

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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THOMAS COX, JULIE FEINER, SUSAN HOTT,
SUSY KOSHKAKARYAN, YULIUS MUSTAFA,
GRETA SCHOENEMAN, et al.,

MEMORANDUM & ORDER

17-CV-5172 (EK) (VMS)

Plaintiffs,

-against-

SPIRIT AIRLINES, INC.,

Defendant.

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ERIC KOMITEE, United States District Judge:

**ORDER GRANTING PRELIMINARY APPROVAL OF SETTLEMENT BETWEEN
PLAINTIFFS AND DEFENDANT, AUTHORIZING DISSEMINATION OF CLASS
NOTICE OF THE PROPOSED SETTLEMENT, AND SCHEDULING HEARING FOR
FINAL APPROVAL OF PROPOSED SETTLEMENT**

THIS CAUSE having come before the Court on Plaintiff's Motion for Preliminary Approval of Settlement ("Motion") (ECF No. 178) between and among Thomas Cox, Shirin Begum, Jill Brua, Julie Feiner, Susan Hott, Susy Koshkakaryan, Yulius Mustafa, Greta Schoeneman, and Michael Wyant ("Plaintiffs") on behalf of themselves and the Class certified by the Court, and Spirit Airlines, Inc. ("Defendant" or "Spirit"). Having reviewed the Motion, its accompanying memorandum and declaration in support, the Settlement Agreement and Release, dated August 23, 2023 ("Settlement Agreement"), and being familiar with the prior proceedings in this Action, the Court orders as follows.

1. Terms used in this Order that are defined in the Settlement Agreement have the same meaning as in the Settlement Agreement. See ECF No. 178-3 at 2-33.

Preliminary Approval of Settlement Agreement

2. The terms of the Settlement Agreement are hereby preliminarily approved, as being within the range of possible approval, subject to the Final Approval Hearing described below in paragraph 21. See, e.g., *Kelen v. World Fin. Network Nat. Bank*, 302 F.R.D. 56, 69 (S.D.N.Y. 2014) (granting preliminary approval where “the proposed settlement is within the range of possible approval”). The Court finds that the Settlement Agreement was entered into at arm’s length and, for the reasons that follow (among others), appears to be sufficiently within the range of reasonableness that it warrants preliminary approval. Notice of the Settlement Agreement may therefore be given to potential Class Members as provided in this Order.

3. In the Second Circuit, district courts evaluate the fairness, reasonableness, and adequacy of a settlement by considering, among other factors, the relationship between the proposed settlement and “the best possible recovery” in light of “all the attendant risks of litigation.” *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 117 (2d Cir. 2005). Courts make this assessment in part by expressing the proposed settlement amount as a percentage of the best possible recovery

(i.e., the total amount recoverable if the plaintiffs were to prevail fully at trial). See, e.g., *In re Citigroup Inc. Bond Litig.*, 296 F.R.D. 147, 157 (S.D.N.Y. 2013) (considering the settlement amount as a “percentage of the best possible recovery”); *In re Merrill Lynch Tyco Rsch. Sec. Litig.*, 249 F.R.D. 124, 135 (S.D.N.Y. 2008) (noting that the settlement would provide an “estimated recovery of three percent of the total damages estimated by the plaintiffs”); see also *Morris v. Affinity Health Plan, Inc.*, 859 F. Supp. 2d 611, 621 (S.D.N.Y. 2012); *Alleyne v. Time Moving & Storage Inc.*, 264 F.R.D. 41, 57–58 (E.D.N.Y. 2010).

4. Here, the proposed settlement amount is \$8.25 million. The total amount recoverable is approximately \$60.47 million, calculated as follows: We begin with the total estimated number of Class Members (720,000), and multiply it by the average carry-on fee that Spirit assessed for personal items (\$45.83) – yielding total estimated damages of approximately \$33 million. We then calculate prejudgment interest by multiplying the principal amount of loss – \$33,000,000 – by .09 (because New York’s statutory rate of interest is 9%, see N.Y. C.P.L.R. § 5004(a)), and then multiplying that amount by the duration of the interest calculation. That duration is calculated from the midpoint of the class period – here, June 1, 2014 – through the date of comparison, which for these preliminary purposes we will

set at September 1, 2023, yielding a duration of 9.25 years. *See, e.g., Fermin v. Las Delicias Peruanas Rest., Inc.*, 93 F. Supp. 3d 19, 49 (E.D.N.Y. 2015) ("simple prejudgment interest is calculated from a singular, midpoint date through the date judgment is entered"); *Soto v. Los Corbaticas Deli Grocery II, Corp.*, No. 18-CV-3602, 2018 WL 4844018, at *7 (S.D.N.Y. Oct. 5, 2018) (same and collecting cases), *R&R adopted*, 2018 WL 6173713 (S.D.N.Y. Nov. 23, 2018).¹ Using this formula, total prejudgment interest is roughly \$27.47 million. Combined with the principal, the total estimated amount recoverable is \$60.47 million.

