**UNITED STATES DISTRICT COURT**
**DISTRICT OF MASSACHUSETTS**

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| ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all others similarly situated,<br><br>Plaintiffs,<br><br>v.<br><br>STATE STREET BANK AND TRUST COMPANY,<br><br>Defendant. | No. 11-cv-10230 MLW |
| ARNOLD HENRIQUEZ, MICHAEL T. COHN, WILLIAM R. TAYLOR, RICHARD A. SUTHERLAND, and those similarly situated,<br><br>Plaintiffs,<br><br>v.<br><br>STATE STREET BANK AND TRUST COMPANY, STATE STREET GLOBAL MARKETS, LLC and DOES 1-20,<br><br>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,<br><br>Plaintiffs,<br><br>v.<br><br>STATE STREET BANK AND TRUST COMPANY,<br><br>Defendant. | No. 12-cv-11698 MLW |

**MEMORANDUM IN SUPPORT OF**
**MOTION OF LIEFF CABRASER HEIMANN & BERNSTEIN, LLP**
**FOR PARTIAL STAY OF EXECUTION ON JUDGMENT, PENDING APPEAL**

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Lieff Cabraser Heimann & Bernstein, LLP ("Lieff Cabraser" or "the Firm") respectfully submits this memorandum of law in support of its motion for a partial stay, pending appeal, of execution on the Final Judgment Concerning Attorneys' Fees and Service Awards entered by the Court on January 19, 2021 (the "Final Judgment," ECF No. 663) and the accompanying Memorandum and Order and Second Revised Payment Plan (the "Second Revised Plan") entered on the same date (ECF Nos. 662 and 662-1) (collectively, the "Fee Order").

## INTRODUCTION

Lieff Cabraser seeks a stay, pending appeal, of the Fee Order insofar as it directs Lieff Cabraser to make payments that are to be distributed to the Class and others without waiting for Lieff Cabraser's appeal to be decided by the First Circuit. As discussed below, Lieff Cabraser will be irreparably injured by full and immediate execution of the Order absent a stay, because funds will not be recoverable from the Class once they have been distributed, effectively mooting Lieff Cabraser's appeal. As detailed in the brief filed in support of its previous appeal (which Lieff Cabraser intends to re-file in large substance), Lieff Cabraser's appeal presents more than a substantial case on the merits, involving serious legal questions.

No appellee came forward in response to Lieff Cabraser's prior appeal. There is therefore no known appellee who would be harmed by the requested stay. Further, any potential harm to any other interested party (including the Class) is minimal to non-existent. This much is evidenced by the Court's own previous order concerning Class distributions, which specifically provided for Lieff Cabraser's escrowed funds to be withheld from the first proposed distribution to the Class, and contemplated withholding those funds from the second proposed distribution as well, provided Lieff Cabraser's appeal was still pending. The Court's concerns about the cost-effectiveness of distributing Lieff Cabraser's escrowed funds to the Class after an appeal has been adjudicated can be allayed under the realities of this case. The complete distribution of all

settlement funds will likely take years, and there will be re-allocations and additional distributions to class members independent of the issues presently before this Court. In short, it is highly unlikely that Lieff Cabraser's escrowed funds would be all that is left to distribute to the Class once Lieff Cabraser's appeal has been decided. And even if they were, the balance of equities would still strongly favor holding the funds in escrow while the appeal is pending.

Only with the Second Payment Plan has a new potential "harm" to an interested party materialized (and, though not material to the instant motion, from the appeal itself)—namely, a reduced total distribution, and by extension a reduced fee award (in the amount of $569,728.50), to ERISA Counsel.[1] However, this "harm" from staying distributions of Lieff Cabraser's funds under the Second Payment Plan to ERISA Counsel (split among three law firms) will be only temporary if Lieff Cabraser does not prevail in its appeal. Whereas if Lieff Cabraser does prevail, and the distribution of its funds is not stayed in the interim, Lieff Cabraser will be left without a clear remedy as to the funds distributed to ERISA Counsel, and without any remedy at all as to those distributed to the Class. The balance of equities thus clearly favors granting the stay requested by Lieff Cabraser pending resolution of its appeal.

Lieff Cabraser's request for a stay pending appeal thus readily satisfies the factors traditionally considered in this circuit (and by this Court specifically) on such motions, and should be granted.

[1] "ERISA Counsel" refers to Keller Rohrback, LLP, Zuckerman Spaeder LLP, and McTigue Law LLP.

