UNITED STATES DISTRICT COURT
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

REPLY 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 reply memorandum of law in support of its motion for a partial stay, pending appeal, of execution on the Final Judgment (the "Stay Motion," ECF No. 667).

ARGUMENT

The Special Master and HLLI oppose Lieff Cabraser's requested partial stay of enforcement on the final judgment on the grounds that Lieff Cabraser's appeal does not—indeed, cannot—present a substantial case on the merits because the 2020 Fee Order[1] was nothing more than an exercise of the Court's discretion in setting and allocating attorneys' fees. They further argue that immediate enforcement of the Final Judgment will not inflict irreparable harm on Lieff Cabraser because the Firm, should it prevail on appeal, can seek compensation from its co-counsel at a later date. Both arguments misread or ignore substantial parts of the record, including (a) the Court's rationale in the 2020 Fee Order, pegged to specific findings of alleged misconduct, for mandating payment by Lieff Cabraser and others to the class and (b) the arguments Lieff Cabraser previously made on appeal challenging each of the Court's adverse findings against the Firm. By advocating for the disbursement of Lieff Cabraser's funds to the class now, the Special Master and HLLI seek to effectively tie the First Circuit's hands in considering the issues that Lieff Cabraser's appeal squarely presents. The Special Master and HLLI cite no case authorizing such an obvious end-run around the First Circuit's potential mandate. Nor does the balance of equities favor immediate disbursement of Lieff Cabraser's funds, which even the Special Master acknowledges cannot be recovered from the class once they have been distributed. The requested stay pending appeal accordingly should be granted.

[1] Unless otherwise indicated, the abbreviations or capitalized terms herein are the same as those provided in the Memorandum in Support of Motion of Lieff Cabraser Heimann & Bernstein, LLP for Partial Stay of Execution on Judgment, Pending Appeal [ECF No. 668] ("Stay Mem.").

I. Lieff Cabraser's Appeal Presents a Substantial Case on the Merits Involving a Serious Legal Question.

The Special Master's and HLLI's arguments regarding the merits of Lieff Cabraser's appeal fail under the "substantial case on the merits" involving a "serious legal question"[2] standard that applies when considering a stay of execution on judgment. At a minimum, Lieff Cabraser's appeal meets this standard—a fact the Special Master and HLLI contest by ignoring or mischaracterizing broad swaths of the 2020 Fee Order and Lieff Cabraser's prior appeal.

Contrary to the Special Master's contention,[3] Lieff Cabraser's appeal is not limited to challenging the one specific Rule 11 finding the Court made as to the Firm. Instead, the appeal challenges—or will challenge, just as it did previously—*all* of the Court's findings of misconduct and "deficiencies" giving rise to the $1.14 million penalty against the Firm as having been both (a) decided without satisfying the due process requirements of Rule 11(c)(3) and (b) readily contradicted by the extensive record developed before the Court and the Special Master.[4] *See, e.g.*, Brief at 29-33, 44-51, 56-61.

Even assuming (incorrectly) that Lieff Cabraser's appeal "only" challenges the one specific Rule 11 finding against the Firm, neither the Special Master nor HLLI plausibly contests that such a determination presents the sort of "serious legal question" contemplated by the standard for granting a stay. Indeed, the Special Master tacitly concedes this point by (incorrectly) taking Lieff Cabraser to task for "miss[ing] the fact" that the Rule 11 finding was

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[2] *SEC v. BioChemics, Inc.*, 435 F. Supp. 3d 281, 296 (D. Mass. 2020) (Wolf, J.).

[3] The Special Master argues, wrongly, that Lieff Cabraser "has not argued that the Court improperly concluded its submissions in support of the fee petition were improper or that the Court incorrectly assessed deficiencies against it." *See* Special Master's Memorandum in Response to the Court's January 27, 2021 Order and to Lieff Cabraser Heimann & Bernstein's Motion to Stay Execution on Judgment, Pending Appeal [ECF No. 677] ("Master Br.") at 9. This argument is clearly erroneous, ignoring more than a dozen pages of Lieff Cabraser's previously submitted brief on appeal.

