UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

ARKANSAS TEACHER RETIREMENT SYSTEM, on Behalf of Itself and All Others Similarly Situated; JAMES EHOUSHEK-STANGELAND; ANDOVER COMPANIES EMPLOYEE SAVINGS AND PROFIT SHARING PLAN, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, Defendant,	No. 21-1069
LIEFF CABRASER HEIMANN & BERNSTEIN, LLP, Interested Party – Appellant, v. LABATON SUCHAROW LLP; THORNTON LAW FIRM LLP; KELLER RORHBACK L.L.P.; MCTIGUE LAW LLP; ZUCKERMAN SPAEDER LLP, Interested Party – Appellees.	

HAMILTON LINCOLN LAW INSTITUTE'S MOTION FOR AN ORDER APPOINTING IT *AMICUS CURIAE* TO DEFEND THE DISTRICT COURT'S JUDGMENT ON APPEAL; AND IN THE ALTERNATIVE FOR LEAVE TO FILE AN *AMICUS* BRIEF IN SUPPORT OF AFFIRMANCE OF DISTRICT COURT'S ORDER

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, the Hamilton Lincoln Law Institute ("HLLI") is a non-profit public interest law that is not publicly traded, and no entity owns more than 10% of any stock of HLLI, which does not issue stock.

INTRODUCTION

Appellees' briefs were due last Monday, June 21, 2021, but no appellee filed, and the Court has found that several appellees have defaulted any right to be heard at oral argument. As the district court feared in its Renewed Request that First Circuit Invite it to Retain Counsel, the interests of the class remain "unrepresented." *Ark. Teacher Ret. Sys. v. State Street Bank & Tr. Co.*, No. 11-10230-MLW, 2021 U.S. Dist. LEXIS 103938, at *6 (D. Mass. June 1, 2021) (filed in this docket June 3, 2021). The Court has not ruled upon or acknowledged the request.

The Hamilton Lincoln Law Institute ("HLLI") offers to advocate for the interests of class members as it has several times in this litigation. HLLI had intended to file an *amicus* brief in support of any appellees in this case, but unless this Court extends the briefing schedule and allows the district court to appoint counsel, HLLI lacks an appellee to support. HLLI's Center for Class Action Fairness ("CCAF") has participated as an *amicus* in the district court repeatedly since 2017. Its contributions have been praised by the district court, most recently in granting HLLI a modest fee request in connection with certain work the district court asked it to perform in 2018.[1] "CCAF's work was not only helpful to the court, it also contributed to a decision by

[1] For the avoidance of doubt, HLLI will not seek further fee for work on this appeal if this Court grants the present motion.

the court that provided an additional almost $15,000,000 for the benefit of the class." *Ark. Teacher Ret. Sys. v. State Street Bank & Tr. Co.*, No. 11-10230-MLW, 2021 U.S. Dist. LEXIS 9826, at *18-19 (D. Mass. Jan. 19, 2021).

Therefore, HLLI respectfully moves this Court as F.R.A.P. 27 and 29(b) permit, to appoint it as *amicus curiae* to defend the district court's judgment in Case No. 21-1069, file the attached brief of 12,096 words, and allow HLLI the opportunity for oral argument as an appellee, so as to not delay the current briefing schedule or tentative September argument date, if argument is necessary. Briefing Notice, Doc. 00117743421. Alternatively, HLLI seeks leave of this Court to file an *amicus* brief in support of the district court's order on appeal on a schedule established by the Court.

Consistent with the proposed brief attached, HLLI requests an extension of the applicable word limit from 6,500 to 12,100 words, because it would be the only party defending the district court's judgment.

Such an order is appropriate because the nominal appellees—other law firms awarded funds from the settlement fund—have declined to oppose appellant Lieff Cabraser Heimann & Bernstein LLP ("Lieff"). Lieff seeks only to win money from the settlement fund residual otherwise distributable to class members.[2] Thus, the nominal appellees cannot be made worse off by Lieff's appeal and rationally have not spent time protecting the settlement residual. Appellees have already been paid.

[2] This Court concluded that HLLI would not be an appellee if Lieff did not seek to disturb the portions of the district court's orders granting HLLI's fee award. Apr. 2, 2021 Order, Doc. 00117725504. Lieff made clear in its opening brief that it seeks only money from residual funds that might remain in the settlement fund—not recovery from any other law firm. Op. Br., Doc. 00117599876. Thus, HLLI is not an appellee.

As a non-profit familiar with the facts of the case, HLLI is uniquely situated to step in and provide the Court with the benefit of an adversarial appeal.

I. Background

Appellant Lieff was one of three lead firms in the underlying litigation, along with Thornton Law Firm LLP ("Thornton"), and Labaton Sucharow LLP ("Labaton"). Counsel filed the case on behalf of Arkansas Teachers Retirement System ("ATRS") in 2011, alleging that the defendant had charged unfavorable rates in foreign currency exchange transactions. After surviving a motion to dismiss in 2012, parties stayed the case for mediation for years. ADD31.[3] In 2016, the parties agreed to settle for a $300 million common fund. ADD32.

Without the benefit of adversarial litigation, the district court relied "heavily" on counsel's uncontradicted representations and granted a nearly $75 million (25%) attorneys' fees award on November 2, 2016. ADD46. Unbeknownst to the district court, the attorneys had agreed that 90% of the attorneys' fees would go collectively to Class Counsel (Labaton, Lieff, and Thornton), and that nearly $4.1 million dollars of this money would be paid to Chargois & Herron LLP, a Texas firm that did absolutely no work in the case but was once well-connected to Arkansas politicians with oversight over the lead plaintiff, ATRS. The district court did not award Lieff any particular amount of money in 2016, but instead delegated allocation entirely to Class Counsel.

Shortly after issuing the award, the *Boston Globe* inquired with class counsel about duplicative hours that the *Globe* had noticed in Class Counsel's declarations. Labaton filed a letter on November 10, 2016 advising that it had inadvertently double-counted

[3] "Axyz" cites to Appellant's appendix; "OBxyz" cites Appellant's opening brief, "ADDxyz" cites Appellant's addendum.

nearly 10,000 hours of attorney time with a claimed value of over $4 million, but arguing it "should have no impact on the Court's ruling on attorneys' fees." A288. The letter did not inform the court of counsel's agreement to pay an attorney who did no work in the case over $4 million, nor did it correct any other representations made in connection with the fee request.

The *Boston Globe* published its story December 17, 2016, and described several questionable features of Class Counsel's fee request. It described not only the double-counting of attorney time, but also revealed (1) billing by the brother of Thornton managing partner Garrett Bradley at $500/hour, far above his typical rate, (2) described how 60% of the claimed billing was performed by staff attorneys, at least one of which was actually a temporary contract attorney employee paid about $30/hour, and (3) explained that paying defense-side clients would not pay such rates; HLLI senior attorney Theodore H. Frank, who had reviewed the fee petitions and settlement at the *Globe*'s request, was quoted on these issues and others. Andrea Estes, *Critics hit law firms' bills after class-action lawsuits*, BOSTON GLOBE (Dec. 17, 2016) (A314-A322).

On February 6, 2017, the district court attached the *Globe* story to an order proposing to appoint a Special Master, retired Eastern District of Michigan Judge Gerald Rosen, to investigate the billing rates and representations. *Id.* The court noted that "the reported lodestar may not have been based on what plaintiffs' counsel, or others in their community, actually customarily charged paying clients for the type of work done by the staff attorneys in this case." A298.

On February 17, 2017, HLLI's Center for Class Action Fairness ("CCAF"), then part of the Competitive Enterprise Institute, moved to file an *amicus* brief in response to the Court's February 6 Order. Dkt. 126. The brief supported the Court's proposal to appoint the Special Master, and raised a potential jurisdictional time bomb Class

Counsel could spring should the Special Master's investigation require the Court to modify the underling fee order more than one year after it issued. Dkt. 126-1 at 12-13. CCAF argued that the "Court should appoint a guardian *ad litem* for the class" to provide an adversarial presentation of the issues, and CCAF volunteered to undertake this task. *Id.* at 3. CCAF argued that in the alternative the Court should at least order supplemental notice to advise class members of the pendency of the Special Master's investigation. *Id.* at 9. Class Counsel opposed granting leave for CCAF to even file its *amicus* brief and opposed every suggestion CCAF made. Dkts. 145, 147, 150, 168. Ultimately, the Court granted leave for CCAF to file the brief, took its motion to participate as guardian *ad litem* under advisement, and adopted CCAF's suggestion to provide supplemental notice to the class. Dkt. 172. The Court also took notice of CCAF's concern about the jurisdictional time bomb. At the Court's behest, the parties moved to reopen the fee order. Dkt. 178. The Court granted the Rule 60 motion on June 22, 2018, vacating the 2016 fee award. Dkt. 331.

CCAF also flagged class counsel's misrepresentation of Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811 (2010). Dkt. 127 at 1. The Court later agreed that Class Counsel mischaracterized the study in the fee memorandum signed by all three firms. ADD43. This misrepresentation—asserting that the 24.85% fee request was "right in line with Professor Fitzpatrick's findings even though the study indicated the mean and median awards for a large $250 to $500 million common fund were 17.8% and 19.5% respectively—is one of the bases for the district court to find Lieff had violated Rule 11(b). ADD125.

The district court had intended for the Special Master to deliver his report by October 10, 2017 at a total cost of no more than $2 million (A332), but near the end of

document discovery, on August 8, 2017, the Master discovered Thornton-produced emails concerning Labaton's fee agreement with Chargois & Herron LLP, which both Labaton and Lieff unilaterally decided were not relevant to the Special Master's inquiry and withheld from their discovery responses. *See*, *e.g.*, Dkt. 401-174 at 14-15 (Lieff's June 9, 2017 answers to interrogatories, failing to disclose over $1 million Lieff had agreed to pay toward Chargois as one of the "costs and/or expenses incurred by the Firm during the SST Litigation that the Firm did not include in its Fee Petition/Lodestar calculation"). The late disclosure of a $4.1 million payment to attorneys who did no work in the case necessitated additional fact discovery, another round of depositions, and ultimately expert discovery where Class Counsel collectively retained seven experts specifically to rebut one expert retained by the Special Master. Report and Recommendations, A605 n.188.

As background, Labaton forged the Chargois arrangement years before the *State Street* suit when it agreed to pay Chargois 20% of any fees Labaton earned from ATRS cases. In an email to Labaton, Damon Chargois claimed "we got you ATRS as a client (after considerable favors, political activity, money spent and time dedicated in Arkansas)." ADD61. While discovery from Chargois never spelled out (and the Special Master did not investigate) what these favors might have been, Chargois's partner Tim Herron provided free rent to former Arkansas State Treasurer Martha Shoffner, who oversaw ATRS at the time of Labaton's retention as monitoring counsel in 2008. *Id.* at n.13. Shoffner was later convicted of accepting bribes from a bond dealer in 2011 in order to pay her rent. *Id.*

While Lieff did not fully understand the nature of the Chargois fee arrangement, the firm did not balk when asked to contribute over $1 million to Chargois' fee even though "they should have been suspicious about the reasons for a payment of more

than $4,000,000 to an attorney who did not file an appearance in the case and did no work on it that they had seen." ADD118. Indeed, Lieff has now launched two appeals over what it contends to be a $1.14 million reduction to its fee award, and Lieff also complains in its brief about its $1.15 million contribution to the Special Master's investigation.[4] OB54. Yet when Labaton asked Lieff to contribute a similar amount to pay a lawyer who did no work in the case, Lieff did so without inquiry.

The Special Master filed a 377-page Report and Recommendation on May 14, 2018 with a 54-page executive summary, and the district court noticed further hearings to discuss topics raised by the reports and other topics that the Special Master had overlooked, including the misrepresentations of the Fitzpatrick article, which CCAF flagged on February 17, 2017. Dkt. 543 at 2-3 (agenda for hearings). Following three days of live hearings and post-hearing briefs from all parties and *amicus* CCAF, the district court issued its 159-page fee order, which Lieff now appeals from. ADD1-ADD159.

