

Cox v Microsoft Corp.
2007 NY Slip Op 31118(U)
February 2, 2007
Supreme Court, New York County
Docket Number:
Judge: Karla Moskowitz
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. KARLA MOSKOWITZ PART 03
Justice

-----X
CHARLES COX and OLD FACTORIES, INC.,
Individually and on Behalf of all Others Similarly
Situating,

INDEX NO. 105193/2000

MOTION DATE _____

Plaintiffs,

MOTION SEQ. NO. _____

- v -

MOTION CAL. NO. _____

Microsoft Corporation and Docs 1-100, inclusive

Defendants.
-----X

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

FILED

FEB 26 2007

NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is

ORDERED that greysheet of this date is vacated and the greysheet substituted; and it is

ORDERED that the portion of this class action settlement as to attorneys' fees is decided in accordance with the accompanying Decision and Order Granting A Final Award.

Dated: February 2, 2006

KARLA MOSKOWITZ J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. KARLA MOSKOWITZ PART 03
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CHARLES COX and OLD FACTORIES, INC.,
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Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is

ORDERED that this motion is decided in accordance with the
accompanying Decision and Order granting a Final Award of Attorneys' Fees.

Dated: February 2 2007

KARLA MOSKOWITZ J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

FILED
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS Part 3

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CHARLES COX and OLD FACTORIES, INC.,
Individually and on Behalf of all Others Similarly
Situated,

Index No. 105193/2000

Plaintiffs,

- v -

**DECISION AND ORDER
GRANTING A FINAL AWARD
OF ATTORNEYS' FEES**

Microsoft Corporation and Does 1-100, inclusive

Defendants.

-----X
KARLA MOSKOWITZ, J:

This decision and order concerns the portion of this class action settlement dealing with the award of attorneys' fees, expenses and the incentive award to the class representatives. On July 19, 2006, after a fairness hearing, I approved the settlement of this class action because I found it was fair, reasonable and adequate as to, and in the best interests of, each of the settling parties and the Class members (the "Prior Decision"). In approving this settlement, I specifically considered all objections filed with the Court or served upon counsel, but determined that, under the circumstances, the objections were not grounds for denying approval of the settlement. In the Prior Decision, I did not address the request of plaintiff's counsel for \$23.5 million dollars in fees, preferring to wait to see the extent to which the class members submitted claims. (See Prior Decision at pg. 2). On November 14, 2006, I ordered Microsoft Corporation ("Microsoft") to pay to plaintiff's counsel \$5.1 million, representing 5 % of the claims that had been submitted at that point. (November 14, 2006 Prior Decision at 4).

I also ordered the exclusion of attorneys' fees, expenses and the amounts the named plaintiffs were to receive from the value of the settlement. (November 24, 2006 Prior Decision at 2). The claims period has now closed. The settlement administrator has received 102,277

Standard Claims and 3,303 Volume Claims that were post dated on or before the January 3, 2007, the claims deadline. (See Affirmation of Daniel Hume. Dated January 31, 2007 at ¶ 7). Plaintiffs' counsel estimates that the value of those claims is \$112,773,769 and that the number of claims represents a 32% claims rate. (Id.) Accordingly, plaintiffs' counsel estimates that the total value of the settlement is \$182,886,885, including the *cy pres* component and the cost of claims administration. (Id. at ¶ 8). Plaintiffs' fee request of \$23.5 million is therefore 12.8% of the settlement's total value.

The court has considered the following documents in assessing attorneys' fees:

- Plaintiffs' Memorandum of Law in Support of Application for an Award of Attorneys' Fees and Reimbursement of Expenses dated May 5, 2006;
- Plaintiffs' Memorandum of Law in Support of Motion for Final Approval of Settlement dated May 5, 2006;
- Affidavit of Daniel Hume in Support of Motion for an Award of Attorneys' Fees and Reimbursement of Expenses, sworn to May 5, 2006;
- Affidavit of David S. Stellings in Support of Motion for an Award of Attorneys' Fees and Reimbursement of Expenses, sworn to May 4, 2006;
- Affidavit of J. Douglas Richards in Support of Motion for an Award of Attorneys' Fees and Reimbursement of Expenses, sworn to May 4, 2006;
- Affidavit of Professor Geoffrey P. Miller, sworn to May 4, 2006;
- Affidavit of Robert J. Gralowski, Jr. in Support of Motion for an Award of Attorneys' Fees and Reimbursement of Expenses, sworn to May 3, 2006;
- Affidavit of Ryan C. Williams, sworn to February 1, 2006;
- Affidavit of Mark Bogen in Support of Motion for an Award of Attorney's Fees and Reimbursement of Expenses (undated);
- Affirmation of Daniel P. Chiplock, Esq. dated May 4, 2006;

