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 RENEWED MOTION
FOR APPOINTMENT AS GUARDIAN *AD LITEM* FOR THE CLASS

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INTRODUCTION

As permitted by the Court's September 29 Order (Dkt. 646), *amicus curiae* the Hamilton Lincoln Law Institute's Center for Class Action Fairness ("CCAF") renews its motion for appointment as guardian *ad litem*. This motion supersedes all prior filings, and proposes a limited engagement for CCAF to defend on appeal the Court's February 27 Memorandum and Order ("Fee Order," Dkt. 590).

The motion is warranted because otherwise the interests of class members will not be represented on appeal. At the recent hearing, counsel for Lieff Cabraser Heimann & Bernstein LLP ("Lieff") emphasized ***four times*** that "our principal concern is that the money not be distributed to the class … our view would be, in the event that we prevail, it will be -- well, at the expense of the class, not of co-counsel." Dkt. 642, Tr. 9/22/2020 ("Tr.") at 14-15; *see also id.* at 13, 34, and 35. Lieff's position diametrically opposes class member interests, and for a very simple reason: co-lead counsel has attorneys who would strongly oppose any further reduction of their fee awards, as they made clear at the hearing. *Id.* at 17. In contrast, absent class members have no advocate to protect their interests before the First Circuit. By appointing CCAF as guardian *ad litem* the Court corrects this asymmetry.

CCAF moves for appointment if *and only if* an appeal is taken from the final fee order, and for the limited purpose of defending the fee order on appeal. CCAF offers its services on a contingency basis: that it will only be entitled to fees if final fee order is affirmed with respect to the distribution of attorneys' fees to the appealing firms. CCAF requests that any appealing law firms be ordered to deposit a total of $400,000 in escrow to cover CCAF's fees, and that CCAF will make an application to the Court for attorneys' fees following the appeal (if CCAF is successful). CCAF will apply for fees on a lodestar basis, but reserves the right to request a multiplier in the event of a collateral challenge to its billing.

CCAF attempted to confer on this motion. Thornton, Labaton, and Lieff oppose the motion.

The Special Master takes no position except to the extent that he opposes payment from the common fund. CCAF has not heard from defendant or ERISA counsel on the motion.

MEMORANDUM IN SUPPORT OF THE MOTION

Lieff intends to appeal final judgment implementing the Court's Fee Order, and it aims to increase its own fee award at the expense of the class. In its now-dismissed appeal, Lieff argued that the overall fee award should be increased—with respect to Lieff's fee award—and it intends to renew this argument "when Lieff Cabraser files a new appeal." Dkt. 648 at 2-3. Lieff seeks payment from the voiceless—not from fellow law firms who will fight back. As Mr. Heimann explained, Lieff seeks fees "at the expense of the class, not of co-counsel." Tr. at 15.

The class needs an advocate on appeal.

Without action by the Court, no party will have both the standing *and* an incentive to defend class interests on appeal. Co-lead counsel's interest extends only as far as preventing *their* fees from being diminished. *Id.* at 17.

In precisely this situation, 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). CCAF remains willing to serve as guardian *ad litem*, and is well-qualified to do so. This motion supersedes all prior motions for appointment.[1]

CCAF would undertake the engagement on favorable terms. CCAF proposes payment on strictly contingent terms—meaning that CCAF will not be entitled to attorneys' fees unless the final fee distribution is affirmed with respect to the appealing firm(s). Therefore, if Lieff (or any other appellant) truly believes their appeal will enhance their attorneys' fee award, they need not worry about CCAF's motion: appellants do not pay a cent to CCAF unless it is successful. CCAF proposes that its

[1] *See* Dkt. 451 at 5-7, 11-20; Dkt. 420 at 14-22, Dkt. 154 at 6-13; Dkt. 127 at 8-12.

fees be paid out of a $400,000 escrow amount paid by the appealing firm(s). After appeal(s) are successfully concluded in favor of the class's interests, CCAF would apply for payment much as the Special Master has—using lodestar billing at rates comparable to or lower than the rates awarded to class counsel. That said, CCAF reserves its right to seek a multiplier if class counsel challenges the fee award. In this way, CCAF hopes to avoid collateral challenge so that no multiplier will be sought or paid.

No reason exists to deny this modest appointment. While Lieff claims not to oppose the Court's suggestion to appoint counsel to defend the Fee Order on appeal (Tr. at 26-27), such appointment still effectively makes the Court a party on the appeal. Contrary to Lieff, the First Circuit has not endorsed the arrangement. *Id.* at 27. Contrary to Lieff's suggestion at the hearing, the failure of a public pension fund to object does not imply endorsement of Lieff's appeal, and the class continues to need protection. Lieff (or other appellants) should bear the costs of such appointment.