## SUMMARY BACKGROUND

On January 19, 2021, the Court entered the Fee Order, which mandates that Lieff Cabraser deposit a total of $1,139,457[2] into escrow for payment, along with payments to be made by Labaton Sucharow LLP ("Labaton") and the Thornton Law Firm, LLP ("TLF"),[3] to the Class and to ERISA Counsel. Contrary to the Court's prior order, the Fee Order mandates (absent a stay) the payments made by Lieff Cabraser be fully distributed to the Class and to ERISA Counsel notwithstanding the pendency of the appeal by Lieff Cabraser that could result in a reversal of the Court's findings as to, and any financial penalties imposed on, Lieff Cabraser from the Court's 2020 Fee Order.[4] Lieff Cabraser has previously stated, and the Court has acknowledged, its intention to appeal the 2020 Fee Order on essentially the same grounds it asserted previously.[5]

The Fee Order differs in material part from the payment and distribution schedule approved by the Court six months ago, which provided that any escrowed payment made by Lieff Cabraser not be distributed as part of the first distribution to the Class and ERISA Counsel in January 2021, in light of Lieff Cabraser's (then-pending) appeal.[6] The Prior Payment Plan

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[2] According to the Fee Order, Lieff Cabraser's total is to be split into two payments of $569,728.50 each, to be made on January 27 and either March 3 or March 30, 2021, respectively. *See* Mem. and Order, ECF No. 662, at 20 *and* Second Payment Plan, ECF No. 662-1, at 4. Lieff Cabraser respectfully requests clarification from the Court as to whether the date for the second escrow payment is intended to be March 3 or March 30, 2021.

[3] Lieff Cabraser, Labaton and TLF are referred to collectively herein as "Customer Class Counsel."

[4] The "2020 Fee Order" refers to the February 27, 2020 Memorandum and Order [ECF No. 590] and Exhibit A [ECF No. 590-1].

[5] *See* Memorandum and Order, January 19, 2021 [ECF No. 662] at 21-22. Lieff Cabraser filed its new Notice of Appeal on January 26, 2021. *See* ECF No. 664.

[6] *See* Memorandum and Order, July 9, 2020 [ECF No. 619] *and* Exhibit 2 attached thereto [ECF No. 619-2] (the "Prior Payment Plan") at 3 (specifically withholding Lieff Cabraser's first escrowed payment of $569,728.50 from the contemplated January 15, 2021 distribution of funds to the Class and to ERISA Counsel).

also required the parties to seek "guidance from the Court" concerning Lieff Cabraser's escrowed funds forty-five days before the second distribution to the Class and ERISA Counsel was to be made.[7] Under the terms of the Prior Payment Plan, the deadline for seeking such guidance would have fallen on March 16, 2021, with the second scheduled distribution taking place on April 30, 2021.[8] The Prior Payment Plan did not presuppose the inclusion of Lieff Cabraser's escrowed funds in the second distribution, either, stating only that the Class would receive "at least" those funds that had been deposited by the other (non-appealing) Class Counsel, assuming Lieff Cabraser's appeal was still pending, with ERISA Counsel's payment not being affected one way or the other.[9]

As stated above, the Prior Payment Plan was entered while the 2020 Fee Order was under appeal. The first Notice of Appeal, filed on March 26, 2020 (ECF No. 596), stated that Lieff Cabraser was appealing the 2020 Fee Order, which, *inter alia*, "(i) awarded and allocated settlement counsel's fees and expenses out of the common settlement fund in the Actions; and (ii) found a violation of FED. R. CIV. P. 11(b)." *See* ECF No. 596.

Specifically, Lieff Cabraser's prior appeal challenged the Court's findings that the Firm (i) "violated Federal Rule of Civil Procedure 11(b) by agreeing to be a signatory" to a fee memorandum which, in the Court's opinion, misleadingly cited a study on class action settlements (the "Fitzpatrick study"); (ii) made "false and misleading representations concerning [its] regular hourly rates" in its fee declaration; and (iii) "contribut[ed]" through "inaction and acquiescence" to co-counsel's "misconduct" concerning sharing attorneys' fees with a putative

[7] *Id.*
[8] Prior Payment Plan at 4.
[9] *Id.*

local counsel, Damon Chargois.[10] Although the Court had maintained in the 2020 Fee Order that it was "not imposing sanctions or denying attorneys' fees,"[11] the Court nonetheless imposed "a reduction of about $1,140,000" in Lieff Cabraser's final fee to address, in its view, the firm's "deficiencies."[12]

This Court has had the benefit of having access to Lieff Cabraser's arguments on appeal from the prior appeal of its earlier order. In its Brief on appeal, Lieff Cabraser explained that it was not appealing the amount of the total fee awarded by the Court *except* to the extent that the fee had been reduced to reflect findings of misconduct or "deficiencies" by Lieff Cabraser. Accordingly, Lieff Cabraser argued that the $60 million attorneys' fee awarded in the 2020 Fee Order should be adjusted to remove any reduction in the fees awarded to Lieff Cabraser:

> This is a narrow appeal concerning specific findings and orders regarding Lieff. There is no challenge to the overall reduction in the fees awarded, ***except as to the penalty assessed against Lieff,***[13] nor to the findings concerning other attorneys in the case. Based on the procedural and substantive failings of the court, as discussed below, Lieff appeals 1) the finding that it violated Rule 11(b); 2) the categorization of its submissions as improper; and 3) the imposition of a $1,138,917 million penalty for its "deficiencies."

Brief at 33.

And again later in the Brief, Lieff Cabraser argued:

> Although Lieff does not challenge the reduced overall fee order to 20 percent of the class recovery, ***except to the extent necessary to offset the penalty assessed against Lieff***, the underlying findings highlight the court's legal error.

Brief at 55.

