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 REPLY TO LIEFF CABRASER HEIMANN & BERNSTEIN'S RESPONSE TO APRILS 13, 2020 COURT ORDER

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* reply to Lieff Cabraser's recent filings, namely Dkts. 600 and 603.

This reply may already be authorized by the Court, which previously allowed that "[a]ny response" to Lieff's filing "shall be filed by April 27, 2020." Dkt. 601. Because CCAF is not formally a party and because it replies to both of Lieff's filings, in an abundance of caution CCAF moves for leave to file its reply. CCAF's proposed reply is attached to this motion.

CCAF has attempted to confer with the parties on the motion. All three Class Counsel firms (Labaton, Thornton, and Lieff) oppose this motion for leave. The Special Master and McTigue Law do not oppose this motion and Keller Rohrback takes no position on this motion. CCAF has not received responses from the defendant or the remaining ERISA plaintiffs' firm.

MEMORANDUM IN SUPPORT OF MOTION

In general, *amicus* briefs are liberally permitted when relevant and helpful. Dkt. 127 at 4-7. The standard for evaluating submission of a relevant and helpful exhibit should be no different. 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); Dkt. 560 (Tr. 6/24/2019) at 15 ("helpful"). The Court also previously allowed that "[a]ny response" to Lieff's filing (Dkt. 603) "shall be filed by April 27, 2020." Dkt. 601.

WHEREFORE, CCAF respectfully requests that the Court accept the attached document as a response to Lieff's filings.

Respectfully submitted,

Dated: April 27, 2020

/s/ M. Frank Bednarz

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

I certify that on April 24, 2020, 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. Thornton, Labaton and Lieff Cabraser opposes CCAF's motion. The Special Master, and McTigues Law do not oppose the motion and Keller Rohrback takes no position on the motion. At the time of filing, counsel for CCAF has not heard the position of defendant or the remaining plaintiffs firms.

Dated: April 27, 2020

/s/ M. Frank Bednarz
M. Frank Bednarz

CERTIFICATE OF SERVICE

I certify that on April 27, 2020, I served a copy of the forgoing on all counsel of record by filing a copy via the ECF system.

Dated: April 27, 2020

/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*
REPLY TO LIEFF CABRASER HEIMANN & BERNSTEIN'S APRIL 9
FILING AND LIEFF'S RESPONSE TO APRIL 13, 2020 COURT ORDER

The Hamilton Lincoln Law Institute's Center for Class Action Fairness ("CCAF") agrees with the accommodation proposed in Special Master's reply to Lieff Cabraser. Dkt. 607. While the Court directly asked Lieff Cabraser to address the "factors relevant to whether a stay is justified" (Dkt. 601), it did not. It also declined to "identif[y] the issues it intends to raise on appeal." *Id.* at 2. Lieff instead insisted that it does not seek a stay at all and merely objected to the "Master's recommendations that (a) any funds that could be affected by the First Circuit's decision on Lieff's appeal be paid out to the class and ERISA Counsel regardless of whether that appeal has been adjudicated and (b) any reduction by the First Circuit in Lieff's obligation be necessarily reimbursed to Lieff by other Customer Class Counsel." Dkt. 603 at 3. Given that Lieff does not object to *depositing* the funds into escrow, the Master correctly observes that Lieff can yet file a motion to stay the distribution money to blameless class members under the *Hilton* factors. Dkt. 607 at 3 & n.3. The Master has also already clarified that it did not "necessarily" intend the second recommendation Lieff flagged. Dkt. 606 at 4.

CCAF writes separately concerning two other aspects of Lieff's proposed course of action. First, Lieff's suggestion to forego notice would unfairly prejudice class members, who were specifically advised by previous notice that they could object following the Master's report. Second, contrary to Lieff, the Court retains jurisdictions to appoint counsel to defend the February 27 Order.

A. Prior notice sent to class members, unopposed by Lieff, promised both notice and an opportunity for class members to object.

Lieff writes "[t]here is no basis for supplemental notice to the Settlement Class, and the expense entailed by such notice, where the Settlement Class is obtaining an additional benefit over and above the terms provided in the original Settlement Notice." Dkt. 600 at 2. Lieff is mistaken in several respects.

Most importantly, class members were previously told *both* that a reduction in attorneys' fees may occur *and that they could object* to the new fee award. Notice sent to class members clearly stated

"Class members will be provided notice of the report and recommendation, and an opportunity to be heard on whether the court should adopt the Special Master's recommendations." Dkt. 202, Ex. A at 1; Ex. B at 2. Notice also referred class members to the settlement website, which included and includes all of the Court's orders, including one pertaining to this very topic:

> The court is not requiring that such objections be made in response to the notice now being issued. **Instead, the court will order that class members be sent an additional notice after the Special Master issues his Report and Recommendation, and that any objections or comments by class members be filed in response to that notice.** The form of that notice and the procedure for making such objections will be addressed in connection with the submission of the Special Master's Report and Recommendation.