Therefore, CCAF moves for appointment as guardian *ad litem*—if *and only if* any class counsel firms appeal the finalized Fee Order, and for the limited engagement of defending the fee order in the First Circuit on a contingency basis.

I. A guardian *ad litem* may be appointed in this situation, and such representation would well-serve the class and the First Circuit.

While class counsel firms and ERISA counsel may respond as appellees in a fee appeal, their interests lie in protecting their own fee awards. For this reason, Lieff's core argument—that money should be taken from the class common fund (Dkt. 648)—will likely remain uncontested without the involvement of an advocate like a guardian *ad litem*.

Just like a district court evaluating a settlement without objectors, an appellate court deciding an *ex parte* appeal is put at an inherent "disadvantage." *Eubank v. Pella Corp.*, 753 F.3d 718, 720 (7th Cir. 2014). "Even the most dedicated trial judges are bound to overlook meritorious cases without the benefit of an adversary presentation." *Bounds v. Smith*, 430 U.S. 817, 826 (1977). To reintroduce a

thorough-going adversarial presentation of the issues, courts routinely appoint *amici* to argue on behalf of the unrepresented side. *See, e.g., Cardinal Chem. Co. v. Morton Int'l*, 508 U.S. 83, 104 (1993) (Scalia, J., concurring) ("[W]hen faced with a complete lack of adversariness" it is common practice for federal courts to "appoint[] an amicus to argue the unrepresented side." (listing Supreme Court cases); *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024, 1030 (D.C. Cir. 2004).

The lack of adversarial process is doubly problematic in the fee-setting stage of a class action where conflicts of interest between class counsel and class members are endemic. *Pearson v. NBTY, Inc.*, 772 F.3d 778, 787 (7th Cir. 2014) ("acute conflict of interest"); *Redman v. Radioshack Corp.*, 768 F.3d 622, 629 (7th Cir. 2014) ("built-in conflict of interest"); *In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1178 (9th Cir. 2013) ("the interests of class members and class counsel nearly always diverge."). Attorneys' fees disputes in an aggregate litigation context present a prototypical situation warranting third-party appointments. Even a "clear sailing" settlement clause can thus "depriv[ing] the court of the advantages of the adversarial process." *Weinberger v. Great N. Nekoosa Corp.*, 925 F.2d 518, 525 (1st Cir. 1991). Confronting an otherwise *ex parte* appeal from class counsel, the First Circuit in *Weinberger* granted the Maine Attorney General leave to file a brief and participate in oral argument as an amicus opposing class counsel's appeal. *Id.* at 525 n.8. The *Weinberger* opinion itself reflects the Maine AG's generalized "concern that that negotiated attorneys' fees in plaintiffs' class actions can be a potential source of abuse." *Id.*

But even without an explicit "clear sailing" clause, a common fund settlement structure results in the same "diluted—indeed, suspended" "adversary system." *Goldberger v. Integrated Res.*, 209 F.3d 43, 52 (2d Cir. 2000). After a common fund all-in sum has been negotiated, defendants care not how the settlement fund is divided, and individual class members lack the incentive to intervene simply in hopes of a "miniscule *pro rata* gain." *Id.* at 52-53 (citing *In re Continental Ill. Sec. Litig.*, 962 F.2d 566, 573 (7th Cir. 1992)); *see also Hill v. State St. Corp.*, 794 F.3d 227, 231 (1st Cir. 2015) ("it is hard to see why defendants would have cared very much how the money they paid was divided"). Lay class

members were especially unlikely to object here because of the lack of adequate disclosure in the moving fee papers—especially ironic in a case complaining that class members were the victims of unfair and deceptive practices. "[T]he conflict between a class and its attorneys may be most stark where a common fund is created and the fee award comes out of, and thus directly reduces, the class recovery." *Weinberger*, 925 F.2d at 524. Thus, the Second Circuit appointed *amicus* counsel to argue in support of the district court's decision to limit contingency fees. *In re World Trade Ctr. Disaster Site Litig.*, 754 F.3d 114, 121 n.4 (2d Cir. 2014). There, *amicus* counsel vindicated the district court's concern that "overcompensation of attorneys would take away money from needy plaintiffs, and…[its] rightful[] sensitiv[ity] to the public perception of overall fairness." *Id.* at 127.

The conflict here is much more stark. At the recent hearing, Lieff emphasized ***four times*** that "our principal concern is that the money not be distributed to the class … our view would be, in the event that we prevail, it will be -- well, at the expense of the class, not of co-counsel." Dkt. 642, Tr. 9/22/2020 ("Tr.") at 14-15; *see also id.*at 13, 34, and 35.

