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 MOTION FOR LEAVE TO FILE *AMICUS CURIAE* RESPONSE TO CLASS COUNSEL'S MOTION FOR LEAVE TO CALL ADDITIONAL WITNESS AT THE JUNE 24-26 HEARING (DKT. 546)

In accordance with Local Rule 7.1, *amicus curiae* the Hamilton Lincoln Law Institute's Center for Class Action Fairness ("CCAF") seeks leave of this Court to file the attached *amicus* opposition to the Class Counsel's Motion for Leave to Call Additional Witness at the June 24-25 Hearing. Dkt. 546 ("Class Counsel's Motion").

CCAF has attempted to confer with the parties on the motion. Labaton and Lieff Cabraser oppose this motion for leave to file. The Special Master and defendant have no position on the motion. CCAF has not received responses from the remaining plaintiffs' firm.

MEMORANDUM IN SUPPORT OF MOTION

CCAF is concerned that Class Counsel has offered Brian T. Fitzpatrick's live testimony not to address "whether Customer Class Counsel misrepresented a study in their memorandum in support of attorneys' fees" (Dkt. 543), but to sandbag to the Court with last-minute argument about the underlying attorneys' fee request. The Fitzpatrick Affidavit (Dkt. 550) consists chiefly of legal argument, and the Court need not hear live testimony of a *de facto* legal brief. CCAF suggests that these arguments, which do not depend on the credibility of the witness nor facts outside the record, can be adequately presented in writing.

The Affidavit also includes scantly-explained assertions about "presumptively reasonable" fee requests and an opinion on the ultimate legal issue of these proceedings, "that the fee requested here is appropriate." *Id.* at 5-6. The Court should not permit live direct testimony to elaborate these issues, which do not pertain to the misrepresentation of the Fitzpatrick article in Class Counsel's 2016 fee memorandum. If life testimony is nevertheless taken, it should be preceded by a deposition of Fitzpatrick so that the Court has a written record to meaningfully cross-examine the witness. Other fact and expert testimony has been rigorously tested through the Special Master's discovery, including by depositions.

The attached *amicus* brief is titled alternatively as a motion to require compliance with Rule 26 by permitting the deposition of Fitzpatrick to the extent live direct testimony should be permitted. CCAF asks the Court to appoint it guardian *ad litem* for the limited purpose of taking Fitzpatrick's deposition in order to ensure meaningful cross examination. CCAF further proposes that Class Counsel bear the costs of deposition—including attorneys' fees—which are necessitated by Class Counsel's failure to advance this defense for more than two years.

As previously described, CCAF typically represents class members *pro bono* in class actions where class counsel employs unfair class action procedures to benefit themselves at the expense of the class. *See* Dkt. 127 at 2-3. Since it was founded in 2009, CCAF has "recouped more than $100 million for class members" by driving the settling parties to reach an improved bargain or by reducing outsized fee awards. Andrea Estes, *Critics hit law firms' bills after class-action lawsuits*, BOSTON GLOBE (Dec. 17, 2017).

In general, *amicus* briefs are liberally permitted when relevant and helpful. Dkt. 127 at 4-7. During this litigation, CCAF filings have repeatedly been helpful to the Court. *See* Dkt. 192 (finding amicus brief "helpful"); Dkt. 460 at 8 (same); Dkt. 448 (Pub. 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."); Dkt. 519 (Tr. 11/7/2018) at 96 ("very helpful" submissions).

WHEREFORE, CCAF respectfully requests that the Court accept its *amicus* brief in opposition to Class Counsel's motion.

Respectfully submitted,

Dated: June 18, 2019

/s/ M. Frank Bednarz

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(A)(2)

I certify that on June 13, 2019, and again with more detail concerning the proposed motion on June 17, 2019, CCAF emailed counsel for the parties and counsel for the Special Master in a good faith effort to narrow or resolve the issues raised in this motion. Labaton and Lieff Cabraser opposes CCAF's motion. The Special Master and defendant take no position on the motion. At the time of filing, counsel for CCAF has not heard the position of the remaining plaintiffs firms.

Dated: June 18, 2019

/s/ M. Frank Bednarz
M. Frank Bednarz

CERTIFICATE OF SERVICE

I certify that on June 18, 2019, I served a copy of the forgoing on all counsel of record by filing a copy via the ECF system.