Dkt. 192 (March 31, 2017 Order) at 5.

No such notice or opportunity has been provided, and Lieff offers no reason to pull the rug out from a plan they did failed to oppose over the course of three years. Lieff did not previously oppose supplemental notice or objection concerning the fee award. While the Court amended some terms of the proposed notice on April 11, 2017 (*See* Dkt. 200), the opportunity to be heard was an essential part of the 2017 notice at least since Labaton filed its proposal on March 27, 2017. Dkt. 188. In fact, Labaton's proposed notice was even more specific on this matter: "[i]f any Class Member wishes to object to the award of attorneys' fees, litigation expenses, and service awards previously authorized by the Court, you will be given the opportunity to do so within [45] days after the Special Master issues his report and recommendation." Dkt. 188-1 at 4-5. Lieff had plenty of time to oppose co-lead counsel's proposal, but they did not. Even non-party *amicus* CCAF managed to file a response to Labaton's proposed motion, suggesting that both email and postal notice be used. Dkt. 189 at 2 n.2. This was ultimately done, even though earlier declarations had suggested it impossible. *See* Dkt. 203 (Order demanding explanation for previous representation class counsel

"does not have email addresses for class members").[1] Labaton also filed an emergency motion to amend certain parts of the notice that the Court drafted. Dkt. 195. Lieff remained silent throughout, and did not object to the purported baselessness of notice until April 9, 2020.

Lieff unconscionably requests that the Court foreclose the promised opportunity for class members to be heard. The lack of promised further notice might be especially puzzling to class members expecting the Master's report to issue by "October 10, 2017." Dkt. 202, Ex. B at 2. Of course, the appalling failure of Lieff (and Labaton) to disclose the even the existence of the Chargois referral fee arrangement necessitated the delay. Especially due to this unexpected discovery and the delay it caused, the Court should make good on its promise to hear from class members.

As a general matter, whenever a court is contemplating "material alterations to the settlement," "[c]lass members should be notified." *In re Baby Prods. Antitrust Litigation*, 708 F.3d 163, 176 n.10 (3d Cir. 2013). This principle applies to matters of class counsel's fees as well, because under Rule 23(h), class members are entitled to accurate, complete notice and a fair opportunity to object to counsel's fee requests. *See, e.g., In re Mercury Interactive Secs. Litig.*, 618 F.3d 988, 994 (9th Cir. 2010); *accord Redman v. Radioshack Corp.*, 768 F.3d 622, 637-38 (7th Cir. 2014). Notice allows unopposed fee requests to receive "the closest and most systematic scrutiny before gaining judicial approval." *Weinberger v. Great Northern Nekoosa Corp.*, 925 F.2d 518, 526 (1st Cir. 1991). While courts sometimes forgo notice when a settlement has been unambiguously improved, that has not

[1] Given the COVID-19 pandemic, which likely keeps many class member employees out of their offices, both email and postal notice should again be employed. CCAF agrees with the Master that paper notice should be mailed, but hopes that the Court specifies that emails *also* be sent where possible. The Master refers to both electronic and hard copy notice, but is unclear what the electronic notice entails. Dkt. 599 at 9-10. The administrator should again supplement their email list with additional addresses that may have received through inquiries over the intervening 35 months. *See* Dkt. 205-2 (Eric Miller Decl.) at 2 (explaining how administrator obtained some email addresses from class inquiries sent to the settlement email address).

happened here. Instead, new misconduct came to light which further called the original fee award into question. It would be unfair to insist that class members would have needed to object by October 7, 2016 based on the materially false and misleading record that existed on that date.

Most preposterously, Lieff complains about the "expense entailed" of the notice. Dkt. 600 at 3. The administrator sent 1,945 paper copies of the notice in 2017. Dkt. 202. Given that the Master's new proposed notice can surely fit be sent with one ounce postage. Given Lieff's generous estimate of the value of their time, their filings were likely more "expensive" than class notice.

The Court should make good on its promise to allow class members to object. As it rightly observed, "in view of the fact that the award of 20% of the common fund is above the median and mean for settlements between $100,000,000 and $500,000,000 reported in the Fitzpatrick Study, it is possible that, in view of the court's findings, an objector may assert that the award is too generous." Dkt. 590 (February 27 Order) at 155 n.22.

B. The Court retains jurisdiction in these proceedings, may appoint a guardian *ad litem*, and may tax costs of such appointment to Lieff.

Lieff incorrectly contends that "the Court has no jurisdiction either to (a) appoint counsel to represent the Court in defending the February 27 Order, or (b) impose 'costs occasioned by the appeal' on Lieff Cabraser." Dkt. 600 at 3. Both claims are false.

