IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

In re Nigeria Charter Flights Contract Litigation MDL No. 1613	04-md-1613 (RJD) (MDG)

This document relates to: Mba et. al. v. World Airways, Inc. et. al.	04-cv-0473 (RJD) (MDG)

MEMORANDUM OF DEFENDANT WORLD AIRWAYS INC.
IN OPPOSITION TO SUPPLEMENTAL MEMORANDUM OF PLAINTIFFS

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IN OPPOSITION TO SUPPLEMENTAL MEMORANDUM OF PLAINTIFFS

Pursuant to the Court's Scheduling Order of September 8, 2010, World Airways, Inc. ("World") respectfully submits this memorandum in opposition to the supplemental memorandum filed by O. Benjamin Okeke, attorney for Plaintiffs, seeking the award of attorneys' fees and costs totaling $144,813.65.[1] For the reasons set forth below, Mr. Okeke's request is without merit and should be denied.

SUMMARY

Mr. Okeke seeks to re-litigate issues that have already been conclusively determined by the U.S. Court of Appeals for the Second Circuit by Summary Order dated March 10, 2010 ("Summary Order"). The only issue to be resolved on remand is for the district court to "provide sufficient grounds for its orders granting class counsel Thacher $1,355,265.94 in fees and $109,734.06 in costs and Echeruo $600,000 in fees and denying fees and costs to Okeke."

[1] Although Mr. Okeke's supplemental memorandum bears an electronic filing stamp of July 30, 2010, the document was not served on World until September 8, 2010, as the Court properly notes in its Scheduling Order.

Summary Order at 8. In this regard, Mr. Okeke has not provided any evidence that he contributed to the creation of the common fund or otherwise undertook efforts that materially benefitted the Class, much less has he demonstrated that he is entitled to fees and costs on the basis of his objections to the Settlement Agreement. However, in the event that the Court were to determine that Mr. Okeke is entitled to fees and costs (which he is not), Mr. Okeke's recovery is limited to the portion of the fund set aside under the Settlement Agreement for legal reimbursements; that Mr. Okeke might encounter difficulty actually collecting these fees and costs from Thacher or Echeruo does not constitute adequate grounds to disturb the explicit terms of the Settlement Agreement, as approved by the district court and affirmed by the Second Circuit.

It has now been more than 21 months since the district court approved the Settlement Agreement and the time for Mr. Okeke to file a petition for certiorari seeking review of the Summary Order upholding the district court's approval of the Settlement Agreement has long since passed. Mr. Okeke's quest for attorneys' fees, to which he is not entitled, has only served to delay payment of qualifying claims made by Class members – the vast majority of which Mr. Okeke did not represent. World urges this Court to issue findings and recommendations providing sufficient grounds for the district court to deny Mr. Okeke's fee petition and approve the petitions of Class Counsel, so that World may promptly proceed with the payment of qualifying claims to Class members.

ARGUMENTS

I. Mr. Okeke Is Seeking To Impermissibly Re-Litigate Issues That Are Clearly Foreclosed By The Summary Order Of The U.S. Court of Appeals For The Second Circuit.

Importantly, the Summary Order "affirm[ed] the district court's order approving the settlement." *Id.* at 7. The Second Circuit did not approve selected provisions of the Settlement Agreement; it approved all of the Settlement Agreement, including the amount set aside for attorneys' fees and costs—$2,065,000. Nevertheless, Mr. Okeke persists in attacking the Settlement Agreement and invites this Court to reconsider the reasonableness, and ignore the express terms, of that agreement. This Court should decline Mr. Okeke's invitation to engage in such a review, which is beyond the permissible scope of remand established by the Summary Order. Having failed in his challenge against the terms of the settlement on appeal, Mr. Okeke cannot re-litigate this issue now.

The Settlement Agreement was the product of extensive arm's length negotiations under the close supervision of this Court. The district court found the Settlement Agreement to be fair, reasonable, and adequate, as required under Fed. R. Civ. P. 23(e)(2). The understanding that fees for the attorneys representing the Class would not exceed the amount established by the Parties was an essential element of World's assent to the Settlement Agreement. Mr. Okeke's argument that he is entitled to recover from funds set aside to satisfy Class members' claims not only violates the terms of the Settlement Agreement – which caps the amount for legal fees and costs – but also is foreclosed by the Summary Order.

Nevertheless, Mr. Okeke, as he did in his appeal of the district court's orders, once again attempts to assail the manner in which unclaimed settlement funds will be distributed under the Settlement Agreement, contending that such an arrangement would confer an undue benefit on

World. However, this argument was considered, and expressly rejected, by the Court of Appeals, on the grounds that, "This Court has held that unclaimed portions of a class action fund in a private action may properly be returned to the defendant." Summary Order at 4.

