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**United States Court of Appeals**  
*for the*  
**First Circuit**

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Case No. 20-1365

ARKANSAS TEACHER RETIREMENT SYSTEM, on Behalf of Itself and All  
Others Similarly Situated; JAMES PEHOUSHEK-STANGELAND; ANDOVER  
COMPANIES EMPLOYEE SAVINGS AND PROFIT SHARING PLAN,

*Plaintiffs,*

v.

STATE STREET CORPORATION; STATE STREET BANK AND TRUST  
COMPANY; STATE STREET GLOBAL MARKETS, LLC,

*Defendants,*

LIEFF CABRASER HEIMANN & BERNSTEIN, LLP

*Interested Party-Appellant,*

LABATON SUCHAROW LLP; THORNTON LAW FIRM LLP; KELLER  
ROHRBACK L.L.P.; MCTIGUE LAW LLP; ZUCKERMAN SPAEDER LLP

*Interested Parties-Appellees.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE DISTRICT OF MASSACHUSETTS IN CASE NOS.  
1:11-CV-10230-MLW; 1:11-CV-12049-MLW; AND 1:12-CV-11698-MLW  
HON. MARK L. WOLF, U.S. DISTRICT JUDGE

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**INTERESTED PARTY-APPELLANT'S RESPONSE TO  
COURT ORDER OF JULY 7, 2020**

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## TABLE OF CONTENTS

	<b>Page</b>
I. Introduction.....	1
II. The February 27 Order Appeared Final for Appeal Purposes.....	2
III. Subsequent Activity Complicates the Jurisdictional Issue.....	7
IV. Conclusion .....	9

**TABLE OF AUTHORITIES**

	<b>Page</b>
<b>Cases</b>	
<i>Bowles v. Russell</i> , 551 U.S. 205 (2007).....	6
<i>Cohen v. Beneficial Indus. Loan Corp.</i> , 337 U.S. 541 (1949).....	2
<i>Cunningham v. Hamilton Cty.</i> , 527 U.S. 198 (1999).....	1
<i>Empresas Omajede, Inc. v. Bennazar-Zequeira</i> , 213 F.3d 6 (1st Cir. 2000).....	1
<i>FirsTier Mortg. Co. v. Inv’rs Mortg. Ins. Co.</i> , 498 U.S. 269 (1991).....	1
<i>García-Rubiera v. Fortuño</i> , 727 F.3d 102 (1st Cir. 2013).....	1, 7
<i>Griggs v. Provident Consumer Disc. Co.</i> , 459 U.S. 56 (1982).....	6
<i>Grupo Dataflux v. Atlas Glob. Grp., L.P.</i> , 541 U.S. 567 (2004).....	6
<i>In re Nineteen Appeals Arising out of San Juan Dupont Plaza Hotel Fire Litig.</i> , 982 F.2d 603 (1st Cir. 1992).....	1, 4
<i>Johnson v. Burken</i> , 930 F.2d 1202 (7th Cir. 1991) .....	7
<i>United States v. Sorren</i> , 605 F.2d 1211 (1st Cir. 1979).....	2
<b>Rules</b>	
Fed. R. App. P. 4(a)(1)(A).....	6

## **I. Introduction**

This brief addresses the Court’s show cause order of July 7, 2020 concerning the jurisdictional basis of the present appeal. For the reasons that follow, the initial appeal was based on the apparent finality of the district court’s February 27, 2020 order and memorandum awarding attorneys’ fees and finding multiple violations of Fed. R. Civ. P. 11(b) and the Massachusetts ethics code. As this Court has held repeatedly, “an order which definitively resolves claims for attorneys’ fees and expenses payable out of a common fund is severable from the decision on the merits and sufficiently final to be separately appealable under 28 U.S.C. § 1291.” *In re Nineteen Appeals Arising out of San Juan Dupont Plaza Hotel Fire Litig.*, 982 F.2d 603, 610 (1st Cir. 1992); *see also García-Rubiera v. Fortuño*, 727 F.3d 102, 116 (1st Cir. 2013) (“A ruling on attorneys’ fees is definitive where a dollar-specific order for attorneys’ fees has been entered and further action on the main case will not require revisiting that order.”) (internal quotations omitted).<sup>1</sup>

