Labaton Sucharow

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November 10, 2016

By ECF

Hon. Mark L. Wolf
United States District Judge
United States District Court
District of Massachusetts
John Joseph Moakley
United States Courthouse
1 Courthouse Way
Boston, Massachusetts 02210

Re: Arkansas Teacher Retirement System v. State Street Bank & Trust Co.,
No. 11-CV-10230 MLW

Dear Judge Wolf:

We are writing respectfully to advise the Court of inadvertent errors just discovered in certain written submissions from Labaton Sucharow LLP, Thornton Law Firm LLP, and Lieff Cabraser Heimann & Bernstein LLP supporting Lead Counsel's motion for attorneys' fees, which the Court granted following the fairness hearing held on November 2, 2016. *See* Order Awarding Attorneys' Fees, Payment of Litigation Expenses, and Payment of Service Awards to Plaintiffs ("Fee Order," ECF No. 111).

These mistakes came to our attention during internal reviews that were conducted in response to an inquiry from the media received after the hearing. The purpose of this letter is to disclose the error and provide a corrected lodestar and multiplier. We respectfully submit that the error should have no impact on the Court's ruling on attorneys' fees.

As the Court is aware, the submissions supporting Lead Counsel's fee application included individual declarations submitted on behalf of Labaton Sucharow, Thornton, and Lieff Cabraser, reporting each firm's lodestar and number of hours billed. *See* ECF Nos. 104-15, at 7-9; 104-16, at 7-8; 104-17, at 8-9; *see also* ECF No. 104-24 (Master Chart).

The professionals and paraprofessionals listed in these firms' respective lodestar reports include persons denoted as Staff Attorneys, or "SAs." SAs are bar-admitted, experienced attorneys hired on a temporary, though generally long-term, basis, and are paid by the hour. The SAs in this action

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were tasked principally with reviewing and analyzing the millions of pages of documents produced by State Street.

Seventeen (17) of the SAs listed on the Thornton lodestar report are also listed as SAs on the Labaton Sucharow lodestar report.[1] Six (6) of the SAs listed on the Thornton lodestar report are also listed as SAs on the Lieff Cabraser lodestar report.[2] Both sets of overlap reflect the fact that as the litigation proceeded, efforts were made to share costs among counsel, such that financial responsibility for certain SAs located at Labaton Sucharow's and Lieff Cabraser's offices was borne by Thornton.

We have now determined that:

- The hours of the Alper SAs reported in the Thornton lodestar report mistakenly were also reported in the Labaton Sucharow lodestar report.
- Certain hours reported by one of the Alper SAs (S. Dolben) in the Thornton lodestar report mistakenly duplicated certain hours of another Alper SA (D. Fouchong).
- A portion of the hours of two of the Jordan SAs reported in the Thornton lodestar report (C. Jordan and J. Zaul) mistakenly were also reported in the Lieff Cabraser lodestar report.
- The hours of two other Jordan SAs (A. Ten Eyck and R. Wintterle) mistakenly were included in the Lieff Cabraser lodestar report.[3]

Because of these inadvertent errors, Plaintiffs' Counsel's reported combined lodestar of $41,323,895.75, and reported combined time of 86,113.7 hours, were overstated. *See* ECF No. 104-24 (Master Chart).

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[1] These SAs, listed alphabetically, are D. Alper, E. Bishop, N. Cameron, M. Daniels, S. Dolben, D. Fouchong, J. Grant, I. Herrick, D. Hong, C. Orji, D. Packman, A. Powell, A. Rosenbaum, J. Saad, B. Schulman, A. Vaidya, and R. Yamada (collectively, the "Alper SAs"). *Compare* ECF No. 104-16, at 7-8 (Thornton lodestar report) *with* ECF No. 104-15, at 7-8 (Labaton Sucharow lodestar report).

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[3] The lodestar reports in the individual firm declarations submitted by ERISA counsel (ECF Nos. 104-18 to 104-23) are unaffected.

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We have corrected these errors by removing the duplicative time. When a given SA had different hourly billing rates, we removed the time billed at the higher rate. Deducting the duplicative time from the $41.32 million reported combined lodestar results in a reduced combined lodestar of **$37,265,241.25**, and a reduced combined time of 76,790.8 hours.

Cross-checking the $37.27 million reduced combined lodestar against the $74,541,250 percentage-based fee awarded by the Court yields a lodestar multiplier of **2.00**.[4] This is higher than the 1.8 multiplier we proffered in our submissions and during the hearing.

Plaintiffs' counsel respectfully submits that a 2.00 multiplier remains reasonable and well-within the range of multipliers found reasonable for cross-check purposes in common fund cases within the First Circuit, and that such an enhancement of the reduced lodestar represented by the 24.85% fee awarded by the Court remains well-supported by the $300 million Settlement obtained and fees awarded in comparable cases. *See* Fee Brief, ECF No. 103-1, at 24-25.

Accordingly, Plaintiffs' counsel respectfully submits that the Court should adhere to its ruling on attorneys' fees. *See* Fee Order ¶¶ 4, 6 (ECF No. 111)[5]; Nov. 2, 2016 Hrg. Tr. at 36:1-2 (finding 1.8 multiplier "reasonable").

We sincerely apologize to the Court for the inadvertent errors in our written submissions and presentation during the hearing. We are available to respond to any questions or concerns the Court may have.

Respectfully submitted,

David J. Goldsmith

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[4] The Court found it "appropriate in this case to use the percentage of the common fund approach in determining the amount of attorneys' fees that should be awarded." Nov. 2, 2016 Hrg. Tr. at 22:25-23:2; *see also id.* at 35:12-13 ("I have used the percentage of common fund method. I've used the reasonable lodestar to check on that.").

[5] The Fee Order, at Paragraph 6(d), references the approximately 86,000 combined hours and $41.32 million combined lodestar reported in our written submissions.

Labaton Sucharow

DJG/idi

cc: All Counsel of Record
(by ECF)

Certificate of Service

I certify that on November 10, 2016, I caused the foregoing Letter to be filed through the ECF system in the above-captioned action, and accordingly to be served electronically upon all registered participants identified on the Notices of Electronic Filing.

/s/ David J. Goldsmith
David J. Goldsmith

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all others similarly situated, Plaintiff	)	
v.	)	C.A. No. 11-10230-MLW
STATE STREET BANK AND TRUST COMPANY, Defendants.	)	
ARNOLD HENRIQUEZ, MICHAEL T. COHN,WILLIAM R. TAYLOR, RICHARD A. SUTHERLAND, and those similarly situated, Plaintiff	)	
v.	)	C.A. No. 11-12049-MLW
STATE STREET BANK AND TRUST COMPANY, Defendants.	)	
THE ANDOVER COMPANIES EMPLOYEE SAVINGS AND PROFIT SHARING PLAN, on behalf of itself, and JAMES PEHOUSHEK-STANGELAND and all others similarly situated, Plaintiff	)	
v.	)	C.A. No. 12-11698-MLW
STATE STREET BANK AND TRUST COMPANY, Defendants.	)	

MEMORANDUM AND ORDER

WOLF, D.J. February 6, 2017

I. SUMMARY

Questions have arisen with regard to the accuracy and reliability of information submitted by plaintiffs' counsel on

which the court relied, among other things, in deciding that it was reasonable to award them almost $75,000,000 in attorneys' fees and more than $1,250,000 in expenses. The court now proposes to appoint former United States District Judge Gerald Rosen as a special master to investigate those issues and prepare a Report and Recommendation for the court concerning them. After providing plaintiffs' counsel an opportunity to object and be heard, the court would decide whether the original award of attorneys' fees remains reasonable, whether it should be reduced, and, if misconduct has been demonstrated, whether sanctions should be imposed.

The court is now, among other things, providing plaintiffs' counsel the opportunity to consent or to object to: the appointment of a special master generally; to the appointment of Judge Rosen particularly; and to the proposed terms of any appointment. A hearing to address the possible appointment of a special master will be held on March 7, 2017, at 10:00 a.m.

