation. *Isby v. Bayh*, 75 F.3d 1191, 1198 (7th Cir. 1996). Although the standards to be applied at the preliminary approval stage "are ultimately questions for the fairness hearing that comes after a court finds that a proposed settlement is within approval range, a more summary version of the same inquiry takes place at the preliminary phase." *Kessler v. Am. Resorts Int'l*, 2007 WL 4105204, at *5 (N.D. Ill. Nov. 14, 2007) (citing *Armstrong v. Board of Sch. Dirs. of City of Milwaukee*, 616 F.2d 305, 314 (7th Cir. 1980)). The factors considered at this stage include: (i) the strength of the plaintiff's case compared to the amount of the settlement; (ii) an assessment of the likely complexity of trial; (iii) the length and expense of the litigation; (iv) the amount of opposition to settlement among affected parties; (v) the opinion of counsel; and (vi) the stage of the proceedings and amount of discovery completed. *Kessler*, 2007 WL 4105204, at *5 (citing *Isby*, 75 F.3d at 1199).

1. Strength of the Case

Plaintiffs assert that Southwest breached its contract with its Business Select customers by refusing to accept (and retroactively invalidating) Vouchers that did not show a printed expiration date, or that were not used on the date of the ticketed travel. Plaintiffs contend that the $5 value of the Vouchers was included in the purchase price of their Business Select tickets. Plaintiffs thus allege that each Business Select customer's purchase of airfare tickets constituted a contract, supported by bargained-for consideration, which included a Voucher with no expiration date. For that reason, Plaintiffs allege that when Southwest decided not to honor those

Business Select Vouchers, Class Members were denied the benefit of their bargain with Southwest.

Southwest denies liability and contends that it was never Southwest's intention to allow consumers to use Business Select Vouchers with no date restrictions or expirations. Rather, Southwest's informal practice of allowing consumers to redeem Vouchers after the date of ticketed travel was an accommodation. Southwest further asserts that any class certification motion would be denied and that Plaintiffs will not be able to demonstrate typicality, ascertainability, or superiority. Clearly, one of the factors to be considered as to the fairness of a class action settlement is a defendant's willingness and ability to mount just such a vigorous defense.

One of the principal factors the Court considers in the course of preliminary approval is "the strength of plaintiff's case on the merits balanced against the amount offered in the settlement." *Donovan v. Estate of Fitzsimmons*, 778 F.2d 298, 309 (7th Cir. 1985) *on reh'g sub nom. Sec'y of Labor v. Fitzsimmons*, 805 F.2d 682 (7th Cir. 1986). In doing so, however, "courts should refrain from resolving the merits of the controversy or making a precise determination of the parties' respective legal rights." *In re AT & T Mobility Wireless Data Services Sales Litig*., 270 F.R.D. 330, 346 (N.D. Ill. 2010) (internal quotations omitted). Moreover, "[b]ecause the essence of settlement is compromise, courts should not reject a settlement solely because it does not provide a complete victory to the plaintiffs." *Id*. (internal quotations omitted). Rather, an integral part of the Court's strength-versus-merits evaluation "is a consideration of the various risks and costs that accompany continuation of the litigation." *Donovan*, 778 F.2d at 309.

As explained above, the Settlement allows Settlement Class Members to be made completely whole by receiving replacements – on a full-value, one-to-one basis – for the very

Vouchers that are at issue in this case. Importantly, Eligible Class Members receive these Replacement Vouchers without any decrease in value or additional conditions, and are not limited as to how many Replacement Vouchers they can request and receive.[3] The Settlement also allows Settlement Class Members to sell their Replacement Vouchers if they want cash or to gift or otherwise transfer their Replacement Vouchers, should they so desire. Thus, Settlement Class Members will not only receive a tangible benefit from the proposed relief; they will recover, in full, the very thing taken from them by Southwest.

2. Risk, Expense, & Complexity of Case

Due to the nature of Plaintiffs' case, trial will require an examination of economic and marketing experts – presented by both Parties – as well as an examination of Plaintiffs and a number of Southwest's current and former employees. In addition, Southwest intends to assert a number of affirmative defenses that it contends bar Plaintiffs' claims in whole or in part. The uncertainty as to whether these affirmative defenses apply in this case creates substantial risk for both sides. Plaintiffs and proposed Class Counsel also recognize that the expense, duration, and complexity of protracted litigation would be substantial, and require further briefing on numerous substantive issues, evidentiary hearings, and further discovery and the gathering of evidence and witnesses.