Dated: June 18, 2019

/s/ M. Frank Bednarz
M. Frank Bednarz

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THE HAMILTON LINCOLN LAW INSTITUTE'S
CENTER FOR CLASS ACTION FAIRNESS'S [PROPOSED] *AMICUS*
BRIEF REGARDING TESTIMONY BY BRIAN T. FITZPATRICK AND
ALTERNATIVE MOTION TO REQUIRE COMPLIANCE WITH RULE 26

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INTRODUCTION AND SUMMARY OF THE ARGUMENT

In view of Brian T. Fitzpatrick's affidavit ("Fitzpatrick Affidavit," Dkt. 550), the Hamilton Lincoln Law Institute's Center for Class Action Fairness ("CCAF") files this *amicus* brief in opposition to Class Counsel's Motion for Leave to Call Additional Witness at the June 24-26 Hearing. Dkt. 546 ("Class Counsel's Motion"). Alternatively, to the extent Fitzpatrick does testify live, CCAF moves for appointment as guardian *ad litem* for the limited purpose of ensuring adversarial pre-testimony discovery under Rule 26(a)(2) and (b)(4), including a deposition of Fitzpatrick before June 24 or any future date of his testimony.

The Court has asked parties to address "whether Customer Class Counsel misrepresented a study in their memorandum in support of attorneys' fees." Dkt. 543 ("Agenda Order") at 2. This issue does not require expert testimony, but simply turns on whether the 2016 Fee Motion (Dkt. 103-1) tended to mislead the Court by citing the mean and median fee percentage of *all* class action settlements rather than larger settlements in excess of $250 million. Fitzpatrick's proposed testimony does not help clarify this issue. The Affidavit instead opines Class Counsel "hardly hid" the salience of the study because it was submitted among 731 pages of exhibits filed on September 15, 2016. Dkt. 550 at 3. But Fitzpatrick is not offered as an expert on legal ethics, psychological motivation, or candor to the Court.

There is no need to accept legal argument as live testimony. The Fitzpatrick Affidavit can be received and considered by the Court as the legal brief it is. Live testimony could not possibly alter the 2016 Fee Motion, nor how a reasonable person would interpret this filing, nor the public meaning of the study it cited. Because the Fitzpatrick Affidavit provides no relevant fact or expert testimony about the misrepresentation, it should be precluded entirely under Fed. R. Evid. 702.

Alternatively, to the extent that Class Counsel insists that Fitzpatrick should provide testimony beyond his Affidavit, CCAF moves to require Class Counsel to comply with Rule 26. In particular, Class Counsel should present Fitzpatrick for a deposition prior to live testimony pursuant

to Rule 26(b)(4)(A). Further, CCAF seeks to participate in any such deposition. CCAF disclaimed any interest in cross-examining the fact witnesses in this case (Dkt. 545 at 1), and CCAF will not interfere with the Court's questioning of the *fact* witnesses upon the substantial written record that Special Master prepared. But Class Counsel's last-minute effort to shoehorn untested live expert testimony to rebut CCAF's argument has significantly changed circumstances. Only through adversarial testing of the proposed testimony can the Court obtain an adequate written record to cross-examine Fitzpatrick.

Class Counsel has known about the misrepresentation issue for over two years, since CCAF's first filings in this case (Dkt. 125-2 at 2-3), and vividly understood no later than December when filing their opposition to CCAF's Memorandum Propounding an Appropriate Total Fee Award, which discussed the misrepresentation in detail. *See* Dkt. 522 ("CCAF Fee Memo") at 1-2, 4-6, 23. Therefore, to the extent that Fitzpatrick's belatedly-disclosed testimony is allowed, Class Counsel should be taxed for the cost of deposing him. The deposition need not delay Fitzpatrick's testimony because CCAF can be prepared to depose him June 23 in Boston. These costs constitute a modest penalty for Class Counsel's exceptionally untimely effort to introduce new matters after over two years of investigation.

Labaton and Lieff Cabraser oppose CCAF's motion. The Special Master and defendant take no position on the underlying motion for leave to file this document. The remaining plaintiffs' firms have not at this time responded to CCAF's inquiry regarding the motion.

WHEREFORE, CCAF respectfully requests that the Court preclude Fitzpatrick from offering live testimony and at most accept his Affidavit as belated attorney argument. Alternatively, if the Court allows Fitzpatrick to testify, CCAF moves that the Court require that Class Counsel provide a pre-hearing deposition of Fitzpatrick, that CCAF be permitted to participate in such

deposition, and the Class Counsel pay cost and attorneys' fees to facilitate its belated disclosure of witness testimony.

MEMORANDUM IN SUPPORT OF *AMICUS* AND MOTION

District courts must act "as gatekeepers of expert testimony, assessing it for reliability before admitting it." *Bricklayers & Trowel Trades Int'l Pension Fund v. Credit Suisse Sec. (USA) LLC*, 752 F.3d 82, 91 (1st Cir. 2014) (affirming district court's *sua sponte* grant of summary judgment after concluding plaintiffs' expert testimony must be excluded as unreliable). The district court's responsibility as gatekeeper extends to all judicial hearings—not just formal trials on the merits. *See Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2553-54 (2011) (expressing "doubt" over district court's assumption that *Daubert* does not apply to non-trial proceedings such as class certification hearings); *Mars Steel Corp. v. Continental Bank N.A.*, 880 F.2d 928, 938 (7th Cir. 1989) ("Fairness hearings conducted under Fed. R. Civ. P. 23(e) are not among the proceedings excepted from the Rules of Evidence"). Expert testimony must "help the trier of fact to understand evidence or to determine a fact in issue." Fed. R. Evid. 702(a). "Expert testimony which does not relate to any issue in the case is not relevant, and ergo, non-helpful." *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 591 (1993).