The district court did not impose monetary sanctions on any of the firms, but instead determined that a 20% fee award would be appropriate in a $300 million case, and that "even absent the serious, repeated misconduct of Labaton and Thornton, an award of less than 25% of the common fund would be most appropriate." ADD28. After determining this overall fee award, the court allocated fees to each of the firms. Although the overall attorneys' fee award was 20% lower than the original vacated fee

[4] Of course the Special Master's investigation was complicated and prolonged by Lieff and Labaton's failure to promptly disclose sharing fees with Chargois.

award, the fee to Lieff was only 7% lower.[5] The district court awarded Lieff over $2.4 million more than the Special Master recommended. ADD162. While Lieff complains of a 7% "reduction" from the sum derived from its secret fee sharing agreements, this compares very well against the 30%-33% "reductions" borne by Labaton and Thornton, respectively. It also compares handsomely with Lieff's private fee agreement with these firms, which provided Lieff with precisely 24% of Customer Class Counsel's fee. Under the Fee Order, Lieff received 30% of the Customer Class Counsel fee, leapfrogging over Thornton, which previously got $3 million more, but was ultimately awarded $2 million less than Lieff. ADD162. Thus, no economic sanction was imposed on Lieff.

The district court expressly found Lieff's conduct deficient, though not as much as Labaton and Thornton's conduct (these firms having a much better understanding of the cynical nature of the Chargois relationship). In particular, Lieff had reviewed and signed the fee memorandum, which mischaracterized the Fitzpatrick Study. ADD148. Additionally, Lieff had misleadingly claimed that the rates submitted were "the same as my firm's regular rates charged for their services, which have been accepted in other complex class actions." ADD26. In fact Lieff has only billed a "handful of paying clients over the years" (ADD26), and several of the claimed attorneys were contract attorneys

[5] ERISA counsel's fee *increased*, but the district court did this to compensate for their time spent on the investigation and for being kept in the dark about the Chargois arrangement by all Class Counsel firms, including Lieff. ADD146-47. Moreover, the final ERISA awards more accurately approximates the $10.9 million fee award deducted from the ERISA portion of the settlement fund. Dkt. 89, ¶ 24. A reasonable observer might have inferred that since $10.9 million was deduced from ERISA subclass recovery, ERISA counsel were paid that amount. Instead, in 2016, Lieff and the other Class Counsel firms redistributed the surplus among themselves. A443.

with no previous relationship with Lieff at all—let alone bills paid by clients. *See* Dkt. 401-56 at 14-16. These representations were made by Lieff on an unopposed fee application, and the district court expressly relied upon the truthfulness of the representations. Thus, the district court found that Lieff had violated Rule 11. ADD125.

The nominal appellees appear to take no position on appeal. Not one appellee has filed a response brief, and therefore the appeal will proceed *ex parte* unless the Court grants the district court's motion to retain an attorney, or an *amicus* is permitted to act as *de facto* appellee in support of the district court's order.

II. HLLI and its interest in this case

The district court appointed HLLI's Center for Class Action Fairness ("CCAF") as *amicus* below, and repeatedly flagged its contributions has helpful. In its very first filing, February 17, 2017, CCAF flagged an "intriguing issue" regarding the Court's continuing jurisdiction. Dkt. 176 (Tr. 3/7/17) at 19. Thanks to this filing, the Court directed the parties to draft a Rule 60 motion to reopen the fee award. *Id.* at 20. Thanks to this early work, the Court avoided a potential jurisdictional and appellate complication in its fee order—which took much longer to issue because of the facts discovered by the Special Master.

Each time CCAF sought leave to file a brief, the district court allowed it, and it specifically found several filings helpful. *E.g.,* Dkt. 448 (Tr. 8/13/2018) at 20 ("I found the memoranda you've submitted both in 2017 [and recently] to be helpful. For example, you're the one who identified the Rule 60(b) issue, which was helpful; and some of the authorities in your recent briefs were -- recent brief were helpful, citing cases that I read with care, citing of the statement were helpful."). The Count allowed

CCAF to participate over three days of live testimony in part because "I found what Mr. Frank and you submitted to be helpful." A1238.

CCAF was founded in 2009 as a non-profit to litigate *pro bono* on behalf of the protection of rights of absent class members against unfair class-action settlements and procedures.[6] In its history, CCAF has won hundreds of millions of dollars for class members. Andrea Estes, *Critics hit law firms' bills after class-action lawsuits*, Boston Globe (Dec. 17, 2016) (then $100 million).

CCAF attorneys have won numerous landmark decisions in support of the principle that fairness requires that the primary beneficiary of a class-action settlement should be the class, rather than the attorneys. *E.g. Pearson v. NBTY, Inc.*, 772 F.3d 778, 787 (7th Cir. 2014) (praising CCAF's work); *In re Dry Max Pampers Litig.*, 724 F.3d 713, 716-17 (6th Cir. 2013) (describing CCAF's client's objections as "numerous, detailed and substantive"); *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163 (3d Cir. 2013).

CCAF has a particularly strong record of appellate advocacy. It has won reversal or remand in over a dozen federal appeals, which have help reshape the law governing class action settlements, ensuring class members secure real recovery with reasonable fees.[7] Several of these appeals centered around excessive fee awards. *E.g., Redman*;

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[6] From October 1, 2015 through January 31, 2019, CCAF was part of the non-profit Competitive Enterprise Institute. On January 31, 2019 CCAF became part of the newly-formed non-profit HLLI.

[7] *Frank v. Gaos*, 139 S. Ct. 1041 (2019); *Briseno v. Conagra*, __ F.3d __ (9th Cir. 2021); *Berni v. Barilla S.P.A*, 964 F.3d 141 (2d Cir. 2020); *Pearson v. Target Corp.*, 968 F.3d 827 (7th Cir. 2020); *In re Lithium Ion Batteries Antitrust Litig.*, 777 Fed. Appx. 221 (9th Cir. 2019) (unpublished); *In re Google Inc. Cookie Placement Consumer Privacy Litig.*, 934 F.3d 316 (3d Cir. 2019); *In re EasySaver Rewards Litig.*, 906 F.3d 747 (9th Cir. 2018); *In re Subway Footlong Mktg. Litig.*, 869 F.3d 551 (7th Cir. 2017); *In re Target Corp. Customer Data*

Pearson; *Bluetooth*. CCAF's senior attorney Theodore H. Frank is an experienced appellate litigator and an elected member of the American Law Institute.

CCAF has won national acclaim for its work. *E.g.,* The Editorial Board, *The Anthem Class-Action Con*, Wall St. J., Feb. 11, 2018 (opining "[t]he U.S. could use more Ted Franks" while covering CCAF's role in exposing "legal looting" in data breach MDL); Adam Liptak, *When Lawyers Cut Their Clients Out of the Deal*, N.Y. Times (Aug. 13, 2013) (identifying Frank as "the leading critic of abusive class action settlements"); Roger Parloff, *Should Plaintiffs Lawyers Get 94% of a Class Action Settlement?*, Fortune, Dec. 15, 2015 (calling Frank "the nation's most relentless warrior against class-action fee abuse"); Editorial, *Posner vs. the Plaintiffs Bar*, Wall St. J. (Aug. 12, 2016) (giving "kudos" to the CCAF for successfully fighting for shareholder rights against M&A strike suits that benefit only attorneys); Jeffrey B. Jacobson, *Lessons From CCAF on Designing Class Action Settlements*, Law360 (Aug. 6, 2013) (discussing CCAF's track record); Ashby Jones, *A Litigator Fights Class-Action Suits*, Wall St. J. (Oct. 31, 2011).

Without HLLI's participation in support of the decision below, this Court would be left without a proper adversarial presentation in reviewing an appeal. "[W]hen faced

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Sec. Breach Litig., 847 F.3d 608 (8th Cir. 2017); *In re Walgreen Co. Stockholder Litig.*, 832 F.3d 718 (7th Cir. 2016); *In re EasySaver Rewards Litig.*, 599 Fed. Appx. 274 (9th Cir. 2015) (unpublished); *In re BankAmerica Corp. Secs. Litig.*, 775 F.3d 1060 (8th Cir. 2015); *Pearson v. NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014); *Redman v. RadioShack Corp.*, 768 F.3d 622 (7th Cir. 2014); *In re MagSafe Apple Power Adapter Litig.*, 571 Fed. Appx. 560 (9th Cir. 2014) (unpublished); *In re Dry Max Pampers Litig.*, 724 F.3d 713 (6th Cir. 2013); *In re HP Inkjet Printer Litigation*, 716 F.3d 1173 (9th Cir. 2013); *In re Baby Products Antitrust Litigation*, 708 F.3d 163 (3d Cir. 2013); *Dewey v. Volkswagen*, 681 F.3d 170 (3d Cir. 2012); *Robert F. Booth Trust v. Crowley*, 687 F.3d 314 (7th Cir. 2012); *Nachshin v. AOL, LLC*, 663 F.3d 1034 (9th Cir. 2011); *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935 (9th Cir. 2011).

with a complete lack of adversariness" it is common practice for federal courts to "appoint[] an *amicus* to argue the unrepresented side." *Cardinal Chem. Co. v. Morton Int'l*, 508 U.S. 83, 104 (1993) (Scalia, J., concurring) (listing Supreme Court cases); *see also Weinberger v. Great Northern Nekoosa Corp.*, 925 F.2d 518, 525 n.8 (1st Cir. 1991) (granting participation of amicus where there was concern that "negotiated attorneys' fees in plaintiffs' class actions can be a potential source of abuse."); *Warren v. Comm'r*, 282 F.3d 1119, 1122 (9th Cir. 2002) (Reinhardt, J., concurring); *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024, 1030 (D.C. Cir. 2004); *Zucker v. Westinghouse Elec.*, 374 F.3d 221, 224 & n.3 (3d Cir. 2004) (expressing appreciation for amicus who defended the district court's fee denial). The Seventh and Eighth Circuits have appointed CCAF as *amicus* in a similar procedural posture in class actions to resolve the lack of adversary presentation. *E.g., Adams v. USAA Cas. Ins. Co.*, 863 F.3d 1069 (8th Cir. 2017) (defending district court's imposition of sanctions for plaintiffs' forum shopping by dismissing complaints and refiling settlement in state court with less scrutiny); *House v. Akorn, Inc.*, No. 19-2401, -2408, No. 42 (7th Cir. Nov. 6, 2019) (granting motion to file *amicus* brief defending district court's exercise of its inherent authority by ordering the return of attorneys' fee to defendant).

III. *Ex parte* fee motions highlight the need for adversarial presentation.

Nowhere is the conflict between class counsel and putative class members more direct than when counsel moves for fees from a common fund. "[T]he conflict between a class and its attorneys may be most stark where a common fund is created and the fee award comes out of, and thus directly reduces, the class recovery." *Weinberger*, 925 F.2d at 524. *See also Pearson*, 772 F.3d at 787 ("acute conflict of interest"); *In re HP Inkjet Printer Litigation*, 716 F.3d 1173, 1178 (9th Cir. 2013) ("the interests of class members

and class counsel nearly always diverge."). This is because the defendant, having agreed to fund a common fund settlement has little interest in how the fund is allocated between class members and attorneys; "it is hard to see why defendants would have cared very much how the money they paid was divided" *Hill v. State Street Corp.*, 794 F.3d 227, 231 (1st Cir. 2015). The conflict is especially dangerous because in most class action settlements, as in this one, no coherent objector appears to challenge class counsel's effectively *ex parte* representations in support of their fee award.

HLLI seeks to defend the district court's decision because it appropriately faults Lieff for representations it made in signing unopposed and essentially *ex parte* fee papers. HLLI cannot object to every unfair class action settlement or excessive fee request, so courts should provide incentives for counsel to seek reasonable fees on their own. Most settlements and fee requests—like the one this case—attract no objectors at all, even when they are manifestly objectionable. Counsel's Rule 11 obligation carries special importance in unopposed fee motions because no other party is likely to ever call out errors. The *Boston Globe*'s Spotlight team did in this case, but class members should not need to depend on fortuitous flukes. The Rule 11 findings, even though they lack monetary sanction, encourage all class attorneys to make accurate representations to courts going forward. The district court's finding in this regard was well-noticed and modest given that the court had broad latitude to greatly reduce Lieff's fees or impose monetary sanctions. "[D]enial of attorneys' fees may be a proper sanction for attorney misconduct." *Travers v. Flight Servs. & Sys.*, 808 F.3d 525, 542 (1st Cir. 2015) (cleaned up). For this reason, the district court below appropriately held Lieff and the other lead firms to account for statements the court relied upon to approve an excessive fee request laden with concealed and highly questionable payoffs.

