

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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In Re:  
WORLD AIRWAYS LITIGATION

Case No: CV 2004-0304  
(RJD) (MDG)

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THIS DOCUMENT RELATES TO: ALL CASES

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**REPLY MEMORANDUM OF LEAD PLAINTIFFS IN RESPONSE TO  
OPPOSITION OF DEFENDANTS AND IN FURTHER SUPPORT OF THEIR  
MOTIONS FOR CLASS CERTIFICATION**

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The plaintiffs in the above captioned actions (“Plaintiffs”), by and through lead plaintiffs’ co-counsel Echeruo, Counsel, Attorneys At Law, LLP and Thacher Proffitt & Wood LLP respectfully submit this reply memorandum of law in response to the opposition briefs and other submissions filed by World Airways, Inc. (“World Airways”) and Capitol Indemnity Corporation (“Capitol”), and in further support of Plaintiffs’ motion for class certification.

## I. PRELIMINARY STATEMENT

World Airways’ and Capitol’s effort to oppose class certification is just a litigation tactic to deny Plaintiffs a meaningful and effective mechanism to receive redress for their injuries. Quite obviously, defense counsel have calculated (probably correctly) that if each stranded passenger has to bring his or her own lawsuit, most will have difficulty finding competent legal counsel and litigating their case in light of their relatively modest individual damages. The Court should not countenance such untoward motivations.

This case is paradigmatic for class certification -- the proposed classes are well-defined groups of World Airways ticket holders for air travel between the United States and Nigeria in 2004 who were injured by the misconduct of World Airways and Ritetime in abruptly terminating numerous scheduled flights. The claims arise from identical conduct that injured all members of the Classes, and numerous questions of law and fact are common to each of the Classes, which predominate over any individual questions. For instance, World knew that Ritetime was not in compliance with the federal public charter regulations, that Ritetime was misusing its escrow account, and that they were using a misleading, if not fraudulent, ticketing scheme. World knew that Ritetime had sold tickets for travel in 2004, but cancelled the flight program without notice anyway in late December 2003, knowing that passengers would be

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stranded. The passengers all received the same misleading tickets, did not receive Charter Participant Agreements, and were all stranded, without receiving reimbursement. Maybe the only difference among the individual Plaintiffs is which chair or section of the floor they sat on for days in J.F.K. or Lagos Airports while waiting to fly home.

World Airways' claim that class certification is improper is belied by its representation to the Judicial Panel on Multi-District Litigation that these cases all present common questions of fact and should be consolidated in this Court for discovery purposes. It is further belied by its successful removal of *Ayeni et al v. World Airways, Inc., et al* from state court in Georgia to federal court on federal question grounds, and then subsequent consolidation in this Court. It is still further belied by common sense -- in terms of efficiency and manageability, for World, Plaintiffs and the judicial system, a class action is preferable to hundreds of lawsuits in a dozen states.

Not surprisingly, then, World Airways and Capitol have little to work with in opposing class certification. So, for instance, World's arguments about privity and agency improperly address the merits, involve only Plaintiffs' contract claim to the exclusion of other claims (such as fraud and misrepresentation), and, in any case, are baseless, since World Airways and Ritetime had essentially one course of dealing with all Plaintiffs. Moreover, Capitol's central allegation that it did not receive "written notice of claim" within 60 days of the termination of the World Airways/Ritime charter ignores the fact that Ritetime was served with a Summons and Complaint on January 30, 2004 -- well within the 60 day period.

A class action is, without doubt, the fairest and most efficient manner in which to adjudicate Plaintiffs' claims.

## II. STATEMENT OF FACTS

Defendants Ritetime and World Airways operated a charter airline business offering non-stop flights between the United States and Nigeria. On or about December 31, 2003, Ritetime and World Airways stopped flying, stranding numerous passengers in both Nigeria and in the United States. Under public charter regulations, Capitol issued a bond to insure the financial responsibility of Ritetime with respect to money received from the passengers on the charter flights. That bond explicitly states that it is for the “protection” of the charter participants (passengers) and “inures to the benefit” of the charter participants. (Exhibit A to Capitol’s Memorandum of Law). Capitol’s liability is therefore derivative of Ritetime’s liability.