Because the Fitzpatrick Affidavit does not assist the Court, his testimony may be precluded entirely, or—appropriately—be considered as legal argument. Alternatively, to the extent that he testifies live, his testimony should be strictly limited to the Fitzpatrick Affidavit, and Class Counsel should not be permitted to introduce new matter by direct examination. If Fitzpatrick should testify more generally, he should first be provided for a deposition pursuant to Rule 26(b)(4)(A). To the extent that no party will test Fitzpatrick's testimony, CCAF should be appointed to provide adversarial proceedings in the deposition and at any subsequent testimonial hearing. Class Counsel should bear all costs of such deposition—including attorneys' fees—because such proceedings are necessary due to their own foot-dragging.

A. Fitzpatrick's expert testimony is irrelevant because the best evidence is already of record and does not require technical expertise.

Class Counsel intends for Fitzpatrick to act as a legal brief come to life on the witness stand. His affidavit "reads more like a legal brief than an expert report." *Pinal Creek Grp. v. Newmont Mining Corp.*, 352 F. Supp. 2d 1037, 1044 (D. Ariz. 2005). Purely legal arguments should be excluded. *Id.* "This is because the judge's expert knowledge of the law makes any such assistance at best cumulative, and at worst prejudicial." *Nieves-Villanueva v. Soto-Rivera*, 133 F.3d 92, 100 (1st Cir. 1997); *Bernstein v. Bernstein Litowitz Berger & Grossmann LLP*, 814 F.3d 132, 144 (2d Cir. 2016) ("longstanding rule that expert testimony on issues of domestic law is not to be considered"); *Burkhart v. Washington Metro. Area Transit Auth.*, 112 F.3d 1207, 1213 (D.C. Cir. 1997) ("Each courtroom comes equipped with a 'legal expert' called a judge."). This principle "holds just as true when the finder of fact is the court, if not more so; the court is well equipped to instruct itself on the law." *Stobie Creek Invs., LLC v. United States*, 81 Fed. Cl. 358, 364 (Ct. Fed. Cl. 2008), aff'd 608 F.3d 1366 (Fed. Cir. 2010). The proposed testimony constitutes legal argument—not fact or expert testimony—about whether Class Counsel misrepresented Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811, 835 (2010) (the "Study") in its 2016 Fee Motion. *See* Agenda Order at 2-3.

No matter how Fitzpatrick argues his Study should be sliced and diced, it does not relate to the question at hand. The best evidence is Class Counsel's representation, and the Study itself—both of which are already in evidence. *See* Dkt. 103-1 at 11 and Dkt. 104-31, respectively. "[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).

Interpreting a law review article does not call for expert testimony. The Study speaks for itself. It does not require especially advanced scientific or mathematical ability to understand. Its abstract succinctly states that "Fee percentages were strongly and inversely associated with the size

of the settlement." Dkt. 103-31 at 811. Scores of courts have accurately interpreted this article without need of expert testimony. Many courts have relied on the Study and empirical studies like it to reduce attorneys' fee awards requested by plaintiffs' counsel.[1] In fact, a court has relied on such empirical studies to award less than plaintiffs' counsel requested even where Fitzpatrick himself was hired to bless the requested fee. *See In re High-Tech Emple. Antitrust Litig.*, No. 11-CV-02509-LHK, 2015 U.S. Dist. LEXIS 118052, at *48 (N.D. Cal. Sep. 2, 2015) (relying on published studies and other factors to award 10.5% of $415 million settlement—less than plaintiffs' retained expert Fitzpatrick recommended).

The opinion Fitzpatrick expresses is not expert opinion about his area of expertise. He does not explain technical methodology of his Study or much of anything beyond its plain meaning. Instead he opines on Class Counsel's duty of candor in essentially *ex parte* proceedings—filing an unopposed fee motion. But Fitzpatrick does not claim to be an expert in legal ethics and the opinion is dubious, perhaps colored by Fitzpatrick's own view that it is reasonable to award class counsel the