HLLI supports the district court's measured order. HLLI's experience—deriving from its attorneys' involvement in this case and in dozens of other class action proceedings—qualifies it to defend the district court's decisions. After all, the district court itself credited HLLI and invited it to file an *amicus* brief in opposition to Lieff and other Class Counsel. Without *amicus curiae* or another appointment by this Court, this appeal will likewise lack adversarial process.

HLLI's participation will not delay proceedings and will not unfairly prejudice appellants, who have no right to an *ex parte* appeal.

CONCLUSION

HLLI therefore asks this Court for an order:

- appointing HLLI as *amicus curiae* on behalf of affirming the district court in this appeal, and allowing HLLI to file the attached brief of 12,096 words in defense of the district court's opinion, and
- allowing HLLI to participate in oral argument as an appellee would in Nos. 21-1069, should the Court set this case on its oral argument calendar.[8]

Respectfully submitted,

Dated: June 28, 2021

/s/ Theodore H. Frank

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[8] HLLI believes that the Court's sound exercise of discretion may be affirmed without need for an oral argument, as it set forth in its brief.

COMPLIANCE WITH WORD LIMIT REQUIREMENTS

I certify that this motion complies with Fed. R. App. Proc. 27(d)(1)(E) and (d)(2) because it contains 4,285 words and complies with the typeface requirements of Fed. R. App. Proc. 32(a)(5) and the type style requirements of Fed. R. App. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Garamond font.

Dated: June 28, 2021

/s/ Theodore H. Frank
Theodore H. Frank

CERTIFICATE OF SERVICE

I certify that I have this day, June 28, 2021, served this document upon all parties by electronically filing to all ECF-registered parties in this action.

Dated: June 28, 2021

/s/ Theodore H. Frank
Theodore H. Frank

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Case No. 21-1069

ARKANSAS TEACHER RETIREMENT SYSTEM, on Behalf of Itself and All Others Similarly Situated; JAMES PEHOUSHEK-STANGELAND; ANDOVER COMPANIES EMPLOYEE SAVINGS AND PROFIT SHARING PLAN; ARNOLD HENRIQUEZ; MICHAEL T. COHN; WILLIAM R. TAYLOR; RICHARD A. SUTHERLAND, *et al.*,
Plaintiffs,

v.

STATE STREET CORPORATION; STATE STREET BANK AND TRUST COMPANY; STATE STREET GLOBAL MARKETS, LLC; DOES 1-20,
Defendants,

v.

LABATON SUCHAROW LLP; THORNTON LAW FIRM LLP; KELLER ROHRBACK L.L.P.; MCTIGUE LAW LLP; ZUCKERMAN SPAEDER LLP,
Interested Parties-Appellees.

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

Brief of *Amicus Curiae* Hamilton Lincoln Law Institute Supporting Absent Appellees in Favor of Affirmance

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Corporate Disclosure Statement

Under Fed. R. App. P. 26.1, Hamilton Lincoln Law Institute ("HLLI") states that it is a non-profit corporation and public-interest law firm that is not publicly traded, and no entity owns more than 10% of any stock of HLLI, which does not issue stock.

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Introduction

This is an *ex parte* appeal by one firm of a court's Rule 23(h) order awarding over $60 million of fees and costs to several firms when the court criticized three of the firms' misleading statements and omissions in their *ex parte* fee application. Because appellant Lieff's brief omits the procedural posture of the case, *amicus* Hamilton Lincoln Law Institute provides this brief to assist this Court.

Interest of the Hamilton Lincoln Law Institute

The non-profit Hamilton Lincoln Law Institute is the home of the Center for Class Action Fairness ("CCAF"), which has been participating as an *amicus* in this case for over four years. ADD11-ADD12 & n.2.[1] The district court repeatedly found CCAF's work helpful over repeated opposition by Lieff to CCAF's participation as *amicus*.[2]

CCAF represents class members *pro bono* where class counsel employs unfair procedures to benefit themselves at the expense of the class. Since its 2009 founding, CCAF has "develop[ed] the expertise to spot problematic settlement provisions and attorneys' fees." Elizabeth Chamblee Burch, *Publicly Funded Objectors*, 19 THEORETICAL INQUIRIES

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[1] OB, ADD, and A refer to Appellant Lieff's Opening Brief, the brief's Addendum, and Appellant's Appendix, respectively.

[2] *E.g.,* ADD12; Dkt. 445 at 3; Dkt. 448 at 20; Dkt. 460 at 8; Dkt. 519 at 96; A1238.

IN LAW 47, 55-57 & n.37 (2018). Over that time CCAF has recouped more than $200 million for consumer and shareholder class members by driving the settling parties to reach an improved bargain or by reducing outsized fee awards. *E.g., In re Wells Fargo & Co. Shareholder Derivative Litig.*, 445 F. Supp. 3d 508 (N.D. Cal. 2020) (reducing Lieff fees by more than $15 million and proportionally increasing shareholder recovery); *see also* A319 (more than $100 million at time). The *Boston Globe* story that sparked the proceedings below relies at length on CCAF founder Ted Frank's analysis. A316-A319.

The Court found that "CCAF brought expertise to the proceedings, which was often very helpful to the court." ADD12.

CCAF will not seek fees for its participation in this appeal.

No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief; and no person contributed money that was intended to fund the preparation or submission of this brief.

Counter-Statement of Issues Presented

In 2016, the district court granted a motion for a fee award of $75 million (25% of $300 million) based on admittedly incorrect information class counsel supplied. After the *Boston Globe* exposed several discrepancies in the fee petition, the parties agreed in 2017 to vacate the fee award under Rule 60(b)(1), and allow the court to adjudicate the fee award anew after a special-master investigation.

1. This Court has affirmed a court's decision to deny fees entirely in response to an excessive request. *First State Ins. Group v. Nationwide Mut. Ins. Co.*, 402 F.3d 43, 44 (1st Cir. 2005). Did the district court reasonably exercise its discretion when it awarded an above-average $60 million of attorneys' fees in a 159-page order issued after the appointment of a special master who issued a 377-page Report and Recommendation, extensive discovery over three years, and several hearings with live testimony?

2. Did the district court impose a monetary sanction on Lieff, despite expressly holding it was not applying any monetary sanction, when it allocated Lieff over $2 million more than the Special Master recommended and a higher percentage of the overall fee award than Lieff had agreed to receive in 2016?

3. The district court held that it did not sanction Lieff. A1476. This Court reviews judgments, not language. *In re Williams*, 156 F.3d 86,

92 (1st Cir. 1998). Is the district court's criticism that Lieff failed to meet Rule 11 standards justiciable?

4. If the district court's language criticizing Lieff while declining to issue a reprimand or a monetary penalty constitute a judicially reviewable sanction,

a. Rule 11(b) applies when attorneys "present[] to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it…." Does the lack of counsel's "/s/" in the signature block of a motion preclude a court from finding a Rule 11(b) violation for a motion that counsel filed, submitted, or advocated for?

b. Did the district court's repeated announcements over the course of two years that it would consider imposing sanctions put Lieff on notice that the court might impose sanctions?

c. Is it within the discretion of a court to find attorneys did not meet Rule 11 standards when attorneys file misleading fee applications that are unopposed and effectively *ex parte* submissions, or must a court excuse such filings as a matter of law because other attorneys drafted the misleading declaration that counsel signed or because class counsel attached a complete copy of an article they misrepresented in their brief as exhibit 31 in a 778-page filing in support of the fee motion?

Counter-Statement of the Case

Lieff's Statement of the Case regrettably omits much—including the procedural posture of the case. Remarkably, Lieff never mentions that plaintiffs moved unopposed under Rule 60(b)(1) for the district court to vacate its original fee award (Dkt. 178; Dkt. 331), and that the January 19 order it appeals is a partial grant of its fee motion under Rule 23(h). ADD126. We largely restrict this counter-statement to these omissions.

A. Lieff's knowledge of the undisclosed Labaton-Chargois referral arrangement.

In 2008, Labaton, with help from Chargois & Herron, a Texas law firm with no experience in securities litigation and no formal relationship with Arkansas Teacher Retirement System ("ATRS"), but with connections with local politicians, won selection by ATRS as monitoring counsel. ADD60. Labaton agreed to pay the Chargois firm 20% of its fee awards from cases in which courts selected ATRS as lead plaintiff. ADD62. Labaton's public contract with ATRS did not disclose this. ADD61 n.13. Chargois partner Damon Chargois wrote in 2014: "we got you ATRS as a client (after considerable favors, political activity, money spend and time dedicated in Arkansas)." ADD61. The nature of that work remains unclear, but partner Tim Herron provided free rent to Arkansas State Treasurer Martha Shoffner, who sat on ATRS's board when it retained Labaton. A federal jury later convicted Shoffner for accepting

bribes to pay rent for another one of Herron's properties in Little Rock, Arkansas. ADD61 n.13. In 2013 Labaton, Thornton, and Chargois exchanged emails fixing the fee at 20% of what would be Labaton's allocation of award, but requiring Thornton and Lieff contribute to the payment. A462-63. Robert Lieff replied "I am in agreement in full." Dkt. 401-145.

Lieff may not have known that Chargois was a referring counsel, but Lieff's partner Dan Chiplock also didn't think that his work in the case "was anything extensive" (Dkt. 401-40 at 104), and further that "it's not unusual for referral counsel to exist in cases" without disclosure to the court. *Id*. at 142. Robert Lieff reported he had no recollection of Chargois at all until he prepared for a deposition by the Special Master. Dkt. 401-138 at 58. Yet in August 2016, Lieff agreed to surrender 5.5% of all attorneys' fees "off the top," which works out to just under $1 million from Lieff, to pay Chargois $4,102,549.43. A604; Dkt. 401-169; Dkt. 401-152. The district court later found that Lieff "should have been suspicious about the reasons for a payment of more than $4,000,000 to an attorney who did not file an appearance in the case and did no work on it that they had seen." ADD118.

B. Lieff's involvement in the *State Street* action and its use of contract attorneys.

ATRS sued State Street in 2011, and the district court granted an unopposed motion for appointment of Labaton as interim class counsel.

The appointment order gave Labaton "sole authority" over motions (ADD201), but did not require any other attorneys to sign any documents, nor excuse any attorney from complying with Rule 11. After surviving a motion to dismiss, the parties voluntarily stayed proceedings for mediation in 2012. Dkt. 62. The stay was never lifted before settlement in 2015. ADD17.

Starting in 2013, Lieff hired nine contract attorneys through an agency. ADD66. The cost to Lieff was $45-$50/hour. ADD135.

