IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all others similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 11-cv-10230 MLW
ARNOLD HENRIQUEZ, MICHAEL T. COHN, WILLIAM R. TAYLOR, RICHARD A. SUTHERLAND, and those similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, STATE STREET GLOBAL MARKETS, LLC and DOES 1-20, Defendants.	No. 11-cv-12049 MLW
THE ANDOVER COMPANIES EMPLOYEE SAVINGS AND PROFIT SHARING PLAN, on behalf of itself, and JAMES PEHOUSHEK-STANGELAND, and all others similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 12-cv-11698 MLW

THE HAMILTON LINCOLN LAW INSTITUTE'S
CENTER FOR CLASS ACTION FAIRNESS'S REPLY IN SUPPORT OF RENEWED MOTION FOR APPOINTMENT AS GUARDIAN *AD LITEM* FOR THE CLASS

Hamilton Lincoln Law Institute's Center for Class Action Fairness ("CCAF") has renewed its motion for appointment as guardian *ad litem* for the limited purpose of defending the class's interests on an appeal by conflicted class counsel. Dkt. 649 ("Mot."). Customer Class Counsel and the Special Master oppose. Dkt. 651 ("Opp."); Dkt. 652 ("Master Resp."). This reply in support of the motion follows.

First, Customer Class Counsel asserts that the First Circuit "must invite or order the Court to address any appeal…and then authorize any counsel to make a presentation on the Court's behalf." Opp. 1. This is confused. Although the First Circuit indisputably has the prerogative to appoint an *amicus* to defend the Court's decision, that does not mean the Court lacks authority to appoint a guardian on behalf of the class who can then defend the class's interests on appeal. *See Gottlieb v. Barry*, 43 F.3d 474, 490 (10th Cir. 1994) ("It is up to the individual [district] judge's preference as to whether he uses…an interested advocate (e.g., guardian)"); *see generally* Fed. R. Civ. P. 23(d)(1) (authorizing district courts to issue orders that determine the course of class proceedings and impose conditions on the representative parties or intervenors).

Customer Class Counsel criticizes CCAF for citing a "pastiche of concurring opinions and inapposite case law." Which one is *Gottlieb*? But Customer Class Counsel do not cite a *single* case that declares or even hints that the Court lacks the authority to appoint a guardian to defend the class's interest in the fee reduction. Customer Class Counsel argue that *Miller v. Mackey* and *Haas v. Pittsburgh Nat'l Bank* are obsolete because Rule 23 now has in place more rigorous requirements in place. But Customer Class Counsel have it backward. *Miller* and *Haas* were ahead of their time, and in line with current judicial understandings, in recognizing the direct conflict between the class and their counsel at the time of the fee request. "[I]n the decades since [the 1970s] judges have accrued much more experience with class actions and have learned that class action settlements are often quite different from settlements of other types of cases, which indeed are bargained exchanges between opposing litigants." *Pearson v. NBTY, Inc.*, 772 F.3d 778, 787 (7th Cir. 2014). The only reason that the guardian

procedure has not become commonplace is that interested observers are not widely available to spur courts to appoint such guardians.

CCAF seeks to represent the *class* (not the Court) on appeal; the appeal will not be a mandamus action subject to the particular procedures Fed R. App. P. 21 that call for the Court's direct participation; and the First Circuit has not endorsed the notion of the Court directly participating on appeal. Mot. 13.[1] Given that the First Circuit dismissed Lieff's earlier appeal, and Lieff has not noticed another appeal yet, there is no potential issue of the Court having been divested of jurisdiction. (For reasons CCAF has discussed earlier, even if the appeal were pending, the Court will still have jurisdiction because a guardian appointment is a procedure "in aid of the appeal." Dkt. 610 at 9.) The depth of the record, noted by Customer Class Counsel itself (Opp. 4) is a primary reason why it is more efficient and cheaper to appoint CCAF as class guardian to defend the appeal. Just as class counsel cannot force a presiding judge to recuse himself because his opinions are too critical, they have no right to disqualify opposing counsel because they consider them too zealous. Adverseness is precisely what the class needs.