II. BACKGROUND

After a hearing on November 2, 2016, the court approved a $300,000,000 settlement in this class action in which it was alleged that defendant State Street Bank and Trust overcharged its customers in connection with certain foreign exchange transactions. It also employed the "common fund" method to determine the amount of attorneys' fees to award. See In re

Thirteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litig., 56 F.3d 295, 305 (1st Cir. 1995). The court found to be reasonable an award to class counsel of $74,541,250 in attorneys' fees and $1,257,697.94 in expenses. That award represented about 25% of the common fund.

Like many judges, and consistent with this court's long practice, the court tested the reasonableness of the requested award, in part, by measuring it against what the nine law firms representing plaintiffs stated was their total "lodestar" of $41,323,895.75. See Nov. 2, 2016 Transcript ("Tr.") at 30-31, 34; see also Manual for Complex Litigation (Fourth) § 14.122 (2004) ("the lodestar is . . . useful as a cross-check on the percentage method" of determining reasonable attorneys' fees); Vizcaino v. Microsoft Corp., 290 F.3d 1043, 1050 (9th Cir. 2002) ("[T]he lodestar may provide a useful perspective on the reasonableness of a given percentage award."). Plaintiffs' counsel represented that the total requested award involved a multiplier of $1.8%, which they argued was reasonable in view of the risk they undertook in taking this case on a contingent fee. See Memorandum of Law in Support of Lead Counsel's Motion for an Award of Attorneys' Fees (Docket No. 103-1) at 24-25 ("Fees Award Memo").

A lodestar is properly calculated by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate. See Blum v. Stenson, 465 U.S. 886, 889 (1984). The

Supreme Court has instructed that "[r]easonable fees . . . are to be calculated according to the prevailing rates in the relevant community." Id. at 895. "[T]he rate that private counsel actually charges for her services, while not conclusive, is a reliable indicum of market value." United States v. One Star Class Sloop Sailboat built in 1930 with hull no. 721, named "Flash II", 546 F.3d 26, 40 (1st Cir. 2008)(emphasis added).[1]

In their memorandum in support of the fee request, plaintiffs' counsel represented that to calculate the lodestar they had used "current rather than historical billing rates," for attorneys working on this case. Fees Award Memo. (Docket No. 103-1) at 24. Similarly, in the related affidavits filed on behalf of each law firm counsel stated that "the hourly rates for the attorneys and professional support staff in my firm . . . are the same as my firm's regular rates charged for their services . . . ." See, e.g., Declaration of Garett J. Bradley on behalf of Thornton Law Firm LLP ("Thornton") (Docket No. 104-16) at ¶4; Declaration of Lawrence A. Sucharow on behalf of Labaton Sucharow LLP ("Labaton") (Docket No. 104-15) at ¶7. In view of the well-established jurisprudence and the representations of counsel, the court understood that in calculating the lodestar plaintiffs' law firms

[1] The First Circuit cited a common fund case, In re Cont'l III Sec. Litig., 962 F.2d 566, 568 (7th Cir. 1992), for this proposition.

had used the rates they each customarily actually charged paying clients for the services of each attorney and were representing that those rates were comparable to those actually charged by other attorneys to their clients for similar services in their community.

On November 10, 2016, David J. Goldsmith of Labaton, on behalf of plaintiffs' counsel, filed the letter attached hereto as Exhibit A (Docket No. 116). Mr. Goldsmith noted that the court had used the lodestar calculated by counsel as a check concerning the reasonableness of the percentage of the common fund requested for attorneys' fees. Id. at 3, n.4. Counsel stated that as a result of an "inquiry from the media" "inadvertent errors [had] just been discovered in certain written submissions from Labaton Sucharow LLP, Thornton Law Firm LLP, and Lieff Cabraser Heiman & Bernstein LLP supporting Lead Counsel's motion for attorneys' fees . . . ." Id. at 1. Counsel reported that the hours of certain staff attorneys, who were paid by the hour primarily to review documents, had been included in the lodestar reports of more than one firm. Id. at 1-2. He also stated that in some cases different billing rates had been attributed to particular staff attorneys by different firms. Id. at 3.

The double-counting resulted in inflating the number of hours worked by more than 9,300 and inflating the total lodestar by more than $4,000,000. Id. at 2-3. As a result, counsel stated a multiplier of 2, rather than 1.8, should have been used to test

the reasonableness of the request for an award of $74,541,250 as attorneys' fees. Id. at 3. Counsel asserted that the award nevertheless remained reasonable and should not be reduced. Id. The letter did not indicate that the reported lodestar may not have been based on what plaintiffs' counsel, or others in their community, actually customarily charged paying clients for the type of work done by the staff attorneys in this case. Nor did the letter raise any question concerning the reliability of the representations concerning the number of hours each attorney reportedly worked on this case.

Such questions, among others, have now been raised by the December 17, 2016 Boston Globe article headlined "Critics hit law firms' bills after class action lawsuits" which is attached as Exhibit B. For example, the article reports that the staff attorneys involved in this case were typically paid $25-$40 an hour. In calculating the lodestar, it was represented to the court that the regular hourly billing rates for the staff attorneys were much higher -- for example, $425 for Thornton, see Docket No. 104-15 at 7-8 of 14, and $325-440 for Labaton, see Docket No. 104-15 at 7-8 of 52. A representative of Labaton reportedly confirmed the accuracy of the article in this respect. See Ex. B at 3.

The court now questions whether the hourly rates plaintiffs' counsel attributed to the staff attorneys in calculating the lodestar are, as represented, what these firms actually charged

for their services or what other lawyers in their community charge paying clients for similar services. This concern is enhanced by the fact that different firms represented that they customarily charged clients for the same lawyer at different rates. In general, the court wonders whether paying clients customarily agreed to pay, and actually paid, an hourly rate for staff attorneys that is about ten times more than the hourly cost, before overhead, to the law firms representing plaintiffs.

In addition, the article raises questions concerning whether the hours reportedly worked by plaintiffs' attorneys were actually worked. Most prominently, the article accurately states that Michael Bradley, the brother of Thornton Managing Partner Garrett Bradley, was represented to the court as a staff attorney who worked 406.40 hours on this case. See Docket No. 104-15 at 7 of 14. Garrett Bradley also represented that the regular rate charged for his brother's services was $500 an hour. Id. However the article states, without reported contradiction, that "Michael Bradley . . . normally works alone, often making $53 an hour as a court appointed defendant in [the] Quincy [Massachusetts] District Court." Ex. B at 1. These apparent facts cause the court to be concerned about whether Michael Bradley actually worked more than 400 hours on this case and about whether Thornton actually regularly charged paying clients $500 an hour for his services.

The acknowledged double-counting of hours by staff attorneys and the matters discussed in the article raise broader questions about the accuracy and reliability of the representations plaintiffs' counsel made in their calculation of the lodestar generally. These questions -- which at this time are only questions -- also now cause the court to be concerned about whether the award of almost $75,000,000 in attorneys' fees was reasonable.

III. THE PROPOSED SPECIAL MASTER

In view of the foregoing, the court proposes to appoint a special master to investigate and report concerning the accuracy and reliability of the representations that were made in connection with the request for an award of attorneys' fees and expenses, the reasonableness of the award of $74,541,250 in attorneys' fees and $1,257,697.94 in expenses, and any related issues that may emerge in the special master's investigation. In the final judgment entered on November 11, 2016, the court retained jurisdiction over, among other things, the determination of attorneys' fees and other matters related or ancillary to them. See Final Judgment (Docket No. 110) at 10. Federal Rule of Civil Procedure 23(h)(4) states that in class actions "the court may refer issues related to the amount of the [attorneys' fee] award to a special master . . . as provided in Rule 54(d)(2)(D)." Federal Rule of Civil Procedure 54(d)(2)(D) states that "the court may refer issues concerning the value of services to a special master under Rule 53 without regard

to the limitations of Rule 53(a)(1)." As the 1993 Advisory Committee's Note explains, "the rule [] explicitly permits . . . the court to refer issues regarding the amount of a fee award in a particular case to a master under Rule 53. . . . This authorization eliminates any controversy as to whether such references are permitted . . . ." Fed. R. Civ. P. 54 Advisory Committee's Note to 1993 Amendment.