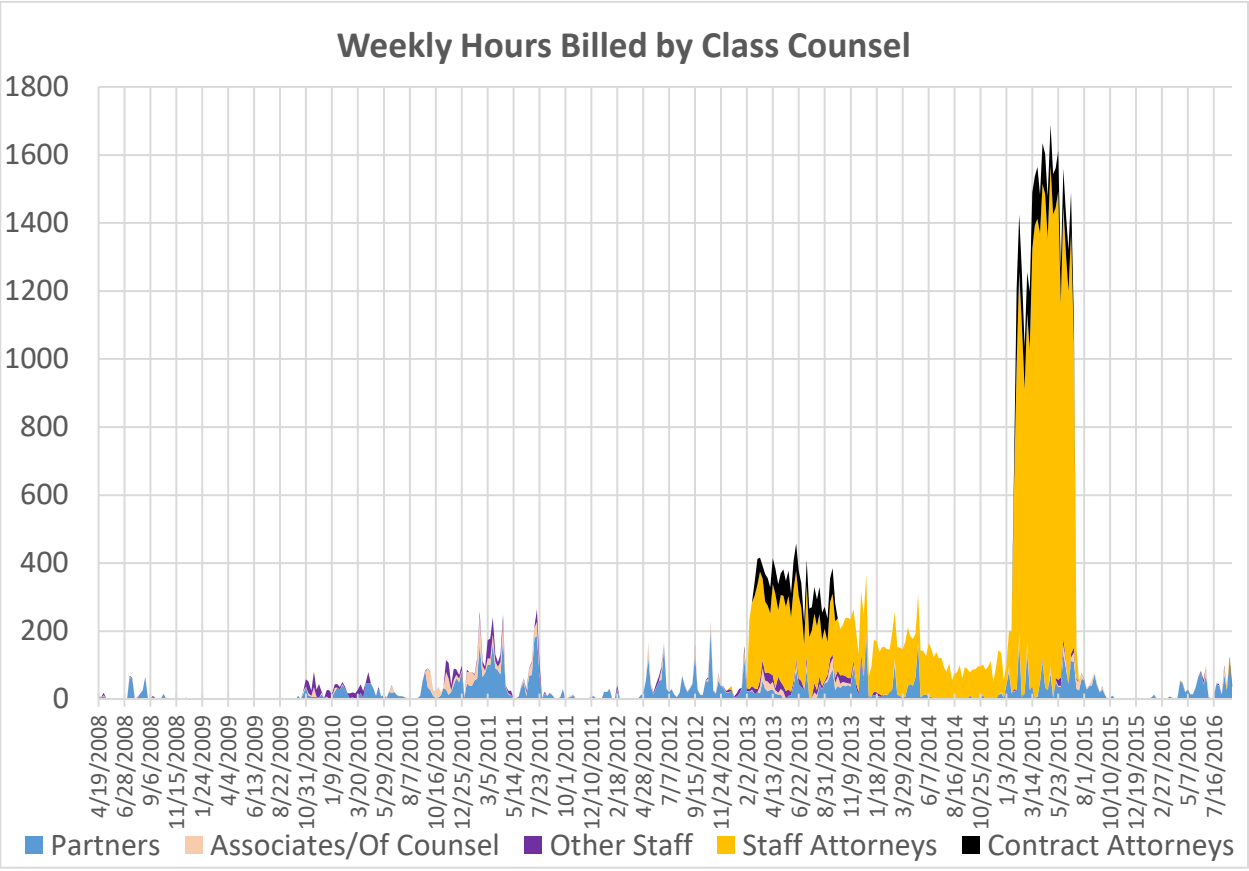
Lieff, Labaton, and Thornton agreed that Thornton would pay for some of Lieff's and Labaton's staff and contract attorneys and claim those attorneys on its lodestar. ADD90. A Thornton partner wrote in February 2015 that this was "the best way to jack up the lodestar," which the court found to mean a scheme to give Thornton a claim to a larger percentage of the future fee award. *Id.*

In August 2015, attorneys at Lieff and Thornton exchanged emails where Lieff expressed concern that Mike Thornton had described an unrealistic lodestar figure during a call. Dkt. 401-86 at 1-2. In the exchange, Thornton claimed to have brought Lieff into the *State Street* litigation and Lieff claimed to have brought Thornton into similar litigation against BoNY Mellon (*In re Bank of N.Y. Mellon Corp. Forex Trans. Litig.*, No. 12-md-02335-LACJLC (S.D.N.Y)). *Id.* at 3-5. A Thornton partner claimed that "Mike Thornton demand[ed] that you

[Lieff] get a floor of 20% which is probably worth about $10 million." *Id.* at 4; ADD91.

C. The parties settle, and Class Counsel obtains a 25% fee award *ex parte* in 2016.

The parties reached an agreement in principle in June 2015, and signed a settlement in July 2016. Dkt. 89 at 6. No depositions, motion practice, or discovery disputes occurred after the 2012 stay. ADD82; ADD126. Staff and contract attorneys billed nearly all of the attorney time after the similar *BoNY Mellon* case settled in February 2015. Dkt. 583 at 13.



Dkt. 583-1 at 6.

The Court advised the parties that "the adversary system doesn't work" with unopposed fee application and that it was "relying heavily" on the *ex parte* submissions. ADD40; ADD46.

In the joint fee application, Lieff and Thornton each took lodestar credit for four attorneys Lieff loaned to Thornton (OB10); the two firms' fee applications claimed these four attorneys regularly billed at different hourly rates. ADD10.

Lieff participated in two filings in support of fees that the court ultimately found misleading: (1) the joint memorandum in support of fees and (2) a four-page declaration signed by Lieff partner Daniel Chiplock.

1. The joint memorandum's characterization of the Fitzpatrick Study.

The joint memorandum in support of the fee motion discussed an empirical study. ADD43. Lieff attorneys are in the signature block on this memorandum. A141. Lieff acknowledges reviewing this memorandum submitted on its behalf. A829. The district court found that the joint memorandum:

> provided a misleading description of a prominent study by Brian Fitzpatrick. *See* Brian T. Fitzpatrick, "An Empirical Study of Class Action Settlements and Their Fee Awards," 7 *J. Empirical Legal Stud.* 811 (2010) (the "Fitzpatrick Study"). Labaton accurately reported that Fitzpatrick had found that the mean and median fees awarded in 444 common fund settlements were 25.7% and 25%. Sucharow argued that, therefore, "[t]he

> 24.85% fee requested [in this case] is right in line with Professor Fitzpatrick's findings." [A143].
>
> However, Sucharow did not disclose other findings from the Fitzpatrick Study that undermined his argument, as was required by the Massachusetts ethical rules that deem applications for attorneys' fees to be *ex parte* proceedings in which lawyers must disclose all material facts even if some of them are adverse to the attorneys' interests. *See* Mass. R. Prof. C. 3.3 cmt. 14A. More specifically, Sucharow did not disclose that Fitzpatrick had written that: "fee percentage is strongly and inversely associated with settlement size . . . ; [when] a settlement size of $100 million was reached . . . fee percentages plunged well below 20 percent." Fitzpatrick Study, *supra*, at 837-38. Nor did Sucharow reference Fitzpatrick's finding that in settlements between $250,000,000 and $500,000,000, the mean fee award was 17.8% and the median award was 19.5%. *See id.* at 839. It was, therefore, misleading for Sucharow to assert that the 25% award being requested in this case was "right in line with Professor Fitzpatrick's findings."

ADD20-22. Though the Fitzpatrick Study had findings about standard deviations, the joint memorandum did not mention those, either. ADD22 n.8. The unopposed *ex parte* fee memorandum included 731 pages of exhibits; class counsel included the full Fitzpatrick Study as Exhibit 31 of 32. Dkt. 104; Dkt. 104-31.

The district court noted that Lieff cited the Fitzpatrick study in its *BoNY Mellon* fee request while accurately noting the mean and median percentage fee awarded in settlements of this size. ADD107 & n.21.

2. Lieff's representations of its billing rates.

Lieff attorney Daniel Chiplock signed a declaration under oath in support of the motion. ADD43. The declaration stated "The hourly rates for the attorneys and professional support staff in my firm included in Exhibit A are the same as my firm's regular rates charged for their services, which have been accepted in other complex class actions." A194.

Even though the ERISA counsel firms stood to gain a fraction of the attorneys' fees Lieff received, three of those firms modified the language in their declarations, and one specifically did so because the rates in the application were *not* "charged," but that similar rates had been *approved* by other courts. ADD96. Lieff also used less misleading language in declarations filed in the *BoNY Mellon* matter. *Id.*

D. Lieff obtained its original award through an undisclosed fee-sharing agreement.

The original fee order awarded a total amount of $75 million without delegating it across firms. ADD208. Thus, the court did not award Lieff any particular amount in that fee order. Sole discretion was left with class counsel, who unknown to the court and even to ERISA counsel, had struck fee-sharing agreements with other class counsel firms, ERISA counsel, and Chargois. ADD24. As part of this fee sharing, ERISA counsel received only a 1.17 multiplier on their lodestar for their work on the case (compared to the lead firms' 2.19 multiplier), though all of ERISA counsel's time was included in the lodestar justifying the

original fee motion. Dkt. 583 at 12. The fee application had claimed that the multiplier was 1.8. ADD45.

E. *Boston Globe* reveals overbilling.

Boston Globe reporter Andrea Estes discovered the double-counting shortly after the fee order issued, and contacted Thornton's attorneys for comment. A484. In response, on November 10, 2016, David Goldsmith filed a letter which, for the first time, informed this Court that errors had caused the time of certain "staff attorneys" to be incorrectly included on the billing for both Thornton and other Class Counsel firms. A289. The extent of this double-counting was about $4 million, nearly a tenth of the original claimed lodestar. A290. While Lieff and the other lead firms reviewed their declarations before filing this letter, no one then advised the court that Lieff did not have "regular rates charged" for many attorneys listed as an exhibit to the Chiplock declaration. ADD104. Nor did the letter accurately advise that many of the supposed "staff attorneys" were not staff at all, but temporary contract attorneys hired at rates of about $50/hour. ADD65. Nor did the letter disclose that Class Counsel—unknown to ERISA counsel—had paid $4.1 million to a politically connected attorney (Chargois) who performed no work in the case.

Estes contacted CCAF director Ted Frank around November 4 to ask questions about the billing and class actions in general. Dkt. 125-1

¶ 30. Frank reviewed the fee papers and docket, and wrote a detailed five-page letter memo to Estes about the fee application and the November 10 Goldsmith letter. Dkt. 125-2 ("Frank Memo"). The Frank Memo flagged several issues that Goldsmith and the fee application failed to address, including the misleading use of temporary contract attorneys at greatly inflated rates, the declining percentages generally awarded in "megafunds," and the misrepresentation of the Fitzpatrick article in the fee papers. *Id*. at 3, 5.

Estes and the *Globe* reported on several of these issues in a lengthy December 17, 2016 story on the billing. The article quotes Frank extensively; Frank correctly inferred that the double-counting error was inadvertent, but argued that the misrepresentation of contract-attorney rates was pervasive. A319.

F. The court vacates the fee award after an unopposed Rule 60 motion and appoints a Special Master.

On February 6, 2017, the Court ordered the parties to respond to its proposal to appoint Judge Rosen as Special Master to investigate issues the *Globe* report raised, including "whether the hourly rates plaintiffs' counsel attributed to the staff attorneys in calculating the lodestar are, as represented, what these firms actually charged for their services or what other lawyers in their community charge paying clients for similar services." A298-A299.

> In their memorandum in support of the fee request, plaintiffs' counsel represented that to calculate the lodestar they had used "current rather than historical billing rates," for attorneys working on this case. … In view of the well-established jurisprudence and the representations of counsel, the court understood that in calculating the lodestar plaintiffs' law firms had used the rates they each customarily actually charged paying clients for the services of each attorney and were representing that those rates were comparable to those actually charged by other attorneys to their clients for similar services in their community.

A296-A297.

The district court noted that the Goldsmith letter did not address the reliability of the rates, but that the *Globe* raised these questions, particularly about contract attorneys paid less than $50/hour. A298-A299. The court stated it intended that the Special Master would consider whether any misconduct "should be sanctioned." A302.

On February 17, CCAF appeared and moved for appointment as guardian *ad litem* on behalf of the class, or alternatively to participate as an *amicus*. Dkt. 126-1. CCAF suggested that a guardian *ad litem* was needed to make a Rule 60(b) motion vacating the fee award to avoid any possible jurisdictional problem over the court's review of the fee grant. *Id*. at 12.

The parties opposed CCAF's motion, and sought to preempt it. At the March 7 hearing, Labaton made an oral, and then later a written,

Rule 60(b)(1) motion to vacate and reopen the fee award. Dkt. 176 at 19-20; Dkt. 178. Lieff did not oppose the motion, and the court granted it. Dkt. 331. The firms, however, retained the previously awarded money over the course of the investigation. *Cf.* A1439; Dkt. 176 at 19.

The court put the parties on notice it believed the "regular rates charged" language in their declarations was misleading. ADD55. Lieff admitted it had virtually no "regular rates charged." ADD56.

The parties also argued that a special master with investigative authority would be more appropriate than a CCAF appointment. ADD54. The court took CCAF's motion for appointment as guardian *ad litem* under advisement. Dkt. 172 at 2.[3] It appointed Judge Rosen to act as Special Master, ordering him to prepare a report addressing items including: "the accuracy and reliability of the representations made by the parties in their requests for awards of attorneys' fees and expenses," and "the accuracy and reliability of the representations made in the November 10, 2016 letter from David Goldsmith." A330-A331.

[3] The district court ultimately denied the motion in January 2021, holding it "may be renewed if the First Circuit does not invite the court to retain counsel." Dkt. 662 at 24. While this Court has not yet ruled on the district court's request to invite it to retain counsel, CCAF believes its participation as *amicus* will provide the "adversary process" that the district court rightly believes will benefit this Court without the delay of collateral litigation over a guardian *ad litem* appointment.

