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 RESPONSE TO COURT'S SEPTEMBER 14, 2020 ORDER [DKT. 634], THE SPECIAL MASTER'S PROPOSED REVISED PAYMENT PLAN [DKT. 636], AND LIEFF CABRASER'S RESPONSE [DKT. 638]

As allowed by the Court's Order (Dkts. 637), the Hamilton Lincoln Law Institute's Center for Class Action Fairness ("CCAF") provides its views regarding the Special Master's Response (Dkt. 636), Lieff Cabraser's Response (Dkt. 638) and topics for discussion at the September 22 hearing.

A. Agenda for the September 22 Hearing

The Special Master and Lieff Cabraser (Dkt. 638) have identified several topics to address at the hearing, and CCAF agrees that all of them should be resolved:

1. Approval of the Revised Payment Plan to amend Dkt. 619 (Dkt. 636 at 3);
2. Addressing the finality of the Court's order (*id.*);
3. Repayment by Lieff Cabraser in the event it appeals again (*id.*);
4. Whether Lieff Cabraser's repayments will be held in escrow (Dkt. 638 at 2-3); and
5. Whether a hearing should occur 45 days before the second supplemental distribution (*id.* at 2).

CCAF would add an additional topic to this list:

6. The status of the Court's retention of counsel to represent it in Lieff Cabraser's likely new appeal. *See* Dkt. 611.

This topic relates to the amount of time that another First Circuit appeal may take.

CCAF flags an additional concern that Lieff Cabraser may argue that such appointment would make the Court a party to the proceedings and require the disqualification. *Cf. In re Flynn*, No. 20-5143, 2020 U.S. App. LEXIS 27670, *20 (D.C. Cir. Aug. 31, 2020) (divided panel refusing to find a violation of 28 U.S.C. 455 because "the District Judge has not become a party to the proceeding below. "'[P]roceeding" includes pretrial, trial, appellate review, or other stages of litigation,' 28 U.S.C. § 455(d)(1)—but, contrary to the contention of the dissent … a petition for a writ of mandamus is a separate action."). CCAF could not find authority

suggesting that a district court's participation in a direct appeal would merit disqualification, but Lieff Cabraser may raise the issue in their forthcoming appeal.

CCAF again 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 at Dkt. 451, updated further at Dkt. 610.) The Court has repeatedly observed that the motion for appointment as guardian *ad litem* remains pending and under advisement. Dkts. 410 at 3; 445 at 2; 519 (Tr. 11/7/2018) at 96; 549 at 2; 611 at 2. If appointed for the limited purpose of appeal, CCAF would not require any outside attorneys to assist it.

As Guardian, CCAF would *not* represent the Court, but instead absent class members currently ill-served by Lieff Cabraser, which obscenely suggests that class members should effectively—and without notice—spot Lieff a $1.14 million loan to fund an escrow account.

B. CCAF's Views on the Issues

CCAF agrees with the Special Master in all respects. In particular, Lieff Cabraser should repay the common fund as the Revised Payment Plan (Dkt. 636-1) prescribes. And, if Lieff prevails in their appeal, it can then petition the Court for relief, and "[s]uch relief should not be re-captured from monies paid to the class members." Dkt. 636 at 3. The Special Master's plan should be adopted for several reasons.

In the first place, Lieff Cabraser continues to seek a stay of judgment and *still* fails to respond to the Court's April order to address "factors relevant to whether a stay is justified." Dkt. 601. The escrow payment even more clearly effectuates a stay than it did months ago—the First Circuit will very unlikely resolve an appeal that Lieff hasn't even filed yet, causing prejudice to absent class members.