[4] *See* Stay Mem. at 15-17.

"not the only" basis for the Court's reduction of Lieff Cabraser's fee—as if to suggest that even if Lieff Cabraser were correct as to the specific Rule 11 finding, that would not change the outcome of its appeal.[5] HLLI, meanwhile, dispenses with the question by simply denying that the 2020 Fee Order can be construed as a Rule 11 order at all[6]—an argument which flies in the face of the plain and explicit language of the Court's finding of a violation of Rule 11.

As for the strength of Lieff Cabraser's arguments on appeal, it bears noting that all three instances of "misconduct" the Special Master now advocates as the basis for upholding the Court's decision to reduce Lieff Cabraser's fee concern matters as to which the Special Master himself, after an exhaustive multi-years investigation, either (a) made no mention (the description of the Fitzpatrick study in the fee memorandum), (b) found that Lieff Cabraser committed no misconduct (the Firm's description of its "regular rates" in its fee declaration), or (c) found Lieff Cabraser itself to have been misled (the Chargois issue).

HLLI first accused counsel of having "misrepresented" the Fitzpatrick study on February 17, 2017.[7] The Special Master, during the more than 2 year investigation that followed, never once asked counsel to respond to that accusation or sought any further information about the issue. The matter is not mentioned at all in the Special Master's 377-page Report and Recommendations. The Special Master also found nothing inaccurate (let alone "false and misleading") in Lieff Cabraser's description of its hourly rates in its fee declaration, instead

[5] Master Br. at 10.

[6] *See* The Hamilton Lincoln Law Institute's Center for Class Action Fairness's Response in Qualified Opposition to Lieff Cabraser's Motion for Partial Stay of Execution on Judgment, Pending Appeal [ECF No. 676] ("HLLI Br.") at 7-8 (arguing that the 2020 Fee Order "does not become a Rule 11 order merely because this Court found Lieff's performance 'deficient'").

[7] *See* The Competitive Enterprise Institute's Center for Class Action Fairness's Memorandum in Support of Motion for Leave to File *Amicus Curiae* Response to Court's Order of February 6 and for Leave to Participate as *Guardian ad Litem* for Class or *Amicus* in Front of Special Master [ECF No. 127] at 1.

recognizing (correctly) that "Lieff . . . has clients it bills on an hourly basis" who "are billed largely at the same rates claimed by Lieff in this case."[8] As for Damon Chargois, the Special Master found after an exhaustive investigation, involving multiple depositions and lengthy written discovery, that Lieff Cabraser was itself "misled" about Mr. Chargois' role and relationship to the litigation.[9] In fact, the Special Master offered no criticism at all of Lieff Cabraser's conduct with respect to the Chargois issue (and no support for HLLI's claim that the Firm "conceal[ed]" fee sharing agreements from ERISA Counsel).

The Special Master did not in fact, as he now claims, impugn Lieff Cabraser for "fail[ing] to investigate the $4.1 million dollar [sic] payment to Damon Chargois." The pages he cites to his Report and Recommendations contain no such assertion.[10] Further, the Special Master's claim that his Report and Recommendations "noted" that Lieff Cabraser "sign[ed] and submit[ted] the misleading memorandum filed in support of attorneys' fees" and made "misrepresentations concerning the regular hourly rates charged for the attorneys who worked on the case"[11] is simply false—the Special Master cites no pages from his Report "noting" these things, as to Lieff Cabraser, because there are none. In fact, as described above, these claims are either not made or are directly contradicted by the findings in his Report.