G. Lieff conceals the Chargois arrangement, delaying the Special Master's Report and Recommendation until June 2018.

The Special Master filed its 377-page Report and Recommendation in June 2018; it cited hundreds of exhibits. A359-A735. The delay occurred because the Chargois arrangement did not come to light until the after the Special Master's depositions closed, buried in Thornton's (but omitted entirely from Lieff's and Labaton's) June 2017 document production. A445 n.66.

The Special Master noted Lieff's conduct, including its failure to disclose documents and knowledge it possessed about the Chargois arrangement in response to multiple discovery requests and interrogatories directly calling for its disclosure. A477-A481. The Special Master reopened its investigation because of the concealment.

The Special Master recommended a Rule 23(h) award to Lieff of under $12.8 million. ADD161.

H. The class counsel firms point fingers at each other.

Labaton and Thornton objected to the Special Master's recommendation to sanction these firms for use of the term "regular rates charged." Labaton argued that it was similarly-situated to Lieff in that it flagged a handful of billers who had worked on non-contingency cases. ADD102; Dkt. 579 at 19.

Thornton, for its part, argued that the logic for sanctions applied essentially equally to five of the firms because hardly any biller had "regular" rates; Lieff committed the "same" error it did. Dkt. 361 at 54.

I. The court declines to reduce fees as a sanction for the misconduct it finds, awards above-average fees, and awards Lieff $15.2 million.

In response to the reopened fee petition, after several days of hearings and several rounds of new briefing, the court issued a fee award of 20%, higher than the mean and median fee award for large settlements in the Fitzpatrick Study. ADD28. It was also substantially higher than the relevant 13.16% mean in an empirical study by Professor William Rubenstein, an expert Lieff had retained. ADD130. The court set a reasonable percentage fee award, cross-checked that percentage against an adjusted lodestar (awarding a substantial multiplier), and then allocated the fee award between the firms, with $15.2 million in fees and costs for Lieff. ADD148. The fee percentage was 20% instead of 25% because the court found, once it had accurate information, that the 2016 percentage was too high. "On closer scrutiny, the court has decided that even absent the serious, repeated misconduct of Labaton and Thornton, an award of less than 25% of the common fund would be most appropriate." ADD28. Lieff was a beneficiary of the new allocation: it received 24.9% of the new allocation instead of 21.6% under the original

secret fee-sharing agreement, and $2.4 million more than the Special Master recommended. ADD161-ADD162.

Lieff's Statement of Case includes the speculative claim that "Lieff's reduction apparently resulted from attributing to Lieff a portion of the amount paid to Chargois, which had never actually been received by Lieff, as the erroneous starting point for the penalty for the firm's perceived deficiencies, and then deducting that as if it had been received." OB29; *see also* OB54 n.194. This is wrong.

First, Lieff's contribution to the "off the top" payment to Chargois (A480) was not $1.14 million, but Lieff's proportion of the class counsel fees, 24%, so $984,611.86. Dkt. 566 at 131. *Second*, the district court's fee order fixes the overall attorneys' fees at $60 million precisely. ADD29. Then after awarding ERISA counsel $10,128,490, the court splits the balance among Class Counsel—44% to Labaton, 26% to Thornton, and 30% to Lieff. *Id.*; ADD148. Lieff's $14,961,453 fee award equals *precisely* 30% of Class Counsel's $49,871,510 portion. Lieff comes off very well from this calculation—it had agreed to receive (and did receive) precisely 24% of the Class Counsel portion (minus the payment to Chargois) in 2016, with Labaton and Thornton taking 47% and 29%, respectively. Dkt. 566 at 131.

The Court noted that it could have reduced or denied fees altogether as a sanction (ADD38), but decided "the court is neither imposing

sanctions nor denying a fee award to any attorney or firm because of misconduct." ADD86; *see also* ADD127; A1477-A1478 n.12.

The court addressed and rejected Lieff's and Fitzpatrick's argument that the fee petition was not misleading because its numbers were "within the range of standard deviation." ADD22 n.8. The court also rejected the argument that counsel fulfilled their responsibility by including the Fitzpatrick Study as an exhibit: "It is unreasonable to expect that the court would scrutinize hundreds of pages of exhibits to determine the veracity of every representation made by counsel." ADD106. The court instead relied "heavily" on counsel's submissions because of their duty of candor. ADD106-107; *accord* A1277; *contra* OB25 (claiming court did not address this argument).

Lieff did not argue until a June 2020 First Circuit filing that a court could not hold it responsible for a motion it did not sign. The district court pointed out that this was a bad misreading of Rule 11. A1478-A1479 n.13.

In a March 2021 order, the court repeated its statement that Lieff's conduct was "deficient" and did not meet the standard required by Rule 11. A1476. Lieff did not amend its appeal to review this unflattering remark.

Standard of Review

Because Lieff neglects to mention the procedural posture of the case, it omits the relevant standard of review. This Court reviews a

court's award of attorneys' fees for abuse of discretion. *Heien v. Archstone*, 837 F.3d 97, 100-01 (1st Cir. 2016).

Summary of Argument

Lieff's arguments are based on a ruling that never happened. The district court imposed no monetary sanction on Lieff. In 2016, the district court awarded a lump sum of $75 million in fees to Labaton, and Labaton secretly allocated part of that money to Lieff. In 2017, the parties asked the court to vacate that fee award under Rule 60(b)(1), and the court did so. In 2020, the court issued a new Rule 23(h) fee and costs award with a specific amount, $15.2 million, allocated to Lieff. ADD29. In doing so, the court found that its original $75 million award was erroneously high, and that the new award did not reflect any monetary sanction—even though it had the discretion to entirely zero out Lieff under Rule 23(h) because of its submissions to the court. ADD28; ADD38; ADD86; A1477. That the court awarded Lieff a different sum in 2020 than Labaton secretly agreed to pay Lieff in 2016 does not constitute a penalty. Lieff is asking for review of an attorney's fee award without once mentioning Rule 23(h) (or the fact that the court vacated the initial $75 million award under Rule 60).

Lieff's omissions in what, without this *amicus* brief, would be an *ex parte* appeal are all the more ironic because they are appealing an order

criticizing them for omissions in what was an *ex parte* attorneys' fee motion.

Such criticisms are normally non-justiciable. *In re Williams*, 156 F.3d 86, 92 (1st Cir. 1998). But even if the district court's criticism of Lieff constitutes a Rule 11 admonishment, the district court gave notice to Lieff of its misconduct years in advance. Lieff's argument that a signature is required for sanctions misstates the law, the precedent, and the Advisory Committee Notes, repeating a misleading use of ellipses despite the district court warning them about the error in their earlier appellate brief. A1478-A1479 n.13. The court not only did not clearly err in its findings, it is clearly correct, and Lieff is fortunate that it is walking away with $15.2 million.

Argument

I. The district court imposed no monetary sanction on Lieff.

"Lieff seeks to have its fee penalty" removed (OB2), but there was no fee penalty. That confines the issue on appeal solely to the district court's comments about Lieff's conduct; the district court *granted* Class Counsel's otherwise vacated fee request. The court expressly decided it "is not imposing sanctions of denying attorneys' fees" based on its findings that Lieff failed to meet Rule 11 standards. ADD127.

In any event, the district court found that Lieff failed to meet Rule 11 standards in two ways. *First*, Lieff reviewed, approved, and

authorized Labaton to sign the fee memorandum, which falsely implied a 25% fee award was empirically "right in line" with settlements between $250 and $500 million. ADD26-27; ADD106. *Second*, Lieff's declaration in support of the fee application describing "my firm's regular rates charged for their services" was "inaccurate and misleading" because "Lieff also worked primarily on a contingent-fee basis and had only a 'handful of paying clients over the years.'" ADD26 (*quoting* Lieff partner Richard Heimann, A343); ADD125. While the district court made these findings, it did not even "reprimand" or "admonish" Lieff. The district court emphasized its intention to *not* reprimand Lieff three months ago. A1476. Thus, the appeal may be non-justiciable under Circuit law because "a jurist's derogatory comments about a lawyer's conduct, without more, do not constitute a sanction." *In re Williams*, 156 F.3d 86, 92 (1st Cir. 1998) (finding no jurisdiction to review order that found misconduct but annulled sanctions for technical reasons); *accord Sexual Minorities Uganda v. Lively*, 899 F.3d 24, 28 (1st Cir. 2018).[4] The district

[4] Lieff claims that the district court supposedly sanctioned it for a third reason: a statement that Lieff's inaction "facilitated Labaton's violation of the Massachusetts Rules of Professional Conduct." OB23 (quoting ADD149). But the court did not find a Rule 11 violation, let alone order monetary sanction, for this conduct, so *Williams* certainly precludes review of this remark.

Besides, the remark is true. Robert Lieff testified that he would have never accepted the Chargois arrangement had he understood it. Dkt. 401-138 at 97. Lieff's ostrich-like acquiescence for Class Counsel to

court put Lieff on notice of this binding precedent, A1476, but Lieff does not cite or address it.

We note that to the extent that Lieff contends despite *Williams* that the court's mere observation that Lieff failed to meet Rule 11 standards is a "sanction," then Lieff has forfeited appeal on that issue. The court repeated the same observation in a March 2021 order (A1476), and Lieff failed to amend its notice of appeal to address that order's language.

That said, if the court wishes to reach the issue, this rest of this brief assumes *arguendo* that the two factual findings are a sort of implicit admonishment and Lieff has not forfeited the appeal.

If the criticisms are an implicit admonishment, the sanction was *only* an implicit admonishment, because neither of the two Rule 11 findings resulted in a fee reduction or other monetary penalty. It was impossible for those findings to be a fee reduction because the district court never set a fee award to Lieff from which it could deduct sanctions. As with all too many class attorneys' fee awards, the district court first awarded a lump sum to Labaton, which then distributed in accord with secret fee agreements undisclosed to the court and ERISA counsel. That the court awarded Lieff a different sum in 2020 than Labaton secretly

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pay over $4 million (and conceal the payment from ERISA counsel and the court and Arkansas taxpayers), when Lieff knew or should have known Chargois performed no work (ADD24), enabled co-counsel to proceed with the scheme.

agreed to pay Lieff in 2016 without court review does not constitute a penalty.

The district court explained that it arrived at its 2020 fee order by first determining 20% of the common fund would be an appropriate overall fee award. ADD27. While Lieff may prefer to mischaracterize the Fee Order as a *sua sponte* sanction, it does not become a Rule 11 order just because the court found Lieff's performance "deficient." ADD123; A1476. Deficient performance, and in particular overreaching fee motions, constitute equitable grounds for fee reductions independent of Rule 11. *See, e.g.*, *First State Ins. Group v. Nationwide Mut. Ins. Co.*, 402 F.3d 43, 44 (1st Cir. 2005); *Clemens v. N.Y. Cent. Mut. Fire Ins. Co.*, 903 F.3d 396, 402-03 (3d Cir. 2018); ADD38. In reality, the Court awarded $2,448,678 more to Lieff than the Special Master recommended. ADD161-ADD162.

Finally, even if Lieff's alternative facts were correct, and the district court would have awarded plaintiffs precisely $61,140,000 instead of $60,000,000 but for its findings about Lieff, the court can issue sanctions under *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991), "to protect the integrity of its proceedings,"[5] which the district court observed (A1483-A1484), but Lieff does not mention.

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[5] *Davis v. Credit Bureau of the South*, 908 F.3d 972, 977 (5th Cir. 2018).

A. The court vacated the 2016 fee order, with Lieff's acquiescence, years before the 2020 order awarded Lieff fees.

The Fee Order does not impose a monetary sanction. In fact, it's the only order authorizing Lieff to keep any money at all. Lieff did not oppose a 2017 Rule 60 motion to vacate the original fee order. Dkts. 178, 331. The Court generously allowed Lieff and the other Customer Class Counsel firms to hold millions of dollars accruing interest since 2016—an extraordinary benefit given that payments to class members did not begin until October 2020.