[1] *E.g., In re AT&T Mobility Wireless Data Servs. Sales Tax Litig.*, 792 F. Supp. 2d 1028, 1033 (N.D. Ill. 2011) (awarding less than 25% and less than requested fee award in view of sliding scale described by Study, among other things); *In re Citigroup Inc. Bond Litig.*, 988 F. Supp. 2d 371, 375 (S.D.N.Y. 2013) (same); *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 991 F. Supp. 2d 437, 444 (E.D.N.Y. 2014) (same); *In re IndyMac Mortg.-Backed Sec. Litig.*, 94 F. Supp. 3d 517, 523 (S.D.N.Y. 2015) (same); *In re Polyurethane Foam Antitrust Litig.*, 135 F. Supp. 3d 679, 692 (N.D. Ohio 2015) (same); *In re Capital One Tel. Consumer Prot. Act Litig.*, 80 F. Supp. 3d 781, 797 (N.D. Ill. 2015) (same); *Wilkins v. HSBC Bank Nev., N.A.*, No. 14 C 190, 2015 U.S. Dist. LEXIS 23869, at *36 (N.D. Ill. Feb. 27, 2015) (same); *Gehrich v. Chase Bank United States*, 316 F.R.D. 215, 236 (N.D. Ill. 2016) (same); *Good v. W. Va.-American Water Co.*, No. 14-1374, 2017 U.S. Dist. LEXIS 104242, at *93 (S.D.W.Va. July 6, 2017) (same); *McGreevy v. Life Alert Emergency Response, Inc.*, 258 F. Supp. 3d 380, 385 (S.D.N.Y. 2017) (same); *In re Metlife Demutualization Litig.*, 689 F. Supp. 2d 297, 359 (E.D.N.Y. 2010) (granting requested fees less than 25%, while noting sliding scale described by Study); *Craftwood Lumber Co. v. Interline Brands, Inc.*, No. 11-cv-4462, 2015 U.S. Dist. LEXIS 35421, at *9 (N.D. Ill. Mar. 23, 2015) (granting less than requested fee award in view of the sliding scale described in Study, among other things); *In re Neurontin Mktg. & Sales Practices Litig.*, 58 F. Supp. 3d 167, 172 (D. Mass. 2014) (same).

entire amount of any settlement without regard to compensating class members. Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?*, 158 U. PA. L. REV. 2043, 2047 (2010). Fitzpatrick says Class Counsel did not mislead the Court because "not only did they give the court a copy of my entire study, but they discussed the megafund relationship at length over several other pages in their submission and compared their fee request to a chart of fee awards in other 'megafund' settlements." Fitzpatrick Affidavit at 3.

As for attaching the Study, there was no reasonable chance that the Court would have verified the contents of the Study, Exhibit 31 among ***731 pages*** of exhibits. In *ex parte* proceedings, the Court simply cannot be expected to verify whether officers of the Court are burying questionable assertions in hundreds of pages of text. It's akin to attempting to excuse misleading use of ellipsis just because the underlying citation is provided. Courts should and do expect better from advocates before them. *Cf. In re Southwest Airlines Voucher Litig.*, 799 F.3d 701, 713 n.4 (7th Cir. 2015).

As for Class Counsel's discussion of megafunds in the 2016 Fee Motion, it simply confirms how Class Counsel created a misleading impression about the Study. The motion introduces the "megafund" concept, then immediately references the Study, incorrectly implying the Study did not distinguish between all settlements and the more relevant statistics for megafunds:

> The 24.85% requested fee falls comfortably within the range of fees that courts within this Circuit generally award in class action settlements, and have awarded in "megafund" settlements of $100 million or more. The fee aligns with the mean and median of percentage fees awarded in 444 settlements in all federal courts in 2006 and 2007.

Dkt. 103-1 at 2. Class Counsel later admits that "[s]ome courts" lower the percentage of fees for megafunds, but claims First Circuit courts disagree and cites *Neurontin* as rejecting the sliding scale approach based "on an empirical study of class action fee awards (discussed below)." *Id.* at 9. This is a misrepresentation of *Neurontin*, which didn't reduce the fee request merely due to the average of *all* fees reported in the Study, but specifically because "[t]he sizes of fee awards in similar mega-cases

suggest that 33 1/3% of the settlement fund is too high a percentage." *In re Neurontin Mktg. & Sales Practices Litig.*, 58 F. Supp. 3d 167, 172 (D. Mass. 2014).

The *Neurontin* court and Class Counsel's timely expert, William B. Rubinstein, independently identified the same 17.8% figure as being most relevant datum from the Study. After recounting the First Circuit average, the *Neurontin* court added: "Importantly, however, the study also broke down fee award data according to the size of the settlement fund, and found that for settlements between $250 million and $500 million, the mean percentage was just 17.8%." *Id.* Prof. Rubinstein's summary of Fitzpatrick is even more remarkable given that he is Class Counsel's own expert:

> CEI notes that the mean percentage award in the 20 lodestar cross-checked cases in my billing rate set was 13.16%.[21] However, the empirical study with the closest data on this point shows that in $250-$500 million settlements, the mean percentage is 17.8% and the median percentage is 19.5%.[22]

[21] CEI Br. [Dkt. 522] at 9.

[22] Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements* . . .

Dkt. 531-1 (Rubenstein Decl.) at 6. Rubenstein's previously-submitted expert testimony confirms that the plain reading of the Study is correct: In 2006-07, fee awards for settlements between $250 and 500 million were 17.8% on average, with a median of 19.5%. No testimony, much less expert testimony, is needed to divine this plain fact.