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[10] *See Lieff Cabraser Heimann & Bernstein, LLC v. Labaton Sucharow, LLP, et al.*, 20-ap-1365 (1st Cir.), Appellant's Br. (June 9, 2020) (the "Brief") at 25-31.
[11] Brief at 31 (citing 2020 Fee Order at 127).
[12] *Id.* (citing 2020 Fee Order at 149).
[13] All emphases herein are supplied.

Finally, in its "Prayer for Relief," Lieff Cabraser specifically requested that the Court of Appeals "[v]acate the portion of the order requiring payment of $1,138,917 by Lieff ***and order the fee reduction to be adjusted accordingly***." *Id.* at 62.

On June 25, 2020, nearly three months after Lieff Cabraser filed its appeal and two weeks after it filed its Brief, the Court concluded that a supplemental notice to the class of the 2020 Fee Order, regardless of whether it was legally required, was "most appropriate," and ordered the parties to confer and prepare that notice.[14] On July 9, 2020, the Court approved the Prior Payment Plan, which approved the distribution of Lieff Cabraser's escrowed funds only after the conclusion of Lieff's appeal and the resolution of any objections prompted by the supplemental notice to the class.[15]

On July 7, 2020, prompted by the Court's order mandating a supplemental notice to the Class, the First Circuit entered an order to show cause questioning the finality of the 2020 Fee Order, requesting a response from Lieff Cabraser within thirty days.[16] Meanwhile, the deadline for filing responsive briefs in opposition to Lieff Cabraser's appeal passed on July 8, 2020, with no party opposing or filing a brief.

On July 10, the Court ordered that the supplemental notice (as modified by the Court with roughly 24 hours' notice) be distributed to the Class "as promptly as possible."[17] The supplemental notice was sent to the Class on July 24, 2020, with a deadline for any objections on September 8, 2020.[18]

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[14] *See* Memorandum and Order, June 25, 2020 [ECF No. 613] at 5.
[15] *See* n. 6, *supra.*
[16] *See Lieff Cabraser Heimann & Bernstein, LLC v. Labaton Sucharow, LLP, et al.*, 20-ap-1365 (1st Cir.), Order of Court (July 7, 2020) (the "Show Cause Order").
[17] *See* Order, July 10, 2020 [ECF No. 623] at 2.
[18] *See* Special Master's Response to Court's July 10, 2020 Order [ECF No. 624] at 2-3.

On August 3, 2020, in response to the Show Cause Order, Lieff Cabraser filed a memorandum with the First Circuit explaining, *inter alia*, that at the time of the filing of the first Notice of Appeal it had no choice but to treat the 2020 Fee Order as final or risk losing the right to appeal entirely.[19] The Firm stated that in light of subsequent events, however, it did not object to dismissal of the appeal without prejudice. *Id.* On September 3, 2020, the First Circuit entered judgment dismissing the appeal without prejudice for lack of an appealable order.[20]

The supplemental notice dated July 24, 2020 generated no objections from the Class. On September 17, 2020, the Special Master submitted a proposed Revised Payment Plan for the Court's consideration.[21] Notably, the Revised Payment Plan removed the provisions from the Prior Payment Plan that had allowed for Lieff Cabraser's funds to be held in escrow pending its appeal. In support of these revisions, the Special Master did not assert that the Prior Payment Plan had prejudiced any interested party or the Class. Instead, the Special Master simply asserted that Lieff Cabraser could "petition the Court for relief" if its renewed appeal is successful after its funds are distributed, and that "[s]uch relief should not be re-captured from monies paid to the class members."[22] Implicit in the Special Master's assertion was that Lieff Cabraser would have to petition the Court for payment from—in effect, additional penalties against—other Customer Class Counsel in the event its renewed appeal were successful, notwithstanding whatever mandate might issue from the First Circuit.

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[19] *See Lieff Cabraser Heimann & Bernstein, LLC v. Labaton Sucharow, LLP, et al.*, 20-ap-1365 (1st Cir.), Interested Party-Appellant's Response to Court Order of July 7, 2020 (Aug. 3, 2020) at 1-2.

[20] *Lieff Cabraser Heimann & Bernstein, LLC v. Labaton Sucharow, LLP, et al.*, 20-ap-1365 (1st Cir.), Judgment (September 3, 2020).

[21] *See* Special Master's Response to the Court's September 14, 2020 Order [ECF No. 636].

[22] *Id.* at 3.

On September 19, 2020, Lieff Cabraser responded to the Special Master's proposed Revised Payment Plan, and requested that the Court enter final judgment on the attorneys' fee question forthwith so that it could proceed with its renewed appeal "on the grounds it ha[d] previously asserted."[23] The Firm argued that altering the Prior Payment Plan as the Special Master had proposed might directly interfere with the First Circuit's mandate, given the express relief previously sought by Lieff Cabraser, and which was going to be sought in its renewed appeal.[24] Lieff Cabraser further argued that no salient facts had changed since the Court had approved the Prior Payment Plan to indicate that the Class could not readily be paid (as the Prior Payment Plan contemplated)[25] any funds owed to them out of Lieff Cabraser's escrowed contributions, should Lieff Cabraser's appeal be unsuccessful.[26]