CCAF agrees with the Master that the Court should appoint counsel to defend the February 27 Order on appeal. Dkt. 599 at 13. Several filings explain why the court should appoint a guardian *ad litem* to protect the class's interests. Dkt. 451 at 5-7, 11-20; Dkt. 420 at 14-22, Dkt. 154 at 6-13; Dkt. 127 at 8-12. The appointment of a guardian *ad litem* enables a "genuinely adversarial process" and "serve[s] to enhance the accuracy and legitimacy of fee awards." *Laffitte v. Robert Half Int'l., Inc.*, 376 P.3d 672, 691 (Cal. 2016) (Liu, J., concurring). The costs of such representation "'pale in comparison to the significant amounts of money' to be divided between plaintiffs and counsel in

high-value cases." *Laffitte*, 376 P.3d at 691 (quoting William Rubenstein, *The Fairness Hearing: Adversarial and Regulatory Approaches*, 53 UCLA L. Rev. 1435, 1455 (2006)).

CCAF reminds the Court of its motion for appointment as guardian *ad litem* and confirms it remains willing to serve in this role. (Motion filed at Dkt. 126, amended and expanded at Dkt. 451.) The Court has repeatedly observed that the motion for appointment as guardian *ad litem* remains under advisement. Dkts. 410 at 3; 445 at 2; 519 (Tr. 11/7/2018) at 96; 549 at 2. The Court previously expressed concern that a guardian *ad litem* might appeal unnecessarily (Dkt. 519 (Tr. 11/7/2018) at 95), but this is no longer a risk. The time for a cross-appeal has elapsed, and the guardian's mandate appointing a guardian could limited it to serving as appellee against this existing appeal.

CCAF is well-positioned to provide such assistance. CCAF has experience as an *amicus* defending district court decisions in otherwise *ex parte* appeals. *See Adams v. USAA et. al.*, Nos. 16-3382, -3482 (8th Cir.) (defending district court's imposition of sanctions for plaintiffs' forum shopping by dismissing complaints and refiling settlement in state court with less scrutiny); *House v. Akorn, Inc.*, No. 19-2401, -2408, No. 42 (7th Cir.) (granting motion to file *amicus* brief defending district court's exercise of its inherent authority by ordering the return of attorneys' fee to defendant). It would bill at the modest and previously-quoted rates, which are discounted from rates it has been awarded in other cases and approximately *half* the rates used to award to Lieff in this case. Dkt. 451 at 5.[2] CCAF's lengthy participation in this case has been substantive, meaningful, and helpful, as it recently recounted. Dkt. 592-1 at 2-8.

[2] As previously explained (Dkt. 592-1 at 15), CCAF does not believe it would need the full assistance of Burch, Porter & Johnson, PLLC to defend an appeal, which is a more limited engagement than proceedings before the Master would have been. CCAF might transparently engage Gary Peeples, the Burch Porter attorney who has spent the most time in this case, at his previously-quoted rate of $275/hour. Dkt. 451 at 15.

Moreover, if appointed as guardian *ad litem* CCAF's advocacy would be consistent with its past work in this case. CCAF advocated an even smaller overall fee award than what the Court recommended, so would not be in the awkward position that the Master would find himself in if appointed—defending a fee award *smaller* than what he previously recommended. At no time was CCAF charged with acting as an impartial umpire, so further advocacy could in no way color earlier proceedings.

Lieff oddly relies on authority that the Court may not appoint an advocate to defend a *sua sponte* finding that Rule 11 has been violated. But the Court did not impose sanctions in its fee order, and certainly did not sanction Lieff for violating Rule 11. While Lieff may prefer to mischaracterize the February 27 order as a *sua sponte* sanction—ostensibly because of the limits on monetary Rule 11(c)(3) sanctions—in reality this Court issued its order under Rule 23(h), not Rule 11. It does not become a Rule 11 order merely because this Court found Lieff's performance "deficient." Dkt. 590 at 123. "[A] jurist's derogatory comments about a lawyer's conduct, without more, do not constitute a sanction." *In re* Williams, 156 F.3d 86, 92 (1st Cir. 1998). Indeed, a reasonable fee award should take into account counsel's deficiencies (i.e. overbilling and exaggerating the initial fee request). *See First State Ins. Group v. Nationwide Mut. Ins. Co.*, 402 F.3d 43, 44 (1st Cir. 2005). In fact, the Court *rejected* suggestions by the Master (and CCAF) to sanction the other class counsel firms. Although the Court considered misconduct in setting an overall fee award, "the court is neither imposing sanctions nor denying a fee award to any attorney or firm because of misconduct." Dkt. 590 at 86. Lieff denies it will challenge the overall fee award (Dkt. 600 at 3), so the Court's Rule 11 findings (and Lieff's Rule 11 caselaw) has little relevance to their appeal. The February 27 Order is not primarily a Rule 11 decision, but a Rule 23(h) fee order. But for this order, Lieff would not be entitled to keep *any* of the fees it previously collected the now-vacated 2016 order. Dkt. 331. *See Dale*

M. v. Bd. of Educ. of Bradley-Bourbonnais High Sch., 282 F.3d 984, 985-86 (7th Cir. 2002) (finding inherent authority to require disgorgement of fee award attorney was not entitled to keep).