Lieff obtained the 2016 fee award in part by *misleading* the Court, and certainly by concealing the fee agreements between Lieff, Labaton, Thornton, and Chargois. In 2016, the court awarded a lump sum of $74,541,250 for Labaton to distribute to all plaintiffs' counsel. Dkt. 111 at 5. Lieff's "share" of $16,100,910 was not the product of judicial decision but of a secret fee agreement among Class Counsel to award themselves more richly than ERISA counsel while agreeing to divert over $4.1 million to politically connected lawyers whom Lieff never disclosed. A445. Lieff would have presumably concealed the Chargois arrangement forever but for the Special Master's careful review of document production from Thornton. A445 n.66.

The $16,100,910 figure was not carved into stone or even judicial order even before the court issued its new fee order. Lieff had no legal entitlement to the original $16,100,910 figure once it acceded to the court

vacating the award. (Lieff does not even have legal entitlement to the interest it will keep for holding that money for years after the court vacated the fee award. Dkt. 684-1 (requiring Lieff to repay only the difference in fee allocations without repayment of earned interest).) Deducting from this amount is not a sanction, but simple arithmetic: the court ordered Lieff to repay the common fund the difference in dollars lawfully awarded by the Court and the dollars Lieff obtained for itself based on secret negotiations five years ago. The payment arrow is only from Lieff now because the court did not require Lieff to repay the full sum to the settlement fund when the court vacated the fee award under Rule 60.

B. The district court set a reasonable 20% fee award and only then allocated the award among counsel.

Having Class Counsel's assent to vacate the 2016 fee order, the district court constructed a new fee award from a blank slate, and its transparent methodology shows no sanction.

Lieff describes this exactly backwards when it says "the court reduced the overall fee percentage from 25% to 20%, which included 'a reduction of about $1,140,000' in Lieff's final fee to address the firm's 'deficiencies.'" OB29 (quoting ADD149). In fact, the district court set the overall fee award of 20% first (ADD77-ADD144) and only then decided how to allocate the fee among the firms (ADD144-ADD153).

The court found that the 2016 25% overall fee award was simply too high, even if no misconduct occurred. ADD28. Although the district court considered conduct and professional performance in setting an overall fee award, as is appropriate under this Court's standards, it was "neither imposing sanctions nor denying a fee award to any attorney or firm because of misconduct." ADD86.

A 20% award is not just consistent with the empirical research Class Counsel relied on, but generous. The 20% award for a $300 million fund "is above both the mean of 17.8% and median of 19.5% in settlements between $250,000,000 and $500,000,000 according to the Fitzpatrick Study on which plaintiffs' counsel asked the court to rely." ADD28. The court also relied on the empirical work of Professor William Rubenstein, the expert that Lieff retained for itself. ADD130.

After determining the overall fee award, the district court turned to allocated fees among the firms. It does cite several factors for Lieff's award, including deficiencies that did not rise to the level of misconduct like failing to disclose its (limited) knowledge of Chargois arrangement to ERISA counsel. ADD149; *compare* ADD123. Such findings are not sanctions, however; courts can and should consider counsel's deficiencies when setting reasonable fee awards. *See First State Ins. Group.*, 402 F.3d at 44 (affirming denial of *any* fee award because of overbilling); *see* Section I.D below. This is not new, before the merger of law and equity, it was the "duty of a Court of Equity, in the distribution of its favors, to

discriminate between those who violate their duty, and abuse their trust, and those who perform it with skill and fidelity." *Diffenderffer v. Winder*, 3 G. & J. 311, 348 (Md. 1831). More colloquially, an "[o]utside-chance opportunity for a megabucks prize must cost to play." *Commonwealth Elec. Co. v. Woods Hole*, 754 F.2d 46, 49 (1st Cir. 1985). Class counsel gambled that they could pull the wool over a busy court's eyes, and lost by the happenstance of an enterprising newspaper investigation exposing the discrepancies—and the "punishment" is an above-average fee where Lieff outperformed the other firms in allocation.

C. The Court awarded Lieff over $2.4 million more than the Special Master recommended.

While Lieff complains of a 7% "reduction" from the sum derived from its secret fee sharing agreements, this compares very well against the 30%-33% "reductions" borne by Labaton and Thornton, respectively. It also compares handsomely with Lieff's secret private fee agreement, which provided Lieff with precisely 24% of Customer Class Counsel's fee. Under the Fee Order, Lieff receives 30% of the Customer Class Counsel fee, leapfrogging over Thornton, which surrendered 3 points of its 2016 percentage to Lieff. ADD161. Finally, it compares well to the Special Master's recommendation, which found no Rule 11 violation from Lieff, but would have more aggressively adjusted its contract-attorney lodestar rates to actual market rates without a multiplier (A858-A859), and awarded $2,448,678 less in fees and costs than the district court

approved. ADD161-ADD162. The "deficiencies" that Lieff complains the district court considered favored Lieff's allocation relative to its co-counsel.

Lieff oddly claims that the below-average "reduction" of "its" fee was "pure punishment; it was not tied to any compensatory objective." OB54. But the compensatory objective was reducing the overall fee award from the originally-excessive 25% fee award. The district court's award was 20% lower than the 2016 award, but Lieff's fees were only 7% lower than what it would have received under the misbegotten 2016 order and fee sharing agreements. Lieff fails to explain why the entire $1.14 million arithmetical difference represents a "sanction" given the Court's express findings otherwise and the mathematical implausibility of reducing the overall attorneys' fee award from 25% to 20% without adjusting Lieff's share a penny.

The court also had a "compensatory objective" in increasing the awards to ERISA counsel. Lieff may complain that ERISA counsel's fee *increased*, but the contrast also undermines the notion that the court sanctioned Lieff. The district court increased ERISA counsel's fees to compensate for their time spent on the investigation and for being kept in the dark about the Chargois arrangement. ADD146-ADD147. And the final ERISA awards more closely approximate the $10.9 million fee award deducted from the ERISA subclass's portion of the settlement fund. Dkt. 89 ¶ 24. A reasonable observer might have presumed that

because the ERISA subclass had $10.9 million deducted to pay attorneys, ERISA counsel received that amount. Instead, Lieff and the other Customer Class Counsel firms redistributed the surplus among themselves. A443. And Lieff fares quite well compared even to ERISA counsel. As the attorneys originally divided the 2016 fee award, ERISA counsel received just $7.45 million, which works out to a blended lodestar multiplier of about 1.17. *Compare* Dkt. 104-24 (originally claimed lodestars) *with* ADD192. Even under the 2020 fee award, Lieff continues to enjoy almost the same fee multiplier (about 1.53) as ERISA counsel (about 1.59), not including payments to the Special Master.[6] And this is crediting Lieff's incredible original lodestar figures that count $45-$50/hour contract attorneys with billing rates ten times what the defendant here pays. A more exacting lodestar calculation for contract and staff attorney rates (*e.g.*, Dkt. 522 at 20) would show Lieff still has a larger multiplier than ERISA counsel.

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[6] Lieff repeatedly suggested before the district court that its lodestar might include time spent on the investigation. *E.g.*, Dkt. 367 at 6. But the whole purpose of attorneys' fees awards is to compensate common benefits provided to *class members*. *In re Fidelity/Micron Secs. Litig*, 167 F.3d 735, 738 (1st Cir. 1999). After 2016, Lieff did not provide additional class benefit, but instead zealously advocated for its own interests, most vividly when it asked the district court to stay paying the class during this appeal. A1410.

Lieff retains a *much* higher multiplier than the award it conspired with co-class counsel for ERISA counsel to receive in 2016.

Lieff fails to argue that the fee award is an abuse of discretion under Rule 23(h). It is not.

D. Alternatively, even if a $15.2 million above-lodestar award constitutes a sanction, the district court's inherent authority justifies that result.

In response to Lieff's earlier appeal (No. 20-1365), the district court confirmed specifically that it did not impose a monetary sanction on Lieff when it denied Lieff's motion to stay distribution of funds to the class. A1475.[7]

That said, even if this panel were to conclude the district court lied several times about how it reached its fee award, a sanction would still be justified under the district court's inherent authority, as the district court observed. A1483-A1484 (citing *Chambers v. NASCO*). Attorneys' fee awards are within a district court's equitable authority, which may—and *should*—consider the conduct of the parties. *See First State Ins. Group*, 402 F.3d at 44 (1st Cir. 2005). "[C]onsistent with its inherent authority to protect the integrity of proceedings," a district court might even decide "that a 'reasonable' fee in response to an exorbitant request is a nominal amount approaching zero." *Davis*, 908 F.3d at 977 (citing

[7] *Amicus* supports Lieff's newfound position that the class should be paid from the settlement proceeds with "no further delay." OB2.

Chambers and quoting *Baylor v. Mitchell Rubenstein & Assocs., P.C.*, 857 F.3d 939, 958 (D.C. Cir. 2017) (Henderson, J., concurring)). If Rule 11(c)(3) process were required every time a district court sought to reduce an excessive fee request owing to substandard performance, it would deter courts from fulfilling their role as fiduciaries for absent class members.

Lieff does not mention inherent authority or cite *Chambers* in its brief, but it does include the district court's March 2021 order mentioning *Chambers* as the next-to-last exhibit in its 1,493-page appendix.

II. The district court provided ample process to Lieff under Rule 11(c).

From the outset of this investigation, the district court alerted Lieff that sanctions could result. Whether misconduct "should be sanctioned" was one of the principal reasons the court appointed a special master. A302. This was discussed at the hearing after the *Boston Globe* published a story on the questionable representations made by counsel. ADD132.

Lieff received notice of both of the Rule 11 deficiencies and the court provided it an opportunity to respond, the essence of what Rule 11(c)(3) requires. (Lieff does not claim the court violated Rule 11(c)(5). It did not, but the Court need not consider the question, because, by failing to mention it, Lieff forfeits the issue. *E.g.*, *Sparkle Hill, Inc. v. Interstate Mat Corp.*, 788 F.3d 25, 29 (1st Cir. 2015).)

A. The district court noticed the parties repeatedly that it was considering sanctions.

After the district court proposed appointing a special master on February 6, 2017, it repeatedly informed counsel that it intended to determine "whether any misconduct occurred; and, if so, … whether it should be sanctioned." A302. The district court proposed that Judge Rosen provide a written report and recommendation, after which time the court would "if appropriate, conduct a hearing concerning any objections" and review the report under Rules 53(f)(3), (4) & (5), which provide for *de novo* review of findings of facts and conclusions of law. A302. Lieff *assented* to the appointment as the district court outlined. Dkt. 128.

Nor could Lieff be surprised about the misrepresentations that court identified as violations of Rule 11: filings flagged both in 2017. The district court's February 6, 2017 order specifically identified as questionable language in class counsel's declaration, that "the hourly rates for the attorneys and professional support staff in my firm … are the same as my firm's regular rates charged for their services." A296. The court made its concerns even more clear at the March 7 hearing, when the court noted that the *Globe* article cast doubt on whether the contract attorneys (contracted solely by Lieff) had really been charged to anyone at $450/hour given that their actual cost was one-tenth that amount. Dkt. 176 at 28-29. The court asked Lieff attorneys about the

representation and learned from partner Richard Heimann: "We have only a handful of paying clients over the years. We're almost entirely a contingent fee firm." A343. The district court observed that jurisprudence shows that rates should be based on what lawyers are charging paying clients and "I think probably many other judges made the same mistake—well, have understood the representations made the way I have for many years when we try to do that lodestar reasonableness check." A344. As for the Fee Memorandum's discussion of the Fitzpatrick study, CCAF identified the problem in its first filing, and the court gave notice that it considered it a possible misrepresentation. Dkt. 126-1 at 11; Dkt. 543.

Lieff had three years to file arguments, retain experts, and argue in open court several times about potential sanctions. Lieff did so with gusto, retaining two experts to argue that neither the "rates charged" statement nor its characterization of the Fitzpatrick study were misrepresentations. A911, A1203-A1208.

While the Special Master did not recommend a sanction for Lieff based on the "rates charged" representation and completely overlooked the misrepresentation of Fitzpatrick, Lieff well knew the court would conduct a *de novo* review on the entire determination.

As for the "rates charged" recommendation, the Special Master *had* found that Thornton and Labaton violated Rule 11 on the belief that these firms billed lacked *any* paying clients. A416. But co-class counsel's

objections highlighted the tenuous distinction recommended by the Special Master. Labaton argued it was identically situated with Lieff—that they too had a small handful of billers that worked on the case. The Special Master ultimately accepted this argument. Dkt. 523 at 3. Thornton, which lacked *any* paying clients, raised a more fundamental challenge to the line drawn. Why should Thornton be sanctioned when Lieff also "acknowledged that, generally, they do not have clients who pay by the hour"? Dkt. 361 at 54. "There is no principled basis by which the Special Master can recommend that the Thornton Law Firm should be sanctioned for these misstatements when" every class counsel firm said the same thing. *Id*.