3. The Opinion of Counsel

"The opinion of competent counsel is relevant to the question whether a settlement is fair, reasonable, and adequate under Rule 23." *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 586-87 (N.D. Ill. 2011). Here, Class Counsel has extensive experience in consumer class actions and complex litigation. (Siprut Aff., ¶18.) Based upon proposed Class Counsel's analysis and the

[3] The Replacement Vouchers will take the form of the vouchers typically used by Southwest as part of its Rapid Rewards program, and will expire one year after issuance.

information obtained from Southwest, the replacement Vouchers – with a total value ranging from $29 million, at an absolute minimum, to $58 million – represents a significant recovery for the Settlement Class, especially when weighed against Southwest's anticipated defenses and the inherent risks of litigation. Class Counsel believes that the Settlement is beneficial to the Settlement Class and meets the class-certification requirements of Rule 23.

4. Extent of Discovery

By virtue of extensive oral and written discovery, Plaintiffs believe they possess the evidence needed to establish their *prima facie* case and defeat Southwest's defenses. Southwest has provided Plaintiff with information relating to Southwest's marketing practices, policies concerning the issuance (and subsequent revocation) of Vouchers, internal valuation of the Vouchers, and empirical data concerning the number of Vouchers in circulation. Plaintiffs have also supplied Southwest with testimonial and documentary evidence supporting their contentions in the Complaint. As such, counsel for each party has sufficient information to assess the strengths, weaknesses, and likely expense of taking this case to trial.

While the parties have exchanged extensive information and taken multiple depositions to evaluate the strength of Plaintiffs' contentions (and Southwest's defenses), the amount of discovery taken is not a prerequisite to a class action settlement. Courts have noted that, "the label of 'discovery' [either formal or informal] is not what matters. Instead, the pertinent inquiry is what facts and information have been provided." *Schulte,* 805 F. Supp. 2d at 587 (N (internal citation omitted). *See also in re Corrugated Container Antitrust Litigation,* 643 F.2d 195, 211 (5th Cir. 2010) ("It is true that very little formal discovery was conducted and that there is no voluminous record in the case. However, the lack of such does not compel the conclusion that insufficient discovery was conducted." (emphasis omitted)). Here, information more than

sufficient to make a reasonable and informed decision has been procured, meaning that there was a reasonable, informed basis to evaluate the Settlement.

5. Presence of Governmental Participants

Although there is no governmental entity participating in this matter as of this time, full and complete notice is being provided to all appropriate state and federal authorities. Southwest will provide such notice which will include all appropriate information and documents required by the Class Action Fairness Act, 28 U.S.C. § 1715(b).

V. THE SETTLEMENT CLASS SHOULD BE PROVISIONALLY CERTIFIED; THE FORM AND METHOD OF NOTICE TO THE CLASS MEMBERS SHOULD BE APPROVED; AND, A HEARING REGARDING FINAL APPROVAL OF THE SETTLEMENT SHOULD BE SCHEDULED.

A. The Settlement Class Should be Provisionally Certified.

Before preliminary approval of a class action settlement can be granted, the Court must determine that the proposed class is appropriate for certification. *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 620 (1997); MANUAL FOR COMPLEX LITIGATION (Fourth) § 21.632. Federal Rule of Civil Procedure 23(a) provides that a class may be certified if (i) the class is so numerous that joinder of all members is impractical, (ii) there are questions of law or fact common to the class, (iii) the claims or defenses of the representative parties are typical of those of the class, and (iv) the representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a); *Williams v. Chartwell Fin. Serv., Ltd*., 204 F.3d 748, 760 (7th Cir. 2000).