It also bears repeating that the Court, in its 2020 Fee Order, saw no need to penalize ERISA Counsel for using the same "regular rates" language in their fee declarations that Lieff

[8] Brief at 59; *see also* Special Master's Report and Recommendations [ECF No. 357], at 67 and 58 n. 44 (criticizing other counsel, but not Lieff Cabraser, for using the word "charged" to describe their rates).
[9] Special Master's Report and Recommendations [ECF No. 357] at 106-07, 109-13, 247, 287-89, 292-95, 301-03, 331, 350-52; *see also* Brief at 15.
[10] Master Br. at 10 n. 5.
[11] *Id.*

Cabraser used[12] and which the Court (clearly erroneously as to Lieff Cabraser) describes as "false and misleading."[13] Nor did the Court address the obvious fact that the putatively "misleading" description of the Fitzpatrick study was submitted on behalf of *all* plaintiffs' counsel—including ERISA Counsel—who also reviewed, edited, and approved the fee brief and the presentation of the Fitzpatrick study.[14]

Moreover, the 2020 Fee Order is not immune to challenge as a simple exercise of the Court's "authority and discretion to allocate fee awards in class action cases."[15] While it is true that the Court made a point of stating in the 2020 Fee Order that it was not imposing sanctions on any firm,[16] that statement is belied by the rest of the Order—as made plain by the lengthy rationale (or, as the Special Master terms it, the "litany of. . . misconduct")[17] cited by the Court to arrive at the fee "reductions" and mandatory payments set forth therein.[18] At multiple points in the 2020 Fee Order, the Court states that its determination to reduce the total attorneys' fee awarded to 20 percent (necessitating payments by Customer Class Counsel back to the class and/or ERISA Counsel) was driven by the "misconduct" and "deficiencies" of class counsel. *See, e.g.*, 2020 Fee Order at 129 (holding that the "misconduct contribute[d] to the court's conclusion that it is most appropriate to award counsel 20% of the common fund, $60,000,000") and 143 (holding that the "misconduct contributed to the conclusion that an award at the lower

[12] *See* 2020 Fee Order at 152 (holding that "All ERISA Counsel should have modified the Labaton template concerning hourly rates to make their respective declarations accurate," but declining to penalize any of them).
[13] Brief at 57.
[14] Regardless of this omission, as previously argued on appeal, the Court's finding that the description of the Fitzpatrick study in plaintiffs' counsel's fee memorandum was "false and misleading" is clear error. Brief at 45-51.
[15] Master Br. at 10.
[16] 2020 Fee Order at 86.
[17] Master Br. at 11.
[18] *See* Brief at 1-7, 34-61.

end of the presumptively reasonable 20-30% range is appropriate").[19] In allocating the reduced fee, the Court assessed the relative fault of each of the Customer Class Counsel for the misconduct it identified, and determined how much each firm's fees should be reduced (and effectuated by payments "back" to the class and/or ERISA Counsel).

The unavoidable conclusion from the Court's 2020 Fee Order is that it made Rule 11 and other findings of misconduct, and imposed penalties concordant with those findings, and that the total fee reduction was a direct result of those findings. To the extent that the findings of misconduct as to Lieff Cabraser are overturned on appeal, the Court's reduction of the fee to 20 percent from 25 percent is unfounded, and in error. None of the cases on which the Special Master relies for the general proposition that the Court has "authority and discretion to allocate fee awards in class action cases" mandates a different result, as none involved Rule 11 or disputed findings of fact regarding alleged attorney misconduct.[20] They accordingly provide little guidance here—and certainly no basis on which to reject, out of hand, Lieff Cabraser's requested stay on the grounds that its appeal does not present a substantial case on the merits. To the contrary, Lieff Cabraser's challenge to the Court's findings presents more than a "substantial case on the merits," relying as it does on clear Rule 11(c)(3) language and jurisprudence, as well as the extensive factual record before the Court and developed through the Special Master's lengthy investigation.

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[19] The Court states elsewhere in the 2020 Fee Order that even without any consideration of misconduct, it would not award the 25 percent attorneys' fee that it previously awarded, but cites no factors justifying that conclusion that were not readily apparent and known to it when it awarded a 25 percent fee originally. *Id*. at 126-27.