The court proposes to exercise this authority to appoint Gerald Rosen, a recently retired United States District Judge for the Eastern District of Michigan, to serve as special master; Judge Rosen's biography is attached as Exhibit C. The court proposes to authorize Judge Rosen to investigate all issues relating to the award of attorneys' fees in this case. If appointed, he would be empowered to, among other things, subpoena documents from plaintiffs' counsel and third parties, interview witnesses, and take testimony under oath. Judge Rosen would be authorized to communicate with the court ex parte on procedural matters, but encouraged to minimize ex parte communications, and to avoid them if possible. He would be expected to complete his duties within six-months of his appointment, if possible.

At the conclusion of his investigation, Judge Rosen would prepare for the court a Report and Recommendation concerning: (1) the accuracy and reliability of the representations made by plaintiffs' counsel in their request for an award of attorneys'

fees and expenses, including, but not limited to, whether counsel employed the correct legal standards and had proper factual bases for what they represented to be the lodestar for each firm and the total lodestar; (2) the reasonableness of the amount of attorneys' fees and expenses that were awarded, including whether they should be reduced; and (3) whether any misconduct occurred; and, if so, (4) whether it should be sanctioned, see, e.g., In re: Deepwater Horizon, 824 F.3d 571, 576-77 (5th Cir. 2016). The court would provide plaintiffs' counsel an opportunity to object to the Report and Recommendation and, if appropriate, conduct a hearing concerning any objections. See Fed. R. Civ. Proc. 53(f)(1). The special master's report would be reviewed pursuant to Federal Rule of Civil Procedure 53(f)(3), (4) & (5).

Judge Rosen would be compensated at his regular hourly rate as a member of JAMS of $800 an hour or $11,000 a day.[2] Judge Rosen could be assisted by other attorneys and staff, who would be compensated at a reasonable rate approved in advance by the court. Judge Rosen and anyone assisting him would also be reimbursed for their reasonable expenses.

The fees and expenses of the Special Master would be paid, by the court, from the $74,541,250 awarded to plaintiffs' counsel.

[2] The court notes that plaintiffs' counsel reported billing rates of up to $1,000 an hour. See, e.g., Docket No. 104-17 at 8 of 135.

The court may order that up to $2,000,000 be returned to the Clerk of the District Court for this purpose.

As required by Federal Rule of Civil Procedure 53(b)(3)(A), Judge Rosen has submitted an affidavit disclosing whether there is any ground for his disqualification under 28 U.S.C. §455, which is attached as Exhibit D. The only matter disclosed relates to Elizabeth Cabraser, a partner in one of plaintiffs' law firms. Ms. Cabraser reportedly worked 29.50 hours on this case. Judge Rosen reports that about four years ago he asked Ms. Cabraser to become, with him and others, a co-author of the book Federal Employment Litigation. Since then they have had annually, independently submitted updates to different chapters of the book. They, and the other authors, share royalties from the book. In addition, Judge Rosen and Ms. Cabraser have participated together on panels on class actions. Although at least one lawyer from plaintiffs' law firms has appeared before Judge Rosen, Judge Rosen has had no other association with any of them.

Judge Rosen represents that he has no bias or prejudice concerning anyone involved in this matter, or any personal knowledge of potentially disputed facts concerning it. Therefore, it does not appear that his disqualification would be required by 28 U.S.C. §455(b)(1). It also appears to Judge Rosen and the court that his relationship with Ms. Cabraser could not cause a reasonable person to question his impartiality. Therefore, it

appears that his recusal would not be justified pursuant to §455(a). See United States v. Sampson, 12 F. Supp. 3d 203, 205-08 (D. Mass. 2014) (Wolf, D.J.) (discussing standards for recusal under §455(a)).[3]

However, the court is providing plaintiffs' counsel the opportunity to consent to the appointment of Judge Rosen as special master on the terms discussed in this Memorandum, register any objections, and/or comment on the proposal. Among other things, plaintiffs' counsel may propose alternative eligible candidates for possible appointment. See Fed. R. Civ. P. 53(b)(1).[4]

IV. ORDER

In view of the foregoing it is hereby ORDERED that:

1. Plaintiffs' counsel shall file by February 20, 2017, a memorandum addressing, among other things deemed relevant: whether they object to the appointment of a special master; whether they object to the selection of Judge Rosen if a special master is to

[3] Ideally, the court would propose a special master who presents no question of possible recusal. However, the court has found in exploring potential candidates to serve as special master that lawyers in larger law firms are unavailable because their firms have adversarial relationships with plaintiffs' counsel in other cases. Therefore, the court concluded that proposing a recently retired judge would be most feasible and appropriate.

[4] Any proposed alternative candidate must file an affidavit demonstrating that he or she does not have any conflict of interest and is not subject to disqualification pursuant to 28 U.S.C. §455.

be appointed; whether they believe Judge Rosen's disqualification would be required under 28 U.S.C. § 455(a) or (b) and, in any event, whether they waive any such ground for disqualification; whether they object to any of the terms of the appointment and powers of a special master discussed in this Memorandum; and whether they propose the appointment of someone other than Judge Rosen as special master. Counsel shall provide an explanation, with supporting authority, for any objection or comment.

2. A hearing to address the proposed appointment of a special master generally, and Judge Rosen particularly, shall be held on March 7, 2017, at 10:00 a.m. Each of plaintiffs' counsel who submitted an affidavit in support of the request for an award of attorney's fees, see Docket Nos. 104-15 - 104-24, shall attend.[5] Michael Bradley shall also attend. In addition the representative of each lead plaintiff who supervised this litigation (not a lawyer) shall attend.[6]

[5] Such counsel are: Lawrence A. Sucharow of Labaton; Garrett J. Bradley of Thornton; Daniel P. Chiplock of Lieff, Cabraser, Heimann & Bernstein, LLP; Lynn Sarko of Keller Rohrback LLP; J. Brian McTigue of McTigue Law; Carl S. Kravtiz of Zuckerman Spaeder LLP; Catherine M. Campbell of Feinberg, Campbell & Zack, PC; Jonathan G. Axelrod of Beins, Axelrod, PC; and Kimberly Keevers Palmer of Richardson, Patrick, Westbrook & Brickman, LLC.

[6] Such individuals are: George Hopkins on behalf of Arkansas Teacher Retirement System; Arnold Henriquez; Michael T. Cohn; William R. Taylor; Richard A. Sutherland; James Pehoushek-

Judge Rosen shall also be present and may be questioned. Regardless of whether Judge Rosen is appointed special master, the court will order that he receive reasonable compensation for his time and expenses from the fee award previously made to plaintiffs' counsel.

/s/ Mark L. Wolf

UNITED STATES DISTRICT JUDGE

Stangeland; and Janet A. Wallace on behalf of The Andover Companies Employee Savings and Profit Sharing Plan.

EXHIBIT A

Labaton Sucharow

David J. Goldsmith
Partner
212 907 0879 direct
212 883 7079 fax
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November 10, 2016

By ECF

Hon. Mark L. Wolf
United States District Judge
United States District Court
District of Massachusetts
John Joseph Moakley
United States Courthouse
1 Courthouse Way
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Respectfully submitted,

David J. Goldsmith

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DJG/idi

cc: All Counsel of Record
(by ECF)

Certificate of Service

I certify that on November 10, 2016, I caused the foregoing Letter to be filed through the ECF system in the above-captioned action, and accordingly to be served electronically upon all registered participants identified on the Notices of Electronic Filing.