Second, Class Counsel complains that the Court already said it would not order Class Counsel to pay the costs of defending the appeal. Opp. 4-5. CCAF does not gainsay the American Rule regarding attorneys' fees, but conferring a common benefit is an exception to that general rule. Mot. 14-15.[2] Defending against Lieff's efforts to increase their fee is necessary to preserve the class's share of the fund (assuming that Lieff will seek a reduction in net class funds rather than co-counsel's fee fund). If CCAF's advocacy as class guardian is necessary to "unlock" that full benefit, they should

[1] Class Counsel now acknowledge Lieff's error in stating that the First Circuit approved the Court's request to participate (Opp. 2 n.7), but they make a further mistake in suggesting that the Court's request for an invitation to address the appeal "remains pending." Opp 2. Lieff's first appeal (No. 20-1365 (1st Cir.)) has been dismissed and the mandate issued. The Court's request related to that now-dismissed appeal is moot. *Tur v. Youtube, Inc.*, 562 F.3d 1212, 1215 n.4 (9th Cir. 2009).

[2] CCAF will not seek fees on a fee-shifting basis. *Contra* Opp. 3 n.19.

be paid from the total fee award granted to class counsel. *In re Trans Union Corp. Privacy Litig.*, 629 F.3d 741, 747 (7th Cir. 2011). The equitable principles of common benefit (Mot. 15-17) do not change simply because CCAF does not represent an objector. In any event, if appointed CCAF will represent the absent class members on appeal. Lieff (or other Class Counsel appellants) cannot claim fees based on the common benefit doctrine and then disclaim the obligations the common-benefit doctrine creates not to waste the class's money. Class Counsel has no response to the cases and authorities CCAF cites in its brief.

Class Counsel also oddly represents that Lieff—and only Lieff—does not oppose the Court appointing counsel to represent it on appeal.[3] This raises the question of whether the other Class Counsel firms may also appeal, a possibility they do not deny in either their filing or at the recent hearing. To the extent firms besides Lieff appeal, the need for appointment of guardian *ad litem* increases because Thornton and Labaton have *not* assented to such advocacy. As Class Counsel points out (Opp. 1-2 n.3) district courts do not normally appear before appellate courts except for collateral matters such as defending writs of mandamus. Therefore, even if Thornton and Labaton do not appeal, they could later argue that the court's appointment of counsel to defend against Lieff's appeal requires reassignment. Mot. 13; Dkt. 640 at 1.

The Special Master asserts that they have "consistently been an advocate for the class," Master Resp. 7, but the Master did not press certain terms of his appointment to investigate elements of overbilling that only CCAF investigated and litigated. The Special Master's recommendations largely left the originally $75 million award intact but applied other remedies and sanctions to the 2017 fee

[3] Class Counsel also oddly characterizes Lieff's prospective appeal as against "a district court's Rule 11 finding against counsel or a common benefit fee award." Opp. 3. But if Lieff did not also seek to reduce class recovery, a guardian *ad litem* would be unnecessary. Instead, Lieff repeatedly emphasized "our principal concern is that the money not be distributed to the class." Dkt. 642, Tr. 9/22/2020 at 14-15. If Lieff *had* confined its appeal to defending its own reputation, no acute conflict of interests would require appointing an advocate on behalf of the class before the First Circuit.

award, which might have returned at most $8.1 million to the class. *See* Report at 364-368, 376; Dkt. 590-1. The Special Master then recommended a compromise that ensured that the Special Master would be paid, but the attorneys would receive an amount much closer to the original $75 million figure. In contrast, CCAF successfully advocated for a fee reduction that reduced fees by $14.4 million—an additional benefit to the class of at least $6.2 million, and likely more. CCAF moves for the limited purpose of preserving this beneficial result on appeal on behalf of absent class members.

The Special Master appears to be responding to a different motion than the one CCAF made. The Special Master points to Labaton's success in administering funds, and their "administrative expertise and a well-established relationship with AB Data Ltd." Master Resp. 7-8. But this is beside the point. CCAF is not asking to administer funds or replace Labaton's role in that regard; CCAF's sole role as an appointed guardian would be "for the limited engagement of defending the fee order in the First Circuit on a contingency basis." Mot. 3; *see also id.* at 10. Labaton would be conflicted in doing so, not least if they appeal themselves. The putative risk to administration is the only stated basis for the Special Master's assertion that appointment would be "counterproductive"; because CCAF does not seek any change to the status quo administration of the settlement, and seeks no role in administering the settlement, the Special Master's concerns are baseless.

CCAF previously stated that it is "willing to accept other terms or rates that the Court may request *ex ante*. Should the Court want different terms, it should propose an appointment order for CCAF to accept, if able." Mot. 11. That offer stands if the Court finds any individual component of CCAF's motion troubling.

Respectfully submitted,

Dated: October 27, 2020

/s/ M. Frank Bednarz

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CERTIFICATE OF SERVICE

I certify that on October 27, 2020, I served a copy of the forgoing on all counsel of record by filing a copy via the ECF system.

Dated: October 27, 2020

/s/ M. Frank Bednarz
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