Mr. Okeke's belated attempt to redraft the terms of a settlement in which he played no active role during negotiations should be rejected. There is simply no basis for his suggestion that the terms of the Settlement Agreement are open to challenge. Contrary to Mr. Okeke's claims in his supplemental memorandum, the Summary Order closes the door on any further consideration by this Court of the terms of the Settlement Agreement.

Finally, it should be noted that while World stands ready to process payments to Class members, it cannot move forward with payment unless and until the Court has concluded that the total amount of legal fees and costs awarded to all attorneys for Class members in this case will not exceed the amount specifically allocated for such purposes under the Settlement Agreement, *i.e.* $2,065,000. Any outcome that would, as Mr. Okeke urges, involve payment to attorneys from the balance of the Settlement Fund for claims would materially modify the settlement terms and, under Paragraph 117 of the Settlement Agreement, constitute grounds for termination. As that settlement provision establishes, if "the Court . . . denies or changes in any way any portion or term of this Settlement Agreement," the Settlement Agreement may be terminated, in which case, under Paragraph 119, "the Settlement Funds," including the amounts earmarked to pay the qualifying claims of Class members, shall be returned to the Settling Defendants.

II. The Only Issue On Remand Is An Examination Of The Fee Petitions By Mr. Okeke And Class Counsel.

In its Summary Order, the Second Circuit very clearly approved the Settlement Agreement while vacating and remanding only the orders of the district court pertaining to attorneys' fees and costs. The sole matter to be decided on remand is whether the district court

ruled properly when it awarded the entire amount of those fees as allocated between the Thacher firm and Mr. Echeruo, while determining that Mr. Okeke should not receive any portion. Indeed, that is the only meaning that can be attributed to the last paragraph in the Summary Order:

> We affirm the district court's order approving the settlement. Because, however, we find that the district court failed to provide sufficient grounds for its orders granting class counsel Thacher $1,355,265.94 in fees and $109,734.06 in costs and Echeruo $600,000 in fees and denying fees and costs to Okeke, we vacate those orders and remand to the district court for further findings.

Summary Order at 7-8 (emphasis added).

As a consequence, the only controversy that remains in this proceeding is Mr. Okeke's dispute with Class Counsel over the allocation of the fees set aside for attorneys in the Settlement Agreement.

The exclusion of Mr. Okeke from any share of these fees does not mean that he has gone uncompensated for his efforts on behalf of his own clients in this proceeding; it should be noted that Mr. Okeke already received $69,000 in settlement payments in connection with the resolution of claims against World outside the Class settlement.

III. Mr. Okeke Has Not Demonstrated That He Is Entitled To Legal Fees.

As Mr. Okeke is well aware, in the courts of the Second Circuit "[t]he actions of the party seeking to recover costs must . . . be a substantial cause of the benefit obtained," through a class settlement. *In re Holocaust Victim Assets,* 424 F.3d 150, 157 (2d Cir. 2005) (citation and internal quotations omitted). *See also Savoie v. Merchants Bank,* 84 F.3d 52, 56-57 (2d Cir. 1996) (same). Explained another way, "a material benefit to the class is the *sine qua non* for an attorney's entitlement to an award of fees from the common fund." *In re Holocaust Victim Assets,* 424 F.3d at 157. However, Mr. Okeke scarcely even attempts to make this required

showing in his supplemental memorandum. This is not surprising as Mr. Okeke cannot show that his undertakings had such an effect.

Mr. Okeke's efforts have been singularly focused on intentionally hampering the settlement process in the hopes of extracting legal fees for himself. Mr. Okeke most certainly did not materially contribute to the creation of the common fund. Rather, while Class Counsel litigated the case for more than four years, Mr. Okeke was largely absent until it came time to submit his own fee petition. Mr. Okeke can point to no specific undertakings that had a material effect on the terms of the Class settlement. Instead, he proceeds under the mistaken belief that his representation of clients (many of whom settled with World independently of the Class members) automatically entitles him to almost $145,000, no matter how limited his participation in this case.

It is well settled that objectors are entitled to attorneys' fees and costs only if "a proper showing has been made that the settlement was improved as a result of their efforts." *White v. Auerbach*, 500 F.2d 822, 828 (2d Cir. 1974) (citations omitted). *See also In re Joint Eastern and Southern District Asbestos Litigation*, 982 F.2d 721, 749 (2d Cir. 1992) (denying law firm's petition for objectors' fees where firm failed to identify "any concrete benefit that its efforts conferred on the class").