[20] *See* Master Br. at 10-11 (citing *In re Fidelity/Micron Securities Litig.*, 167 F.3d 735, 737 (1st Cir. 1999) (dispute over reimbursement of counsel's case expenses); *Latorraca v. Centennial Technologies, Inc.*, 834 F.Supp.2d 25, 27 (D. Mass. 2011) (fee request reduced from 30% to 25% given size of common fund); *In re Thirteen Appeals Arising Out of San Juan*, 56 F.3d 295, 307 (1st Cir. 1995) (allocation between plaintiff steering committee members and non-members redone by appellate court).

II. Lieff Cabraser Will Be Irreparably Injured Absent a Stay.

The argument that Lieff Cabraser will not be irreparably injured absent a stay because it may seek to recoup its funds from other counsel should it prevail on appeal similarly relies on a misreading of the 2020 Fee Order and Lieff Cabraser's prior arguments to the First Circuit. In the 2020 Fee Order, the Court explicitly based its decision to award a reduced attorneys' fee on what it termed the "deficiencies" of counsel, and made specific findings with respect to each affected firm in order to arrive at both the total 20 percent fee awarded and the allocation of that fee. In short, the Court has already apportioned fault for what it viewed as the shortcomings of counsel and ordered (down to the cent) precisely how much each Customer Class Counsel must pay for the benefit of the class.[21] Lieff Cabraser challenges (as it did before) the Court's 20 percent attorneys' fee award insofar as it was arrived at by penalizing Lieff Cabraser, and will argue (as it did previously) that a reversal of the Court's findings and penalty as to Lieff Cabraser should necessarily result in a total attorneys' fee that is higher than 20 percent—not in an additional penalty or set of penalties against any other firm.

To put it another way, had the Court found no misconduct on the part of Lieff Cabraser, according to the Court's own rationale, it would have awarded some amount greater than 20 percent as the total fee to be allocated among the firms.[22] Accordingly, increasing the penalties

[21] Indeed, ERISA Counsel itself argues that the Final Judgment set the fee awards for all counsel at specific amounts in support of its argument that it should not get a reduced fee should Lieff Cabraser prevail on its appeal. *See* ERISA Counsel's Memorandum in Support of Motion to Clarify, or in the Alternative, for Reconsideration of Exhibit 1 to the Court's January 19, 2021 Decision and Order [ECF No. 671] ("ERISA Motion"). For what it is worth, Lieff Cabraser does not oppose the relief sought by the ERISA Motion, as it has been Lieff Cabraser's consistent position that its appeal, if successful, should only result in a higher total attorneys' fee (to eliminate the requirement of any payment by Lieff Cabraser) and should have no bearing on the fees the Court has awarded to other firms.

[22] 2020 Fee Order at 86 (the Court "consider[ed] such misconduct in deciding where within the reasonable range to make a total fee award and how to allocate the total award among counsel").

imposed on the other two Customer Class Counsel to compensate Lieff Cabraser would conflict directly with the rationale of the Court regarding both the fee award of 20 percent and the allocation of the fee reduction among the three firms. The Court has already decided how much Labaton and Thornton should suffer financially. The reversal of its findings as to Lieff Cabraser would provide no legitimate basis to increase the penalties imposed on those other firms. By arguing that Lieff Cabraser should, in the event it prevails, nonetheless be required to seek compensation from other counsel rather than simply be refunded the money it has deposited into escrow, the Special Master and HLLI thus improperly seek to tie the First Circuit's hands on this question as well.

All of the foregoing will be part of the Firm's arguments on appeal. Should the Court in briefing the matter before the First Circuit contest the amount of the fee and whether reversal of the findings of misconduct against Lieff Cabraser should cause an increase in the fee award rather than a further reallocation of the fee among counsel, that will be a matter for the First Circuit to decide. Refusing to stay distribution of Lieff Cabraser's funds in the meantime would effectively prevent the First Circuit from deciding the issue, prejudging the appeal's outcome.