If Lieff Cabraser *had* properly moved for a stay, it should not be granted precisely because an escrow fund *does* harm the class. Lieff cavalierly volunteers that its absent clients,

"2,400 sophisticated institutions, may readily be paid any funds owed to it out of Lieff Cabraser's escrowed contributions," but they do not provide any evidence for this assertion. It is false. Lieff Cabraser effectively wants its clients to lend $1,139,457 to establish an escrow account for Lieff's benefit in the unlikely event their appeal results in an increase of attorneys' fees.[1] This delay is especially notable because Lieff Cabraser's own conduct—including its failure to disclose documents and knowledge it possessed about the Chargois arrangement (Dkt. 357 at 119)—has already greatly delayed class compensation. If the funds are placed into escrow, as Lieff requests, class members will collectively be paid $1,139,457 less in the supplemental distributions than would otherwise occur.

This harms class members, because Lieff effectively proposes a *third* supplemental distribution to occur after it loses its appeal, and some class members will not be paid that would otherwise get a larger check in earlier distributions. Whereas the earlier distributions likely include significant residual funds from the first distribution, Lieff's *de facto* third supplemental distribution will require additional administration costs and distribute a much

[1] Based on its opening briefs in its now-dismissed appeal, Lieff Cabraser frames their appeal as an error of law based on the Court's supposed failure to provide notice to impose Rule 11 sanctions. No. 20-1365 (1st Cir. June 6, 2020). Whatever the merits of this argument, Lieff Cabraser does not clearly show prejudice in the attorneys' fee award. This Court held it was "not imposing sanctions or denying attorneys' fees," based on Rule 11 findings. Dkt. 590 at 127. 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. Thus, Lieff Cabraser's appeal seems constitutionally incapable of altering the Rule 23(h) award.

smaller residual from the prior distributions, such that not much more than $1.14 million would be paid. Most class members would get exceedingly small checks from the third supplemental distribution Lieff Cabraser proposes. For example, based on the administrator's figures, the median recognized loss is $918.94 out of about $74 million in recognized losses. If the class were to divide up the proceeds of Lieff's $1.14 million, the payment to the median class members would be $14.14. In fact, excessively large swaths of the class would not be paid at all—about 45% of class members have recognized losses of less than about $650—which would be worth less than $10 a piece in a subsequent distribution of $1.14 million. Whereas many class members could be paid small additional amounts in the first supplemental distribution due to the corpus of residual funds, adopting Lieff Cabraser's escrow would freeze out nearly half the class from the *de facto* third supplemental distribution.

Even for class members with larger claims, receiving increasingly small checks imposes real administrative costs. Public pension funds are is not indifferent to receiving fewer checks worth more money and many checks worth little money. The class would clearly prefer fewer, larger checks—even before considering the additional administrative costs involved, which Lieff Cabraser conspicuously does not offer to pay.

To the extent that Lieff Cabraser might alternatively suggest the Court should withhold money from ERISA counsel, this doesn't make sense either. Lieff Cabraser has even less cause to secure an escrow against money awarded to ERISA counsel. ERISA counsel—respected and mature law firms—could repay the funds in the unlikely event Lieff prevails on appeal.[2] As the Special Master correctly observed: "[s]uch relief should not be re-captured from monies paid to the class members." Dkt. 636 at 3.

[2] CCAF agrees with ERISA counsel (Dkt. 639) that the equities do not favor transferring funds from blameless ERISA counsel to enhance Lieff Cabraser's fee award. CCAF only observes, for the sake of argument, that no escrow is necessary against other firms in this case.

Almost four years ago Lieff Cabraser unjustly deposited $16.3 million for its own benefit, while simultaneously concealing fee agreements from ERISA counsel (Dkt. 590 at 149), the named plaintiff (*id.* at 153), and the Court. Lieff Cabraser continued to conceal these arrangements even after this Court appointed a Special Master to investigate the fee awards. The Court's order corrects this injustice, and it should be implemented.[3]

Respectfully submitted,

Dated: September 21, 2020

/s/ M. Frank Bednarz

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[3] Should Lieff Cabraser move to stay execution of judgment, CCAF requests leave to file a brief in opposition to the motion.

CERTIFICATE OF SERVICE

I certify that on September 21, 2020, I served a copy of the forgoing on all counsel of record by filing a copy via the ECF system.

Dated: September 21, 2020

/s/ M. Frank Bednarz
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