Accordingly, if the district court’s fee award order was final, then Appellant Loeff would have lost the opportunity to appeal altogether if a notice of appeal were not

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<sup>1</sup> It is well established that Rule 11 orders are not appealable final orders. *See Cunningham v. Hamilton Cty.*, 527 U.S. 198 (1999); *FirsTier Mortg. Co. v. Inv’rs Mortg. Ins. Co.*, 498 U.S. 269, 276 (1991) (“A belief that [a Rule 11 order] is a final judgment would not be reasonable.”). *Empresas Omajede, Inc. v. Bennazar-Zequeira*, 213 F.3d 6, 9 n.4 (1st Cir. 2000). The ripeness of this appeal depends on the finality of the district court’s fee award order.

filed timely. The ambiguity of the district court’s fee order and the uncertain nature of what, if anything, the Special Master might undertake after February 27 compelled a notice of appeal to be filed.<sup>2</sup> Rather than risk waiving its right to appeal, Lieff filed its notice of appeal on March 26, 2020. Appendix 1325.<sup>3</sup> It then filed its initial brief in this Court on June 9, 2020.

While Lieff continues to believe that the February 27 order was final in terms of setting out the fees that each law firm was to receive, Lieff does not object to a dismissal without prejudice of this appeal. The uncertainty at the time the notice of appeal was filed created an unfortunate situation where ambiguity compelled going forward. A dismissal as premature by this Court would preserve the appealability of the underlying Order.

## **II. The February 27 Order Appeared Final for Appeal Purposes.**

At the time Lieff filed its notice of appeal and later its initial brief, the district court’s February 27 order appeared to constitute a final order subject to this

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<sup>2</sup> “Under the ‘collateral order’ exception to the finality rule, announced in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), certain orders may be appealed despite their interlocutory nature. . . . The order must involve: (1) an issue essentially unrelated to the merits of the main dispute, capable of review without disrupting the main trial; (2) a complete resolution of the issue, not one that is ‘unfinished’ or ‘inconclusive’; (3) a right incapable of vindication on appeal from final judgment; and (4) an important and unsettled question of controlling law, not merely a question of the proper exercise of the trial court’s discretion.” *United States v. Sorren*, 605 F.2d 1211, 1213 (1st Cir. 1979).

<sup>3</sup> All Appendix and Addendum citations contained in this brief correspond to the Appendix and Addendum filed in this Court as part of Lieff’s opening brief.

Court’s review. By its terms, the court’s February order resolved the attorneys’ fees in this matter. After making findings of facts and law with respect to whether Lieff and other members of Plaintiffs’ Counsel engaged in sanctionable misconduct under Fed. R. Civ. P. 11(b) and state ethical rules, the court concluded that the purported misconduct justified reducing each firm’s fee award from what the court had initially awarded prior to its opening of a Special Master investigation into the firms’ conduct in this case. Addendum 77–153 [hereinafter Add]. The court then awarded \$60,000,000 to Plaintiffs’ Counsel, “which constitutes 20% of the \$300,000,000 common fund.” *Id.* at 15. Lieff received \$15,233,397.53 of that amount. *Id.* at 148. Finally, the court ordered its memorandum to be transmitted to the Massachusetts Board of Bar Overseers and ordered the Board to “report its final actions to the court.” *Id.* at 159.

The first half of the entry in the clerk’s docket confirms the apparent finality:

02/27/2020	<u>590</u>	<p>Judge Mark L. Wolf: ORDER entered. MEMORANDUM AND ORDER.</p> <p>It is hereby ORDERED that:</p> <ol style="list-style-type: none"> <li>1. The Proposed Resolution of Labaton’s Objections to the Special Master’s Report (Dkt. No. 485) is DENIED.</li> <li>2. After hearings and considering <u>de novo</u> all objections to the Master’s Findings of Fact and Conclusions of Law, including Labaton’s, the Master’s Report and Recommendation (Dkt. No. 357) is ADOPTED in part, REJECTED in part, and MODIFIED in the manner described</li> </ol>
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	<p>in this Memorandum and Order. See Fed. R. Civ. P. 53(f). More specifically, \$60,000,000 is awarded to counsel for plaintiffs as reasonable fees and expenses. From the \$60,000,000 a total of \$22,202,131.25 shall be paid to Labaton; a total of \$13,261,908.10 shall be paid to Thornton; a total of \$15,233,397.53 shall be paid to Lieff; a total of \$3,978,152.18 shall be paid to Keller Rohrbach; a total of \$3,439,775.42 shall be paid to McTigue; and a total of \$3,298,598.55 shall be paid to Zuckerman Spaeder.</p> <p>3. Service Awards shall be paid as follows: \$15,000 to ATRS, and \$10,000 to each of the six ERISA Plaintiffs, Arnold Henriquez, Michael T. Cohn, William R. Taylor, Richard A. Sutherland, The Andover Companies Employee Savings and Profit Sharing Plan, and James Pehoushek-Stangeland.</p>
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These docket entries appear to satisfy this Court’s standard of appealability as following an order that “definitively resolves claims for attorneys’ fees and expenses.” *In re San Juan Dupont Plaza Hotel Fire Litig.*, 982 F.2d at 610.