The 2016 Fee Motion concludes the section on fee percentages by cherry-picking the Fitzpatrick Study in a misleading way. Plaintiffs' representation of the article also speaks for itself. Expert testimony could not possibly contradict the best evidence of what the 2016 Fee Motion says—the motion itself. *See* Fed. R. Evid. 1002. About the Study, Class Counsel wrote:

> Empirical studies also support the requested fee. An in-depth review of all 688 class action settlements in federal courts during 2006 and 2007 found that the mean and median fees awarded in the 444 settlements where the POF method was used (either with or without a lodestar cross-check) were 25.7% and 25.0%, that the mean and median fees awarded in securities cases (233 of 444) were 24.7% and 25.0%, and that the mean and median fees

> awarded in consumer cases (39 of 444) were 23.5% and 24.6%. Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811, 835 (2010) (Ex. 31); *see also Neurontin*, 58 F. Supp. 3d at 172 (favorably citing this study).[18] The 24.85% fee requested is right in line with Professor Fitzpatrick's findings.
>
> [18] Professor Fitzpatrick also found, consistent with the in-Circuit cases cited above, that the mean and median fees awarded in settlements in the First Circuit (23 of 444) were 27.0% and 25.0%. *Id.* at 836.

Dkt. 103-1 at 10-11. Here, Class Counsel cites the average fees for all cases—half of which are smaller than $7 million—and cites a figure for First Circuit settlements, all while sidestepping the statistically significant finding of the Study: "fee percentage is strongly and inversely associated with settlement size among all cases, among securities cases, and among all nonsecurities cases." Dkt. 104-31 at 837. No intellectually honest discussion of the Study would state matter-of-factly that a "24.85% fee requested is right in line with Professor Fitzpatrick's findings" for a $300 million settlement, when both the prose and tables of the Study show the award is above average.

Fitzpatrick opines that the fee award actually is "in line" which his findings because two class action settlements between $250 and $500 million had fees of 25% (Dkt. 550 at 3-4), but this is not the impression Class Counsel created. "In line" does not mean "an outlier." Counsel did not cite the Study for the proposition that 25% fees are occasionally awarded, nor that the request was "hardly unprecedented" in Fitzpatrick's words. Dkt. 550 at 5. Class Counsel instead falsely implied the fee awards of this size were average and "median," even for megafunds. Insofar that the Fitzpatrick Affidavit is at odds with the plain language of the primary documents, it ought to be excluded in favor of the best evidence of what Class Counsel represented. *Cf. Amazin' Raisins Int'l, Inc. v. Ocean Spray Cranberries, Inc.*, No. 04-12679-MLW, 2007 WL 2386360, 2007 U.S. Dist. LEXIS 60808, at *35 (D. Mass. Aug. 20, 2007); *Rothbaum v. Samsung Telecomms. Am., LLC*, 52 F. Supp. 3d 185, 195 (D. Mass. 2014) (excluding expert that "repeatedly draws conclusions that are not supported by the documents on which he relies."). Such testimony "suffer[s] from a bias that is not present in [the] intrinsic evidence." *Amazin' Raisins*, 2007 U.S. Dist. LEXIS 60808, at *35).

Because Fitzpatrick's proposed testimony opines on the ultimate legal issue and is not helpful to the trier of fact, it cannot be admitted as expert testimony and should be excluded.

B. To the extent Fitzpatrick testifies live, he should be strictly limited to his Affidavit, and further discovery should be provided prior to direct testimony.

If the Court nevertheless finds Fitzpatrick's testimony probative, CCAF does *not* suggest that his testimony be precluded, although there are potential grounds for doing so. Parties who fail to provide pre-trial expert discovery pursuant to Rule 26 are normally precluded from presenting that expert's testimony—even when preclusion is fatal to the party's case.[2] *See Santiago-Diaz v. Laboratorio Clinico Y De Referencia Del Este and Sara Lopez, M.D.*, 456 F.3d 272, 276 (1st Cir. 2006); *see also* D. Mass. L.R. 26.4(b) (requiring Court to "consider . . . precluding the appearance of expert witnesses

[2] Additionally, the history of Fitzpatrick's involvement in this case is peculiar given that CCAF inquired about retaining him for the *amicus*, but he is now poised to testify for Class Counsel. On December 18, 2018, CCAF director Theodore H. Frank contacted Fitzpatrick to inquire whether he was "free to be retained" or had been retained by Class Counsel, which had just then filed an old Fitzpatrick declaration in opposition to the CCAF Fee Memo. *See* Dkts. 532 & 532-2. Fitzpatrick responded the next day "I am not familiar with the case, but that does happen from time to time," and later responded "I will look into it," after Mr. Frank described what he thought would be his confidential views of the case to Fitzpatrick. After Class Counsel's Motion was filed last week, Mr. Frank inquired with Richard M. Heimann about this and asked whether any Class Counsel firm "received any confidential information from him." Counsel did not respond to this question, but instead "reserve[d] the right to seek appropriate sanctions if you persist in your improper and frivolous efforts to prevent us from presenting Professor Fitzpatrick's testimony to the court." This failure to respond is a negative pregnant, and raises a question about what information was exchanged with Fitzpatrick prior to the Court extending the Sequestration Order to cover him. Dkt. 549 at 3.