Once the requirements of Rule 23(a) have been met, the proposed class must then satisfy at least one of the three subsections of Rule 23(b). *Amchem*, 521 U.S. at 614. In this case, Plaintiffs seek certification of the Settlement Class under Rule 23(b)(3), which requires that (i) the questions of law or fact common to all class members predominate over issues affecting only individual members, and (ii) the maintenance of a class action be superior to other available

methods for the fair and efficient adjudication of the controversy. *Id*. at 615; *Szabo v. Bridgeport Machines, Inc*., 249 F.3d 672, 676 (7th Cir. 2001).

As discussed further below, the proposed Settlement Class meets each of the requirements of Rules 23(a) and (b), and therefore, certification is appropriate.

1. Numerosity — Federal Rule of Civil Procedure 23(a).

Rule 23(a)'s first requirement, numerosity, is satisfied where "the class is so numerous that joinder of all members is impractical." Fed. R. Civ. P. 23(a)(1). To satisfy this requirement there is no specific number required, nor is a plaintiff required to state the exact number of potential class members. *Smith v. Nike Retail Servs., Inc.*, 234 F.R.D. 648, 659 (N.D. Ill. 2006). *See also* 3 Alba Conte & Herbert B. Newberg, NEWBERG ON CLASS ACTIONS § 7.20, 66 (4th ed. 2001). Instead, courts are permitted "to make common-sense assumptions that support a finding of numerosity." *Maxwell v. Arrow Fin. Servs., LLC*, 2004 WL 719278, at *2 (N.D. Ill. March 31, 2004). Generally, where the membership of the proposed class is at least 40, joinder is impracticable and the numerosity requirement is met. *Pope v. Harvard Banchares, Inc*., 240 F.R.D. 383, 387 (N.D. Ill. 2006).

In this case, as noted above, at least hundreds of thousands of individuals were affected by Southwest's policy change concerning the Vouchers. Accordingly, the Class satisfies the numerosity requirement. *See* NEWBERG ON CLASS ACTIONS § 3:5, 243-46 (4th ed. 2002) ("Class actions under the amended Rule 23 have frequently involved classes numbering in the hundreds, or thousands. . . In such cases, the impracticability of bringing all class members before the court has been obvious, and the Rule 23(a)(1) requirement has been easily met.").

2. Commonality/Predominance — Federal Rule of Civil Procedure 23(a)(2) and 23(b)(3).

The commonality element requires that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). Courts recognize that there may be factual differences between class members, but "factual variations among class members' claims" do not themselves "defeat the certification of a class." *Patterson v. Gen. Motors Corp.*, 631 F.2d 476, 481 (7th Cir. 1980), *cert. denied*, 451 U.S. 914 (1980); *Rosario v. Livaditis*, 963 F.2d 1013, 1017 (7th Cir. 1992), *cert. denied*, 506 U.S. 1051 (1993). In fact, the threshold for commonality is not high. *Scholes v. Stone, McGuire, & Benjamin*, 143 F.R.D. 181, 185 (N.D. Ill. 1992). Rather, commonality exists if a common nucleus of operative fact exists, even if as to one question of law or fact. *Whitten v. ARS Nat'l Servs. Inc.*, 2001 WL 1143238, *3 (N.D. Ill. Sept. 27, 2001) (commonality is often found where "defendants have engaged in standardized conduct toward the members of the proposed class."). *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (stating that "commonality requires that the claims of the class simply "depend upon a common contention . . . of such a nature that it is capable of class-wide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.")

As alleged in Plaintiffs' Complaint, all Settlement Class members share common questions of fact and law that predominate over issues affecting only individual Settlement Class members. Those common factual and legal issues for the Settlement Class include (a) whether a valid and enforceable contract existed as between Southwest and its Business Select customers with regard to the Vouchers; (b) whether Southwest breached its agreements with Settlement Class members; and (c) the value of the Vouchers. Accordingly, the commonality requirement is met.