Through its oversight responsibility, the court itself assumes a derivative fiduciary obligation as a "guarantor of fairness" to class members. *Weinberger*, 925 F.2d at 525 . That "obligates it not to accept uncritically what lawyers self-servingly suggest is reasonable compensation for their services"; instead, it must exercise the "closest and most systematic scrutiny" *Id.* at 525-26. Too often though, an *ex parte* unopposed fee proceeding leads to a rubber stamping of class counsel's proposed fee order. *See, e.g.*, *Marshall v. Deutsche Post DHL & DHL Express (USA) Inc.*, 2015 U.S. Dist. LEXIS 125869, at *2 (E.D.N.Y. Sept. 21, 2015) ("Without the adversarial process, there is a natural temptation to approve a settlement, bless a fee award, sign a proposed order submitted by plaintiffs' counsel, and be done with the matter"). That in turn, leads to "proposed orders masquerading as judicial opinions" and ultimately, an entire self-sustaining jurisprudence that has become "so generous to plaintiffs' attorneys." *Fujiwara v. Sushi Yasuda Ltd.,* 58 F. Supp. 3d 424, 436 (S.D.N.Y. 2014). There is no better time than now to break the deleterious cycle.

Just as "meritorious objectors can be of immense help to a district court in evaluating the fairness of a settlement," so too can an appointed class guardian aid in scrutinizing fee submissions. *Bezdek v. Vibram USA, Inc.*, 809 F.3d 78, 84 n.3 (1st Cir. 2015). "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 *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*, 376 P.3d at 691 (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)).

II. CCAF is uniquely experienced for appointment as guardian.

CCAF is well-positioned to provide its 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). CCAF's lengthy participation in this case has been substantive, meaningful, and helpful. Dkt. 592-1 at 2-8.

A. The non-profit CCAF specializes in this area of law.

The Center for Class Action Fairness currently consists of four attorneys who specialize in litigating on behalf of class members against unfair class action procedures and settlements. *See, e.g.*, *Pearson v. NBTY, Inc.*, 772 F.3d 778, 787 (7th Cir. 2014) (praising CCAF's work); *In re Dry Max Pampers Litig.*, 724 F.3d 713, 716-17 (6th Cir. 2013) (describing CCAF's client's objections as "numerous, detailed and substantive") (reversing settlement approval and certification); *Richardson v. L'Oreal USA, Inc.*, 991 F. Supp. 2d 181, 205 (D.D.C. 2013) (describing CCAF's client's objection as "comprehensive and sophisticated" and noting that "[o]ne good objector may be worth many frivolous objections in ascertaining the fairness of a settlement") (rejecting settlement approval and certification). Each of the CCAF attorneys has years of experience representing objectors to class action settlements, and most have years of prior experience in civil litigation. *Id.*

CCAF has won more than two hundred million dollars 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, 2016) ($100 million at time). *See also, e.g., McDonough v. Toys "R" Us*, 80 F. Supp. 3d 626, 661 (E.D. Pa. 2015) ("CCAF's time was judiciously spent to increase the value of the settlement to class members") (internal quotation omitted); *In re Citigroup Inc. Secs. Litig.*, 965 F. Supp. 2d 369 (S.D.N.Y. 2013) (reducing fees, and thus increasing class recovery, by more than $26 million to account for a "significantly overstated lodestar"); *In re Apple Inc. Sec. Litig.*, No. 5:06-cv-05208-JF, 2011 U.S. Dist. LEXIS 52685 (N.D. Cal. May 17, 2011) (parties nullify objection by eliminating *cy pres* and augmenting class fund by $2.5 million). CCAF does not object to simply "r[un] up a tab with minimal value added." *See In re Southwest Airline Voucher Litig.*, 898 F.3d 740, 746 (7th Cir. 2018).

CCAF has received national acclaim for its work. *See, e.g.*, Adam Liptak, *When Lawyers Cut Their Clients Out of the Deal*, N.Y. Times, Aug. 13, 2013 (calling CCAF director "the leading critic of abusive class action settlements"); Roger Parloff, *Should Plaintiffs Lawyers Get 94% of a Class*

Action Settlement?, Fortune, Dec. 15, 2015 (calling CCAF director "the nation's most relentless warrior against class-action fee abuse"); The Editorial Board, *The Anthem Class-Action Con*, Wall St. J., Feb. 11, 2018 (opining "[t]he U.S. could use more Ted Franks" while covering CCAF's role in exposing "legal looting" in the Anthem data breach MDL, including by lead class counsel Lieff).

CCAF has a particularly strong record of appellate advocacy. It has won reversal or remand in sixteen federal appeals, which have help reshape the law governing class action settlements, ensuring class members secure real recovery with reasonable fees.[2] Several of these appeals centered around excessive fee awards. *E.g., Redman*; *Pearson*; *Bluetooth.*

CCAF's non-profit status also makes it an excellent choice for appointment. CCAF moved from the Competitive Enterprise Institute to the Hamilton Lincoln Law Institute ("HLLI") in February 2019. At its new home at HLLI, CCAF remains a § 501(c)(3) non-profit qualified to receive attorneys' fees for its legal work. Tax rules precludes CCAF attorneys from personally profiting from any fee award. *See* Dkt. 647-1 ¶ 6.