The remainder of the docket entry is more complicated:

	<p>4. This matter is RESUBMITTED to the Master. The Master shall, by March 23, 2020:</p> <p>(a) Consult Class Counsel, ERISA Counsel, and CCAF, and report concerning whether notice to the class of new awards that have been ordered is legally required or appropriate. If the Master or anyone consulted is of the view that notice to the class should be given, the Master shall submit a proposed form of notice.</p> <p>(b) Report how he proposes to manage the implementation of this Order, including the required recovery from Labaton, Thornton, and Lieff of fees previously awarded, and the reallocation of them to other counsel and the class.</p>
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	<p>(c) Identify and provide advice on any other issues relevant to the implementation of this Order.</p> <p>5. Labaton and Thornton shall, by March 11, 2020, provide to the Clerk of the United States District Court for the District of Massachusetts an additional \$250,000 each to pay past and future reasonable fees and expenses of the Master and any firm, organization, or individual assisting him.</p> <p>6. The Clerk shall send this Memorandum and Order to the Massachusetts Board of Bar Overseers for whatever action, if any, it deems appropriate. Upon request, the Clerk shall provide the Board any documents in the public record of this case. The Board of Bar Overseers may move for the unsealing of sealed documents. The Board shall report its final actions to the court. (Attachments: # <u>1</u> Exhibit A)Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Montes, Mariliz) (Entered: 02/27/2020)</p>
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The remand to the Special Master appears to be administrative given that the court's February order appeared to set the final attorneys' fee awards. The resubmission to the Special Master ordered him to, among other things, "consult" with Plaintiffs' Counsel "concerning whether notice to the class of new awards that have been ordered is legally required or appropriate." Add158. This too would appear to be administrative and not altering the merits of the fee awards.

As of the time of filing an appeal, nothing further had happened. The Special Master did not file his brief arguing that the court was required to issue notice to the district court until April 7, 2020. ECF No. 599. In other words, the Special Master took no steps indicating further activity in the case until *after* the

period for filing a notice of appeal had run. On April 9, Lieff filed its opposition to providing the class with notice of the February order, arguing that the order increased the benefits conferred to the class as compared to the court's previous award and thus rendered notice of little value to the class. ECF No. 600. No further action on the issue of notice was taken by either the Special Master or the court until late June.

Lieff was thus put in the position of determining whether the court's February order was final as of the time it was entered. Courts have uniformly held that jurisdiction is established at the time of filing, without reference to subsequent actions the court might take. *See Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982) ("The filing of a notice of appeal is an event of jurisdictional significance – it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal."); *cf.*, *Grupo Dataflux v. Atlas Glob. Grp., L.P.*, 541 U.S. 567, 570 (2004) (diversity jurisdiction "depends upon the state of things at the time of the action brought"). As a result, Lieff was forced to either file a notice of appeal by March 28 or risk losing its right to do so, should this Court later find that the order was a final order. *See Fed. R. App. P. 4(a)(1)(A); Bowles v. Russell*, 551 U.S. 205, 209 (2007) ("[T]he taking of an appeal within the prescribed time is mandatory and jurisdictional.") (internal quotations omitted).

Lieff concluded that the court's order was a final order because the court awarded attorneys' fees, made detailed findings of what it believed to be ethical misconduct, and referred its findings to Massachusetts ethical authorities.