Though the Lieff retainer is surely more lucrative than the CCAF retainer could have been, Professor Fitzpatrick's actions are disappointing at a minimum. The law is unclear whether Model Rule 1.18's standards regarding "prospective clients" applies to attorneys going on to act as expert witnesses; because of this, and because of Mr. Frank's friendship with Fitzpatrick, CCAF will not trouble the court with collateral litigation seeking disqualification, especially since disqualification would risk creating an unnecessary issue in any appeal given the irrelevance of Fitzpatrick's testimony. But to the extent the Court would permit live testimony, this history heightens the need for standard civil discovery practices.

not timely identified"). In fact, "the required sanction in the ordinary case is mandatory preclusion." *Lohnes v. Level 3 Communs., Inc.*, 272 F.3d 49, 60 (1st Cir. 2001).

That said, "[p]reclusion, . . . is not a strictly mechanical exercise." *Esposito v. Home Depot U.S.A.*, 590 F.3d 72, 77 (1st Cir. 2009) (cleaned up). Expert preclusion decisions "fall[] in the heartland of case management decisions—the area where a trial judge has the remorseless responsibility, evenhandedly and efficiently, to govern, monitor, and police the progress of an endless line of cases through the court." *Gagnon v. Teledyne Princeton, Inc.*, 437 F.3d 188, 191 (1st Cir. 2005). Given the strange procedural posture of the case, there is no need to preclude testimony under Rule 37(c)(1) because the Fitzpatrick Affidavit functions as a legal brief, which can be considered by the Court.

However, if Fitzpatrick will be cross-examined, his testimony should be strictly limited to the contents of his Affidavit as would be done in any other case under Rule 37(c)(1). And if direct examination is permitted, discovery will be necessary because several parts of the Fitzpatrick Declaration hint at vast opinions bearing little relation to topic 1 of the Court's agenda. *See* Dkt. 550 at 4-5 (asserting without legal citation that fees over a broad range are "presumptively reasonable"; opining as to the ultimate issue of law that "the fee requested here is appropriate."). If direct testimony is permitted, Class Counsel must provide Fitzpatrick for a deposition, and the Court should impose a lesser sanction "such as the imposition of fines or costs" to remedy their untimely disclosure of the proposed testimony. *Esposito*, 590 F.3d at 80.

1. For direct live testimony, the Court should first require a pre-hearing deposition of the expert, as contemplated by Rule 26.

Here, the Court should provide an adequate factual record to cross-examine Fitzpatrick by requiring Class Counsel to provide normal pretrial discovery under Rules 26 and 37(c)(1). "Recognizing the importance of expert testimony in modern trial practice, the Civil Rules provide for extensive pretrial disclosure of expert testimony." *Licciardi v. TIG Ins. Grp.*, 140 F.3d 357, 363 (1st

Cir. 1998). These rules exist to provide opponents with the "opportunity to depose the proposed expert, challenge his credentials, solicit expert opinions of its own, or conduct expert-related discovery." *Lohnes*, 272 F.3d at 60. Class Counsel's attempt to spring Fitzpatrick on the court with little prior record "is exactly the type of unfair tactical advantage that the disclosure rules were designed to eradicate." *Id.* The Rules ought not be "undermined either by evasion or by dilatory tactics." *Licciardi*, 140 F.3d at 363. "[T]he purpose of the disclosure and supplementation requirements in Rule 26 was to alleviate 'the heavy burden placed on a cross-examiner confronted by an opponent's expert whose testimony had just been revealed for the first time in open court.'" *Id.*

Here, the Court would be the primary cross-examiner of Fitzpatrick, so it is important it have available a written record to effectively confront the record—the same sort of record that the Special Master appropriately prepared for all of the fact witnesses.

CCAF has suggested that a deposition pursuant to Rule 26(b)(4)(A) could occur in Boston on June 23, which would allow Fitzpatrick to testify as Class Counsel wishes, but Lieff Cabraser categorically rejected this suggestion. Class Counsel apparently believes Fitzpatrick's testimony falls outside the requirements of Rule 26 because he may not be used "at trial." Rule 26(a)(2)(A). This is incorrect for several reasons.

