

**UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS**

ARKANSAS TEACHER RETIREMENT SYSTEM,  
on behalf of itself and all others similarly situated,

Plaintiff,

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,

Defendant.

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

**OPPOSITION OF CUSTOMER CLASS COUNSEL TO THE HAMILTON LINCOLN  
LAW INSTITUTE'S CENTER FOR CLASS ACTION FAIRNESS'S MOTION FOR  
LEAVE TO FILE MOTION AND MEMORANDUM FOR AN EXTENSION OF TIME  
TO FILE MOTION FOR ATTORNEYS' FEE AWARD**

Labaton Sucharow LLP, Lief Cabraser Heimann & Bernstein, LLP, and the Thornton Law Firm (collectively, “Customer Class Counsel”) oppose the Hamilton Lincoln Law Institute’s Center for Class Action Fairness’s (“CCAF”)<sup>1</sup> Motion for Leave to File Motion and Memorandum for an Extension of Time to File Motion for Attorney’s Fee Award (ECF No. 592) (the “Motion for Leave”).

The Court should deny CCAF’s Motion for Leave, because the proposed motion it seeks to file (the “Proposed Motion”) is meritless. Simply stated, there is no good cause to grant CCAF any extension of time within which to seek fees, because CCAF has no basis to seek fees. Under black-letter law, an award of fees to an amicus requires the amicus to have been appointed by the Court. But, as CCAF has previously made clear: “*CCAF has not been appointed to any official role in this case.*” See CCAF’s Motion Seeking Clarification on Participation at the Upcoming Hearing (ECF No. 545) at 1 (emphasis added). CCAF’s voluntary participation in this case is dispositive of its Proposed Motion.

**I. CCAF’s Participation In This Case Has Been Entirely Voluntary.**

CCAF does not represent any party in this case, and its limited participation has been voluntary since it first sought to “intercede” in these proceedings. See February 17, 2017 Declaration of Theodore Frank (ECF No. 125-1) at 4. This intercession was not requested by the Court, a class member, or any party. Instead, CCAF affirmatively sought *permission* to participate. ECF No. 126 at 1 (requesting that CCAF “be permitted to participate during the proposed special master proceedings”); ECF No. 154 at 6 (“CCAF should be permitted to participate as *amicus* or guardian”); see also Mar. 7, 2017 Hr’g Tr. (ECF No. 176) at 39 (“If

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<sup>1</sup> As used herein, CCAF also includes the Competitive Enterprise Institute’s Center for Class Action Fairness, which we understand was the predecessor to the Hamilton Lincoln Law Institute’s Center for Class Action Fairness.

there's a report and recommendation, we'll probably submit an amicus, whether or not there's a class member and the class member has specifically retained us."). Indeed, CCAF expressly offered to proceed without receiving a fee. ECF No. 126-1 at 6 (offering to serve as guardian ad litem "pro bono without compensation").<sup>2</sup>

Although it has allowed CCAF to participate on a limited basis, the Court has made clear that any work performed by CCAF is voluntary, and that it has not been appointed to any broader role in this case. ECF No. 170 (granting Mr. Frank's *pro hac vice* motion "for the purpose of allowing Mr. Frank to appear as amicus on March 7, 2017, and in the future *if authorized by the Court*"); 8/9/18 Hr'g Tr. Excerpt (ECF No. 448) at 42 ("You have to file a request to file a brief on an issue, or if I think it would be helpful, *I might ask you, but you better not depend on that.* And we'll see when the time comes."); ECF No. 187 at 2 (setting deadline for CCAF to respond to the extent it "*wish[ed]* to comment"); ECF No. 488 (ordering CCAF to "state whether it *wishes* to participate in the October 15, 2018 hearing"); ECF No. 502 ("Responses by [Lieff, Thornton] and, *if it wishes*, the Competitive Enterprise Institute, shall be filed . . ."); ECF No. 518 at 2 (providing that CCAF "*may*" submit a memorandum) (emphasis added to each parenthetical).

In short, each action CCAF has taken in this case has been voluntary, and has not been an action that was ordered by the Court or taken pursuant to an appointment. Prior to its effort to obtain fees, CCAF was constrained to admit as much. *See* CCAF's Motion Seeking Clarification on Participation at the Upcoming Hearing (ECF No. 545) at 1.

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<sup>2</sup> CCAF later walked back its offer. *See* ECF No. 420 at 25 ("While CCAF was willing to undertake this role gratis last year, it was less busy at the time and believed the case would be more narrowly focused on appropriate billing rates.").