Discovery to date has revealed that World Airways was an integral participant in the wrongdoing that led to the Plaintiffs’ losses. World Airways and Ritetime worked hand in hand in injuring Plaintiffs: World altered its ordinary charter tickets to remove the disclaimer that the flights were charter flights because that would have dissuaded Nigerians from purchasing the tickets. Deposition of Ann Aktabowski dated May 6, 2004. Deposition of Ann Aktabowski dated May 6, 2004 (“Aktabowski Dep.”), attached as Exhibit A to the Declaration of Ike O. Echeruo, Esq. dated July 2, 2004 (“Echeruo Declaration”)) at pp. 63-80. All tickets issued for the flights that are the subject matter of this litigation were printed by World Airways. *Id.* at 63. The tickets clearly identify World Airways as the “carrier” issuing the tickets. *See* Annotated Ticket (attached as Exhibit B to Echeruo Declaration). World Airways was aware that passenger payments were not being paid into an escrow account as required by regulation but into a Ritetime “slush” account. Deposition of Sandra L. Miller, at p. 286 (attached as Exhibit I to Echeruo Declaration.). World knew that Ritetime had sold tickets for travel in 2004 (and even sent Ritetime a new batch of blank tickets in December 2003), but cancelled the flight program

abruptly anyway in late December 2003. Aktabowski Dep. at 109-113.

### III. ARGUMENT

#### A. Class Certification Is Not The Proper Time For A Trial On the Merits

As an initial matter, the large majority of World Airways' and Capitol's arguments against certification misconstrue the analysis that the Court should undertake at the class certification stage of the litigation. As the Second Circuit has repeatedly made clear, the Court is not to examine the merits of the case, resolve factual disputes or weigh conflicting evidence and decide which side is right at the class certification stage. *In re VISA Check/Mastermoney Antitrust Litig.*, 280 F.3d at 134-35. As the Second Circuit has held:

[A] motion for class certification is not an occasion for examination of the merits of the case. As the Supreme Court has stated, "[N]othing in either the language or history of Rule 23...gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action."

*Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 291 (2d Cir. 1982)(citations omitted) *see also Cromer Finance Ltd. v. Berger*, 205 F.R.D. 113,120 (S.D.N.Y. 2001).

Thus, Defendants are improperly asking the Court to resolve factual and legal issues that go to the merits of the case, insisting for example that World Airways is not in privity of contract with the Plaintiffs; that World Airways did not engage in transactions with Plaintiffs; that Ritetime is not World Airways' agent; that Plaintiffs failed to provide written notice to Capitol; and that written notice was not provided to Capitol within a required period. In any case, because class determination is made at the pleading stage, the substantive allegations in the Complaint are accepted as true for purposes of the class certification motion. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974); *Shelter Realty Corp. v. Allied Maintenance*

*Corp*, 574 F.2d 656, 661 n.15 (2d Cir. 1978).

**B. Class Certification is Proper Against World Airways.**

World Airways also wrongly argues that common issues do not predominate because Plaintiffs' claims will require a burdensome series of trials on issues of agency and privity, and further that the contract law of several states may need to be analyzed. These arguments fail because the Plaintiffs' claims do not rely on individualized representations, but rather a uniform deceptive course of conduct by World Airways and Ritetime that was directed at all ticket purchasers. And while World Airways claims that the law of every state may be relevant to this case, that is merely hypothesizing.

**1. Agency and Privity**

It is black letter law that an agent acts with actual and implied authority as a consequence of a principal's conduct toward the agent, whereby the principal manifests assent to be affected by the agent's action, and the agent's reasonable understanding of the principal's direction. Restatement 3d Agency § 2.01. Therefore, whether Ritetime was World Airways' agent, and consequently had the actual or implied authority to issue tickets to the class members on behalf of World Airways, depends almost exclusively on communication between Defendants World Airways, Ritetime and Obafemi and upon their corporate records, with no issue turning on the identity or actions of any individual member of the class.

Moreover, as is laid out in detail in the Complaint, which is accepted as true for purposes of this motion, World Airways held Ritetime out as its agent in the course of its marketing to the general public, and permitted Ritetime to hold itself out as World Airways' agent as well. Among other things, this can be seen in World Airways' press releases, its website and Ritetime's website. *See* Exhibit E to Echeruo Declaration. Indeed, in World Airways' statement

on or about January 15, 2004 announcing the termination of the charter service at issue, Ritetime is identified as the “contractor and sole marketing agent” for the Nigerian flights. Instead, the agency relationship was created by the business model and course of dealing that World Airways and Ritetime engaged in, which was explicitly intended to deceive the general public as to the true nature of the charter flights and therefore also inherently intended to conceal the true relationship between Ritetime and World Airways.