/s/ David J. Goldsmith
David J. Goldsmith

EXHIBIT B

SPOTLIGHT FOLLOW-UP

Critics hit law firms' bills after class-action lawsuits

By Andrea Estes | GLOBE STAFF DECEMBER 17, 2016

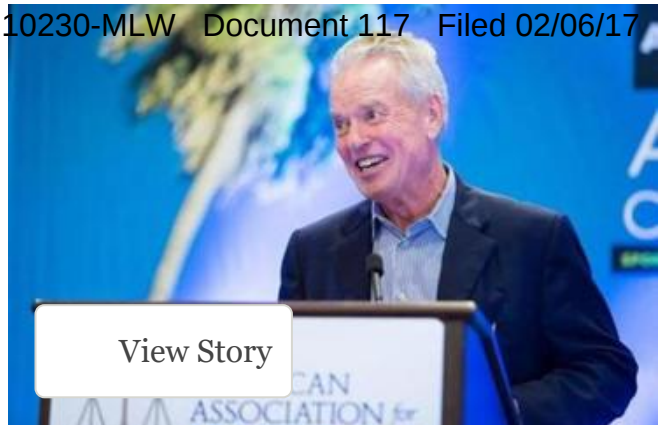
Attorneys at the Thornton Law Firm had just helped win a $300 million settlement from State Street Bank and Trust in a complicated lawsuit involving eight other law firms. Now, it was time to submit their legal fees to the judge so that they could get paid.

That's when the younger brother of Thornton managing partner Garrett Bradley emerged as a $500-an-hour "staff attorney" at the Boston firm.

Michael Bradley is a lawyer, but he normally works alone, often making $53 an hour as a court-appointed defender in Quincy District Court, records show. Yet, according to his older brother's sworn statement on Sept. 14, 2016, Michael Bradley's services were worth nearly 10 times that rate in the State Street case.

The elder Bradley said Michael worked 406.4 hours on the lawsuit, which centered on international currency trades, at a cost of $203,200.

Michael Bradley wasn't the only lawyerfor whose work Thornton claimed stratospheric — and questionable — legal costs in the filing to US District Court Judge Mark L. Wolf. Garrett Bradley listed 23 other staff attorneys, each with hourly rates of $425, who collectively accounted for $4 million in costs.



Law firm 'bonuses' tied to political donations

A small Boston law firm became a top funder of the national Democratic Party by paying lawyers "bonuses" for their political donations.

Candidates returning donations from Thornton Law Firm attorneys

Hassan to return law firm's donations

But one of the lawyers told the Globe he was actually paid just $30 an hour for his services — and not by Thornton. Like all the other staff attorneys on Garrett Bradley's list, except his brother, he worked for another firm in the case, which also counted his hours on its list of costs.

The sworn statement by Garrett Bradley — until recently an assistant House majority leader on Beacon Hill — raises troubling questions about the way Thornton and the other firms that brought the State Street lawsuit tallied legal costs to justify their enormous $75.8 million payday.

BRADLEY FOR SELECTMAN

Michael Bradley, Quincy attorney.

More than 60 percent of the costs that Thornton and two other law firms submitted to Judge Wolf came from the work of staff attorneys — all of them assigned hourly rates at least 10 times higher than the $25 to $40 an hour typical for these low-level positions — which involves document review.

A spokesman for the lead law firm in the case acknowledged that hourly rates the firms listed for staff attorneys were above the lawyers' actual wages, but argued that, essentially, everyone does it. Diana Pisciotta, spokeswoman for the Labaton Sucharow law firm in New York City, called it "commonly accepted practice throughout the legal community."

Critics of the way lawyers are paid in class-action lawsuits acknowledge that firms often dramatically mark up the rates of their lower-paid attorneys when seeking legal fees in court, but they say Thornton has pushed the practice to an extreme.

"This happens all the time," said Ted Frank, a lawyer at the Competitive Enterprise Institute in Washington and a leading national critic of legal fees in class-action lawsuits. "Lawyers pad their bills with overstated hourly work to make their fee request seem less of a windfall."

Lawyers in class-action lawsuits commonly receive a major share of any settlement because they are taking the risk that, if they lose, they will be paid nothing.

In fact, plaintiffs in the State Street case, many of them public pension funds, agreed in advance to set aside a quarter of any settlement for attorneys in their lawsuit alleging that the Boston-based bank routinely overcharged clients for their foreign currency exchanges, costing them more than $1 billion.

But, to actually collect the money, lawyers document their costs by filing affidavits under penalty of perjury.

The accounting must be based on actual time records, listing the names and hourly rates of the lawyers who worked on the case, and the total amount billed. The hourly rate is supposed to be what the lawyer would charge a paying client for

similar work, including the lawyer's salary and a markup for office costs and other expenses.

That's where, critics of contingency fee lawsuits say, lawyers have a built-in opportunity to inflate their bills. And, for a variety of reasons, their bills often get little scrutiny.

"Imagine you're a lawyer and you're allowed to write your own check for your fee," explained Lester Brickman, a Yeshiva University law professor and author of "Lawyer Barons: What Their Contingency Fees Really Cost America."

"I could write $3,000, but I could add a zero and write $30,000 or add two zeroes and charge $300,000," Brickman said. "That's the honor system."

Thornton officials insist that they did nothing wrong and that the 23 staff attorneys who actually work for Labaton or a firm in San Francisco belonged on Thornton's list.

Under a cost-sharing agreement between the firms, Thornton paid part of their wages while they were reviewing millions of pages of documents in the State Street case. These lawyers just receive their usual salary and don't share in the proceeds from the settlement.

Garrett Bradley's brother, by contrast, will receive the $203,200 listed for him on the filing to Judge Wolf, according to Thornton spokesman Peter Mancusi, who noted that Michael Bradley, unlike the other staff attorneys, was not paid previously for his work.

Neither Michael Bradley nor a spokesman for Thornton would say what he did on the case, but the spokesman described him as an experienced prosecutor and fraud investigator.

Globe questions about the legal bills prompted the lead law firm in the State Street case to submit an extraordinary letter to Judge Wolf admitting that Thornton and

$4 million. The author, David Goldsmith of Labaton Sucharow, blamed the inflated bills on “inadvertent errors.”

According to Goldsmith’s Nov. 10 letter, Labaton and another firm, Lieff Cabraser Heimann & Bernstein, claimed the same staff attorneys that Thornton had listed on its legal expenses, double-counting the lawyers’ cost. Goldsmith said the double-counted lawyers were employees of either Labaton or Lieff Cabraser, but their hours and costs should have been counted only once — by Thornton Law.

To resolve the issue, he said, the other firms dropped the lawyers and Thornton lowered the hourly rate it charged for numerous staff attorneys because it had assigned a higher rate than the other firms.

Despite the resulting drop in combined legal fees, Goldsmith urged Wolf not to reduce the lawyers’ payment from the settlement. In class-action cases, lawyers commonly receive a payment that not only covers costs, but a financial reward for bringing a risky case that could have failed and paid nothing.

Goldsmith suggested that Wolf simply boost the reward to offset the reduced legal fees so that the firms still split the same $74 million, including $14 million for Thornton.

“We respectfully submit that the error should have no impact on the court’s ruling on attorneys’ fees,” wrote Goldsmith, whose firm often joins forces with Thornton.

That may not be enough to satisfy Wolf, who has a reputation for closely questioning claims made in his court.

He called the legal fees “reasonable” at a Nov. 2 hearing and praised the plaintiffs’ lawyers for taking on a “novel, risky case.” But he approved the fees in part based on sworn statements that the lawyers now admit were in error. Wolf could reduce their payments, which were issued earlier this month, or hold a hearing to determine whether the lawyers knowingly submitted false information, a serious breach of professional ethics.

"The double-counting was likely the result of sloppiness, assuming that there would be no objectors' or court scrutiny of the fee request," said Frank, who has successfully challenged several settlements and fee requests in other cases, recouping more than $100 million for class members.