## II. Because Its Work Has Been Voluntary, CCAF's Proposed Fee Request Is Baseless.

CCAF's proposed fee request must be rejected, because "before a federal court may charge the legal fees of amici curiae to a party for services rendered to the court . . . the court must *appoint* an amicus curiae who renders services which prove beneficial to a solution of the questions presented." *Morales v. Turman*, 820 F.2d 728, 731 (5th Cir. 1987) (internal quotations omitted); *Schneider v. Lockheed Aircraft Corp.*, 658 F.2d 835, 853 (D.C. Cir. 1981) (same). The typical role of an amicus – *i.e.*, voluntary participation in a case – does not warrant a fee award. *See Morales*, 820 F.2d at 731 ("Amici were volunteers, however, not appointees."); *Miller-Wohl Co. v. Comm'r of Labor & Indus.*, 694 F.2d 203, 205 (9th Cir. 1982) ("But these amici fail to satisfy the underlying requirement: they were volunteers, not appointees."); 10 Moore's Federal Practice - Civil § 54.173 (2020) ("Instead, the participation of the amicus in the action is entirely voluntary, and any attorney's fees incurred are voluntary as well.").

CCAF's request is particularly inapt here, because – far from being appointed – it has aggressively lobbied for a role in the case and repeatedly requested permission to participate. *See Morales*, 820 F.2d at 731 ("Their appointment was not sparked by the need for their aid. That is, the district court did not seek the aid of amici, but allowed them to participate at their request."). And, because it was voluntary, the fact that CCAF claims to have provided a benefit is not the controlling question. *E.g.*, *Miller-Wohl*, 694 F.2d at 205 ("These amici performed a valuable service for the court. Admirably fulfilling the role of amicus does not, however, entitle them to compensation.")<sup>3</sup>

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<sup>3</sup> CCAF's proposed motion suggests that its role somehow resembles the facts of *Schneider*. *See* Proposed Memorandum (ECF No. 592-1) at 9; *Schneider* 658 F.2d at 839. CCAF misses the mark. In *Schneider*, the court appointed an apparently unrelated attorney to advise the court as an amicus and, later, to act as guardian ad litem on behalf of numerous orphaned children who were involved in a plane crash. *Id.* There is no indication that the guardian stepped forward to

Despite the procedural history outlined above – and notwithstanding CCAF’s prior representations – the motion CCAF is attempting to file now claims that the Court *has* appointed it to act in this matter. *Compare* CCAF Proposed Memorandum (ECF No. 592-1) at 10 (“The Court most clearly appointed CCAF as amicus when requested briefing on the overall fee award, which was filed November 20, 2018.”), *with* ECF No. 545 at 1 (“CCAF has not been appointed to any official role in this case”). CCAF is wrong. The Order it relies upon granted permission to file a brief, but did not “appoint” CCAF, with respect to that particular issue, or otherwise. *See* ECF No. 518 at 2 (CCAF “*may* . . . submit a memorandum”) (emphasis added); *see also* CCAF’s Motion to Substitute Party (ECF No. 540) at 3 (explaining that the Court’s Order “granted CCAF leave to participate as an amicus”).

In sum, because CCAF has not been appointed as amicus, it may not be awarded any fee. *E.g., Miller-Wohl*, 694 F.2d at 205 (“But these amici fail to satisfy the underlying requirement: they were volunteers, not appointees.”).<sup>4</sup>

### **III. Conclusion.**

CCAF requests leave to file a motion that would seek an extension of time to file a groundless fee motion. Respectfully, because CCAF’s fee request is (and will continue to be) without merit, the Court should deny CCAF’s Motion.

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volunteer his services; instead, he was “appointed” as amicus and was later “appointed” as guardian – apparently out of necessity given the uniquely complex issues and vulnerable plaintiffs. *See id.* By material contrast, CCAF has consistently sought a role in this case.

<sup>4</sup> The motion CCAF is attempting to file would invite the Court appoint it as guardian ad litem now, after the fact – so that its fee request (purportedly) may be placed on better footing. ECF No. 592-1 at 11 (“If, however, the Court grants CCAF’s pending motion for appointment as guardian ad litem, it would avoid any controversy and appellate issue over whether it could award CCAF fees as it indicated it wished to do.”). CCAF’s suggestion that the Court retroactively appoint it as guardian ad litem – when it did not act in that role and the proceedings have now concluded – should be rejected out of hand.

Dated: March 26, 2020

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that this document filed through the ECF system will be sent electronically to all counsel of record on March 26, 2020.

*/s/ Joan A. Lukey* \_\_\_\_\_