While Hamilton Lincoln Law Institute ("HLLI"), as a non-profit, is limited in the total awards of fees it may receive in any given five-year period, Rev. Proc. 92-59, 1992-2 C.B. 411, its non-profit

[2] *Frank v. Gaos*, 139 S. Ct. 1041 (2019); *Berni v. Barilla S.P.A*, 964 F.3d 141 (2d Cir. 2020); *Pearson v. Target Corp.*, 968 F.3d 827 (7th Cir. 2020); *In re Lithium Ion Batteries Antitrust Litig.*, 777 Fed. Appx. 221 (9th Cir. 2019) (unpublished); *In re Google Inc. Cookie Placement Consumer Privacy Litig.*, 934 F.3d 316 (3d Cir. 2019); *In re EasySaver Rewards Litig.*, 906 F.3d 747 (9th Cir. 2018); *In re Subway Footlong Mktg. Litig.*, 869 F.3d 551 (7th Cir. 2017); *In re Target Corp. Customer Data Sec. Breach Litig.*, 847 F.3d 608 (8th Cir. 2017); *In re Walgreen Co. Stockholder Litig.*, 832 F.3d 718 (7th Cir. 2016); *In re EasySaver Rewards Litig.*, 599 Fed. Appx. 274 (9th Cir. 2015) (unpublished); *In re BankAmerica Corp. Secs. Litig.*, 775 F.3d 1060 (8th Cir. 2015); *Pearson v. NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014); *Redman v. RadioShack Corp.*, 768 F.3d 622 (7th Cir. 2014); *In re MagSafe Apple Power Adapter Litig.*, 571 Fed. Appx. 560 (9th Cir. 2014) (unpublished); *In re Dry Max Pampers Litig.*, 724 F.3d 713 (6th Cir. 2013); *In re HP Inkjet Printer Litigation*, 716 F.3d 1173 (9th Cir. 2013); *In re Baby Products Antitrust Litigation*, 708 F.3d 163 (3d Cir. 2013); *Dewey v. Volkswagen*, 681 F.3d 170 (3d Cir. 2012); *Robert F. Booth Trust v. Crowley*, 687 F.3d 314 (7th Cir. 2012); *Nachshin v. AOL, LLC*, 663 F.3d 1034 (9th Cir. 2011); *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935 (9th Cir. 2011).

status does not preclude it from being awarded fees as any other counsel. Pro bono and/or non-profit representation does not preclude a request for attorneys' fees of the same size that a for-profit firm could recover. *E.g., In re Primus*, 436 U.S. 412, 429-31 (1978) (ACLU and NAACP); *Blum v. Stenson*, 465 U.S. 886, 894-95 (1984) (pro bono publico representation not grounds for reducing attorneys' fees); *Cuellar v. Joyce*, 603 F.3d 1142 (9th Cir. 2010) ("The fact that Cuellar's lawyers provided their services pro bono does not make a fee award inappropriate."); *Hutchinson ex rel. Julien v. Patrick*, 636 F.3d 1, 16 (1st Cir. 2011) (affirming award to nonprofit Center for Public Interest).

B. CCAF's extensive experience in this litigation.

CCAF has repeatedly helped the court in these proceedings. This traces back to its very first filings, where it flagged an "intriguing issue" regarding the Court's continuing jurisdiction beyond November 2, 2017. Dkt. 176 (Tr. 3/7/17) at 19. Thanks to this filing, the Court directed the parties to draft a Rule 60 motion to reopen the fee award. *Id.* at 20. The court also found "helpful" another brief CCAF on March 20, 2017 concerning the stipulated Rule 60 motion and notice plan. Dkt. 192 at 2. Thanks to this early work, the Court avoided a potential jurisdictional and appellate complication in its Fee Order—which took much longer to issue because of the facts discovered by the Special Master.

Each time CCAF sought leave to file a brief, the Court allowed it, and the Court specifically found several filings helpful to it. *E.g.,* Dkt. 445 at 3; 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. 460 at 8; Dkt. 519 (Tr. 11/7/2018) at 96. The Count explained it allowed CCAF to participate over three days of live testimony in part because "I found what Mr. Frank and you submitted to be helpful." *See* Dkt. 560 (Tr. 6/24/2019) at 15. *See also* Tr. (9/22/19) 17.

The Court confirmed these findings in the Fee Order itself, which found that "CCAF brought

expertise to the proceedings, which was often very helpful to the court." Fee Order at 12.