At a hearing shortly thereafter on September 22, 2020, Lieff Cabraser again indicated its intent to immediately appeal the 2020 Fee Order once it became final, and that it would be raising the same issues raised in its prior appeal—including that a reversal of the 2020 Fee Order should result simply in a reversion of Lieff Cabraser's escrowed funds back to Lieff Cabraser

[23] *See* Response by Lieff Cabraser Heimann & Bernstein, LLP to the Court's September 14, 2020 Order and the Special Master's Proposed Revised Payment Plan Submitted in Response Thereto [ECF No. 638].
[24] *Id.* at 2.
[25] Two of the ERISA Counsel filed a response in support of the Special Master's Revised Payment Plan—and, specifically, the removal of the provision for Lieff Cabraser's funds to be held in escrow while its appeal is pending. *See* Keller Rohrback LLP and Zuckerman Spaeder LLP's Response to the Court's September 14, 2020 Order and the Special Master's Proposed Revised Payment Plan [ECF No. 639] at 2. As stated above, however, the Prior Payment Plan provided for no less of a guaranteed payment of the total amounts mandated by the Fee Order to ERISA Counsel than the Revised Payment Plan did. Only with the Second Revised Plan has the Court now introduced, for the first time, the potentiality for reduced payments to ERISA Counsel resulting from Lieff Cabraser's appeal.
[26] ECF No. 638 at 3.

(and therefore slightly smaller distributions to the Class, as contemplated by the Prior Payment Plan), and not in additional penalties against any other law firm.[27]

On September 29, 2020, the Court declined to enter judgment, and instead ordered the parties to brief HLLI's[28] motion for attorneys' fees.[29] The Court ordered that briefing on HLLI's motion be completed within a month, and stated that Lieff Cabraser "should be prepared to appeal and move for a stay pending appeal soon after HLLI's request for attorneys' fees is decided."[30] The Court further stated its view that Lieff Cabraser had "appealed the award to it of $15,233,397, which is $1,139,457 less than the amount it received as a result of the original . . . fee award," but that "[n]either [Lieff Cabraser] nor any other counsel appealed the $60,000,000 [fee] award" to all counsel.[31]

On October 5, 2020, Lieff Cabraser responded to the Court's September 29, 2020 Order to reiterate that, contrary to the Court's description of Lieff Cabraser's appeal, the Firm did in fact appeal from the $60 million fee award and that reversal of any financial penalties imposed by the 2020 Fee Order on Lieff Cabraser should come at the expense of the Class (as contemplated by the Prior Payment Plan), not in additional penalties against other Customer Class Counsel.[32] Lieff Cabraser provided excerpts from its Brief, as well as its request for relief from the First Circuit, reflecting that it had explicitly made this argument previously on appeal.[33]

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[27] *See* Hearing Tr., Sept. 22, 2020 [ECF No. 642] at 13-15, 34-35.
[28] "HLLI" stands for the Hamilton Lincoln Law Institute, which is not a party to these proceedings.
[29] *See* Memorandum and Order, Sept. 29, 2020 [ECF No. 646].
[30] *Id.* at 4.
[31] *Id.* at 2.
[32] *See* Response by Lieff Cabraser Heimann & Bernstein, LLP to the Court's September 29, 2020 Order [ECF No. 648].
[33] *Id.* at 2-4.

In accordance with the Court's order, HLLI's motions for attorneys' fees and for appointment as guardian *ad litem* were fully briefed by October 27, 2020. On December 30, 2020, Labaton and Thornton filed a notice with the Court indicating that, as HLLI's motions had not been decided and no final judgment and order had been entered, no schedule for deposits or distributions to the Class had yet taken effect.[34] On January 4, 2021, the Court entered an order acknowledging that it had not yet ruled on HLLI's motions or entered final judgment, and that Customer Class Counsel accordingly need not deposit funds into escrow by January 4, 2021 as had been contemplated by the Revised Payment Plan.[35] The Court stated, instead, that counsel should be "prepared to make the first payment into escrow on January 11, 2021, or soon after."[36]

The Fee Order giving rise to this motion to stay was subsequently entered on January 19, 2021. In that order, the Court again changed course from the Prior Payment Plan and Revised Payment Plan by mandating without prior notice to the parties that ERISA Counsel share the cost of success of the appeal by Lieff Cabraser by reducing the distributions to and the fee awarded to ERISA Counsel in the 2020 Fee Order. *See* Second Revised Plan [ECF 662-1] at 3, 4 (showing reduced distributions to ERISA Counsel "if Lieff excluded").[37] Meanwhile, the Final Judgment, entered the same day, sets forth the same fee awards to all counsel that were made in the 2020 Fee Order. *See* ECF No. 663.

## ARGUMENT

The factors regulating a motion to stay pending appeal include:

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[34] *See* Notice of Labaton Sucharow LLP and The Thornton Law Firm LLP Relating to September 29, 2020 Memorandum and Order [ECF No. 655].
[35] *See* Order, Jan. 4, 2021 [ECF No. 657] at 2.
[36] *Id.*
[37] With the Second Payment Plan, the Court has now ordered that ERISA Counsel receive $569,728.50 less in payments should Lieff Cabraser's appeal succeed (with the Class also receiving $569,728.50 less). *See* ECF No. 662-1 at 3, 4. This change is not mentioned in the Memorandum and Order of January 19, 2021. *See* ECF No. 662.