Frank said the problems with the legal fees go beyond the double-counting of attorneys. Other law firms contacted by the Globe said it's common to list an hourly rate for an attorney several times higher than the attorney's own pay, because the law firm has many other expenses aside from the lawyer him or herself. However, Thornton listed attorneys' rates at up to 14 times the lawyer's wages.

Frank said his analysis suggests that the $75.8 million award to the nine law firms was excessive — by at least $20 million and as much as $48.3 million — in part because the lawyers asked too much in the first place. He said that the lawyers' own documents show that, in similarly sized settlements, the legal fees average only 17.8 percent.

Thornton Law Firm, a personal injury firm that specializes in asbestos-related cases, is already the target of three investigations for its controversial campaign contribution program in which the law firm paid millions of dollars in "bonuses" to partners that offset their political contributions.

Federal prosecutors as well as two other agencies are investigating whether the bonuses were an illegal "straw donor" scheme to allow the firm to vastly exceed limits on campaign contributions. Thornton officials have insisted they did nothing wrong, because the bonuses were paid out of the lawyers' own equity in the firm.

Thornton's legal fees in the State Street case feed into a larger debate about how lawyers get paid in class-action lawsuits. Defenders of paying lawyers on contingency say the prospect of a high payoff encourages lawyers to take on exceptionally difficult cases, such as suing a wealthy bank like State Street.

However, Frank said there's little oversight of lawyers' fee claims. Defendants usually don't care what the plaintiffs' lawyers receive, because their costs don't change regardless of how much the plaintiffs' lawyers receive.

And individual plaintiffs typically get too little money to have a strong incentive to challenge legal fees. In the State Street case, the 1,300 plaintiffs would see increases in their individual payments of only about $20,000 apiece if the lawyers' fees were reduced by $20 million, Frank calculated. A plaintiff might have to spend that much or more to hire another lawyer to investigate.

None of the plaintiffs in the State Street case objected to their lawyers' request for legal fees. But neither the lawyers nor their clients apparently noticed that the exact same hours for nearly two dozen staff attorneys were claimed by more than one law firm.

"The mistakes came to our attention during internal reviews that were conducted in response to an inquiry from the media," explained Labaton partner Goldsmith, in his letter to Wolf.

Nor did they notice that Thornton consistently assigned a higher rate than the other firms for the same attorneys — often a difference of $90 an hour.

Labaton officials, in a prepared statement, said the affidavits supporting the fee request weren't as important as the percentage of the settlement fund the lawyers sought — just over 25 percent, once expenses are added.

"This fee award is reviewed by the Court for fairness . . . we believe the fees awarded are still fair," wrote Diana Pisciotta, a spokeswoman for Labaton.

In addition to its fees from the State Street case, Thornton Law will receive a portion of the $20 million the Securities and Exchange Commission awarded a whistle-blower who alerted regulators to State Street's international currency practices.

How low-paid lawyers can rack up big legal bills

Comments

Law firms commonly hire junior-level “staff attorneys” to review documents for $25 to $40 an hour. Thornton Law Firm took advantage of these low-paid lawyers to make millions in its lawsuit against State Street Bank.

1 Thornton says it employed 24 staff attorneys in the State Street case.

2 In court documents, Thornton listed the hourly rates for the staff attorneys at $425 to $500, more than ten times their actual pay.

One attorney's actual pay	$30
Rate listed by Thornton	$425

3 Thornton said the staff attorneys worked more than 10,000 hours on the case at a total cost of $4.5 million, accounting for 60 percent of the total costs of the case.

4 A federal judge approved Thornton's bills, and gave them a bonus for taking on such a risky lawsuit.

5 But there was a problem: 23 of Thornton’s 24 staff attorneys were also listed as lawyers for other law firms working on the same case. Thornton and the other law firms double-counted the work of the staff attorneys, inflating their combined bills by $4 million.

6 The lawyers admitted the “inadvertent errors” to the judge and asked him not to reduce their legal fees.

SOURCE: Court records

GLOBE STAFF

Related

- Walsh, Clinton join growing number of politicians returning donations from Thornton Law Firm

EXHIBIT C

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"Mediation works, and can produce great benefits much more efficiently than other approaches. There are four keys to success: candor, cooperation, creativity and courage. If the Detroit bankruptcy is any guide, early and committed use of mediated negotiation is likely to produce benefits that otherwise might never be achievable."
-Hon. Gerald E. Rosen (Ret.)

"Judge Rosen was indispensable and critical to the successful conclusion of the case. He and his fellow mediators were heroic in their commitment of time

Hon. Gerald E. Rosen (Ret.)

Hon. Gerald E. Rosen (Ret.) joins JAMS following 26 years of distinguished service on the federal bench as a United States District Judge for the Eastern District of Michigan, including seven years as that Court's Chief Judge.

While on the bench, Judge Rosen had wide experience in facilitating settlements between parties in a great many cases, including highly complex Multi-District Litigation (MDL) matters and class actions. Most recently, the Judge served as the Chief Judicial Mediator for the Detroit Bankruptcy case—the largest, most complex municipal bankruptcy in our nation's history—which resulted in an agreed upon, consensual plan of adjustment in just 17 months.

Prior to taking the bench, the Judge was a Senior Partner at the law firm of Miller, Canfield, Paddock and Stone where he was a trial lawyer specializing in commercial, employment and constitutional litigation.

*Read **counsel comments** about Judge Rosen's skills and style as a neutral.*

ADR Experience and Qualifications
Judge Rosen has extensive experience in the resolution of complex disputes in the following areas:

- Antitrust
- Bankruptcy (Municipal)
- Business/Commercial
- Class Action/Mass Tort
- Employment/FMLA
- Civil Rights/§1983
- Intellectual Property
- Real Property
- Securities
- Special Master/Discovery Referee

Representative Matters

- **Antitrust**
  - *Cason-Merenda v. Detroit Medical Center*, No. 06-15601 (Nurse wage case)
  - *In re Northwest Airlines Corp., et al*., Antitrust Litigation, No. 96-74711 (Hidden-city ticketing case)
- **Arbitration**
  - *Quixtar Inc. v. Brady*, No. 08-14346, and *Amway Global v. Woodward*, No. 09-12946 (Addressing arbitrability of disputes and confirmation of arbitrator's award)
- **Bankruptcy**
  - *In re: City of Detroit* (Chapter 9 municipal bankruptcy)
  - *United States v. City of Detroit* (Detroit water and sewer case) (Mediated settlements)
- **Class Action/Mass Tort**
  - *Tankersley v. Ameritech Publishing, Inc.* (FLSA collective action and Rule 23 class action)
  - *Marquis v. Tecumseh Products Co*., No. 99-75971 (Class action alleging sexual harassment at manufacturing plant)
  - *In re Rio Hair Naturalizer Products*, MDL 1055 (Multi-district product liability action)

and effort in the entire process."
-Detroit Bankruptcy Counsel

"[Y]ou demonstrate[d] a keen sense of how to get parties moving together and closing deals."
-Financial Creditor Party, Detroit Bankruptcy

- **Employment/FMLA**
  - *Redd v. Brotherhood of Maintenance of Way Employees Division of International Brotherhood of Teamsters*, No. 08-11457 (ERISA)
- **Civil Rights/§1983**
  - *Cheolas v. City of Harper Woods*, No. 06-11885 (Police raid of party with underage drinking)
  - *Flagg v. City of Detroit*, No. 05-74253 (Tamara Greene case)
- **Intellectual Property**
  - *I.E.E. International Electronics & Engineering, S.A. v. TK Holdings Inc.*, No. 10-13487 (Vehicle occupant sensors patent)
  - *Lear Automotive Dearborn, Inc. v. Johnson Controls, Inc.*, No. 04-73461 (Remote-control garage door opener patent)
- **Real Property**
  - *United States v. Certain Land Situated in the City of Detroit* (Detroit International Bridge land condemnation case)
- **Securities**
  - *In re General Motors Corp. Securities and Derivative Litigation*, MDL No. 06-1749
  - *In re Collins & Aikman Corp. Securities Litigation*, No. 03-71173
  - *In re: Delphi Corporation Securities*, Derivative & "ERISA" Litigation, MDL 1725 (Multi-district securities fraud/ERISA action)