The record in the instant litigation is devoid of any evidence that Mr. Okeke's objections improved the terms of the settlement. In fact, Mr. Okeke's time records in support of his fee petition indicate that his efforts were largely limited to communications with his own clients and attendance at court conferences as a bystander. Moreover, these time records do not appear to have been prepared contemporaneously with the dates reported.

Turning to the substance of Mr. Okeke's arguments in his supplemental memorandum, his reliance on *Frankenstein v. McCrory Corp.*, 425 F. Supp. 762, 767 (S.D.N.Y. 1977) to support his claim for objectors' fees seriously misperceives that case, and ignores its recitation of the rule in the Second Circuit that the efforts must "produce[] a beneficial effect upon the progress of the litigation." 425 F. Supp. at 767. Mere dissension of the variety that Mr. Okeke has advanced is not sufficient. *Elliott v. Sperry Rand Corp.*, 680 F.2d 1225, 1227 (8th Cir. 1982) (citing *Frankenstein*).

In contrast to Mr. Okeke's objections in this proceeding, the district court in *Frankenstein* was faced with an objection to the structure of a settlement stemming from multiple alleged violations of Federal securities laws and involving class plaintiffs who were divided into two sub-classes based on the timing of their ownership of the securities. There, the objector contended that the essential structure of the settlement operated to favor certain class members over others. Although the court awarded fees to the objector notwithstanding its denial of the objections, the court explained that it did so because the objector had significantly benefitted the course of proceedings. As the *Frankenstein* court explained:

> The objections raised, although ultimately overruled, were not frivolous, and the presence of an objector represented by competent counsel transformed the settlement hearing into a truly adversary proceeding. The objections to the settlement caused this Court to spend even more hours in analyzing and assessing the complex settlement agreement, *and cast in sharp focus the question of the fairness and adequacy of the settlement to all the members of the class*.

425 F. Supp. at 767 (emphasis added). Similarly, in *Howes v. Atkins*, 668 F. Supp. 1021 (E.D.Ky. 1987), which Mr. Okeke cites in his July 15, 2010, letter to the Court to support his claim for fees, the necessary predicate is the same as that in *Frankenstein*. The objectors' efforts must be of assistance to the court, which, in *Howes* involved "a vigorous attack" on a settlement,

the terms of which the court worried were "minimal . . . in contrast to plaintiff's attorneys' initial optimistic view concerning the litigation's prospects." *Id.* at 1027. The efforts of the objectors in *Howes* prompted "extensive discovery" that ultimately "made the court more comfortable in approving the settlement." *Id.* In sum, "Objectors' counsel ably performed the role of devil's advocate in this litigation and is deserving of a fee award for this service." *Id.* (citing *Frankenstein, supra,* and collecting similar cases).

The same cannot be said for Mr. Okeke's objections to the Settlement Agreement, which merely alleged that: (i) the distribution of unpaid funds to World would constitute an unfair windfall, and (ii) claimants living in Nigeria would not be able to cash settlement checks payable in U.S. dollars. These objections, which lacked any merit and were summarily dismissed by the Court of Appeals (Summary Order at 7), were of no benefit to the progress of the litigation, but instead were thinly veiled attempts on the part of Mr. Okeke to recover fees for himself from a common fund that he did not help to create. Far from casting "in sharp focus the question of the fairness and adequacy" of the Settlement Agreement, *Frankenstein*, *supra*, 425 F. Supp. at 767, Mr. Okeke's efforts were not undertaken to assist the court or accomplish any other helpful goal.

IV. If The Court Determines That Mr. Okeke Is Entitled To Fees Then He Can Only Recover From The Portion Of The Fund Already Set Aside For Legal Expenses.

Mr. Okeke urges this Court to award him fees from the portion of the Settlement Fund set aside to pay qualifying claims of Class members. In the event the Court concludes that Mr. Okeke contributed to the creation of the common fund or is otherwise entitled to legal fees (which he is not), any fees must come from the portion of the fund established for legal reimbursements. This was precisely the outcome in *Elliott v. Sperry Rand Corp.*, *supra*, in which objecting plaintiffs claimed legal fees. Setting aside the fact that the court in *Elliott* concluded that the objecting plaintiffs were entitled to legal fees on the grounds that they

"required separate representation because their interests had diverged from those of the class," 680 F.2d at 1227, the *Elliott* court concluded, quite properly, that "This compensation, however, must come out of the fund . . . set aside for attorneys' fees by the stipulated settlement." *Id.*