Except for the Court, the parties and Special Master, no other attorneys likely have such a firm grasp of the extensive record in this case as CCAF. For this reason, CCAF is uniquely qualified and would be especially efficient in serving as a guardian *ad litem*.

III. If appointed, CCAF commits itself to working on especially favorable terms on a contingency basis.

CCAF would serve as guardian *ad litem* for the limited purpose of defending the Court's finalized Fee Order on appeal and directly-related proceedings on remand.[3] The engagement will end following resolution of the fee allocation as to Lieff (or the appealing class counsel firms). Thus, CCAF may continue to serve as guardian *ad litem* following remand if the First Circuit requires more proceedings related to the fee award. In contrast, CCAF service will successfully conclude if the First Circuit affirms the fee awards, but, for example, remands for further proceedings related to Rule 11 findings.

CCAF believes strongly that whatever the merits of Lieff's challenge to the Rule 11 sanctions by this Court, these findings have no bearing on the overall $60 million fee award, nor to the reasonable allocation of this award among the law firms. Therefore, CCAF is willing to work on a strictly contingency basis. That is, CCAF will not seek and agrees it will not be entitled to attorneys' fees if the First Circuit *increases* the fee distribution to Lieff (or appellant class counsel firm)—or if appellant(s)'s fee award is later increased as a result of further proceedings required by the First Circuit.

Even though CCAF bears risk in this contingency arrangement, it proposes to be paid at simple lodestar at rates from $425 to $900 per hours, which compares favorably to the rates sought by Lieff and ultimately adopted by the Court. That said, CCAF reserves its right to also seek a multiplier to deter collateral litigation over its eventual fee award.

[3] The Court previously expressed concern that a guardian *ad litem* might appeal unnecessarily (Dkt. 519 (Tr. 11/7/2018) at 95), and a limited appointment order eliminates this risk.

CCAF is willing to accept other terms or rates that the Court may request *ex ante*. Should the Court want different terms, it should propose an appointment order for CCAF to accept, if able.

A. CCAF proposes reasonable billing rates for its work as guardian *ad litem*.

CCAF proposes the following hourly rates:

Attorney	Position (class year)	CCAF Rate
Theodore H. Frank	director of litigation (1994)	$900/hr
Anna St. John	president & senior attorney (2006)	$525/hr
M. Frank Bednarz	attorney (2009)	$450/hr
Adam E. Schulman	attorney (2010)	$425/hr

The proposed rates likely underestimate the true market rates of CCAF attorneys. For example, attorneys St. John, and Bednarz previously worked at law firms when they were less experienced attorneys than they are today, but where the listed rate to paying clients was about equal to or *higher* than the hourly rates listed above. *See* Dkt. 647-1 ¶¶ 9-14.

These rates are much lower than rates class counsel billed the class for similarly experienced attorneys. For example, in 2016 Lieff billed contract attorneys at $415/hour and $515/hour, a 2009 graduate at $435/hour, and a 2005 graduate at $575/hour. Dkt. 647-1 ¶ 23. And Lieff Cabraser's partners were billed at up to $1000/hour. Dkt. 104-17, Ex. A. Under the Fee Order, the Court credited Lieff for these rates *and* an healthy multiplier. Here CCAF seeks lower rates for now more-senior attorneys and also agrees to work under a risky contingency engagement, but will forego any lodestar multiplier of appellants forgo collateral litigation about the fee award.

As guardian *ad litem*, CCAF will also avoid pitfalls it criticizes in this and other class action settlements. CCAF discloses that no fee sharing or referral arrangement exists, nor litigation financing. CCAF will not bill for travel time, nor will it unexpectedly retain attorneys besides those listed above.

Thus, CCAF would efficiently represent the interests of absent class members due to their familiarity with the case and proposed rates dramatically less extravagant than Class Counsel's.

B. Proposed payment process.

CCAF proposes that attorneys' fees for guardian *ad litem* should be paid in a similar fashion

as fees for the Special Master have been paid.

Specifically, the Court should require Lieff (of any appealing firm) to deposit a total of $400,000 with the Clerk of the United States District Court for the District of Massachusetts. *Cf.* Dkt. 173 at 6. Upon successful conclusion of the appeal or remand-required proceedings, the guardian *ad litem* will submit detailed billing invoices documenting both hours and expenses for reimbursement along with supporting documentation for any expenses to be reimbursed, and the Court will award properly justified hours and costs from the fund. *Cf.* Dkt. 173 at 7.