A closely analogous class certification case in the Eastern District of New York involved misrepresentations contained in form “investment contracts” that were used to dupe potential buyers into investing in a tax shelter, just like the identical deceptive tickets at issue here were used to conceal the fact that the flights were charter flights. *See In re Energy Sys. Equip. Leasing. Sec. Litig.*, 642 F.Supp. 718 (E.D.N.Y. 1986). In *Energy Systems* the court allowed certification, holding that the “litigation is rooted in the claims of misrepresentations and omissions contained in standardized materials...the commonality provided by the alleged misstatements and omissions and defendants’ purportedly fraudulent scheme far outweighs any particular distinctions in the fact patterns surrounding...given class members.” *Id.* at 751 (emphasis added). That precise logic applies here: among other things, every single Plaintiff received an identical standardized deceptive ticket with intentional material omissions. That underlying commonality far outweighs any minor differences among the Plaintiffs.

## **2. Analysis of state contract law**

World Airways wrongly asserts that Plaintiffs’ contract claims may require application of the law of various states, which allegedly outweighs any “predominance” shown by Plaintiffs under Rule 23(b)(3). This is incorrect for two reasons: a) a class certification motion is not the proper place for judicial resolution of choice of law issues; b) even if the Court were to consider

choice of law issues during the class certification process, in this case the laws of the various jurisdictions are uniform, and it is arguably the Defendants' burden to show that conflicts between the laws of various jurisdictions will destroy the predominance of common issues of law and fact.

a) This is not the proper time to decide choice of law issues.

Courts have held that choice of law issues should not be considered when ruling on a class certification motion. *In re Crazy Eddie Sec. Litig.*, 135 F.R.D. 39, 41 (E.D.N.Y. 1991) (stating that “along with other district courts in this circuit, this court declines to decide choice of law issues on a class certification motion and holds that the application of the laws of different states, if necessary, does not preclude class action litigation of this case”) *see also Koppel v. 4987 Corp.*, 191 F.R.D. 360, 366 (S.D.N.Y. 2000) (certifying a class action involving the laws of over thirty states, and stating “on a motion for class certification, the court need not anticipate that variance may exist between the laws of the various states involved”). So contrary to *World Airways*, this Court does not need to engage in any conflict of law analysis on this motion.

b) There appears to be no conflict of law, and World Airways should bear the burden of at least alleging such a conflict.

This case presents a very simple contract issue: the Plaintiffs purchased tickets for air travel and World Airways and Ritetime refused to provide it. The Plaintiffs are unaware of any jurisdiction in which one party may lawfully refuse to perform its obligations under a contract after the other party has fully performed. Consequently, state contract laws provide no “manageability” problems with respect to the Classes. Tellingly, World Airways does not actually claim that there is a conflict or variation in state contract law, just that there could be. Courts have held that the defendant bears the burden of showing that conflicts between the laws of different states exist and that therefore, common issues do not “predominate” for purposes of

Rule 23(b)(3). *See, e.g., Margaret Hall Foundation, Inc. v. Atlantic Fin. Mgmt., Inc.*, 1987 WL 15884 (D. Mass. July 30, 1987); *In re Computer Memories Sec. Litig.*, 111 F.R.D. 675, 684-85 (N.D. Cal. 1986).

