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,

Plaintiffs,

v.

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

Defendants,

LIEFF CABRASER HEIMANN & BERNSTEIN, LLP

Interested Party-Appellant,

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

INTERESTED PARTY-APPELLANT'S RESPONSE IN OPPOSITION TO THE MOTION FILED BY HAMILTON LINCOLN LAW INSTITUTE TO FILE AN AMICUS BRIEF

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I. Introduction

The Hamilton Lincoln Law Institute ("HLLI") seeks leave to file an oversized, out-of-time brief as an *amicus curiae*. Appellant, whose consent was never sought for this filing, opposes the motion for two primary reasons: first, the filing is improper under the Federal Rules of Appellate Procedure; and, second, under the facts of this case, the filing is unnecessary for the adjudication of this appeal. Having previously sought (and been denied) appellee status, HLLI now attempts to circumvent the Court's order by submitting what is effectively an appellee's brief that is nearly twice the length of what is permitted for *amici*, a full week after such a brief would have been due. HLLI points to no circumstance in which it was previously allowed to perform such a maneuver. HLLI also fails to state why it is in a better position to present the district court's case on appeal than the district court itself, whose "various and extensive writings"[1] have already been cited by the Court as sufficient reason to deny the district court's request to retain counsel and file (another) memorandum supporting the rulings Lieff has appealed. HLLI also fails to mention that the district court expressly *declined* to retain HLLI for that very purpose, notwithstanding HLLI's fervent and repeated requests that it do so.

[1] Order of Court, Case No. 21-1069, June 30, 2021.

HLLI's proposed submission reveals the reasons for the district court's concern. At more than 12,000 words, HLLI's "*amicus*" brief is nearly twice the length permitted to *amici*. Further, HLLI's prolix brief adds nothing new to the lengthy record in this appeal while seeking to relitigate years-old facts and disputes that are not at issue here, including those specific to parties who are not even participating in this appeal. HLLI's presence as *amicus* here accordingly will only prove to be vexatious and time-consuming. HLLI's motion should be denied.

II. HLLI Improperly and Belatedly Seeks Appellee Status After Having Had it Denied by the Court.

Fed. R. App. P. 29(a)(6) provides that an *amicus* brief and accompanying motion (where necessary) must be filed "no later than 7 days after the principal brief of the party being supported is filed," and an "*amicus curiae* that does not support either party must file its brief no later than 7 days after the appellant's or petitioner's principal brief is filed." HLLI's motion and accompanying brief satisfy neither criterion.

The named appellees filed no briefs, with the first of them making their intent known 10 days before HLLI's motion. *See* Labaton Sucharow LLP's Notice Concerning Briefing, Case No. 21-1069, June 18, 2021. This was no surprise to HLLI. Appellees filed no briefs in the prior, nearly identical appeal, either. *See* Case No. 20-1365. As with its prior appeal, Lieff made clear from the beginning here that it raised no issues impacting the other parties, instead seeking review of

the district court's adverse findings and rulings as to Lieff alone. Dkt. 664 (Notice of Appeal); Response to Motion to Amend the Caption, Case No. 21-1069, Feb. 22, 2021. HLLI accordingly was well aware that whatever issues it wished to argue would be in support not of any of the appellees, but rather of the district court's adverse findings and rulings against Lieff. As the district court is not an appellee, the second clause of Fed. R. App. P. 29(a)(6) applies, making HLLI's motion and brief due no later than 7 days after Lieff's principal brief was filed. HLLI's motion and brief are more than one month late. HLLI's motion should be denied on this basis alone.

Second, despite the Court's previous denial of HLLI's request to be designated an appellee,[2] HLLI has proceeded to appear as one anyway, filing a proposed brief equal in length to that of an appellee (rather than an *amicus*) and appearing to try to step into the shoes of the district court and the Special Master combined (with some misstatements of the record along the way).[3] The Court told

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[2] *See* Order of Court, Case No. 21-1069, March 12, 2021.

[3] Among other things, in its proposed brief, HLLI (a) takes issue with the increased number of hours class counsel devoted to litigating the State Street case after another case against a competitor bank settled in 2015, ignoring the fact that the Special Master extensively reviewed class counsel's hours (including those of their staff attorneys) and found them to be completely justified, and (b) erroneously claims that Lieff did not have "regular rates charged" to clients when it, in fact, did (another fact the Special Master correctly ascertained). Proposed Amicus Br. at 8, 11. HLLI also fails to cite the chief First Circuit authority (*Young v. City of Providence ex rel. Napolitano*, 404 F.3d 33 (1st Cir. 2005)) making the district court's adverse findings against Lieff subject to appellate review.

HLLI that it could re-file its motion to amend the caption in this appeal should any party challenge the fees awarded to HLLI.[4] No party did so, and HLLI did not re-file. Nonetheless, HLLI has proceeded to file the exact brief (purporting to "defend" the district court's rulings at every step along this case's long history, in addition to relitigating the Special Master's investigation) that it would have filed had it been added to the caption as an appellee – just a week later than it would have otherwise been due. Such plain disregard of appellate procedure and the Court's directives should not be permitted.

III. This Appeal is Not "Ex Parte" Because the District Court's Position is Amply Presented in its Extensive Writings on the Subject of this Appeal.

Moreover, HLLI's claim that Lieff's appeal will be *ex parte* absent HLLI's advocacy for the district court's rulings ignores the fact that the Court has already, on two separate occasions, declined the request by the district court to appear *via* outside counsel in order to "defend" its judgment on appeal, correctly noting that the Court already has the benefit of the district court's "various and extensive writings" on the subject, authored as recently as June 1, 2021. *See* Order of Court, Case No. 21-1069, Apr. 2, 2021; Order of Court, Case No. 21-1069, June 30, 2021. HLLI's requested presence as a *de facto* appellee, even if it were procedurally proper, adds nothing pertinent to the record concerning the district court's rationale

[4] *See* Order of Court, Case No. 21-1069, March 12, 2021.

and rulings that is not covered at length by the district court's own "various and extensive writings" on these subjects.