Although the district court held out the possibility that it would issue notice to the class, Lieff could not be sure whether the court would do so, or would instead treat its February order as conclusively resolving the issue of attorneys' fees. Moreover, Lieff could not rely on hypothetical future events to retroactively preserve its appeal. *See Johnson v. Burken*, 930 F.2d 1202, 1205 (7th Cir. 1991) ("Jurisdiction ordinarily is determined by the facts that exist when the case is filed; appellate jurisdiction, therefore, by the facts that exist when the appeal is filed.") (internal citations omitted).

### **III. Subsequent Activity Complicates the Jurisdictional Issue.**

Since the entry of the February 27 order, the district court has taken action indicating that its order might be open to future revision, perhaps signaling that the court does not view its February order as a final order. *See Fortuño*, 727 F.3d at 116 (attorneys' fee award is a final order when "further action on the main case will not require revisiting that order"). First, on June 25, 2020, nearly three months after Lieff filed its notice of appeal and two weeks after it filed its brief in this Court, the district court concluded that notice to the class of its February order, regardless of whether it was legally required, was "most appropriate." ECF No.

613 at 5. Accordingly, the court ordered the Special Master and Class Counsel to confer and submit proposed notice to the class. *Id.* at 7. On July 10, the court approved the proposed notice, ordered it to be distributed to the class “as promptly as possible,” and directed the Special Master to inform the court of the date the notice is sent to the class. ECF No. 623 at 2. The Special Master has since notified the court that the notice was sent on July 24, any objections from the class members are due on September 8, 2020, and a hearing on those objections will be held on September 22, 2020. ECF No. 624 at 2-3.

Second, on July 9, 2020, the district court approved a plan for the distribution of “the remainder of the settlement fund, including the amounts previously awarded to [Class Counsel] that are to be returned pursuant to the February 27, 2020 Memorandum and Order ....” ECF No. 619 at 2. With respect to the fees that the district court ordered Class Counsel to return to the class in its February order, Lieff and other Class Counsel are to make two installment payments into escrow on January 4, 2021 and March 31, 2021. *Id.* Those funds, together with any remaining outstanding funds, will then be distributed to the class in two installments. ECF No. 619-1 at 4. The first installment will be made in “approximately January 2021,” and the second installment in “approximately April 2021.” *Id.* The second installment will include, among other things, “any adjustments to the fee award made by the Court” resulting from Lieff’s appeal or

possible class objections. *Id.*<sup>4</sup>

The court's subsequent actions cannot create or negate appellate jurisdiction over Loeff's appeal as of the time the notice of appeal was filed. At best, its actions might help to resolve ambiguity concerning whether the court's February order was an appealable final order at the time Loeff entered its notice of appeal. But this was not a matter that Loeff could risk by not appealing.

The court's June 25 order requiring notice to the class and its July 9 order approving the distribution of attorneys' after the conclusion of Loeff's appeal and the court's resolution of class objections indicate that the district court is proceeding on the understanding that its February order is open to future revision. Once the class is provided notice, it is possible that some members of the class will object to the court's fee awards and that the court will then amend the awards. As a result, the February order might be viewed as not constituting a final order capable of providing this Court with jurisdiction over Loeff's appeal.

#### **IV. Conclusion**

Loeff's primary concern is with preserving its right to appeal. The uncertainty surrounding the exact terms of the February 27 order required the filing of a notice of appeal to avoid inadvertent waiver of the right to appeal. Appellant

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<sup>4</sup> The second installment is subject to "further guidance from the court" concerning Loeff's escrowed funds. *Id.* This condition is meant to allow the court to take into consideration any decision made by this Court on Loeff's appeal.

continues to believe that the docketing of an order setting the amount of fees was final and appealable. However, if this Court dismisses without prejudice to refile once a new fee order is entered, Appellant has no objection.

Dated: August 3, 2020

Respectfully submitted,

*/s/ Samuel Issacharoff*

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Dated: August 3, 2020

Respectfully submitted,

*/s/ Samuel Issacharoff*

\_\_\_\_\_  
Samuel Issacharoff

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I, Robyn Cocho, hereby certify that on August 3, 2020 the foregoing document was filed through the CM/ECF system and served electronically on all registered users, in addition paper copies have been sent via U.S. Priority Mail to the individuals listed below:

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