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

*SEC v. BioChemics, Inc.*, 435 F. Supp. 3d 281, 296 (D. Mass. 2020) (Wolf, J.) (citing *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)); *Common Cause Rhode Island v. Gorbea*, 970 F.3d 11, 14 (1st Cir. 2020).

As this Court has previously noted, the first prong of the test "has not been interpreted or applied literally, even by the Courts of Appeals." Rather, it has been held that:

> on motions for stay pending appeal the movant need not always show a 'probability of success' on the merits; instead, the movant need only present a substantial case on the merits when a serious legal question is involved and show the balance of the equities weighs heavily in favor of granting the stay.

*Id.* (quoting *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981)). As this Court further described,

> [w]hen the request for a stay is made to a district court, common sense dictates that the moving party need not persuade the court that it is likely to be reversed on appeal. Rather *. . . the movant must only establish that the appeal raises serious and difficult questions of law in an area where the law is somewhat unclear*.

*Id.*; *see also Canterbury Liquors & Pantry v. Sullivan*, 999 F. Supp. 144, 150 (D. Mass.) (Wolf, J.).

The circumstances here readily satisfy the criteria for staying the Fee Order pending appeal. First, with respect to the "balance of equities," the First Circuit has stated:

> Where . . . the denial of a stay will utterly destroy the status quo, irreparably harming appellants, but the granting of a stay will cause relatively slight harm to appellee, appellants need not show an absolute probability of success in order to be entitled to a stay.

*Providence Journal Co. v. Fed. Bureau of Investigation*, 595 F.2d 889, 890 (1st Cir. 1979); *cf. Gorbea*, 970 F.3d at 15 (denying motion to stay pending appeal where, *inter alia*, appellant failed to establish "significant likelihood of irreparable harm" absent a stay).

That is precisely the situation presented here. Under the Fee Order, absent a stay, Lieff Cabraser's escrowed funds will be distributed to the Class before the First Circuit can rule on the Firm's appeal from the Court's decision to penalize Lieff Cabraser. Recovering those funds from the Class, once distributed, will be impossible—effectively mooting the appeal.

Courts have held that it is in the public interest to issue stays where it is unlikely that an appellee will be able to recover funds in the event of a reversal. *See, e.g.*, *Cayuga Indian Nation of New York v. Pataki*, 188 F. Supp. 2d 223, 252 (N.D.N.Y. 2002) (finding that public interest favors stay where there is risk that monetary judgment will be spent by plaintiff and that plaintiff "may not be able to repay any funds that they spent during the pendency of the appeal"). This is also true where specific performance is ordered for a financial transaction. *See Miller v. LeSea Broadcasting, Inc.*, 927 F. Supp. 1148, 1152 (E.D. Wis. 1996) (staying judgment requiring defendant to sell television station to plaintiff because "it could be difficult, if not impossible, to undo the sale if [defendant] is forced to complete the sale of Channel 5 to [plaintiff] and if the appeal is subsequently resolved in favor of [defendant].").

Meanwhile, any "harm" to other interested parties—namely, the Class and ERISA Counsel—from staying the Fee Order pending appeal would be slight to non-existent. As for the Class, the Court's own previously-ordered payment plan, entered just six months ago, specifically contemplated that Lieff Cabraser's funds could be withheld from distribution to the Class while its appeal was pending, while providing for all other funds to be distributed without delay. Nothing changed between then and now to make it "harmful" for the Class to wait for Lieff Cabraser's appeal to run its course other than the argument, recently raised by HLLI, that a

substantial percentage of eligible Class members may receive no share of the distribution of Lieff Cabraser's escrowed funds if it is stayed.[38]

This argument misapprehends how the distributions process works in complex class actions involving large settlement funds such as this one, as evidenced by the claims administrator in this case. In short, complete settlement distributions—especially those involving settlement funds in the hundreds of millions of dollars—commonly take years, not months. Out of the first round of distributions to class members, there will be uncashed checks and declined payments. The claims administrator will then spend time (usually, multiple months) chasing down recipients of uncashed or declined payments to determine whether new payments should be re-issued to those recipients,[39] using new addresses or identifying information (for example), or whether declined payments should revert to the settlement fund to be re-allocated and distributed to class members that negotiated their payments. Then there will be new distributions to reflect that re-allocation. This is an iterative process that typically goes through several cycles until the settlement fund is completely exhausted or reaches the point (often, where the remaining fund consists of just several thousands of dollars) that future distributions are no longer worth more than the cost of processing. It is not uncommon for the entire process to take two to three years (as it did in the comparable *BNY Mellon* litigation),[40]

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[38] *See* Hearing Tr., Sept. 22, 2020 [ECF No. 642] at 22:11-16.

[39] *See, e.g.*, Decl. of Eric J. Miller on Behalf of A.B. Data, Ltd. in Support of Motion for Authorization to Distribute to Eligible ERISA and Public & Other Class Members [ECF No. 629] at ¶ 27 ("Based on A.B. Data's experience with similarly sized class action settlements, settlement reserves are commonly used and an additional distribution of remaining funds due to uncashed and returned checks is a virtual certainty.").