In addition, World Airways argues that the nature of recoverable contract damages raise questions of predominance, but there is no conflict between the thirteen jurisdictions identified by World Airways as possibly supplying contract law here. The law in the various jurisdictions regarding contract damages is fundamentally identical: consequential damages are recoverable for breach of contract when the damages were reasonably foreseeable at the time of the contract and the loss flows naturally from the breach. *See, e.g., Johnson v. Scandia Assoc., Inc.*, 717 N.E.2d 24, 31 (Ind. 1999); *City of Dubuque and Lyons v. Iowa Trust*, 519 N.W.2d 786, 790 (Iowa 1994); *Delano Growers' Cooperative Winery v. Supreme Wine Co., Inc.*, 473 N.E.2d 1066, 1075 (Mass. 1985); *Perry v. Lyon Const. Co.*, 145 A. 637, 638 (N.J. 1929); *Frank B. Bozzo, Inc. v. Electric Weld Div. of Fort Pitt Bridge Div. of Spang Industries, Inc.*, 423 A.2d 702, 709 (Pa. 1979); *Stuart v. Bayless*, 964 S.W.2d 920, 921 (Tex. 1998); *Roanoke Hospital Assoc. v. Doyle & Russell, Inc.*, 214 S.E.2d 155, 160 (Va. 1975); *Bay General Industries, Inc. v. Johnson*, 418 A.2d 1050, 1057 (D.C. 1979); *Halliburton Co. v. Eastern Cement Corp.*, 672 So.2d 844, 845 (Fla. 1996); *Dept. of Transportation v. Arapaho Construction, Inc.*, 349 S.E.2d 196, 200 (Ga. 1986); *Atkins Nutritionals, Inc. v. Ernst & Young LLP*, 754 N.Y.S.2d 320, 322 (2d 2003); *Pennsylvania Threshermen & Farmers' Mut. Casualty Ins. Co. v. Messenger*, 29 A.2d 653, 656 (Md.1943); *Chris v. Epstein*, 440 S.E.2d 581 (N.C. 1994). The Eastern District of New York has already described that formulation as generally reflecting United States contract law, and the great majority of the damages here fit comfortably within that definition. *Tevdorachvili v. Chase Manhattan Bank*, 103 F.Supp.2d 632, 641 (E.D.N.Y. 2000).

Finally, courts have held that class certification is still available to plaintiffs under Rule 23(b)(3), even when claims based on the laws of many different states are present. *See, e.g., In re LILCO Sec. Litig.*, 111 F.R.D. 663, 670 (E.D.N.Y. 1986) (certifying class despite the fact that the substantive laws of different states may have to be applied - “the Court doubts that the differences in the several states’ laws of fraud...are so great as to preclude class treatment”), *In re Busiprone Patent Litig.*, 185 F.Supp.2d 363, 377 (S.D.N.Y. 2002) (finding class certification appropriate where laws of different states are implicated); *Maywalt v. Parker & Parsley Petroleum Co.*, 147 F.R.D. 51, 58 (S.D.N.Y. 1993) (allowing for nationwide class certification on state law claims where issues relating to defendants’ conduct were common to the class); *Ettinger v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 122 F.R.D. 177, 182 (E.D. Pa. 1988).

World’s argument regarding state contract law therefore fails.

### **3. Common Questions Predominate**

World has therefore shown nothing that rebuts the obvious predominance of common questions of fact and law, and World is estopped from arguing to the contrary. World successfully argued before the Judicial Panel on Multi-District Litigation that the plaintiffs’ claims present “multiple actions with common factual questions,” in a section entitled “**THERE ARE COMMON QUESTIONS OF FACT.**”

Moreover, there are common questions of law and fact both for Plaintiffs and Defendants. World Airways focuses only on Plaintiffs, but fails to acknowledge the consistent pattern of behavior by World Airways, Ritetime and Obafemi. In fact, scarcely any issues turn on the identity or actions of any individual member of the classes.

### **4. World’s damning admission**

In light of the sworn testimony of World’s own employee, which indicates that World

Airways acted in close concert with Ritetime with regard to the central deception in this case, World Airways makes a damning admission when it concedes that a class action is proper against Ritetime, its co-conspirator in misrepresentation and fraud. World Airways' Memorandum of Law at p. 16. Because World Airways and Ritetime were acting in concert, and because Capitol's liability is simply dependent on Ritetime's liability and Ritetime's failure to satisfy a judgment, a class action is properly maintainable against all three Defendants.

#### **5. Numerosity**

World has tried to take issue with numerosity for the Nigerian Class. Plaintiffs lead co-counsel currently represent at least 284 individuals that belong to the United States Passenger Class and 75 individuals that belong to the Nigeria Passenger Class. In addition, electronic passenger manifest information provided by World Airways establishes World Airways brought 669 passengers to the United States in December 2003 who it did not return to Nigeria. In addition, World Airways brought 735 passengers to the United States in November 2003 who it did not return to Nigeria. A substantial portion of those passengers are likely members of the Nigerian Passenger Class.