First, the scope of mandatory preclusion under Rule 37(c)(1) extends further than "trial." If disclosure required by Rule 26(a) is not provided, "the party is not allowed to use that information or witness to supply evidence **on a motion, at a hearing, or at a trial**, unless the failure was substantially justified or is harmless." Rule 37(c)(1) (emphasis added). The 1993 Advisory Committee Notes explain: "This automatic sanction provides a strong inducement for disclosure of material that the disclosing party would expect to use as evidence, whether at a trial, at a hearing, or on a motion, such as one under Rule 56." Thus, courts regularly preclude expert testimony at non-trial hearings for noncompliance with Rule 26. *See Brainard v. American Skandia Life Assur. Corp.*, 432

F.3d 655, 663 (6th Cir. 2005) (affirming exclusion of expert affidavit on summary judgment where report did not contain "complete statement" of opinions under Rule 26(a)(2)(B)); *Quevedo v. Trans-Pacific Shipping, 19 Inc.*, 143 F.3d 1255, 1258 (9th Cir. 1998) (affirming exclusion of expert testimony on summary judgment proceeding for failure to provide report under Rule 26(a)(2)(B)). Because few cases proceed to a formal trial, if the sweep of Rule 26(a)(2) did not extend beyond "trial," it would be trivially easy for parties to game the rule by claiming that testimony is not intended for trial. This kind of gamesmanship should not be permitted. *See Energy Intelligence Grp., Inc. v. CHS McPherson Refinery, Inc.*, 304 F. Supp. 3d 1051, 1058 (D. Kan. 2018) (rejecting suggestion that party need not disclose expert testimony proffered on a motion for referral to the Copyright Register because it was not intended for "trial").

Second, while the present proceedings do not constitute a "trial," the proceedings will be dispositive and thus resemble a motion for summary judgement, where Rule 26(a)(2) applies. "Although these rules refer to experts used at trial, courts have applied them when an expert's testimony is offered to the court in connection with summary judgment motions, reasoning that in such situations, the expert has 'entered the judicial arena.'" *S. Yuba River Citizens League v. Nat'l Marine Fisheries Serv.*, 257 F.R.D. 607, 611 (E.D. Cal. 2009) (quoting *United States v. Hooker Chemicals & Plastics Corp.*, 112 F.R.D. 333, 339 (W.D.N.Y. 1986)). Courts attach Rule 26(a)(2)(B) disclosure requirements to expert testimony for or against motions for summary judgment. *See id.*; *Brainard*, 432 F.3d at 663; *Quevedo*, 143 F.3d at 1258. "[W]hen a party offers an affidavit of an expert witness in opposition to, or in support of a motion for summary judgment, it waives its right not to have the deposition of said expert taken." *Hooker Chemicals*, 112 F.R.D. at 339. This is because "affidavits and depositions which support the motion [for summary judgment] are a substitute for live testimony at trial." *Lugue v. Hercules, Inc.*, 12 F.Supp. 2d 1351, 1358 (S.D. Ga. 1997) (refusing to consider expert reports at summary judgment that did not comply with Rule 26(a)(2)). Here, *live testimony* of

Fitzpatrick would be the "substitute" for live testimony at dispositive proceedings concerning plaintiffs' $75 million fee award. The stakes of these fee proceedings exceed the merits of most civil litigation, so there is no reason Rule 26's discovery requirements should not apply to these dispositive matters.

Finally, even if Rule 26(a)(2) does not encompass post-judgment fee proceedings,[3] the Court should hold any expert testimony to the same evidentiary rigor and allow deposition of Fitzpatrick. The Special Master required similar process for proceedings before him, which was expressly allowed under his authority to "compel, take, and record evidence." Dkt. 173 at 3 (Order appointing Special Master, March 8, 2017) (citing Rule 53(c)(1)). The fact that Class Counsel has waited over two years to spring an eleventh-hour expert witness on the witness stand is not a reason to dispense with normal Rule 26 discovery—just the reverse, in fact.

Pre-testimony discovery under Rule 26 remains necessary because the Court must still ferret out unreliable expert testimony. Both *Daubert* and Fed. R. Evid. 702 apply to these proceedings. *See Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2553-54 (2011) (expressing "doubt" over district court's assumption that *Daubert* does not apply to non-trial proceedings such as class certification hearings); *Pearson v. NBTY, Inc.*, 772 F.3d 778, 786 (7th Cir. 2014) (finding expert report submitted for final approval of settlement "too shallow to be admissible as evidence").

To the extent that no other party contests Fitzpatrick's testimony, CCAF should be appointed guardian *ad litem* for at least this limited purpose. To ensure truly adversarial testing of the testimony, CCAF should be permitted to ask questions at the deposition and to cross-examine Fitzpatrick at any live hearing. While the Special Master has done a thorough job of finding facts in

[3] For proceedings besides summary judgment, courts have reached contradictory conclusions concerning Rule 26 requirements. *See S. Yuba River Citizens League*, 257 F.R.D. at 611 & n.1 (noting paucity of cases and inconsistent conclusions regarding expert testimony at preliminary injunction and other decisions besides summary judgment).

this case, he never explored this misrepresentation of the Fitzpatrick Study, even though it was covered in the November 2016 Frank memo used in the *Boston Globe* story and filed with the Court in February 2017. *See* Dkt. 125-2. The Special Master should certainly be allowed to question Fitzpatrick, but the Special Master has not and likely will not be able to act as an advocate on the misrepresentation issue. (For example, prevailing on the misrepresentation issue of Class Counsel's overall fee request could jeopardize the Special Master's preferred result of a settlement with Labaton, which ignores this question.) Therefore, no party can provide the Court with a pre-hearing record as CCAF could. The Court has voluminous deposition and email records to guide its live questioning of the fact witnesses (Agenda Order at 3-4), and it should have the same benefit to the extent Fitzpatrick is added to the agenda.