It also bears noting that the district court itself declined to appoint HLLI to represent it or the class's interests on appeal, despite HLLI's multiple invitations for it to do so over the course of this litigation. *See, e.g.*, Dkt. 610, at 6 (CCAF "remains willing to serve" as guardian *ad litem*); Dkt. 451. To the contrary, the district court believed that if any outside counsel were to represent it on this appeal, it should be someone *other* than HLLI. Dkt. 662, at 24 (denying HLLI's motion for appointment as guardian *ad litem* without prejudice and arguing that "it is preferable that the court . . . be authorized to retain counsel . . . who '*hasn't been part of this battle for years*.'") (emphasis added); Dkt. 681 at 11 n.5 (citing Dkt. 662).

The district court's extensive opinions addressing the merits and the procedural posture of this appeal makes this case readily distinguishable from the authority HLLI cites including cases in which HLLI was appointed *amicus* to advocate for a district court's fee or Rule 11-related rulings. *See* Mot. at 13-14. A proposed *amicus* brief may be disallowed where it fails to "present . . . ideas, arguments, theories, insights, facts, or data that are not to be found" elsewhere in the parties' briefs or in the record. *Voices for Choices v. Illinois Bell Tel. Co.*, 339 F.3d 542, 545 (7th Cir. 2000) (denying leave to file amicus brief); *see also In re*

Halo Wireless, Inc., 684 F.3d 581, 596 (5th Cir. 2012) (granting motion to strike amicus brief that "contain[ed] no information or arguments" not already provided to the Court"); *Nat'l Org. for Women, Inc. v. Scheidler*, 223 F.3d 615, 617 (7th Cir. 2000) ("The policy of this court is, therefore, not to grant rote permission to file an amicus curiae brief[.]"). Such is the case here. HLLI's brief does little more than rehash a lengthy Special Master investigation and multiple rulings contained in a voluminous record to which the district court itself has vigorously contributed, the bulk of which has been before the Court for more than 16 months, over the course of two nearly-identical appeals. If HLLI is permitted (as it requests in the alternative) to file an *amicus* brief on a future date, that will only contribute to further delay in resolving this appeal.

IV. HLLI Was Paid Fees By the District Court Below, Making it Not a Proper Amicus.

Finally, HLLI is not a proper *amicus* because it was a party to the decision below, having been paid attorneys' fees by the district court out of the very judgment from which Lieff presently appeals. A party to a lawsuit is not properly an *amicus*, but, rather, must be a party to any appeal. *See, e.g.*, *Sierra Club v. Wagner*, 581 F. Supp. 2d 246, 250 n.1 (D.N.H. 2008) ("An amicus is not a party to the litigation and, therefore, does not necessarily represent the interests of any party."); *Briggs v. United States*, 597 A.2d 370, 373 (D.C. Cir. 1991) (quoting *Givens v. Goldstein*, 52 A.2d 725, 726 (D.C. Cir. 1947)) ("[A]micus *curiae* is 'not

a party, but is merely a friend of the court whose sole function is to advise, or make suggestions to, the court.'"); 4 Am. Jur. 2d Amicus Curiae § 6 ("An *amicus curiae* is not a party and generally cannot assume the functions of a party[.]"). Here, the final Order that is part of Appellant's appeal, Dkt. 663, the "Final Judgment Concerning Attorneys' Fees," allocates money to a number of parties, including Appellant and HLLI. By virtue of receiving these funds from the district court's order, HLLI is a party to the fee decision. As such, HLLI could have appealed the district court's fee order just as Appellant did because the appeal concerns the amount and allocation of the attorneys' fees. *See Morales v. Turman*, 820 F.2d 728 (5th Cir. 1987) (appeal of district court's award of fees to *amici*). In fact, HLLI took just that position in this case already when it moved to amend the caption to "designat[e] it as an appellee" on the presumption that Appellant would appeal the district court's award of fees to HLLI. HLLI cannot be both a party and an *amicus* – the fee order gives it the status of party and, accordingly, on that independent basis its motion for leave to file an *amicus* brief should be denied.[5]

[5] On this additional basis, the present case is distinguishable from the cases HLLI cites where it was permitted to serve as *amicus* to defend a district court's fee or Rule 11-related ruling. Mot. at 13 (citing *Adams v. USAA Cas. Ins. Co.*, 863 F.3d 1069 (8th Cir. 2017) & *House v. Akorn, Inc.*, No. 19-2401, -2408, No. 42 (7th Cir. Nov. 6, 2019)).

V. Conclusion

For each of the foregoing reasons, HLLI's untimely and otherwise legally and procedurally deficient motion should be denied.

Dated: July 8, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A), because it contains 1,898 words, as determined by Microsoft Word, including the headings and footnotes and excluding the parts of the filing exempted by Fed. R. App. P. 27(a)(2)(B). Pursuant to Fed. R. App. P. 27(d)(1)(E), the filing also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). The text appears in 14-point Times New Roman, a proportionally spaced serif typeface.

Dated: July 8, 2021

/s/ *Samuel Issacharoff*
Samuel Issacharoff

CERTIFICATE OF SERVICE

I certify that I have on this day, July 8, 2021, served this document upon all parties by electronically filing to all ECF-registered parties in this action.

Dated: July 8, 2021

/s/ *Samuel Issacharoff*
Samuel Issacharoff