Additionally, Rule 23(b)(3) provides that a class action may be maintained where the questions of law and fact common to members of the proposed class predominate over any questions affecting only individual members. Fed. R. Civ. P. 23(b)(3); *Fletcher v. ZLB Behring LLC*, 245 F.R.D. 328, 331-32 (N.D. Ill. 2006). "Predominance is a question of efficiency." *Butler v. Sears, Roebuck & Co.*, 2012 WL 5476831, at *2 (7th Cir. Nov. 13, 2012). "A class action is the more efficient procedure for determining liability and damages in a case such as this, involving a defect that may have imposed costs on tens of thousands of consumers yet not a cost to any one of them large enough to justify the expense of an individual suit." *Id.* In this case, common questions predominate for the Class because Southwest's unlawful conduct is *identical* with regard to all members of the proposed Settlement Class. Thus, the predominance requirement is satisfied because liability and damages would have been decided predominantly, if not entirely, based on common evidence of Southwest's conduct.

3. Typicality — Federal Rule of Civil Procedure 23(a)(3).

Rule 23 also requires that a plaintiff's claims be typical of other class members' claims. Fed. R. Civ. P. 23(a)(3). The typicality requirement is closely related to the commonality requirement and is satisfied if the plaintiff's claims arise from "the same event or practice or course of conduct that gives rise to the claims of other class members and…are based on the same legal theory." *Radmanovich v. Combined Ins. Co. of Am.*, 216 F.R.D. 424, 432 (N.D. Ill. 2003) (internal quotations omitted). The existence of factual differences will not preclude a finding of typicality. *Id.* "Typicality does not mean identical, and the typicality requirement is liberally construed." *In re Neopharm, Inc. Securities Litigation*, 225 F.R.D. 563, 566 (N.D. Ill. 2004) (citation omitted).

Here, Plaintiffs and the other Settlement Class members were all Business Select flyers, and have alleged that Southwest's unilateral cancellation (and retroactive invalidation) of their Vouchers was a breach of contract, which damaged Plaintiffs and the other Settlement Class members in the amount of $5 per unused Drink Voucher. Moreover, there are no defenses that pertain to Plaintiffs that would not also pertain to the other Settlement Class members. Accordingly, Plaintiffs' claims are typical of the other Settlement Class members' claims.

4. Adequacy of Representation — Federal Rule of Civil Procedure 23(a)(4).

The final Rule 23(a) prerequisite requires that a proposed class representative "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). To satisfy the adequacy requirement, class representatives must establish that: (i) their claims are not in conflict with those of the proposed class, (ii) they have sufficient interests in the outcome of the case, and (iii) they are represented by experienced, competent counsel. *Hinman v. M and M Rental Ctr., Inc.*, 545 F. Supp. 2d 802, 807 (N.D. Ill. 2008). Furthermore, proposed class counsel must be competent and have the resources necessary to sustain the complex litigation necessitated by class claims; it is persuasive evidence that proposed class counsel have been found adequate in prior cases. *Gomez v. Ill. State Bd. of Educ.*, 117 F.R.D. 394, 401 (N.D. Ill. 1987).

Here, Plaintiffs' interests are consonant with the interests of the other Settlement Class members — obtaining relief from Southwest for its unilateral breach of the Parties contracts, and ensuring that Southwest does not continue such conduct in the future. Plaintiffs have no interests antagonistic to the interests of the other Settlement Class members. (Siprut Aff., ¶ 19.) Moreover, Plaintiffs' counsel are well respected members of the legal community, have regularly engaged in major complex litigation, and have significant experience in consumer class actions

involving similar issues, scope, and complexity. *Id.* at ¶ 14. Accordingly, both Plaintiffs and their counsel would adequately represent the proposed Settlement Class.

5. Superiority — Federal Rule of Civil Procedure 23(b)(3).

In addition to satisfying Rule 23(a), a plaintiff seeking certification must satisfy one of the provisions of Rule 23(b). Rule 23(b)(3) provides that matters pertinent to a finding of superiority include: "(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the difficulties likely to be encountered in the management of a class action." Fed. R. Civ. P. 23(b)(3).

The present class action is superior to other available methods for the fair and efficient adjudication of Plaintiffs' and the other Settlement Class members' claims. The burden and expense of individual prosecution of the litigation necessitated by Southwest's actions makes a class action superior to other available methods of resolution. Thus, absent a class action, it would be difficult, if not impossible, for individual Settlement Class members to obtain effective relief.