2. Class Counsel should be ordered to pay all costs of such deposition—including attorneys' fees—because the burden is one of their own making.

Class Counsel will claim their eleventh-hour sandbagging is due to the Court's recent interest in their misrepresentation of the Fitzpatrick Study. Dkt. 543 ("Agenda Order") at 2-3. But this ignores the long history of this issue, which was flagged by CCAF's *very first filing* in this litigation 851 days ago, on February 17, 2017. *See* Dkt. 125-2 at 2-3. Labaton first responded to this argument 841 days ago. *See* Dkt. 145 at 13-14. While the public record does not suggest that the special master explored this topic, CCAF brought it back to the fore in its Fee Memo on November 20, 2018. *See* CCAF Fee Memo at 1-2, 4-6, 23. Class Counsel cannot credibly claim to be surprised by the Court's interest in it. In fact, on December 18, 2018, counsel specifically responded to the argument. *See* Dkt. 532 at 13-14. On the same day, Class Counsel submitted a supplemental report by their previously-disclosed expert Prof. William Rubenstein who notably did not opine on whether Class Counsel's 2016 Fee Motion was misleading in this respect. In fact, as discussed above, Rubenstein cited the Study for exactly the same data CCAF relies on: " in $250-$500 million settlements, the mean percentage is 17.8% and the median percentage is 19.5%." Dkt. 532-1 at 6. At that time, Class

Counsel instead attempted to rebut the CCAF Fee Memo by attaching a Fitzpatrick Declaration from an unrelated case. Dkt. 532-2.

The argument is not new, Class Counsel was aware of it and could have easily supplemented their disclosures no later than December 18, 2018. Because the Court and parties would be greatly inconvenienced by conducting timely-but-necessary discovery to admit Class Counsel's obscenely late-disclosed live testimony, Class Counsel should bear all fees and costs necessary to conduct the deposition—including attorneys' fees to the Special Master and (if allowed to participate) CCAF.[4] *See Alves v. Mazda Motor of Am., Inc.*, 448 F. Supp. 2d 285, 296-97 (D. Mass. 2006) (considering "a case in which the court would otherwise award reasonable attorneys' fees and costs in lieu of exclusion of the evidence"—an untimely disclosed expert). The Court must consider sanctions "such as the imposition of fines or costs" on a "case-by-case basis" because "the punishment must approximately fit the crime." *Esposito*, 590 F.3d at 80.

Here, Class Counsel is attempting to interject new evidence well after the conclusion of the Special Master's thorough investigation. To the extent the Fitzpatrick testifies live and likely beyond the four corners of his Affidavit (why else insist on live testimony?), the witness's credibility must be tested, and Class Counsel should pay the cost of this testing—including for a deposition, rush transcript, and attorneys' fees by all participants.

[4] The ERISA firms should obviously bear no responsibility for such cost.

CONCLUSION

The Fitzpatrick Affidavit contains legal argument devoid of relevant expert testimony, so should be considered as a legal brief without the need for live testimony. But to the extent the Court permits live, direct testimony, Class Counsel should provide Fitzpatrick for a deposition pursuant to Rule 26(b)(4)(A), which must occur prior to any hearing date. To the extent the Special Master is unable to fully rebut the Fitzpatrick testimony, CCAF should be appointed as guardian *ad litem* at least for this narrow issue. Finally, Class Counsel should pay all costs associated with their sandbagging, including attorneys' fees.

Respectfully submitted,

Dated: June 18, 2019

/s/ M. Frank Bednarz

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(A)(2)

I certify that on June 13, 2019, and again with more detail concerning the underlying motion for leave to file on June 17, 2019, CCAF emailed counsel for the parties and counsel for the Special Master in a good faith effort to narrow or resolve the issues raised in this motion. Labaton and Lieff Cabraser opposes CCAF's motion. The Special Master and defendant take no position on the motion. At the time of filing, counsel for CCAF has not heard the position of the remaining plaintiffs firms.

Dated: June 18, 2019

/s/ M. Frank Bednarz
M. Frank Bednarz

CERTIFICATE OF SERVICE

I certify that on June 18, 2019, I served a copy of the forgoing on all counsel of record by filing a copy via the ECF system.

Dated: June 18, 2019

/s/ M. Frank Bednarz
M. Frank Bednarz