5. The proposed settlement of \$8.25 million is thus 13.64% of the estimated best possible recovery. This percentage is within the range of settlements approved by courts in the Second Circuit. *See, e.g., Pearlstein v. BlackBerry Ltd.*, No. 13-CV-7060, 2022 WL 4554858, at *6 (S.D.N.Y. Sept. 29, 2022) (approving settlement "represent[ing] approximately 13.75% of Plaintiffs' estimated maximum recoverable damages"); *In re GSE Bonds Antitrust Litig.*, No. 19-CV-1704, 2019 WL 6842332, at *4 (S.D.N.Y. Dec. 16, 2019) (preliminarily approving settlement representing "10.9% to 21.3% of the potential trebled recovery"); *In re Currency Conversion Fee Antitrust Litig.*, No.

¹ Unless otherwise noted, when quoting judicial decisions this order accepts all alterations and omits citations and internal quotation marks.

01-MDL-1409, 2006 WL 3247396, at *6 (S.D.N.Y. Nov. 8, 2006) (preliminarily approving settlement “representing roughly 10-15% of the credit transaction fees collected by Defendants”). Courts in other circuits have also approved settlements providing for a similar percentage of recovery. *See, e.g., Gaudin v. Saxon Mortg. Servs., Inc.*, No. 11-CV-1663, 2015 WL 7454183, at *6 (N.D. Cal. Nov. 23, 2015) (approving class settlement providing “13.6% recovery of the maximum possible recoverable damages”); *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1346 (S.D. Fla. 2011) (holding that a low-end estimate of a 9% recovery “constitute[d] a fair settlement even absent the risks associated with prosecuting these claims”). Considering Plaintiffs’ best possible recovery and the risks that Plaintiffs would face at trial, the Court finds that the settlement amount of \$8.25 million is sufficiently within the range of reasonableness.

6. Pursuant to Rule 23(e)(2)(C), district courts must also consider whether proposed attorneys’ fees and incentive awards for class representatives are reasonable. Here, the Settlement Agreement provides for an award of attorneys’ fees not to exceed \$2.75 million – that is, one-third of the maximum settlement amount – and incentive awards not to exceed \$7,500 for each of the nine named plaintiffs. At this preliminary stage, the Court finds that the proposed attorneys’ fees and

incentive awards are – like the total settlement amount itself – sufficiently within the range of reasonableness.

Approval of Settlement Administrator

7. Angeion Group is approved to act as Settlement Administrator; it will facilitate the Class Notice Plan and Claims Process as well as provide professional guidance to Class Counsel in the implementation of the Class Notice Plan, as set forth below and in Section C of the Settlement Agreement. Defendant shall pay, from the Settlement Common Fund, the Settlement Administrator's Notice Costs after entry of this Order upon fourteen days after receiving an invoice from the Settlement Administrator detailing such Notice Costs. Plaintiffs estimate that the Settlement Administrator's total fees – including the costs of notice and claims administration – will be approximately \$432,000 (assuming a 9% rate of valid claims submitted) to \$552,000 (assuming a 19% rate of valid claims).

The Class Notice Plan

8. Within thirty days after the date of entry of this Order, Class Counsel shall cause the Settlement Administrator to: (a) email the Notice in substantially the form attached as Exhibit C-2 to the Settlement Agreement, see ECF No. 178-3 at 43-45, which email shall contain a link to an electronic Claim Form, and is approved; and (b) mail copies of the post-card form

of Notice and Claim Form, in substantially the forms attached as Exhibits B and C-1 to the Settlement Agreement, see ECF No. 178-3 at 37-42, which forms are approved, as specified in paragraphs (C)(2) - (3) of the Settlement Agreement, by first class mail, postage prepaid.

9. To the extent neither a valid personal email address nor mailing address is obtained for a potential Class Member listed on SPIRIT-COX-0007509 or 7510, the Settlement Administrator will employ a social media campaign in substantially the form described in the Declaration of Steven Weisbrot, Esq, of Angeion Group, LLC Re: Proposed Media Notice Plan, see ECF No. 178-6, which is designed to reach such potential Class Members.

10. On or before the Notice Date, Class Counsel shall also cause the Settlement Administrator to publish the Notice, and Claim Form, in substantially the forms attached as Exhibits B and C-3 to the Settlement Agreement, see ECF No. 178-3 at 37-38, 46-59, as well as the Settlement Agreement itself, on the following website: www.spiritcarryonbagfeesettlement.com.

11. Halfway through the period for submitting Claim Forms, the Settlement Administrator will send reminder notices to potential Class Members who have not submitted a Claim by that time using the same method as initial notice was provided to them.

12. Defendant shall serve notice of the settlement that meets the requirements of the Class Action Fairness Act, on the appropriate federal and state officials (including in the State of New York) not later than ten days after the filing of this Settlement Agreement with the Court.

13. No later than ten days before the Final Approval Hearing, Class Counsel shall serve and file a sworn statement attesting to compliance with the provisions of paragraphs 8 through 11 of this Order, and Defendant shall serve and file a sworn statement attesting to compliance with paragraph 12 of this Order.