B. The Form and Method of Service of Class Notice Should Be Approved.

"When the parties reach a settlement agreement before a class determination and seek to stipulate that the settlement will have class wide scope, a class notice must be sent to provide absent class members with certain basic information so that they have an opportunity to consider the terms of the settlement." 2 NEWBERG, section 11.30, p. 11-62-11-63. The substance of the notice must describe, in plain language, the nature of the action, the definition of the certified class, and the class claims and defenses at issue. *See* Fed. R. Civ. P. 23(c)(2)(B). The notice must

also explain that class members may enter an appearance through counsel if desired, may request to be excluded from the class, and that a class judgment shall have a binding effect on all class members. *Id*. Additionally, dissemination of the notice must comport with both Rule 23 and due process, which require that a class receive "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974). The proposed notice plan in this case satisfies Rule 23's notice requirements as well as due process considerations.

As demonstrated below, the proposed written notice goes well beyond the requirements set forth above.[4] In fact, the notice provisions provide:

1. A brief summary of the claims alleged in the action;

2. An explanation of the proposed terms of the Settlement, the amount the Settlement Class Members are entitled to receive under the Settlement Agreement, and the method by which Settlement Class members can claim their Settlement benefit;

3. An explanation of Settlement Class members' rights to opt out of and/or object to Settlement within given time-frames and subject to certain requirements;

4. An explanation that Settlement Class members who do not opt out will be bound by the proposed settlement and judgment and will have released their claims;

5. An explanation that Settlement Class members who do not opt out will be represented by proposed Class Counsel; and

6. An identification of Class Counsel and a means for making inquiries thereof.

Federal courts authorize service of class notice by a variety of reliable means. In this regard, "[t]here is no statutory or due process requirement that all class members receive actual

[4] As noted above, the Exhibits will be submitted to the Court under separate cover.

notice by mail or other means; rather, 'individual notice must be provided to those Class members who are identifiable through reasonable effort.'" *Eisen v. Carlisle* & *Jacquelin*, 417 U.S. 156,175-76, 94 S. Ct. 2140(1974).

In this case, the proposed Settlement provides for notice by direct e-mail to Settlement Class Members for whom Southwest has an email address, direct mail notice to Settlement Class Members for whom Southwest has a physical address (if no e-mail address), Internet posting, and newspaper publications in *USA Today*. These notice methods are reasonably calculated to reach the class members by the best means practicable and should be approved.

C. The Court Should Schedule A Hearing For Final Settlement Approval.

Following notice to the Settlement Class Members, a fairness hearing is to be held on the proposed settlement. *Manual for Complex Litigation*, § 21.633. Accordingly, Plaintiffs, by proposed Class Counsel, respectfully request that the Court schedule a hearing on final approval of the Settlement to be held between 145-160 days after entry of the Preliminary Approval Order. The hearing on the final settlement approval should be scheduled now so that the date can be disclosed in the class notice.

VI. CONCLUSION

Based upon the foregoing, and because the proposed Settlement is fair, reasonable, and advantageous to the proposed Settlement Class Members, Plaintiffs respectfully request that the Court enter an Order:

A. Preliminarily approving the Settlement as being fair, reasonable, and adequate;

B. Preliminarily approving the Email Notice, Publication Notice, and Claim Form described in Sections V.B and VI.C of the Settlement Agreement, to be submitted separately as Exhibits A-H;

C. Setting the date and time of the Fairness Hearing to be held between 145-160 days after entry of the Preliminary Approval Order;

D. Provisionally certifying the proposed Class under Rule 23 of the Federal Rules of Civil Procedure for settlement purposes only;

E. Appointing Plaintiffs as Class representatives;

F. Appointing Joseph J. Siprut and his law firm, Siprut PC, as Class Counsel; and

G. Such other and further relief the Court deems just and proper.

Dated: December 3, 2012

Respectfully submitted,

ADAM LEVITT and HERBERT C. MALONE, individually and on behalf of all others similarly situated

By: _____
One of the Attorneys for Plaintiffs
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CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that a true and correct copy of the foregoing **Plaintiffs' Memorandum in Support of Joint Motion for Preliminary Approval of Class Action Settlement** was filed this 3rd day of December, 2012, via the electronic filing system of the United States District Court for the Northern District of Illinois, which will automatically serve all counsel of record.

Joseph J. Siprut