Because guardian *ad litem* cannot ethically bill the class for time spent defending its own attorneys' fees, CCAF retains its right to seek a lodestar multiplier under limited circumstances to deter frivolous or harassing challenges to the guardian *ad litem*'s billing. Without such a reservation, Lieff would be free to use their superior resources to bully attorneys' fees away from the guardian *ad litem* through collateral attacks on its fees. CCAF reserves the right to seek a lodestar multiplier for its time billed as guardian *ad litem* from any party who unsuccessfully challenges the guardian's fees. Such motion would compensate the guardian *ad litem* for its self-evident risk, and CCAF's reservation to seek a multiplier in this limited situation hopefully deters spiteful multiplication of the proceedings.

IV. Other potential arguments do not counsel away from appointing CCAF.

Lieff has advanced several arguments now and in the past against appointing CCAF as guardian *ad litem*. None carries weight. First, Lieff's preference for the Court to appoint previously uninvolved counsel should carry little weight, and has not been endorsed by the First Circuit. Second, contrary to Lieff, the silence of absent class members does not indicate that they are adequately represented, much less that they support Class Counsel's bloated fee petition. Dkt. 127 at 9. Third, CCAF does not have an ideological agenda that should preclude it from representing the class—in fact, CCAF's alleged interest in reducing attorneys' fees is exactly the sort of advocacy the class now needs. Finally, the Court should disregard the incendiary and false misconduct accusations that Lieff casually hurled earlier in these proceedings. The Court previously indicated that it did not find *ad*

hominem attacks persuasive, so CCAF will not waste the Court's time rebutting every speck of mud thrown, but will happily supplement the record if the Court found any of the accusations troubling or in need of detailed refutation. The Court can also skip (or just quickly skim) the remainder of this section if it is has indeed already rejected the abuse thrown at CCAF, as it suggested it had.

A. The First Circuit has not endorsed this Court's participation in the appeal.

At the hearing, Lieff expressed support for the Court appointing less knowledgeable counsel to represent the Court on appeal. Tr. at 26. The Court should take this as a back-handed compliment to CCAF—that Lieff would prefer an adversary less knowledgeable of the case.

But contrary to Lieff (Tr. at 27), the First Circuit has not embraced this approach. Although Lieff supports the appointment of special counsel for the Court, CCAF remains concerned that Lieff or another Class Counsel firm may the representation of the Court as a party before the First Circuit to seek disqualification of the Court. *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 a Class Counsel firm may raise the issue in their forthcoming appeal.

While Lieff's assent to the procedure makes it less likely something like this would occur, CCAF recommends that the Court formally appoint a guardian *ad litem* rather than a representative for the Court—even if CCAF is ultimately not selected to serve in that role.

B. Silence does not imply adequate representation of the class.

At the hearing, counsel for Lieff objected to the appointment of CCAF because "the class has spoken on that issue by failing to provide any objection or comment and having at least two opportunities to do that." Tr. at 26. Of course, the first such opportunity to object occurred in 2016

after Class Counsel submitted facially duplicative billing, which was not disclosed before a *Boston Globe* reported investigated. This silence in 2016 does not engender confidence about class silence in 2020—especially as Lieff has launched an appeal directly antagonistic to the class.

Contrary to Lieff, silence cannot be read as support because individual class members lack the incentive to intervene simply in hopes of a "miniscule *pro rata* gain." *Goldberger v. Integrated Res.*, 209 F.3d 43, 52-53 (2d Cir. 2000) (citing *In re Continental*, 962 F.2d at 573). It is "naïve" to assume class acquiescence to class-action abuse from the lack of objections. *Redman v. RadioShack Corp.*, 768 F.3d 622, 628 (7th Cir. 2014). Only 23% of securities settlements engender any fee objectors at all (Lynn A. Baker, et. al., *Is the Price Right? An Empirical Study of Fee-Setting in Securities Class* Actions, 115 COLUM. L. REV. 1371, 1389 (2015)), though, as class counsel's own experts indicate, virtually every fee request in large-scale securities actions engages in abuses similar to the ones the special master identified here. The class members in this case—or rather, the class member funds' directors and trustees—were understandably reluctant to respond to notice at all given that the cost of obtaining an attorney opinion on the 374-page Report and 300+ pages of objections could easily dwarf whatever *pro rata* increase an objector might achieve. "Class members have no real incentive to mount a challenge that would result in only a minuscule pro rata gain from a fee reduction." *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 123 (2d Cir. 2005).

The lack of an objector—a public fund that would have to spend its own time and money to object in the middle of a pandemic for an infinitesimal *pro rata* benefit—should not give Lieff or other appellants *carte blanche* to litigate against class interests unanswered.