#### **C. Class Certification Is Proper Against Capitol**

Capitol issued a bond to insure the financial responsibility of Ritetime with respect to money Ritetime received from passengers for the charter flights. On its face, that bond states that it is for the "protection" of and "inures to the benefit" of the charter participants and that it insures the financial security of Ritetime pursuant to 14 C.F.R. 380. See Exhibit A to Capitol's Memorandum of Law. 14 C.F.R. 380.34(c)(1) states that any security agreement (such as Capitol's bond) insures the financial responsibility of the charter operator (Ritime) and the supplying of transportation or other services contracted for. Plaintiffs claim here that World

Airways and Ritetime did fail to provide transportation, and if Ritetime is liable for that failure but is unable to make the Plaintiffs whole, then the Plaintiffs may recover from Capitol's bond, subject to Capitol's defenses, if any.

Therefore, if a class can be certified on any basis to determine Ritetime's liability, then that same class will have claims against Capitol's bond if Ritetime is in fact not financially responsible. So Capitol is incorrect that Plaintiffs only seek certification of a class action against them on the basis of a "limited fund" theory: just because limited fund applies only to Capitol does not mean that only limited fund applies to Capitol. If there is a class of charter passengers to whom Ritetime is liable, and Ritetime does not pay, then Capitol is liable to that same group, subject to Capitol's defenses.

**1. Capitol's affirmative defenses are not at issue in this motion**

In terms of its arguments against certification, Capitol disregards the fact that the merits are not at issue on this motion to certify a class action and essentially argues that in light of its defenses, primarily its notice defense, no identified plaintiff could ever recover from Capitol. And although Capitol repeatedly claims that the Plaintiffs must overcome Capitol's affirmative defense relating to notice to certify a class, that simply is not the law. *See In re Deutsche Telekom Ag Securities Litigation*, 229 F.Supp.2d 277, 284 (S.D.N.Y. 2002) ("[T]he class certification stage of the litigation is an inappropriate time to inquire into the merits of plaintiffs' claims and, by extension, defendants' affirmative defenses."); *In re Arakis Energy Corp. Securities Litigation*, 1999 WL 1021819, fn 1 (E.D.N.Y. 1999) ("Defendants also allege that the claims of the putative option holders class are time barred . . . [t]he court does not address this claim because arguments going to the merits of plaintiffs' claims are not suitable for resolution on a motion for class certification").

## **2. Capitol's Bond Will be Easily Exhausted**

Capitol claims that its bond may not be exhausted, but if anything, its bond is far too small. In January of 2003, World Airways estimated that there were approximately 1,500 stranded passengers. Aktabowski Dep. at p. 108. For example, Plaintiff Newman Nkwor testified in his deposition that the ticket he purchased from KLM Airways to return home after the Defendants stranded him in Nigeria cost him approximately \$1,200 to \$1,300. Deposition of Newman Nkwor, at p. 19 (attached as Exhibit J to Echeruo Declaration). Thus computed, damages are in the minimum approximate amount of at least \$1,800,000 (or nine times the size of Capitol's bond), and the true size of the class is estimated as being between 3,000 and 4,000. If the size of Capitol's bond is a problem for the plaintiffs, it is hardly because it is inexhaustible, but rather because it is woefully inadequate.

## **3. Capitol raises no issues requiring individual trials**

Capitol also claims that a "lengthy series of trials" will be required to determine complicated issues such as: the purchase price of the World/Ritetime ticket, whether the passenger flew from the United States, whether a passenger signed a release, when the passenger was supposed to return and how the passenger eventually returned (among others). Capitol's Memorandum of Law at p. 11. Without dwelling on the subject, Capitol has identified issues that at most may need to be the subject of a series of very short interrogatories, not lengthy trials, and in fact some of these questions were already answered by the depositions conducted by World Airways. If anything, this argument shows the lengths to which Capitol will go to obstruct the Plaintiffs' attempts to seek redress for their injuries.

Finally, Capitol's claim that the proposed class representatives do not adequately represent the class must be viewed with a jaundiced eye; the Seventh Circuit Court of Appeals

has likened a class defendant's interest in finding adequate class representatives to a fox guarding the chicken coop, because obviously a defendant only has an interest in having the poorest class representative, or better yet, none at all. *See Eggleston v. Chicago Journeymen Plumbers' Local Union No. 130*, 657 F.2d 890, 895 (7th Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982).

### CONCLUSION

For the foregoing reasons, and those stated in Plaintiffs initial memorandum of law, Plaintiffs' respectfully request this action be certified as a class action under Rule 23(a) and (b)(1), (2) and (3) of the Federal Rules of Civil Procedure.

Dated: New York, New York  
July 2, 2004

Respectfully Submitted,

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