The court made clear by November 2018 its skepticism of the Special Master's line-drawing:

> Labaton argues, 'Well, we're different than Thornton because we actually had some paying clients….' I mean, it's only four out of the 71 … only four of them ever charged anybody. … So I think I have to look at this kind of holistically and make sure there's no unwarranted disparity in the way the lawyers are treated.

Dkt. 519 at 109. Later, topics the court noticed for live hearing in June 2019 included whether "Customer Class Counsel made errors other than double-counting time in their fee petitions." Dkt. 543 at 3. (The court used "Customer Class Counsel" to describe the three firms collectively and "Labaton" when discussing that firm specifically. *E.g.*, *id.* at 2.)

Lieff understood the "rates charged" declaration was a focus throughout the investigation. Lieff conveyed its viewpoint during proceedings before the Special Master (Dkt. 401-9 at 49-51; Dkt. 401-161 at 13) and through discovery answers (A1079-A1080), before the Special Master. Lieff argued the issue in district court filings at least five times. Dkt. 367 at 13-15; Dkt. 505 at 2; A911; A1303; A1350. And after the district court announced "I continue to be concerned about the reliability of those representations, regular rates charged" (Dkt. 560 at 109), Lieff followed the similarly situated Labaton firm and argued the issue in a live hearing. A1293-A1294.

As for the misrepresentation of the Fitzpatrick Study, CCAF first flagged the issue in 2017 and brought the issue to the court's attention in its November 2018 recommendation for the overall fee award. A1091. On December 18, 2018, Class Counsel (including Lieff) responded in a joint filing that it had *not* misrepresented the Fitzpatrick Study. Dkt. 532 at 14.[8] In May 2019, the district court issued an agenda for three days of live testimony in June, and the *very first topic* said, among other things, "the participants shall be prepared to address whether Customer Class

[8] Lieff cannot argue it did not knowingly join *this* response—Labaton was differently situated then because of the proposed partial resolution, so all Class Counsel firms intentionally joined this response. Lieff also contemporaneously filed a response related to issues specific to it. Dkt. 534.

Counsel misrepresented a study in their memorandum in support of attorneys' fees." Dkt. 543. On June 11, Class Counsel filed a motion for Fitzpatrick himself to testify at the hearings. A1196-A1198. The court called for a declaration summarizing his testimony (A1202), which opined that his study had not been misrepresented because Class Counsel's statement that the 25% fee request was "right in line" with fee awards in similarly sized funds could be understood to mean the percentage was within a standard deviation from the reported mean and median. A1206-A1207.

The district court denied the motion to testify because "the court views the matter of whether the Fitzpatrick study was misrepresented—meaning whether it was characterized by Customer Class Counsel in a false or misleading manner—to be a question of fact on which Mr. Fitzpatrick's testimony is neither necessary nor appropriate." A1222. At the hearing, Lieff argued the matter at length (A1247-A1280), and were joined by Labaton and Thornton's similar arguments. A1280-A1290.

Lieff knew that the court was reviewing its conduct with both filings that violated Rule 11, had ample opportunity to address both filings, and actually did so repeatedly.

B. The district court's years-in-advance and iterative notice to Lieff exceeded Rule 11(c)(3)'s requirements.

Lieff does not deny that the district court put sanctions on the table years in advance, nor that Lieff had the opportunity to respond—and did

respond—regarding the conduct the court ultimately sanctioned it for. Instead, it argues that "[w]ithout question, that open-ended order would be legally insufficient for Rule 11(c)(3)." OB36.

Question: how did the district court's years-in-the-making finding not permit Lieff "to show cause why conduct specifically described in the order has not violated Rule 11(b)"? This is the formality required by Rule 11(c)(3), and none of the cases cited by Lieff suggest the court needed to say additional particular magic words to effectuate notice.

None of the cases cited by Lieff suggest that the court's initial and subsequent order would not provide notice that Lieff faced potential sanction for its declaration and memorandum. Lieff cites several cases it says stand for "strict adherence to the procedural protections mandated by Rule 11(c)(3)" (OB35, OB41-42), but all are inapposite.

- *In re 60 E. 80th St. Equities* concerned sanctions under 28 U.S.C § 1927—not Rule 11—and affirmed sanctions even though the district court never provided "written notice of the possibility of sanctions." 218 F.3d 109, 114, 118 (2d Cir. 2000). The district court had asked from the bench why the attorney should not be sanctioned, and he responded at the same hearing. *Id*. at 114.
- *In re Tutu Wells Contamination Litigation* suspended attorneys from practicing before the court, but had noticed only "why monetary sanctions and dismissal of claims should not be imposed." 120 F.3d 368, 376 (3d Cir. 1997) (affirming $120,000

monetary sanctions, reversing unnoticed suspension sanctions). Here, Lieff had advance notice of possible censure and even monetary sanctions, which the court declined to impose.

- The unpublished *Kenyon Int'l Emergency Servs., Inc. v. Malcolm* provided no advance notice of sanctions at all, but only a colloquy at the end of a hearing that never provided "a chance to contest their imposition orally or in writing." No. 12-20306, 2013 U.S. App. LEXIS 9704, at *16 (5th Cir. May 14, 2013).
- The district court in *PT Pukuafu Indah v. SEC*, awarded monetary sanctions for conduct different than noticed, which plaintiff therefore could not argue against. 661 F.3d 914, 927 (6th Cir. 2011) (remanding to provide further process).
- *Jones v. United Parcel Services, Inc.*, affirmed *sua sponte* sanctions imposed after the district court noticed exemplary misconduct in the plaintiffs' pleadings. 460 F.3d 1004, 1009 (8th Cir. 2006). "The absence of a listing of all offending paragraphs did not deprive Buchanan of adequate notice that he should explain" similar instances of misconduct. *Id.*
- The *United States v. Melot* district court imposed sanctions without written notice, and ignored the appellant's request for an opportunity to be heard "[i]f sanctions are on the table." 768 F.3d 1082, 1084 (10th Cir. 2014).

- *Donaldson v. Clark* concerned sanctions first raised at the end of a hearing, where the sanctioned party had no opportunity to respond. 819 F.2d 1551, 1554 (11th Cir. 1987).
- The court in *In re Bees* "never ordered Bees to show cause," and never provided any written notice it might issue sanctions. 562 F.3d 284, 289 (4th Cir. 2009).[9]

Lieff's argument boils down to tricksy formalism. The sanction cannot stand, suggests Lieff, because the court itself "did not mention Rule 11 with respect to Lieff." OB36-39. The notice must specify the offending conduct, but only to the extent necessary to ensure that the party facing sanctions has an adequate chance to defend himself. *See In re Rimsat, Ltd.*, 212 F.3d 1039, 1046 (7th Cir. 2000); *In re Taylor*, 655 F.3d 274, 286-87 (3d Cir. 2011); *Clark v. United Parcel Serv., Inc.*, 460 F.3d 1004, 1008 (8th Cir. 2006). Lieff not only had the opportunity, but took it, retaining experts to provide written declarations in support of its position on these matters, and arguing them in several filings and court appearances.

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[9] *Earthgrains Co.* and *R&D Latex Corp.* did not decide the adequacy of notice or process under Rule 11(c)(3), but instead reversed sanctions as inappropriate on the merits. *Schlaifer Nance & Co. v. Estate of Warhol* found appellants had been "afforded both adequate notice and an opportunity to be heard," but reversed on the merits. 194 F.3d 323, 336 (2d Cir. 1999).

Moreover, "the determination of what process is due is, in part, a function of the type and severity of the sanction." *Media Duplication Servs., Ltd., v. HDG Software Inc.*, 928 F,2d 1228, 1238 (1st Cir. 1991). Assuming for the sake of argument the order contains *any* sanction, it was simply a bare finding of deficiency; the least severe sanction available. Lieff received extensive and expansive opportunities to defend itself against the least severe sanction the district court could have issued—assuming it's a sanction at all.

While the process was long—elongated by Lieff's concealment of the fee sharing agreement with Chargois—Lieff knew the conduct singled out for potential sanction, had the opportunity to respond, and actually did respond several times.

The proceedings were more akin to Coen Brothers than Kafka or *Jarndyce*. *Contra* OB36. Findings about Lieff's banal misrepresentations were delayed and overshadowed by colorful characters like the Texarkana lawyer Chargois, who said he's entitled to $4.1 million for making one phone call ten years ago; the Arkansas State Treasurer later convicted of accepting bribes for rent that Chargois' partner had given her free; and former ATRS director Hopkins, who testified he knew nothing about pay-to-play before Judge Wolf, but whose hometown

politician Labaton attorneys donated to the day after Hopkins attended a 2012 *State Street* mediation.[10]

That Lieff's co-counsel apparently engaged in more bizarre dealings doesn't excuse Lieff from its duty as officers of the court under Rule 11 to not misrepresent facts in the memorandum and declaration it signed, especially given the *ex parte* nature of the fee application.

III. The modest non-monetary finding against Lieff is justified.

The district court's commentary on Lieff's behavior is non-justiciable because no sanction issued, but to the extent this Court considers it an admonishment, it is not clearly erroneous. Indeed, it is correct.

A. Lieff chose to actively present the fee memorandum to the district court even though Labaton was appointed as Lead Counsel.

Lieff argues it did not violate Rule 11(b) because it did not sign—meaning that it didn't include an "/s/" in front of one of its attorneys' names in the signature block—a brief containing misrepresentations. This is wrong.

As an initial matter, Lieff forfeited this argument below, as it did not raise it until a June 2020 First Circuit filing. (This is why the district

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[10] *See* Jack Newsham, *Labaton's Political Donations Line Up With Pursuit of Client, Records Show*, Law.com (Feb. 20, 2020), which was only filed after the fee order. Dkt. 592-3.

court did not "acknowledge" it before. OB25.) This March, the district court put Lieff on notice that the "signature" argument was baseless, and that Lieff's appellate brief had misleadingly quoted the Advisory Committee Notes. A1477-A1478 n.13. Lieff's 2021 brief repeats the strategic and misleading use of ellipses the district court called out. OB52.[11] Lieff does not address the district court's refutation, which we expand upon here.

Rule 11's text contradicts Lieff's assertion that "the key to Rule 11 is the fact of having signed a pleading." OB51. The "key" to Rule 11 instead is whether an attorney "present[ed] to the court a pleading, written motion, or other paper—whether by *signing, filing, submitting, or later advocating it*…." Fed. R. Civ. P. 11(b) (emphasis added). The Advisory Committee Notes to the 1993 Amendments expressly note that the rule permits sanctions against "co-counsel [and] other law firms," not just the signing attorney. Lieff actively participated in "presenting" the fee motion to the court—regardless of whether Labaton had ultimate authority over the "briefing and argument." OB51 (citing ADD201).

Lieff's fee motion and supporting brief state that they are "Respectfully submitted" … "By:" three Lieff partners serving as

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[11] Perhaps Lieff will argue that its appellate brief is not deceptive because it attached the district court's order flagging the issue as the second-to-last exhibit to its appendix. History doesn't repeat, but it rhymes. *See* Section III.B below.

"Additional Counsel for Plaintiff ARTRS and the Settlement Class." A141; Dkt. 102 at 3-4. Lieff partner Daniel Chiplock also submitted a declaration in support of the fee motion that he personally signed (A195) and argued in support of the motion at the fairness hearing (A250, A255). Lieff's admission that it "participated in the preparation of the fee memorandum" understates its active engagement in and affirmative support for the filing. OB52. Notably, Lieff does not argue that it was not given an opportunity to review and edit the brief or that it was unaware that Labaton had misrepresented the Fitzpatrick Study or that Labaton vetoed a correction. The district court examined this issue at length and found that Lieff reviewed the fee memorandum and authorized Labaton to include it in the signature block. ADD26. The district court recognized that in a previous case Lieff had signed a brief that accurately described the Fitzpatrick Study and therefore "should have caused Labaton to correct the mischaracterization of the Fitzpatrick Study in this case." ADD27.