C. Lieff or the appellants should pay the costs of a guardian *ad litem*.

In the past, Lieff has grumbled that—factoring in the time spend during the Special Master's investigation—the effective net fee award has been reduced below lodestar. In the first place, this is preposterous. Fees from a common fund may be taken for work that generated a common benefit, not defense-of-the-firm work that class counsel brought upon itself. *In re Fidelity/Micron Secs. Litig*,

167 F.3d 735, 738 (1st Cir. 1999).

Moreover, as the Court has recognized, such payment is appropriate because counsel's "unreasonable behavior has occasioned the need to appoint a master." Fee Order at 151-52. Lieff's own conduct—including its failure to disclose the existence of the Chargois arrangement until near the end of the discovery—necessitated the investigation, expanded its length and complexity, and drove up its costs. For similar equitable reasons, CCAF's fee award should preferably be borne solely by Lieff rather than the innocent absent class.

The reason for paying the guardian from class counsel's fees is straightforward. 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); *Rodriguez v. Disner*, 688 F.3d 645, 654 (9th Cir. 2012) (same).

"[T]he 'common benefit' theory is premised on a court's equity power" *United Steelworkers of Am. V. Sadlowski*, 435 U.S. 977, 979 (1978); *accord Rodriguez*, 688 F.3d at 654. Where Class Counsel: (1) concealed a fee-sharing arrangement from co-counsel, the client and the Court, (2) misrepresented their regularly "charged" rates, (3) greatly inflated the rates of temporary attorneys if falsely suggested to have been billed at regular rates "charged" by the firms, (4) misrepresented an empirical study in support of their request, (5) failed to timely correct their declarations even after review, (6) concealed the fee-sharing arrangement from the Special Master appointed to investigate the billing, (7) ran up fact discovery costs by retaining *seven* experts to opine about matters of law, (8) engaged in bellicose and frivolous motion practice in an effort to derail the Court, (9) repeatedly ran up their own costs by opposing helpful *amicus* briefs, and (10) lied under oath in live testimony concerning their conduct—it would be highly inequitable to require the class to foot the bill for **both** class counsel **and** again for HLLI, when class counsel alone created the necessity of CCAF's participation through their own conduct. *See Southwest*, 898 F.3d at 747 (ordering objector fee

payable from class counsel); *In re Petrobras Secs. Litig.*, 320 F. Supp. 3d 597, 601-02 (S.D.N.Y. 2018) (debiting objector's fees from class counsel's award), *vacated on other grounds* 786 Fed. Appx. 274 (2d Cir. 2019); *Hendricks v. Starkist Co.*, 2016 WL 5462423, at *16 (N.D. Cal. Sept. 29, 2016), *aff'd on this point sub. nom Hendricks v. Ference*, 754 Fed. App'x 510, at 513 n.1 (9th Cir. 2018) (finding it "appropriate and justified" to pay objector's counsel from class counsel's fee); *McDonough*, 80 F. Supp. 3d at 651 (decreasing class counsel's fee award to pay objector's counsel because class counsel's fiduciary responsibility was only fulfilled "on the second try"); *In re Ikon Office Solutions*, 194 F.R.D. 166, 197 (E.D. Pa. 2000) (taking objector's fee "from class counsel's award to avoid dilution of the settlement fund"); *Duhaime v. John Hancock Mut. Life Ins. Co.*, 2 F. Supp. 2d 175, 176 (D. Mass. 1998) ("because his objections improved the settlement for the class, [objector's] attorneys in fact shared with class counsel the work of producing a beneficial settlement. It is appropriate that they also share in the fund awarded to recognize the cost of producing the benefit to the class."); *cf. also Radcliffe v. Experian Info Solutions*, 794 F. App'x 605, 608 (9th Cir. 2019) ("Settling Counsel were duty-bound to reimburse the class for the waste of settlement funds caused by the ethical conflict in *Radcliffe I*"). As between the class members (or ERISA counsel) and Class Counsel, "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).

"Those who made the misstatements should bear the costs of a notice to correct misstatements." Manual for Complex Litigation (Fourth) § 21.313 (2004). For this reason, CCAF appropriately seeks fees from Lieff—or any other Class Counsel firm that appeals the Fee Order.

In the past, Lieff also argued that the American Rule means Class Counsel cannot be made to pay for their adversary—i.e. the Special Master following issuance of his Report. Dkt. 418 at 3. This excuse does not pass muster because all attorneys' fees here ultimately derive from the common benefit doctrine, not some fee shifting rule or statute. Lieff plans to appeal directly against the interested of their absent clients—of course the defense against such appeal should come from Lieff's

funds, not at class expense. "Clients should pay just once for the litigation and should not pay for lawyers' time that has been wasted for reasons beyond the clients' control." *Belleville Catering Co. v. Champaign Mkt. Place, LLC,* 350 F.3d 691, 694 (7th Cir. 2003) (cleaned up). "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). Here, the guardian's fees thus should be borne by Lieff or other appellants, who have created the need for this appointment.

D. Lieff's insinuations about CCAF only support the utility of appointing a guardian *ad litem* who cannot settle class claims for private gain.