[40] In the *BNY Mellon* litigation, involving a comparably sized settlement fund benefiting a similar population of public funds, ERISA plans, and registered investment companies, three years elapsed between the first class settlement distribution and the date counsel finally moved to make a *cy pres* distribution of the remainder after having exhausted all efforts at distributing to the class. *See In re Bank of New York Mellon Corp. Forex Transactions Litig.*, No. 12-md-2335-

*(continued . . . )*

with reserves set aside along the way to cover any contingencies.[41] It is thus highly improbable that Lieff Cabraser's escrowed funds will be the only funds left to distribute to the Class once Lieff Cabraser's appeal is resolved (in the event Lieff Cabraser does not prevail). Instead, it is far more probable that Lieff Cabraser's escrowed funds will simply be included along with the other remaining funds to be distributed to participating class members during the process's ordinary lifespan.

HLLI's contention that it would be *per se* cost ineffective and harmful to the Class to stay distribution of Lieff Cabraser's escrowed funds to the Class pending Lieff Cabraser's appeal, accordingly, assumes facts contradicted by ordinary experience with large settlement funds such as this one.[42] Further, assuming solely for the sake of argument that Lieff Cabraser's escrowed funds *were* the only funds left to distribute once its appeal is resolved, it would be entirely speculative at this point to assume how many Class members' estimated payments from that distribution would be *de minimis* (*i.e.*, less than $10) and thus subject to reallocation (given, as stated above, the number of participating class members is likely to fluctuate). Even so, the possibility that some of those payments may hypothetically prove to be *de minimis* can hardly be used to tip the balance of equities in favor of effectively mooting Lieff Cabraser's appeal by distributing more than $1.1 million that the Firm cannot get back. Apart from the fact that the

*( . . . continued)*
LAK-JLC (S.D.N.Y.), Decl. of Ed Barrero in Support of Lead Plaintiffs' Motion for Order Authorizing Authorizing Cy Pres Distribution of Residual Settlement Proceeds, April 29, 2020 [ECF No. 681-1] at ¶¶ 3-8 (attached hereto as Exhibit A).

[41] *See e.g. id.* at ¶ 27(b)(v) (stating that "A.B. Data will distribute to eligible ERISA and Public & Other Class Members, described in subparagraph 27(b)(iv) above, 95% of their Distribution Amounts, with the remaining 5% [or more than $6.4 million] to be set aside and held in reserve (the "Reserves") to address any contingencies that may arise.") *and* ¶ 28 ("Additional re-distributions, after deduction of A.B. Data's fees and costs, any Taxes or Tax Expenses owed, the costs of preparing appropriate tax returns, and any escrow fees, may occur thereafter until it would not be economically feasible to continue.").

[42] *See* n. 39, 41, *supra.*

failure by some previously participating class members to receive a supplemental sub-$10 payment is, by definition, easily outweighed in severity by the loss of more than $1.1 million by the Firm, it is not as if otherwise *de minimis* payments never get paid out in some capacity—they just get reallocated to class members whose remaining payments are not calculated to be *de minimis*.[43]

In sum, no pertinent facts changed between the entry of the Prior Payment Plan on July 9, 2020 and the Fee Order on January 19, 2021 to prompt the removal of the provisions for escrowing Lieff Cabraser's funds, pending its appeal. It was not considered infeasible, or a hardship of any kind, under the Prior Payment Plan for the Class to receive Lieff Cabraser's escrowed funds at a later date, in the event Lieff Cabraser's appeal was unsuccessful. Nor does the newly-added risk for non-payment of some additional fees to ERISA Counsel tip the balance of equities in favor of immediate execution of the final order and judgment. Because all class counsel fees are recovered from the overall recovery of the class, there is no justification for making the ERISA Counsel the guarantors of a fixed class recovery.

Additionally, as this Court is well aware from having had the benefit of the briefing in the earlier appeal, Lieff Cabraser's appeal presents more than a "substantial case on the merits" involving a "serious legal question." *BioChemics*, 435 F. Supp. 3d at 296; *see also Canterbury Liquors & Pantry*, 999 F. Supp. at 150 ("the movant must only establish that the appeal raises serious and difficult questions of law in an area where the law is somewhat unclear."). Among other things, Lieff Cabraser argued in its appeal (and will argue again) that several of the

[43] *See, e.g.,* ECF No. 629 at ¶ 27(b)(iv) ("After excluding Recognized Claims of less than $10.00, A.B. Data will recalculate the pro rata shares of the ERISA and Public & Other Settlement Allocations for eligible ERISA and Public & Other Class Members. This pro rata share is the Settlement Class Member's "ERISA Distribution Amount" or "Public & Other Distribution Amount.").