Under Rule 11's plain language, Lieff's attorneys "presented" to the Court the filing with misrepresentations by both submitting the brief containing misrepresentations and arguing in support of the underlying fee motion. Even if none of Lieff's attorneys had an "/s/" in front of their names in the signature block, they meet the requirements for Rule 11 sanctions without the "additional inquiry" for those persons who did not "mak[e] the presentation to the court." Regardless of whether Labaton

had "final authority" over the fee memorandum, Lieff attorneys had a professional obligation and ethical duty not to present misleading information to the court and easily could have corrected the misrepresentation or refused to participate in presenting the misinformation. Rule 11 no longer allows attorneys actively engaged in presenting misinformation to the court to hide behind the lack of an "/s/" in front of their name.

The authorities Lieff cites do not support its argument that "*only* a signatory" (OB52 (emphasis added)) can be liable under Rule 11. The pre-1993 version of Rule 11 referenced only the "signer"; 1993 amendments broadened the Rule to include anyone who "presented" a filing, including by submitting and arguing in support of it. Lieff improperly relies on a 1989 case that is thus discussing a different rule. *Compare* OB52 (citing *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 125 (1989)), *with Triad Sys. Corp. v. Southeastern Express Co.*, 64 F.3d 1330, 1339 (9th Cir. 1995) (noting effect of 1993 amendment). When an attorney "later advocat[es]" for a paper, the fact that he didn't sign it is "unimportant." *Turner v. Sungard Bus. Sys., Inc.*, 91 F.3d 1418, 1421 (11th Cir. 1996).

Lieff's cited authorities are also unhelpful. *Polar International Brokerage Corp. v. Reeve*, involved the opposite situation: the court reduced (but did not eliminate) its original sanctions where a party personally signed a pleading subject to Rule 11 but had "limited

knowledge and [an] attenuated role" and was unaware of defendants' warning in multiple letters explaining why the pleading was subject to sanctions. 120 F. Supp. 2d 267, 269-70 (S.D.N.Y. 2000). *Rentz v. Dynasty Apparel Industries*, meanwhile, addressed whether sanctioned attorneys' former law firm should also be sanctioned jointly when the attorneys left the law firm and were always understood to be responsible individually for the case and did not include the law firm's name on pleadings. 556 F.3d 389, 397 (6th Cir. 2009). *Ramashwar v. Espinoza* involved a request for sanctions against an associate who participated in the litigation only "at the direction of … his employer and supervisor" and did not "participate in the creation of the complaint or the decision to bring th[e] action." No. 05 Civ. 2021, 2006 U.S. Dist. LEXIS 721, at *32 (S.D.N.Y. Jan. 6, 2006) (cleaned up). And *Gerbode* is plain wrong, misinterpreting the comments to the 1993 Amendments to Rule 11 discussed above. *Religious Technology Center v. Gerbode*, No. CV 93-2226 AWT, 1994 U.S. Dist. LEXIS 6432, at *17 (C.D. Cal. May 2, 1994).

Thus, while Labaton may have had "sole authority" to brief and argue a motion, the district court properly found that Lieff "presented" the fee memorandum with the misrepresentation in the absence of a showing that Lieff objected to the phrasing it reviewed. A finding that Lieff failed to meet the standard of Rule 11 was fully justified.

B. The misrepresentation of the Fitzpatrick Study is sanctionable because of the *ex parte* nature of unopposed fee motion.

Lieff's opposition to the award of sanctions is based on an overly generous interpretation of the fee memorandum's misleading descriptions and a failure to address the *ex parte* nature of the unopposed fee motion. The district court identified two ways in which the fee memorandum mischaracterized the Fitzpatrick Study: it failed to disclose (1) the "sliding scale" approach, in which there is an "inverse relationship between the fee percentage and settlement size; and (2) the mean and median fee awards of, respectively, 17.8% and 19.5% in settlements between $250,000,000 and $500,000,000. ADD21-ADD22; ADD105. The fee memorandum instead created the false impression that the requested fee was less than the mean and median awards in "megafund" settlements. *See* OB44 (quoting fee memorandum). Though the Court did not hear Fitzpatrick's testimony, it fully addressed his "standard deviation" argument in its opinion, noting that the "within one standard deviation" claim was an entirely different argument than the one class counsel made in its filing. ADD22 n.8. That finding (which Lieff does not discuss, and thus forfeits objection to) is not clearly erroneous, but it's also correct. A percentage that is below average is materially different than one that is "within one standard deviation" above average, and it is not ethically candid to elide the two concepts. Lieff has brought consumer fraud claims over less.

Lieff apparently believes that it was acceptable to present such false impressions because it attached the full study as an exhibit for the court to review with eagle eyes. OB44. But the fee memorandum attached over 700 pages of exhibits. Even in an adversarial posture, such a voluminous record presents challenges when parties make misrepresentations. So too is the fee memorandum's cite to a district-court case that mentions the petition's omitted data from the Fitzpatrick study in one sentence. OB45; *In re Neurontin Mktg. Litig.*, 58 F. Supp. 3d 167, 172 (D. Mass. 2014). The fee memorandum doesn't quote the passages from *Neurontin* that Lieff now identifies as remedying the misleading description of the Fitzpatrick Study. OB45. The fee memorandum cited dozens of cases, and that one happened to contain the hidden needle in the haystack is not palliative. In an uncontested hearing, the court "was relying substantially" on the brief and counsel's duty of candor. A1277; ADD106-ADD107.

Under Lieff's proposed standard, appellate briefing can baldly shade facts in the record, so long as attorneys then include the truth somewhere in a 1493-page appendix. Such a hide-and-seek approach to an attorney's professional duty of candor is even more problematic in the context of class-action fee requests. The district court recognized the unique *ex parte* posture of such fee requests. "[A]t that point the attorneys' interests in maximizing their compensation is adverse to the interest of the class in maximizing its recovery." ADD85 (citing *In re Rite*

Aid Corp. Secs. Litig., 396 F.3d 294, 307-08 (3d Cir. 2005)). Defendants, meanwhile, are "interested only in disposing of the total claim asserted against it, and the allocation between the class payment and the attorneys' fees is of little or no interest to the defense." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 949 (9th Cir. 2011) (cleaned up). Because of the diverging interests between class counsel and the class and the lack of any opposition from the defense to identify mischaracterizations or falsehoods, "'it is essential that courts not doubt the forthrightness of counsel.'" ADD85 (quoting *In re IMAX Secs. Litig.*, No. 06 Civ. 6128, 2012 WL 3133476, at *11 (S.D.N.Y. Aug. 1, 2012)); *see also* ADD84-ADD85 (quoting Mass. R. Prof. Conduct 3.3(d) requiring lawyers in an *ex parte* proceeding to "inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision"). Courts' sanctioning power thus becomes an even more important tool to ensure that class members are not overcharged by class counsel willing to play violate their "imperative" to "submit honest and accurate fee petitions." *Young v. Smith*, 905 F.3d 229, 234 (3d Cir. 2018).

After CCAF became *amicus* below, it drew attention to the fee memorandum's questionable representations of the Fitzpatrick Study, but the fee memorandum was an uncontested and essentially *ex parte* document. Underscoring the difficulty of spotting these misrepresentations among the voluminous record and case citations is

the fact that the class attorneys apparently didn't review the exhibits themselves, or they would have spotted the double-counting error. When attorneys who successfully sought almost $75 million couldn't bother to read their own exhibits, a busy district court cannot be required to verify the representations court officers acting *ex parte* and hiding corrections (such as the double-counting) in a phonebook-sized set of exhibits.

Even now Lieff offers dubious excuses for its misrepresentations rather than take responsibility. Lieff claims that its request for a 25% fee award was "within a standard deviation" of the average awarded by other courts in similar mega-fund settlements, the same rationalization that the district court rejected. Perhaps, but that information would be relevant to this appeal only if the fee memorandum had been candid with the district court about this calculation. Instead, the fee memorandum obscured the actual mean and median percentages in similar cases to support the request.

The district court felt misled, especially when comparing this case's submissions to what Lieff wrote in *BoNY Mellon*. ADD107 & n.21. The misstatement was plainly material, because when the court received an accurate account of the Fitzpatrick Study, it came to a substantially different conclusion about a reasonable fee percentage—even with the benefit of additional detailed fine-toothed interpretation Lieff and Class Counsel made in multiple briefs defending its original arguments. Lieff

wants to relitigate the court's reading of the Fitzpatrick Study, but the Rule 23(h) factual finding was not an abuse of discretion.

C. Lieff's declaration misrepresented the nature of its own rates.

The district court's description of Lieff partner Daniel Chiplock's declaration as "false and misleading" is solidly based in the record and is by no means clearly erroneous. The district court did not impose a sanction on Lieff but simply offered its candid view of an attorney's use of vague and misleading language to suggest facts contrary to reality. Affirmance will allow courts to continue to express their uncensored view of attorney representations that fall short of a duty of candor so as to deter attorneys from making misleading statements in the future.

The Chiplock Declaration represented that the hourly rates for the Lieff attorneys and support staff included in the fee request "are the same as my firm's regular rates charged for their services, which have been accepted in other complex class actions." A194. As it turned out, and as Lieff subsequently acknowledged, the firm "had only a handful of paying clients over the years." A343. The district court reasonably understood the Chiplock Declaration as representing that the lodestar calculation "used the rates that they each customarily actually charged paying clients for the services of each attorney and were representing that those rates were comparable to the rates actually charged to clients for similar services by other attorneys in the community." ADD45. The district court

was not an outlier in this understanding; rather, "Labaton has acknowledged that a judge would have reasonably interpreted" the Chiplock Declaration in the same way. *Id.* And Lieff acknowledges that the district court is correct that the declaration omits the express clarification it provided in a different case— *BoNY Mellon*—in which a Lieff attorney affirmatively represented that the rates were those charged "for contingent cases and those generally charged to clients for their services in non-contingent/hourly matters." OB56. Without such an express distinction, a reasonable person would understand the "rates charged" to mean those "charged" to paying clients—not simply the court-awarded rates requested or awarded in class action fee petitions under Rule 23(h). ADD44-ADD45.

Lieff argues that it is somehow relevant that Lieff was "lead counsel with full filing authority" in *BoNY Mellon* but not in this case. But this position suggests that Lieff's attorneys are willing to sign misleading declarations in their own name without edits in any case where another firm with lead counsel status drafts them. OB55-56. Lieff has no authority for applying an "I was just following orders" defense to law-firm partners on a case. There is no evidence that Labaton coerced Lieff into misleading the court.

Lieff further argues that the district court somehow should have been aware that many of its attorneys had not ever actually charged a client an hourly rate. Lieff's assertion that a "handful" of its attorneys

have charged clients their "regular rates" underscores that it has had at least some paying clients. Lieff identifies no basis for the court to have been aware of which attorneys have such experience, particularly in light of the broad representation in the Chiplock Declaration suggesting that there were more than just a handful.

Even if this Court, "writing on a pristine page," might have come to a different conclusion regarding the Chiplock Declaration's representation regarding attorney rates, the district court's description of it falls far short of supporting "a strong, unyielding belief that a mistake has been made," as required under the clear-error standard. *See Phinney v. Wentworth Douglas Hosp.*, 199 F.3d 1, 4 (1st Cir. 1993). The court's choice between "competing interpretations, each plausible … cannot be clearly erroneous." *United States v. Lara*, 181 F.3d 183, 195 (1st Cir. 1999).

Conclusion

The Court should affirm. It may wish to *sua sponte* consider under its inherent authority the propriety of the opening brief's arguments and omissions.

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Respectfully submitted,

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Certificate of Compliance with Type-Volume Limit

If the Court grants leave for Hamilton Lincoln Law Institute to participate as *de facto* appellee in an otherwise unopposed appeal, this brief thus complies with the type-volume limitation of Fed. R. App. Proc. 32(a)(7)(B) because this brief contains 12,096 words.

This brief complies with the typeface requirements of Fed. R. App. Proc. 32(a)(5) and the type style requirements of Fed. R. App. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Century Schoolbook font.

Executed on June 28, 2021.

/s/Theodore H. Frank
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Proof of Service

I hereby certify that on June 28, 2021, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the First Circuit using the CM/ECF system, which will provide notification of such filing to all who are ECF-registered filers.

/s/Theodore H. Frank