The Claims Process

14. In addition to processing claims received by mail, the Settlement Administrator will also establish a secure website that will permit the submission of claims electronically, and, if the claimant elects to do so, permit the claimant to provide securely the information necessary for electronic payment of their share of the Settlement by Zelle, Venmo or EFT, if determined by the Settlement Administrator to be an Authorized Claimant. Claimants will also have the option to receive payment via check.

15. A claimant can only be an Authorized Claimant if the claimant submits a timely Claim Form in which the claimant attests that they first flew Spirit during the Class Period and

it is determined that such Spirit flight is within the applicable Statute of Limitation for the State or U.S. Territory the claimant resided in when he or she purchased that Spirit flight.

16. Unless otherwise determined by the Court, potential Class Members must submit a signed and complete Claim Form within thirty days after a Final Order and Judgment is entered by this Court (the "Claim Date"), provided, however, that there shall be a thirty-day period following the date on which the Class Member receives notice of the deficiency, during which the claimant will have to the opportunity to cure any Claim Forms determined to be deficient by the Settlement Administrator.

Requests for Exclusion

17. As described in the Notices (Exhibits C-1 through C-3 of the Settlement Agreement, ECF No. 178-3 at 39-59), any member of the Class may opt out of the Class by notifying the Settlement Administrator at the address provided in the Notices. A Class Member wishing to request exclusion shall mail their opt-out request in written form by first-class mail, postmarked, or otherwise received by the Settlement Administrator, no later than thirty days before the Final Approval Hearing. Unless otherwise ruled by the Court, to be valid, a request for exclusion must be personally signed and must include: (1) the Class Member's full name, city and state of residence, and, if

the person lived elsewhere when they booked their first flight with Spirit, the State or U.S. Territory in which they then resided; (2) a statement that they first flew Spirit during the Class Period; and (3) a statement substantially to the effect "I request to be excluded from the Class in *Cox et al. v. Spirit Airlines, Inc.*, Case No. 1:17-CV-5172, pending in the United States District Court for the Eastern District of New York."

18. Persons or entities that request exclusion from the Class and whose requests for exclusion are accepted by the Court shall not be entitled to share the benefits of the Settlement Agreement, nor be bound by any judgment, whether favorable or adverse in this Action.

Objections

19. Any Class Member who has not opted out in accordance with the terms above and who intends to object to this Settlement Agreement or to the request for attorneys' fees, reimbursement of Class Counsel's out-of-pocket costs and expenses, or to the request for Service Awards to the Plaintiffs, as described in the Notices, must file their objection in writing with the Court no later than thirty days before the Final Approval Hearing, and must concurrently serve their objection on all counsel in this action. The objection must include the following: (1) the Class Member's full name, city and state of residence, and, if the person lived elsewhere

when they booked their first flight with Spirit, the State or U.S. Territory in which they then resided; (2) a statement that they first flew Spirit during the Class Period; (3) if the individual is represented by counsel, the name and telephone number of their counsel; (4) all objections and the basis for any such objections; (5) the identity of any witnesses the objector may call to testify; (6) a listing of any exhibits the objector intends to introduce into evidence at the Final Approval Hearing as well as true and correct copies of such exhibits; and (7) a statement of whether the objector intends to appear at the Final Approval Hearing, either with or without counsel.

20. Any Class Member who fails to timely file and serve a written objection pursuant to paragraph 19 shall not be permitted to object to the approval of the Settlement or this Settlement Agreement and shall be foreclosed from seeking any review of the Settlement or the terms of the Settlement Agreement by appeal or other means, unless otherwise ordered by the Court.

The Final Approval Hearing

21. A Final Approval Hearing is hereby scheduled to be held on Monday, December 11, 2023 at 9:30 a.m. EST before the undersigned at the United States District Court for the Eastern District of New York, 225 Cadman Plaza East, Brooklyn, New York,

NY 11201, to consider (a) the fairness, reasonableness and adequacy of the Settlement; (b) the request for attorneys' fees, reimbursement of Class Counsel's out-of-pocket costs and expenses and Service Awards for the Plaintiffs; (c) final approval of the costs and expenses of the Settlement Administrator; (d) and entry of an order substantially in the form of the Final Order and Judgment, attached as Exhibit D to the Settlement Agreement, see ECF No. 178-3 at 60-65.

22. All papers in support of final approval of the Settlement, and the request for attorneys' fees, reimbursement of Class Counsel's out-of-pocket costs and expenses incurred in the prosecution of the litigation, for Service Awards for the Plaintiffs, and for approval of the costs and expenses of the Settlement Administrator shall be filed no later than ten days before the Final Approval Hearing.

23. The date of the Fairness Hearing shall be set forth in the Notices and all other forms of notice, but as is also set forth in the Notices, subject to adjournment by the Court without further notice to the members of the Class other than that which may be posted at the Court and on the Court's website.

24. Pending the Final Approval Hearing, all other deadlines set in this Action shall be suspended and all

proceedings in this Action other than to effectuate the
Settlement shall be stayed.

SO ORDERED.

/s/ Eric Komitee
ERIC KOMITEE
United States District Judge

Dated: September 21, 2023
Brooklyn, New York