Honors, Memberships, and Professional Activities

- Widely published on a wide range of topics including, civil procedure, evidence, due process, criminal law, labor law and legal advertising, including:
  - Co-Author, *Federal Civil Trials and Evidence*, The Rutter Group Practice Guide, 1999-Present
  - Co-Author, *Federal Employment Litigation*, The Rutter Group Practice Guide, 2006-2016
  - Co-Author, *Michigan Civil Trials and Evidence*, The Rutter Group Michigan Practice Guide, 2008-2016
  - Contributing Editor, *Federal Civil Procedure Before Trial*, The Rutter Group Practice Guide, 2008-2016
- Co-Chair, Judicial Evaluation Committee for the U.S. District Court for the Eastern District of Michigan, 1983-1988
- Adjunct Professor, Evidence:
  - University of Michigan Law School, 2008
  - Wayne State University Law School, 1992-Present
  - University of Detroit-Mercy Law School, 1994-1996
  - Thomas M. Cooley Law School, 2004-2013
- U.S. Representative, United States Department of State's Rule of Law Program in Moscow, Russia; Tbilisi, Georgia; Beijing, China; Cairo, Egypt, Hebrew University (Jerusalem); and Malta
- Judicial Consultant, United States Departments of State and Justice missions to Thailand and the Ukraine
- Member, Sixth Circuit Judicial Council, 2009-2015
- Member, Board of Directors, Federal Judges Association, 1996-2002
- Member on the Board of Directors of several charitable organizations, including: Focus: HOPE; the Detroit Symphony Orchestra; the Community Foundation of Southeastern Michigan and the Michigan Chapter of the Federalist Society
- Member, Board of Advisors, George Washington University Law School, 2005-Present
- Member, U.S. Judicial Conference, Committee on Criminal Law, 1995-2001
- Founding Member, Michigan Intellectual Property Inn of Court

Selected Articles About the Detroit Bankruptcy

- *Howes: Detroit Bankruptcy Kudos Widely Shared*, Detroit News, February 26, 2015.
- *Detroit Bankruptcy Shows Mediation Can Get the Job Done*, Detroit Free Press, January 18, 2015.
- *Detroit Bankruptcy Pros Write Off Millions in Fees*, Detroit Free Press, December 11, 2014.
- *How Detroit Was Reborn*, Detroit Free Press, Special Section, November 9, 2014.
- *Judge, A Mediator in Bankruptcy, Sees Hope for Detroit*, Detroit Free Press, November 9, 2014.

- *Finding $816 Million, and Fast, to Save Detroit*, The New York Times, November 7, 2014.
- Judge Rosen's Tough Tack on Creditors Helped Speed Detroit Bankruptcy Case, Crain's Detroit Business, November 6, 2014.
- *Mediator in Detroit Bankruptcy Walks Fine Line Between City, Creditors*, The Wall Street Journal, February 14, 2014.
- *How Mediation Has Put Detroit Bankruptcy on the Road to Resolution*, Detroit Free Press, February, 2, 2014.
- *Detroit Emerges From Nation's Largest Municipal Bankruptcy*, Los Angeles Times, November 10, 2014.

Background and Education

- United States District Judge, Eastern District of Michigan (Detroit), 1990-2017
  - Chief Judge, 2009-2015
  - Judge by Designation, United States Court of Appeals for the Sixth Circuit, Repeated Appointments
- Senior Partner, Miller, Canfield, Paddock and Stone, specializing in commercial, employment, real property, and constitutional litigation, 1979-1990
- J.D., George Washington University Law School, 1979
- Legislative Assistant, United States Senate, Sen. Robert P. Griffin (R-MI), 1974-1979
- B.A., Senior Fellow, Political Science Kalamazoo College, 1973

Disclaimer

EXHIBIT D

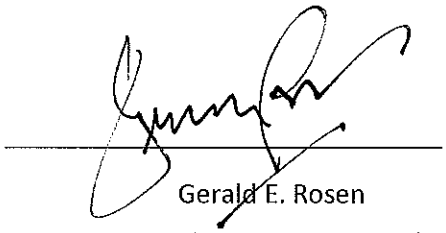
AFFIDAVIT OF GERALD E. ROSEN

Gerald E. Rosen, being duly sworn, deposes and says

1. That I make this affidavit based upon personal knowledge.
2. That I served as a United States District Judge for the Eastern District of Michigan from March 14, 1990 through January 31, 2017.
3. That I have been asked by United States District Judge Mark L. Wolf about my availability and ability to serve as the Special Master in a matter involving the application for attorney fees and costs to the Court in the case of *Arkansas Teacher Retirement System on behalf of itself and all others similarly situated v. State Street Bank and Trust Company,* C.A. No. 11-10230 – MLW.
4. That the law firms submitting applications for fees and costs in this matter are: Labaton Sucharow LLP, The Thornton Law Firm LLP, Leiff Cabraser Heimann & Bernstein LLP, Keller Rohrback LLP, McTigue Law LLP, Zuckerman Spaeder LLP, Richardson Patrick Westbrook & Brickman LLC, Beins Axelrod PC, and Feinberg Campbell & Zack PC.
5. That pursuant to FRCivP 53(b)(3)(A) and 28 USC §455, a potential Special Master must disclose any possible conflicts or other grounds for disqualification.
6. That I do not believe there are any grounds for my disqualification to serve as a Special Master under 28 USC §455(b) and that no reasonable person would have grounds to question my impartiality under 28 USC §455(a).
7. That although there are no grounds for disqualification, I do wish to disclose a relationship with one of the named partners of one of the involved law firms, Leiff Cabraser Heimann & Bernstein.
8. That I have known Elizabeth Cabraser of that firm for approximately four years and first met her when she was recommended to me as a potential new co-author of a then-existing book on which I am a co-author, *Federal Employment Litigation*, published by The Rutter Group, a subsidiary of Thomson Reuters.
9. That after I met with Ms. Cabraser and discussed the book, I asked her to join as a co-author. She agreed, and joined the book in 2013. The other current co-authors include Judge Amy St. Eve (ND IL), Judge Marvin Aspen (ND IL), and attorney Thomas Schuck of the Taft Stettinius & Hollister law firm.
10. That each of the five co-authors share an approximate 16% royalty from the publisher, paid semi-annually. The royalty income of one co-author is independent of that of the other co-authors.
11. That the co-authors update the book annually and divide the update work by allocating chapters with each co-author updating two or three chapters. The updates are submitted independently to the publisher, who edits the updates for incorporation into the book.
12. That beyond this, over the past four years I have attended continuing legal education programs with Ms. Cabraser and have spoken with her on two or three panels unrelated to our book.
13. That I have no other relationship with Ms. Cabraser or any other member of her firm.

14. That I have no relationships with any of the other law firms or lawyers in the case. However, it bears mention that one firm, Keller Rohrback LLP, concluded by settlement an antitrust class action before me in 2015-2016, and one of the partners of that firm, Lynn Sarko, was one of the lead lawyers on that case. Other than this, lawyers from the other firms may have appeared before me in cases over my judicial career, but I have no specific recollection of such lawyers.
15. That this affidavit is made under pain and penalty of perjury.

Further affiant sayeth not.