- Joint Affirmation of Plaintiffs' Lead Counsel Daniel Hume, J. Douglas Richards and David S. Stellings (undated);
- The objections of various class members;
- Plaintiffs' Reply to the Objections to the Proposed Settlement dated June 6, 2006;
- Affirmation of Daniel Hume in Further Support of Fee and Expense Application dated January 31, 2007

I. Calculation based upon Percentage of Recovery

CPLR 909 states that "the court in its discretion may award attorneys' fees to the representatives of the class based on the reasonable value of legal services rendered." I award attorneys' fees of \$16,459,819.60 representing 9% of the value of the settlement.

This award is appropriate for several reasons. Because Microsoft has agreed to pay attorneys' fees separate from the settlement, this award in no way diminishes the amount of benefits to the class. The results of the settlement have the potential to benefit the class members as a whole in a substantial way (over \$183 million). In addition, plaintiffs were able to avoid what would have been a difficult and costly litigation. As this court has previously discussed in its decision approving the settlement, plaintiffs prevailed at the dismissal stage upon risky legal theories. Finally, this case differed from the class actions in other states against Microsoft because here plaintiffs had to develop additional legal theories and undertake additional discovery from that which occurred in the two actions the federal government brought against Microsoft. (*See United States v Microsoft*, 56 F 3d 1448 (D.C. Cir.) (Microsoft I), and *United States v Microsoft*, 84 F Supp 2d 9 (D.D.C.) (Findings of Fact), and 87 F Supp 2d 30 (D.D.C.) (Conclusions of Law), *aff'd in part, rev'd in part, and remanded* 253 F 3d 34 (D.C. Cir.) [Microsoft II]). Accordingly, the fee of \$16,459,819.60 is fair, reasonable and adequate.

Plaintiffs' counsel requested an award of \$23.5 million. However, this high a fee is not warranted. Although plaintiffs have cited material where courts have awarded a higher percentage of the total settlement, this is a coupon settlement. Coupon settlements have fallen under much criticism lately for failing to provide the class with much of a benefit compared to the large attorneys' fees that the plaintiffs' attorneys often receive (*See, e.g.*, Thomas M. Smith and Natalie S. Watson, "Federal Court Draws Roadmap for Scrutiny of Attorney's Fees in 'Coupon' Settlements" Legal Backgrounder, Vol. 21, No. 14 [April 7, 2006]). Concern over the fairness of coupon settlements in part prompted Congress to enact the Class Action Fairness Act ("CAFA") in 2005. CAFA specifically addresses federal court awards of attorneys' fees in coupon settlements. For example, CAFA precludes the calculation of attorneys fees on the basis of any portion of *cy pres* relief that might form part of a settlement. (See 28 U.S.C. § 1712[e]). Nor can a federal court calculate the fee award on the value of unredeemed coupons (28 U.S.C. § 1712[a]). Here, the bulk of the objections complained about how disproportionate the fees plaintiffs' counsel had requested were to what the class members expected to receive. Thus, given the nature of this coupon settlement, a higher award would not be appropriate or reasonable.

There have been similar class action lawsuits involving Microsoft in many other jurisdictions. In those actions where the face value of settlement is higher, the attorneys fees represent a lower percentage of that face value. The two settlements with face values higher than New York's were in Florida and in California. In California, the face value of the settlement was apparently \$1.1 billion while attorneys fees were \$101 million. This represented 9.17% of the value of the settlement. In Florida, the face value of the settlement was \$202.80 million while

the attorneys fees of \$16.874 million represented 8.32% of the total value of the settlement. (*In re South Dakota Microsoft Antitrust Litigation*, 707 NW2d 85, 108 [South Dakota 2005]).

Here, by comparison, the face value of the settlement is \$182,886,885. The attorney fees of \$16,459,819.60 represents 9% of the value of the settlement, a slightly lower percent than what the court awarded in California, but more than what the Florida court awarded. This number is also generous to plaintiff's counsel because the face value of \$182,886,885 assumes that all claims will be redeemed, an unlikely event.

Thus, Microsoft must pay to plaintiffs' counsel \$11,359,819.60 representing the balance on \$16,459,819.60. Because the court is awarding attorneys fees on the basis of percentage of recovery, there is no reason to address the concern of one objector that the court should allow public disclosure of privileged time sheets.