findings in the Fee Order were legally insufficient under the due process notice protections of Federal Rule of Civil Procedure 11(c)(3). *See* Brief at 35-36. Every other Circuit to consider the notice provision of Rule 11(c)(3) has required district courts to adhere strictly to those notice requirements. *See* Brief at 42-43 (citing Second, Fourth, Ninth, and Eleventh Circuit cases addressing Rule 11(c)(3)). As Lieff Cabraser points out, this issue has not directly been addressed by the First Circuit, although the Circuit has noted that "judges must be especially careful where they are both prosecutor and judge…" *Young v. City of Providence ex rel. Napolitano*, 404 F.3d 33, 40 (1st Cir. 2005). The limited number of decisions from other circuits and the novelty of the issue in the First Circuit weigh in favor of granting a stay. *See Canterbury Liquors & Pantry*, 999 F. Supp. at 150 (limited and contradictory Court of Appeals decisions on regulatory scheme presents "sufficiently serious legal issues"); *Boston Taxi Owners Ass'n v. City of Boston*, 187 F. Supp. 3d 339, 342 (D. Mass. 2016) ("While the Commissioner has not convinced the Court that he is likely to succeed in his appeal with respect to qualified immunity, the constitutional issue in this case is neither elementary nor well-established.").

The appeal also presents a substantial case on the merits with respect to the Court's finding of "serious misconduct." As the First Circuit has held, Rule 11 proceedings can "devastate…professional reputations." *Eldridge v. Gordon Bros. Grp., L.L.C.*, 863 F.3d 66, 86 (1st Cir. 2017). The important professional stakes related to Rule 11, coupled with the financial penalties from the Fee Order, raise the sort of serious questions that courts have found sufficient to satisfy this prong of the standard. *See Hilton v. Kerry*, 2013 WL 6244162, at *2 (D. Mass. Dec. 2, 2013) ("the issue of extradition of seriously mentally ill citizens is certainly a serious and difficult one that has yet to be directly addressed by the higher courts"); *Exxon Corp v. Esso Worker's Union, Inc.*, 963 F. Supp. 58, 60 (D. Mass. 1997) (Wolf, J.) (serious question presented

related to reinstating truck driver who failed drug test); *Nevada v. United States Dep't of Labor*, 2018 WL 2020674, at *2 (E.D. Tex. May 1, 2018) (serious questions warranted stay where plaintiff and her counsel were held in contempt of court's injunction and faced sanctions).

## CONCLUSION

For the foregoing reasons, Lieff Cabraser's request for a partial stay of the Fee Order, pending appeal, should be granted.

Dated: January 27, 2021

Respectfully submitted,

Lieff Cabraser Heimann & Bernstein, LLP

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# EXHIBIT A

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**

| | |
|---|---|
| IN RE BANK OF NEW YORK MELLON CORP. FOREX TRANSACTIONS LITIGATION | No. 12-MD-2335 (LAK) (JLC) |
| THIS DOCUMENT RELATES TO: | |
| *Southeastern Pennsylvania Transportation Authority v. The Bank of New York Mellon Corporation, et al.* | No. 12-CV-3066 (LAK) (JLC) |
| *International Union of Operating Engineers, Stationary Engineers Local 39 Pension Trust Fund v. The Bank of New York Mellon Corporation, et al.* | No. 12-CV-3067 (LAK) (JLC) |
| *Ohio Police & Fire Pension Fund, et al. v. The Bank of New York Mellon Corporation, et al.* | No. 12-CV-3470 (LAK) (JLC) |
| *Carver, et al. v. The Bank of New York Mellon, et al.* | No. 12-CV-9248 (LAK) (JLC) |
| *Fletcher v. The Bank of New York Mellon, et al.* | No. 14-CV-5496 (LAK) (JLC) |

**DECLARATION OF ED BARRERO IN SUPPORT OF LEAD PLAINTIFFS' MOTION FOR ORDER AUTHORIZING *CY PRES* DISTRIBUTION OF RESIDUAL SETTLEMENT PROCEEDS**

I, ED BARRERO, declare and state as follows:

1. I am a Senior Project Manager for Epiq Class Action & Claims Solutions, Inc. ("Epiq"). On June 15, 2018, Epiq acquired The Garden City Group, Inc., *i.e.*, the administrator retained to serve as the Claims Administrator in the above-captioned litigation ("Litigation").[1]

[1] All terms with initial capitalization not otherwise defined herein shall have the meanings ascribed to them in the Stipulation and Agreement of Settlement dated March 19, 2015 (ECF No. 583-1).

Prior to the acquisition, I was a Senior Project Manager for The Garden City Group, Inc.[2] I have personal knowledge of the facts stated herein.

**THE INITIAL DISTRIBUTION OF THE NET SETTLEMENT PROCEEDS**

2. By Order Approving Distribution Plan for the Net Settlement Proceeds and Request for Reimbursement of Litigation Expense entered February 29, 2016 (ECF No. 672) ("Distribution Order"), the Court approved distribution of the Net Settlement Proceeds to Settlement Class Members in accordance with the Court-approved Plan of Allocation and Distribution Plan.[3] The Net Settlement Proceeds consisted of the Net Settlement Fund (*i.e.*, the $335,000,000 obtained from the settlement reached by Lead Plaintiffs and Defendants in the Litigation plus interest and after deduction of Court-approved fees and expenses), as well as $155,000,000 obtained pursuant to a settlement that BNYM reached with the New York Attorney General and $14,000,000 obtained pursuant to a settlement that BNYM reached with the United States Department of Labor.