The Court's authority to appoint counsel to represent class interests instead traces to Rule 23 and the fiduciary duty owed to absent class members. "Because the common-fund doctrine places the plaintiff's counsel in a position that is directly adverse to the class, a court can use its supervisory authority under Rule 23 to appoint a guardian *ad litem* to represent the class on the issue of attorneys' fees." William D. Henderson, *Clear Sailing Agreements: A Special Form of Collusion in Class Action Settlements*, 77 TULANE L. REV. 813, 817 (2003); *e.g., Gottlieb v. Barry*, 43 F.3d 474, 490 (10th Cir. 1994) (endorsing possibility of appointing guardian *ad litem*, though holding it not required); *Miller v. Mackey Int'l, Inc.*, 70 F.R.D. 533, 535 (S.D. Fla. 1976) (appointing *guardian ad litem* to act on behalf of class members in conjunction with class counsel's fee motion); *Haas v. Pittsburgh Nat'l Bank*, 77 F.R.D. 382, 383 (W.D. Pa. 1977) (same). This enables a "genuinely adversarial process" and "serve[s] to enhance the accuracy and legitimacy of fee awards." *Laffitte v. Robert Half Int'l., Inc.*, 376 P.3d 672, 691 (Cal. 2016) (Liu, J., concurring).

CCAF also agrees with the Master that Lieff alone bear all costs of its appeal. A guardian's fee, like a class-action common-fund award, is determined by considerations of equity. *In re Fleet/Norstar Secs. Litig.*, 935 F. Supp. 99, 117 (D.R.I. 1996) (guardian); *compare United Steelworkers of Am. v. Sadlowski*, 435 U.S. 977, 979 (1978) (class counsel). As between the class counsel firms and absent class, "equity requires that the loss, which in consequence thereof must fall on one of the two, shall be borne by him by whose fault it was occasioned." *Neslin v. Wells*, 104 U.S. 428, 437 (1882). "While a court of equity will on swift wings fly to relieve the innocent from wrong and injury, it travels with leaded feet and turns a deaf ear, when called on to furnish a cloak of righteousness to cover sin." *Official Comm. of Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP*, 322 F.3d 147, 158 (2d Cir. 2003) (cleaned up). Happily, such a fee arrangement may also deter

marginal or frivolous arguments on appeal because Lieff would know it must pay twice for such arguments. CCAF is so confident that the Court soundly exercised its discretion, so is willing to make its appellate fees contingent on successfully defending Lieff's appeal—provided that CCAF can also recover fees related to any subsequent collateral challenge to its fees or spiteful multiplication of proceedings.[3]

Finally, the Court was not divested of jurisdiction by Lieff's appeal. Neither Lieff nor the Master address the issue, but the First Circuit is among those finding that a district court retains jurisdiction over "orders relating to procedures in aid of the appeal." *United States v. Brooks*, 145 F.3d 446, 456 (1st Cir. 1998) (quoting S*pound v. Mohasco Indus., Inc.*, 534 F.2d 404, 411 (1st Cir. 1976)). District courts have found that such orders include "jurisdiction over the motion for court-appointed appellate counsel" because "[r]esolving it would act in aid of the appeal." *Marshall v. United States*, No. 18-cv-21810, 2019 U.S. Dist. LEXIS 76094, *15 (S.D. Fla. May 3, 2019) (granting prisoner appellant's motion for court-appointed counsel); *Richie v. Wharton County Sheriff Dep't STAR Team*, No. 09-cv-0464, 2012 U.S. Dist. LEXIS 100115, *6 (S.D. Tex. Mar. 30, 2012) (same). Alternatively, the First Circuit might consider such an order as an indicative ruling stating that it would appoint a guardian. *United States v. Maldonado-Rios*, 790 F.3d 62, 65 (1st Cir. 2015) (per curiam) (treating a sentencing court's post-appeal order as an indicative ruling under Federal Rule of Appellate Procedure 12.1 when there was doubt about whether it had been divested of authority).

[3] CCAF maintains it may also be awarded fees from earlier work (Dkt. 592-1), but any work caused by Lieff's appeal should be paid exclusively by Lieff.

Respectfully submitted,

Dated: April 27, 2020

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