Lieff has previously opposed CCAF's motion for appointment by expressly incorporating the "matters set forth in the Surreply by Lieff Cabraser Heimann & Bernstein, LLP to Competitive Enterprise Institute's Motion for Leave to File *Amicus Curiae* . . . (ECF No. 168)." Dkt. 426. The Court may not recall the Surreply, and CCAF did not contemporaneously respond to it because the Court mooted the underlying motion two days after it was filed, on March 8, 2017, by granting CCAF's motion to file its *afmicus* brief. Dkt. 172.

In the Surreply (Dkt. 168), Lieff accuses Mr. Frank of "misconduct" relating to the cash buy out of objections Lieff and other counsel made to objectors in *In re Capital One TCPA Litigation*, MDL No. 2416 (N.D. Ill.). Lieff filed its hair-curling Surreply in response to this footnote in CCAF's reply:

> As discussed in the Frank Memo, Lieff Cabraser once persuaded a CCAF client to instruct CCAF to dismiss his appeal seeking to reduce fees by $10 million in exchange for a personal $25,000 payment. In the absence of a court injunction or other rule precluding such payment offers or acceptances, class counsel can always buy off individual class members who have less at stake than the class counsel—an advantage to appointing a guardian *ad litem* who will not have that conflict.

Dkt. 154 at 11 n.5.

Lieff did not and cannot refute the underlying point of the footnote: that class counsel can and has successfully evaded appellate review by offering money to objectors, instead Lieff provides an avalanche of disingenuous characterizations and personal attacks to bury this central point. (With notable chutzpah, Lieff complained about CCAF's *ad hominem* attacks at the hearing. Tr. 8/9/2018 at 35. Again, the pattern and practice of class counsel has been to levy allegations against the Court, the Special Master, and CCAF that are better aimed at Class Counsel and the class representative.) But Lieff's filings admit that they indeed paid $25,000 to Mr. Collins personally (and unknown amounts to other objectors) to end the *Capital One TCPA* appeal. *See* Dkt. 166-4 at 39 of 73, ¶¶ 13-15 (Selbin Decl., detailing settlement offer to Mr. Collins); *see also* 166-6 (2015 Frank Decl.). CCAF will be happy to provide additional detail rebutting Lieff's attacks if the Court wishes, but the point of this proceeding is not Lieff's and CCAF's litigation in another case, nor undisclosed expert opinions that Lieff did not even feel confident enough to submit to the Seventh Circuit, much less be tested by discovery and cross-examination, but that it seeks this Court to rely upon.

CONCLUSION

To the extent Lieff or other class counsel firms appeal the finalized Fee Order, the court should appoint a guardian *ad litem* to protect the class's interests on appeal.

The Court should appoint CCAF as that guardian given its extensive, helpful, and successful participation in the case to date. Further, CCAF volunteers to accept appointment on a contingency basis—ameliorating Lieff's objection to paying its attorneys fees. If Lieff (or other appellant) is successful in increasing their fee award, CCAF will not receive fees for its work as guardian *ad litem*.

The Court should compensate guardian *ad litem* in a similar manner as it paid the Special Master—by holding appellant funds in trust and paying the guardian *ad litem* based on duly-submitted detailed contemporaneous hours. However, to discourage frivolous disputes over billing, CCAF reserves its right to seek a fee multiplier from parties who unsuccessfully challenges the guardian's

reasonable rates and attorneys' fees.

Respectfully submitted,

Dated: October 7, 2020

/s/ M. Frank Bednarz

M. Frank Bednarz (BBO No. 676742)
HAMILTON LINCOLN LAW INSTITUTE
CENTER FOR CLASS ACTION FAIRNESS
1145 E Hyde Park Blvd. Unit 3A
Chicago, IL 60615
Telephone: 801-706-2690
Email: frank.bednarz@hlli.org

Theodore H. Frank (*pro hac vice*)
HAMILTON LINCOLN LAW INSTITUTE
CENTER FOR CLASS ACTION FAIRNESS
1629 K Street NW
Suite 300
Washington, DC 20006
Telephone: 202-331-2263
Email: ted.frank@hlli.org

Attorneys for Amicus Curiae
Hamilton Lincoln Law Institute
Center for Class Action Fairness

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

I certify that on October 7, 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. CCAF attempted to confer on this motion. Thornton, Labaton, and Lieff oppose the motion. The Special Master takes no position except to the extent that he opposes payment from the common fund. CCAF has not heard from defendant or ERISA counsel on the motion.

Dated: October 7, 2020

/s/ M. Frank Bednarz
M. Frank Bednarz

CERTIFICATE OF SERVICE

I certify that on October 7, 2020, I served a copy of the forgoing on all counsel of record by filing a copy via the ECF system.

Dated: October 7, 2020

/s/ M. Frank Bednarz
M. Frank Bednarz