3. Pursuant to the Distribution Order, commencing on April 25, 2016, Epiq conducted the Initial Distribution, distributing a total of $375,312,224.16 to Settlement Class Members. In the Initial Distribution, Settlement Class Members whose payments calculated to more than $0.00 but less than $1,000.00 were paid their full Distribution Amount ("Claims Paid in Full"), and Settlement Class Members whose payments calculated to $1,000.00 or more were paid 90% of their full Distribution Amount, with the remaining aggregate 10% set aside and held in reserve to address any contingencies ("Reserve").

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[2] The Garden City Group, Inc. and Epiq will both be referred to herein as Epiq.

[3] The proposed Distribution Plan was set forth in the Affidavit of Stephen J. Cirami in Support of Motion for Approval of Distribution Plan for the Net Settlement Proceeds filed with the Court on January 13, 2016 (ECF No. 669).

**POST-INITIAL DISTRIBUTION OUTREACH AND ADDITIONAL DISTRIBUTIONS**

4. Following the Initial Distribution, Epiq monitored the status of Settlement Class Member checks. Epiq made reasonable and diligent attempts to locate Settlement Class Members whose distribution checks remained uncashed or were returned as undelivered by the United States Postal Service. Every Settlement Class Member with an uncashed or undeliverable check over $1,000.00 received personalized emails and/or phone calls in an attempt to get their check cashed and checks were reissued as appropriate.

5. After the completion of such outreach and in accordance with the Distribution Order, the Net Settlement Proceeds remaining following the Initial Distribution (including from the Reserve and the funds for all void stale-dated checks), and after deducting Epiq's estimated costs for conducting a re-distribution, any taxes owed, the costs of preparing appropriate tax returns, and any escrow fees, was redistributed commencing on January 25, 2017 to Settlement Class Members who (i) were not Claims Paid in Full; and (ii) cashed their Initial Distribution check ("Second Distribution"). Epiq distributed a total of $52,288,534.11 in the Second Distribution.

6. Following the Second Distribution, Epiq again made reasonable and diligent efforts to have Settlement Class Members cash their outstanding distribution checks and checks were reissued as appropriate. After such efforts, Epiq and Lead Settlement Counsel determined that a re-distribution of the remaining Net Settlement Proceeds (*i.e.*, those funds remaining by reason of uncashed checks, returned funds, or otherwise) would be cost effective. Accordingly, a further distribution of the remaining Net Settlement Proceeds (*i.e.*, $1,456,227.67) to Settlement Class Members was conducted commencing on February 7, 2018 ("Third Distribution").

7. Since the Third Distribution, Epiq in conjunction with Lead Settlement Counsel have made every effort to have Settlement Class Members cash their outstanding distribution

checks. Every Settlement Class Member with an uncashed or undeliverable check received personalized emails and/or phone calls in an attempt to get their check cashed and checks were reissued as appropriate. All remaining outstanding checks have since been made void. The balance of the Net Settlement Proceeds at the time the checks were made void was $37,265.61.

**EPIQ'S FEES AND EXPENSES**

8. From October 1, 2017 through August 31, 2019, Epiq incurred an additional $28,294.51 in fees and expenses in connection with conducting additional distributions of the Net Settlement Proceeds. This amount included the fees incurred due to the substantial time involved in locating Settlement Class Members with uncashed checks and handling requests for the reissuance of checks. In accordance with the Distribution Order, Lead Settlement Counsel approved and authorized payment of Epiq's additional fees and expenses. Following the deduction of such fees and expenses, and after payment of $2,500.00 to Miller Kaplan for preparing and filing the final tax return for this matter, the balance of the Net Settlement Proceeds is $6,471.10.

***CY PRES* DISTRIBUTION**

9. Epiq believes that it has used reasonable and diligent efforts to distribute the Net Settlement Proceeds, and also believes that additional outreach efforts to Settlement Class Members with uncashed checks would not be effective. In addition, it is Epiq's assessment that it would not be cost effective to conduct a further redistribution of the remaining Net Settlement Proceeds of $6,471.10.

10. Accordingly, Epiq supports Lead Settlement Counsel's motion to contribute the remaining $6,471.10 to an appropriate *cy pres* recipient(s) in accordance with page 6 of the Distribution Order which states that, "…once Lead Settlement Counsel determine that further re-distribution of any balance remaining is no longer cost effective or efficient, Lead Settlement

Counsel shall seek an order from the Court: (i) approving the recommendation that any further re-distribution is not cost effective or efficient; and (ii) ordering the contribution of the balance of the Net Settlement Proceeds to one or more nonsectarian, not-for-profit, 501(c)(3) organizations that are independent of Lead Settlement Counsel so that Lead Settlement Counsel do not derive a direct or indirect benefit from the selection of such organization as of the recipient of a charitable contribution; . . ."

**CONCLUSION**

11. I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed in Lake Success, New York on April 27, 2020.

ED BARRERO

**CERTIFICATE OF SERVICE**

I certify that the foregoing document was filed electronically on January 27, 2021 and thereby delivered by electronic means to all registered participants as identified on the Notice of Electronic Filing ("NEF").

*/s/ Richard M. Heimann*
Richard M. Heimann