Gerald E. Rosen

3 February 2017

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all others similarly situated,	)	No. 11-cv-10230 MLW
Plaintiffs,	)	Consolidated with: No. 12-cv-11698 MLW
STATE STREET BANK AND TRUST COMPANY,	)	
Defendant.	)	

MEMORANDUM REGARDING PROPOSED APPOINTMENT OF SPECIAL MASTER
-- AND –
PLAINTIFF JAMES PEHOUSHEK-STANGELAND'S *UNOPPOSED* MOTION FOR LEAVE TO PARTICIPATE TELEPHONICALLY AT HEARING

On February 6, 2017 this Court entered an Order (Doc. 117) setting a Hearing for March 7, 2017 at 10:00 a.m. EST. This submission is filed on behalf of Plaintiffs James Pehoushek-Stangeland and the Andover Companies Employee Savings and Profit Sharing Plan ("Plan"), who filed suit seeking recovery under ERISA and who sought appointment as class representatives on behalf of an ERISA class/subclass (No. 12-cv-11698 MLW, part of this consolidated case). Mr. Pehoushek-Stangeland and the Plan are represented by undersigned counsel Keller Rohrback L.L.P.

A. No Objection to the Appointment of Judge Rosen as Special Master

The Order instructs Plaintiffs to indicate whether they object to the appointment of a special master or the selection of Judge Rosen as that special master. Mr. Pehoushek-Stangeland and the Plan have no objection to the Court's proposed procedure or to the selection of Judge Rosen.

B. Mr. Pehoushek-Stangeland's Request for Leave to Participate Telephonically at March 7, 2017 Hearing

The March 7, 2017 Hearing will address certain issues related to the accuracy and reliability of the lodestar reports filed in support of the fee petition. Lead Counsel has indicated that "[t]he lodestar reports in the individual firm declarations submitted by ERISA counsel (ECF Nos. 104-18 to 104-23) are unaffected." *See* Order Exh. A, at 2 n.3. This includes the lodestar report of Keller Rohrback L.L.P., ERISA counsel for the Plan and Mr. Pehoushek-Stangeland.

Specific counsel and parties were Ordered to attend the Hearing in person, including Keller Rohrback L.L.P. attorney Lynn Sarko and clients James Pehoushek-Stangeland and Janet Wallace (as the designated spokesperson for the Plan). Order at 13-14 n.6. Mr. Sarko and Ms. Wallace will appear at the Hearing in person as Ordered. Mr. Pehoushek-Stangeland now seeks leave to participate at the Hearing telephonically.

Mr. Pehoushek-Stangeland is scheduled to be on vacation with his family in San Diego, California on March 7, 2017, and he has had this vacation booked since mid-January, 2017. It would be a significant inconvenience for him to disrupt his family vacation. In view of these circumstances, there is good cause to allow Mr. Pehoushek-Stangeland's telephonic participation at the Hearing. If the Court grants this request, Mr. Pehoushek-Stangeland will make himself available by telephone or call in to a pre-arranged conference line, depending on the Court's preference.

Pursuant to Local Civil Rule 7.1, undersigned counsel has conferred with counsel for other parties. The relief requested is unopposed.

Dated: February 16, 2017

By: /s/ Lynn Lincoln Sarko
KELLER ROHRBACK L.L.P.
Lynn Lincoln Sarko
Derek W. Loeser
Laura R. Gerber
1201 3rd Avenue, Suite 3200
Seattle, WA 98101
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dloeser@kellerrohrback.com
lgerber@kellerrohrback.com

Counsel for Plaintiffs James Pehoushek-Stangeland and the Andover Companies Employee Savings and Profit Sharing Plan

CERTIFICATE OF SERVICE

I certify that on February 16, 2017, I caused the foregoing to be filed through the ECF system in the above-captioned actions, and accordingly to be served electronically upon all registered participants identified on the Notices of Electronic Filing.

By: /s/ Lynn Lincoln Sarko
Lynn Lincoln Sarko

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all others similarly situated,	)	No. 11-cv-10230 MLW
Plaintiffs,	)	Consolidated with: No. 12-cv-11698 MLW
STATE STREET BANK AND TRUST COMPANY,	)	
Defendant.	)	

MEMORANDUM REGARDING PROPOSED APPOINTMENT OF SPECIAL MASTER
-- AND –
PLAINTIFF JAMES PEHOUSHEK-STANGELAND'S *UNOPPOSED* MOTION
FOR LEAVE TO PARTICIPATE TELEPHONICALLY AT HEARING

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A. No Objection to the Appointment of Judge Rosen as Special Master

The Order instructs Plaintiffs to indicate whether they object to the appointment of a special master or the selection of Judge Rosen as that special master. Mr. Pehoushek-Stangeland and the Plan have no objection to the Court's proposed procedure or to the selection of Judge Rosen.

Allowed. Mr. Pehoushek-Stangeland may participate by telephone.

Wolf. D.J.
Feb. 17, 2017

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all others similarly situated, Plaintiff, - against - STATE STREET CORPORATION, STATE STREET BANK AND TRUST COMPANY and STATE STREET GLOBAL MARKETS, LLC, Defendants.	No. 11-CV-10230 (MLW)

MOTION FOR ADMISSION *PRO HAC VICE*

Pursuant to Massachusetts Local Rule 83.5.3, Evan R. Hoffman, Esq., of Thornton Law Firm LLP, duly admitted to practice law in the State of Massachusetts and before this Court, and on behalf of the Arkansas Teacher Retirement System ("ARTRS"), hereby moves for the admission of Richard M. Heimann, of the law firm of Lieff, Cabraser, Heimann & Bernstein, LLP, to appear before this Court on behalf of Plaintiffs, and states as follows:

1. Richard M. Heimann is a partner with the law firm of Lieff Cabraser Heimann & Bernstein, LLP, which is located at 275 Battery Street, 29th Floor, San Francisco, California 94111.

2. Richard M. Heimann was admitted to the bar of the State of California on April 9, 1975, and to the bar of the State of New York on July 24, 2000.

3. Richard M. Heimann is also a member of the bars of the United States District Courts for the Northern District of California (1975), the Eastern District of California

(1991), the Central District of California (2001), the Southern District of California (2005), the District of Hawaii (1985), and the District of Colorado (2006).

4. Richard M. Heimann is also a member of the bars of the United States Court of Appeals for the Ninth Circuit (1999), the Second Circuit (2013), the Eleventh Circuit (2015), and the District of Columbia (1973), as well as the United States Supreme Court (1980).

5. Richard M. Heimann is a member of the bar in good standing in every jurisdiction where he has been admitted to practice.

6. There are no disciplinary proceedings pending against Richard M. Heimann as a member of the bar of any jurisdiction where he is admitted to practice, and he has never been subject to any such disciplinary proceeding in the past.

7. Richard M. Heimann has read and is familiar with the Local Rules of the United States District Court for the District of Massachusetts.

Dated: February 17, 2017

Respectfully submitted,

/s/Evan R. Hoffman

Evan R. Hoffman (BBO#678975)
Thornton Law Firm LLP
100 Summer St., 30th Floor
Boston, MA 02110
Tel. (617) 720-1333
Fax (617) 720-2445
ehoffman@tenlaw.com

Certificate of Service

I hereby certify that on February 17, 2017, the foregoing Motion for Admission Pro Hac Vice was filed through the ECF system in the above-captioned actions, and accordingly will be served electronically upon all registered participants identified on the Notices of Electronic Filing.

/s/ Evan R. Hoffman
Evan R. Hoffman

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all others similarly situated, Plaintiff, - against - STATE STREET CORPORATION, STATE STREET BANK AND TRUST COMPANY and STATE STREET GLOBAL MARKETS, LLC, Defendants.	No. 11-CV-10230 (MLW)

AFFIDAVIT OF EVAN R. HOFFMAN

Evan R. Hoffman, being duly sworn, deposes and states:

1. I am an attorney duly admitted to practice in the Commonwealth of Massachusetts and the United States District Court, District of Massachusetts. I make this Affidavit in support of the Motion for Admission of Counsel *Pro Hac Vice*;

2. That I am a partner at the law firm of Thornton Law Firm LLP with offices located at 100 Summer Street, 30th floor, Boston, Massachusetts 02110;

3. That I respectfully request that this Court allow Richard M. Heimann to be admitted *pro hac vice* in this case;

4. That Richard M. Heimann is a member in good standing in every jurisdiction where he has been admitted to practice;

5. That Richard M. Heimann is familiar with the Local Rules of the United States District Court for the District of Massachusetts;

6. That it is my strong belief that Richard M. Heimann is of good moral character and is not currently under any order of disbarment, suspension or any other disciplinary action.

