

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

Plaintiff,

No. 11-cv-10230-MLW

vs.

STATE STREET BANK AND TRUST COMPANY,

Defendant.

ARNOLD HENRIQUEZ, MICHAEL T. COHN,
WILLIAM R. TAYLOR, RICHARD A.
SUTHERLAND, and those similarly situated,

Plaintiffs,

No. 11-cv-12049-MLW

vs.

STATE STREET BANK AND TRUST COMPANY,

Defendant.

THE ANDOVER COMPANIES EMPLOYEE
SAVINGS AND PROFIT SHARING PLAN, on
Behalf of itself, and JAMES PEHOUSHEK-
STANGELAND and all others similarly situated,

Plaintiffs,

No. 12-cv-11698-MLW

vs.

STATE STREET BANK AND TRUST COMPANY,

Defendant.

**SPECIAL MASTER'S RESPONSE TO LIEFF CABRASER HEIMANN &
BERNSTEIN'S RESPONSE TO APRIL 13, 2020 COURT ORDER**

On April 13, 2020, the Court ordered Lieff Cabraser – who objected, in part, to the Special Master’s proposed plan for the firm to repay approximately \$1.4 million reallocated by the Court to the class and ERISA counsel [Dkt.# 599] – to move for a stay pending appeal under the standard articulated in *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987) and *Canterbury Liquors & Pantry v. Sullivan*, 999 F. Supp. 144, 149 (D. Mass. 1998) (“April 13th Order”). [Dkt# 601]. On April 15, Lieff Cabraser responded to the Court’s April 13th Order clarifying that (i) it is not seeking a formal stay pending appeal because, it contends, the Court’s February 27th Order was not an operational order;¹ and, (ii) it seeks relief only from the Special Master’s recommendation that funds potentially affected by the First Circuit’s decision on the appeal be paid out to the class and ERISA counsel if that claim is not adjudicated.² [Dkt.# 603]. As directed in the Court’s April 13th Order, the Special Master responds briefly to address the issues raised by Lieff Cabraser.

Given the lengthy delay in finalizing the fee award in this case, it is imperative that reimbursement of the class not be further delayed without just cause. The Special Master agrees with Lieff Cabraser that, in the event the First Circuit has not adjudicated its appeal, the firm should nevertheless pay its proportionate share of the \$17.2 million reallocated into the escrow account in accordance with the Master’s proposed schedule. This includes, most immediately, that Lieff Cabraser pay \$569,728.50, or approximately half of the total amount owed by the firm, into an approved escrow account by August 15, 2020. Under the Master’s proposed payment

¹ Lieff Cabraser’s view that the February 27th Order does not constitute an “operational order” because the Court did not specify timing or other details of the payment, and resubmitted those issues to the Special Master for further reporting, raises the issue whether the February 27th Order is a final judgement under Fed. R. Civ. P. 54, and thus, whether Lieff Cabraser’s appeal from that order was premature.

² Lieff Cabraser further clarified in its April 15th response that it objects that “any reduction by the First Circuit in Lieff Cabraser’s obligation be necessarily reimbursed to Lieff Cabraser by other Customer Class Counsel.” [Dkt. 603, p.3].

plan, Lieff Cabraser's \$569,728.50 would be included in the \$8.6 million redistribution to the class and ERISA Counsel made on September 15, 2020.

Lieff Cabraser objects to the Master's recommendation that the funds paid by Lieff Cabraser be distributed to the class and counsel prior to the First Circuit's adjudication of the issues raised on appeal. However, absent a decision by the First Circuit or a showing by Lieff Cabraser that its appeal presents a substantial case on the merits in an area of unsettled law, the Court's February 27th Order remains valid and in effect.³

However, it may not be necessary for the Court to resolve this issue immediately. To balance Lieff Cabraser's right to pursue its appeal with the interests of the class, the Special Master recommends that, in the event the First Circuit has not yet resolved the issues on appeal by September 15 – the date of the scheduled distribution – the Court, could, if necessary, briefly suspend the distribution under the proposed second phase to permit Lieff Cabraser to move for a stay according to the standard set forth in the Hilton and Canterbury cases. This should include, among other factors, addressing the merits of the pending appeal. The Court will thereafter evaluate the merits of the pending appeal and decide whether to distribute the \$569,728.50 paid by Lieff Cabraser into escrow.

If the First Circuit has not adjudicated Lieff Cabraser's appeal by January 15, 2021, when the second installment by Customer Class Counsel is due under the third phase of the proposed plan, the Special Master recommends a similar course be followed: that Lieff Cabraser pay the remaining \$569,728.50 balance into the approved escrow account and that, should no decision by

³ As the Court is aware, parties who are subject to a court's judgment or order to pay are generally not permitted by reason of having appealed to evade their obligation to pay the funds which are the subject of the judgment or order, absent "a strong showing that [Lieff] is likely to succeed on the merits" on appeal or extenuating circumstances. *Canterbury Liquors & Pantry v. Sullivan*, 999 F. Supp. 144, 149 (D. Mass. 1998) citing *Hilton v. Braunskill*, 481 U.S. 770,776 (1987). In *Canterbury*, this Court characterized the standard as follows "...with regard to the first prong of the Hilton test, the movant must only establish that the appeal raises serious and difficult questions of law in an area where the law is somewhat unclear." *Canterbury* at 150. The Special Master believes it is unlikely that Lieff can meet this standard.

the First Circuit be rendered by the March 15, 2021 payment date, the Court briefly delay distribution to afford Lief Cabraser the same opportunity to move for a stay of this second distribution.

Dated: April 23, 2020

Respectfully submitted,

**SPECIAL MASTER HONORABLE
GERALD E. ROSEN (RETIRED),**

By his attorneys,

/s/ William F. Sinnott
William F. Sinnott (BBO #547423)
Elizabeth J. McEvoy (BBO #683191)
BARRETT & SINGAL, P.C.
One Beacon Street, Suite 1320
Boston, MA 02108
Telephone: (617) 720-5090
Facsimile: (617) 720-5092
Email: wsinnott@barrettsingal.com
Email: emcevoy@barrettsingal.com

CERTIFICATE OF SERVICE

I hereby certify that this Notice of Appearance was filed electronically on April 23, 2020 and thereby delivered by electronic means to all registered participants as identified on the Notice of Electronic Filing (“NEF”). Paper copies were sent to any person identified in the NEF as a non-registered participant.

/s/ William F. Sinnott
William F. Sinnott