Awarding fees to Mr. Okeke from the portion of the fund established to pay the qualifying claims of Class members would also be contrary to the intention of the Parties when they reached agreement on the settlement, as manifested by the express terms of the Settlement Agreement. The "district judge generally should not dictate the terms of the settlement agreement in a class action. Rather, he should approve or disapprove a proposed agreement as it is placed before him and should not take it upon himself to modify the terms." *In re Agent Orange Product Liability Litigation*, 821 F.2d 139, 144 (2d Cir. 1987) (citation and internal quotations omitted). *See also Goldman v. Shulman*, 1988 WL 144718, *3 (E.D.N.Y. 1988) (noting "[i]t is not the job of the judge to dictate the settlement terms, nor should the district court take it upon itself to modify its terms").

Permitting legal fees to be recovered from the portion of the fund for claims of Class members would also constitute an inappropriate reformation of a written agreement. "It is well established that reformation is appropriate only to conform an agreement to accurately reflect the intentions of the parties at the time of the" agreement. *Beecher v. McDonnell Douglas Corp.*, 575 F.2d 1010, 1015 (2d Cir. 1978) (collecting cases). Such circumstances are wholly absent in this case.

V. The Settlement Agreement Cannot Be Disturbed On The Grounds That Mr. Okeke Might Encounter Difficulty Collecting Monies Previously Awarded To Class Counsel.

Mr. Okeke does not cite to any authority in support of his argument that the dissolution of the Thacher firm *ipso facto* entitles him to recover fees from the portion of the fund set aside for claims of Class members. Such an argument is flawed for several reasons. First, the argument

presupposes that Mr. Okeke's participation in this case was a "substantial cause of the benefit obtained," under the settlement terms. *In re Holocaust Victim Assets,* 424 F.3d at 157 , which it most certainly was not.

Second, Mr. Okeke has failed to allege any lack of an effective remedy to collect fees from Class Counsel—if indeed this Court were to ultimately determine that Mr. Okeke were entitled to receive a share of the portion set aside for legal fees and costs under the Settlement Agreement. Although the Thacher firm has dissolved, Mr. Okeke is free to obtain a money judgment against the Thacher firm. Furthermore, Mr. Okeke has adduced no evidence that he would not be able to collect legal fees already paid to Mr. Echeruo if the district court were to so order. That Mr. Echeruo may reside in Nigeria does not mean that Mr. Okeke lacks an adequate remedy to recover amounts previously paid to Class Counsel. Mere "claim[s] of uncollectability essentially consist[ing] of unsupported statements" in a court pleading "are not evidence and do not count." *Esperanza Aviation 2007-Sky King, LLC v. City Skies, Inc.*, 2009 WL 2947228, *5 (N.D.Ill. 2009) (collecting cases).

Third, and most importantly, that monies set aside for legal expenses have already been paid from the fund does not constitute grounds to disturb a settlement in order to compensate a plaintiff's attorney, no matter how effective the attorney's efforts may have been. *See In re Denial of Gordon Ball's Motion for Attorney's Fees*, 1996 WL 599824, *6 (6th Cir. 1996) (affirming district court's denial of fee petition for attorney who successfully defended settlement on appeal where the "fee award he is requesting would come out of the pockets of the members of the plaintiff class" which "have not yet been distributed by the district court, although attorney's fees have been").

CONCLUSION

Mr. Okeke has failed to present evidence that he is entitled to fees and costs under any theory of recovery and, accordingly: (i) his fee petition should be denied; and (ii) the Court should proceed to the issuance of findings and recommendations allowing the district court to set forth "sufficient grounds for its orders granting class counsel Thacher $1,355,265.94 in fees and $109,734.06 in costs and Echeruo $600,000 in fees and denying fees and costs to Okeke." Summary Order at 8. Alternatively, and in the event the Court determines Mr. Okeke is entitled to fees and costs notwithstanding his limited participation in this case and the payments he already received on behalf of clients who are not members of the Class, his recovery must come from the portion of the fund explicitly allocated to legal fees and costs under the express terms of the Settlement Agreement, as approved by the district court and upheld by the Court of Appeals.

DATED: Washington, D.C.
September 17, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of September, 2010, a copy of the foregoing Memorandum in Opposition was served in accordance with this Court's rules on the parties named below:

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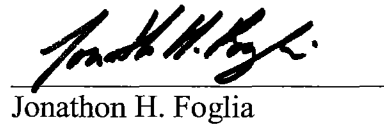

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