None of the cases cited by the Special Master (*see* Master Br. at 6-7) mandates a different result—indeed, none are helpful to the Special Master's argument, because none required either the movant to obtain their monetary damages from another source, or more basically, for a court to rewrite its original order in order to remove the movant's injury. *See Harris v. Butler*, 961 F. Supp. 61, 63 (S.D.N.Y. 1997) (monetary damages would be returned from one party to another following judgment); *Charlesbank Equity Fund II v. Blinds to Go, Inc.*, 370 F.3d 151, 162 (1st Cir. 2004) (same); *Oxford Immunotec Ltd. v. Qiagen, Inc.*, 271 F. Supp. 3d 358, 368 (D. Mass. 2017) (same); *McMann v. Selene Finance LP for Wilmington Savings Fund Society, FSB*, 281 F.

Supp. 3d 218, 220 (D. Mass. 2017) (same); *Cayuga Indian Nation of New York v. Pataki*, 188 F. Supp. 2d 223, 253 (N.D.N.Y. 2002) (same). *See also Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 102 F.3d 12, 18-19 (1st Cir. 1996) (irreparable harm "not easily measured or fully compensable in damages"); *Tucker Anthony Realty Corp. v. Schlesinger*, 888 F.2d 969, 975 (2d Cir. 1989) (irreparable harm demonstrated where plaintiffs' bankruptcy was "imminent"); *Lopez v. Garriga*, 917 F.2d 63, 68 (1st Cir. 1990) (plaintiff failed on merits of case and injunctive relief grant reversed by appellate court). The Final Judgment cannot just be altered to impose new, long-after-the-fact penalties on other counsel in order to remediate the harm incurred by Lieff Cabraser from having its funds disbursed while its appeal is pending. Rather, the Court should stay execution on the Final Judgment insofar as it requires Lieff Cabraser's funds to be disbursed before its appeal is decided.

III. The Balance of Equities Weighs Heavily in Favor of a Stay.

Finally, the "balance of the equities" weighs heavily in favor of granting the stay. Even the Special Master acknowledges "[a]s a matter of both law and practicality, Lieff Cabraser cannot claw back funds paid to the Class" once disbursed.[23] And for the reasons stated above, it would be inappropriate and legally insupportable to impose new penalties on other counsel, after the fact, to make up for disbursing Lieff Cabraser's funds prematurely. Nor do the Special Master or HLLI seriously argue that the harm to Lieff Cabraser from disbursing (and making non-recoverable) its $1.14 million payment would be substantially outweighed, in severity, by the harm experienced by as-yet-undetermined class members who may have future *de minimis* (less than $10) payments reallocated to class members who have more meaningful payments due.

[23] *See* Master Br. at 5.

HLLI's attempt to turn Lieff Cabraser's observation (supported by the Claims Administrator's latest declaration)[24] that the complete settlement distribution process is a multi-step process that takes years rather than months into an additional justification for the Firm's funds to be distributed without delay makes no sense. The point that Lieff Cabraser made in support of its Stay Motion was that HLLI was likely overstating the purported cost "ineffectiveness" of withholding Lieff Cabraser's funds from distribution until after its appeal is decided because the settlement fund (based on experience in similar litigation) would almost certainly still be in the process of being distributed to the class at such time.[25] But that in no way suggests or guarantees, as HLLI now argues, that $1.14 million should be readily available to "repay"[26] Lieff Cabraser from the net settlement fund were the Firm to prevail in its appeal long after having had its funds included in the distribution pool.

CONCLUSION

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

Dated: February 18, 2021

Respectfully submitted,

Lieff Cabraser Heimann & Bernstein, LLP

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[24] *See* Decl. of Eric J. Miller on Behalf of A.B. Data, Ltd. [ECF No. 677-1] at ¶¶ 7-10, 12-13.
[25] Stay Mem. at 13-15.
[26] HLLI Br. at 5.

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CERTIFICATE OF SERVICE

I certify that the foregoing document was filed electronically on February 18, 2021 and thereby delivered by electronic means to all registered participants as identified on the Notice of Electronic Filing ("NEF").

/s/ Richard M. Heimann
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