II. Cross-Check Based on Lodestar

The court prefers the percentage of recovery method to determine an award of attorneys' fees in a class action. The lodestar method has the potential to lead to inefficiency and resistance to expeditious settlement because it gives attorneys an incentive to raise their fees by billing more hours. (*See In re New Mexico Indirect Purchasers Microsoft Corporation Antitrust Litigation*, 2006 WL 3913341 at *11 [N. M. App. November 15, 2006]). Nevertheless, the lodestar method can serve as a cross-check on the reasonableness of fees a court awards under a percentage of recovery approach.

Here, the lodestar amount also supports the award of \$16,459,819.60. Initially, plaintiffs' counsel claimed that attorney time spent on this case was worth about \$11,115,354.75 million. Counsel requested a 2.1 lodestar on that amount to justify their fee request of \$23.5 million. In

the November 14, 2006 Prior Decision, I ordered counsel to recalculate their lodestar subtracting out those fees that the attorneys billed prior to September 17, 2002 because, prior to that date, counsel had been pursuing a legal theory contrary to established New York precedent and I did not believe that attorney time spent pursuing that theory provided any benefit to the class. Plaintiffs' counsel subsequently informed the court that the recalculation equaled a total lodestar of \$10,768,987.25 and requested a multiplier of 2.18 on that number.

\$16,459,819.60 represents a multiplier of 1.53 to reward plaintiffs for prevailing on the newer, risky legal strategy and then successfully negotiating a favorable settlement. Counsels' hourly rates do not appear out of the ordinary for this New York Metropolitan area. The firms also appear to have made an effort to use lower paid associates whenever possible. Therefore, the rates and time do not appear to be unreasonable. In addition, the quality of the representation of the plaintiffs' class was excellent. However, the court is reluctant to apply a higher multiplier. Plaintiffs used five separate law firms to pursue this case. Counsel have not made any effort to justify to the court the duplication of effort inherent in this kind of arrangement. Also, given that this is a coupon settlement, the court cannot see any reason to apply a multiplier any greater than 1.53.

III. Expenses

Class counsel have not supported a separate award of expenses of \$1,844,516.77. As an initial problem, plaintiffs have made no attempt to cull out the portion of expenses that they incurred prior to September 17, 2002. In addition, as stated earlier, five law firms represented plaintiffs. Nothing in the record indicates how these five firms split responsibilities while the documents plaintiffs have provided raise the possibility of duplicative expenses. For example, the

while Lieff Cabraser Heimann & Bernstein, LLP incurred \$18,902.62. Were these for the same trips that only needed one set of attorneys? Milberg Weiss Bershad & Shulman, LLP (“Milberg”) incurred \$14,920.76 for experts while Kirby claims to have incurred \$125,316 in expert fees. Were these fees for the same or different experts? Moreover, counsel have apparently mixed in items of overhead, such as Westlaw or Lexis research. This is not compensable as an expense. (*See, e.g. Bell v. Helmsley*, 2003 WL 21057630 at *7 [Sup. Ct. N.Y. Cty. March 27, 2003]).

In addition, Milberg claims to have incurred \$275,000 in “Assessments”, but the court is not sure to what “Assessments” refers. Kirby claims it spent \$293,615.69 in “Cost Funds” but again there is no description of what “Cost Funds” are. Also, plaintiffs did not provide the court with a breakdown regarding expenses so the court is at a loss to review them properly. (*Cf. Klein v. Robert’s American Gourmet Food, Inc.* 28 AD2d 63, 75 [2d Dep’t 2006] [insufficient support for fee award where affirmations contained only brief and general descriptions of the work the firm performed and only included total hours per attorney.]).

IV. Award to Named Plaintiffs

The Settlement Agreement awards an incentive of \$7,500 to each of the named plaintiffs. This award is reasonable. It rewards the named plaintiffs for the effort and inconvenience of consulting with counsel over the many years this case was active and for participating in discovery, including depositions.

Accordingly, it is

ORDERED THAT defendant Microsoft Corporation pay \$11,359,819.60 to plaintiffs' counsel representing the balance on the final fee award, the court having awarded \$5.1 million in an earlier interim order dated November 14, 2006; and it is further

ORDERED THAT defendant Microsoft Corporation pay to each named plaintiff the sum of \$7,500.00; and it is further

ORDERED THAT plaintiffs' request for an award based on attorney expenses is denied; and it is further

ORDERED THAT plaintiffs' counsel are directed to retrieve the time sheets they submitted in camera from chambers within 20 days of the date of this decision and order; otherwise the court will discard them.

Dated: February 2, 2007



J.S.C.

FILED
FEB 26 2007
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Clerk's Office