WHEREFORE, I respectfully request that Richard M. Heimann be permitted to appear as an attorney *pro hac vice* on behalf of Plaintiff in the above-captioned matter in this case.

Dated: February 17, 2017

Respectfully submitted,

/s/ Evan R. Hoffman

Evan R. Hoffman (BBO # 678975)
Thornton Law Firm LLP
100 Summer Street, 30th Floor
Boston, Massachusetts 02110-2106
Telephone: (617) 720-1333
Facsimile: (617) 720-2445
Email: ehoffman@tenlaw.com

Liaison Counsel for Plaintiff ARTRS and the Class

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all others similarly situated, Plaintiff, - against - STATE STREET CORPORATION, STATE STREET BANK AND TRUST COMPANY and STATE STREET GLOBAL MARKETS, LLC, Defendants.	No. 11-CV-10230 (MLW)

AFFIDAVIT OF RICHARD M. HEIMANN
IN SUPPORT OF MOTION FOR ADMISSION *PRO HAC VICE*

Richard M. Heimann, being duly sworn, deposes and states:

1. I am an attorney and partner of the law firm of Lieff Cabraser Heimann & Bernstein, LLP, which is located at 275 Battery Street, 29th Floor, San Francisco, CA 94111.

2. I am a member in good standing of the bar of the State of California since April 9, 1975 and the bar of the State of New York since July 24, 2000.

3. I am a member of the bars of the United States District Courts for the Northern District of California (1975), the Eastern District of California (1991), the Central District of California (2001), the Southern District of California (2005), the District of Hawaii (1985), and the District of Colorado (2006).

4. I am also a member of the bars of the United States Court of Appeals for the Ninth Circuit (1999), the Second Circuit (2013), the Eleventh Circuit (2015), and the District of Columbia (1973), as well as the United States Supreme Court (1980).

5. I am a member in good standing of the bar in every jurisdiction where I have been admitted to practice.

6. I have never been disciplined by the bar of any jurisdiction and there is no disciplinary proceedings pending against me as a member of the bar of any jurisdiction where I am admitted to practice.

7. I am familiar with the Local Rules of the United States District Court for the District of Massachusetts;

I declare under penalty and perjury this 17th day of February, 2017 that the foregoing is true and correct.

Dated: February 17, 2017

Respectfully submitted,

Richard M. Heimann (CA Bar No. 063607)
Leiff Cabraser Heimann & Bernstein, LLP
275 Battery Street, 29th Floor
San Francisco, CA 94111-3339
Telephone: (415) 956-1000
Facsimile: (415) 956-1008
Email: rheimann@lchb.com

Counsel for Plaintiff ARTRS and the Class

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

NOTICE OF APPEARANCE

Please enter my appearance as counsel for Competitive Enterprise Institute's Center for Class Action Fairness.

Dated: February 17, 2017

Respectfully submitted,

/s/ Ellen Rappaport Tanowitz

Ellen Rappaport Tanowitz (BBO No. 630710)
TANOWITZ LAW OFFICE, P.C.
1340 Centre St., Suite 103
Newton, MA 02459
Telephone: 617-965-1130
Email: ellen@tanowitzlaw.com
Attorney for Amicus Curiae
Competitive Enterprise Institute
Center for Class Action Fairness

Certificate of Service

I certify that on February 17, 2017, I served a copy of the above on all counsel of record by filing a copy via the ECF system.

Dated: February 17, 2017

/s/ Ellen Rappaport Tanowitz
Ellen Rappaport Tanowitz

UNITED STATE 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, *et al*, 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, *et al*, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 12-cv-11698 MLW

UNOPPOSED MOTION FOR ADMISSION *PRO HAC VICE*

Pursuant to Massachusetts Local Rule 83.5.3(b), Ellen Rappaport Tanowitz of Newton, MA, a member in good standing of the Bar of the Commonwealth of Massachusetts and the United States District Court for the District of Massachusetts, moves for the admission of Theodore H. Frank to

practice before this Court on behalf of the non-profit Competitive Enterprise Institute's Center for Class Action Fairness (CCAF), an amicus in the above-captioned matter, and states as follows:

1. I am an attorney duly admitted to practice in the Commonwealth of Massachusetts and the United States District Court, District of Massachusetts. I make this Affidavit in support of the Motion for Admission *pro hac vice*.

2. Theodore H. Frank is a senior attorney at CEI and is founder and director of CCAF. His business address is 1310 L Street, NW, 7th Floor, Washington, DC 20005. His telephone number is (202) 331-2263.

3. Mr. Frank is a member of the Bars of the State of Illinois, the State of California, the District of Columbia, and several United States District Courts. There are no disciplinary proceedings against him as a member of the bar in any jurisdiction. *See* Declaration of Theodore H. Frank, attached hereto as Exhibit A.

4. Mr. Frank is familiar with the applicable provisions of the Local Rules of the United States District Court for the District of Massachusetts.

WHEREFORE, the amicus CCAF respectfully requests that Theodore H. Frank be admitted to practice before this Court *pro hac vice* for the purpose of appearing as its counsel in the above-referenced proceeding in accordance with the Rules of this Court.

Dated: February 17, 2017

/s/ Ellen Rappaport Tanowitz
Ellen Rappaport Tanowitz (BBO No. 630710)
TANOWITZ LAW OFFICE, P.C.
1340 Centre St., Suite 103
Newton, MA 02459
Telephone: 617-965-1130
Email: ellen@tanowitzlaw.com
Attorney for Amicus Curiae
Competitive Enterprise Institute
Center for Class Action Fairness

Certificate of Compliance with Local Rule 7.1(a)(2)

I certify that CCAF counsel conferred with class counsel in good faith effort to narrow or resolve the issues raised in this motion. Class counsel consents to this motion.

Dated: February 17, 2017

/s/ Ellen Rappaport Tanowitz
Ellen Rappaport Tanowitz

Certificate of Service

I hereby certify that on February 17, 2017, I caused a true and correct copy of the foregoing Motion for *Pro Hac Vice* and the attached Declaration of Theodore H. Frank to be served upon all counsel of record by electronic mail via the ECF system for the District of Massachusetts.

/s/ Ellen Tanowtiz
Ellen Tanowitz

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

DECLARATION OF THEODORE H. FRANK IN SUPPORT OF MOTION FOR LEAVE TO PARTICIPATE AS *AMICUS* AND MOTION FOR *PRO HAC VICE* ADMITTANCE

DECLARATION OF THEODORE H. FRANK

I, Theodore H. Frank, declare as follows:

1. I have personal knowledge of the facts set forth herein and, if called as witness, could and would testify competently thereto.

2. I am an attorney licensed to practice law in the State of Illinois, the State of California, and the District of Columbia.

3. I am a resident of the District of Columbia.

4. I am a senior attorney at the Competitive Enterprise Institute (CEI), located at 1310 L Street, NW, 7th Floor, Washington, DC 20005. The office telephone number is (202) 331-1010 and my direct line is (202) 331-2263.

5. I was admitted to practice law in the State of Illinois on November 10, 1994. My Illinois Bar Registration number is 06224948.

6. I was admitted to practice law in the District of Columbia on April 1, 1996. My DC Bar Registration number is 450318.

7. I was admitted to practice law in the State of California on August 4, 1998. My California Bar Registration number is 196332.

8. I am authorized to practice law in the following federal district courts: United States District Court for the Northern District of California, United States District Court for the Central District of California, United States District Court for the Southern District of California, United States District Court for the Eastern District of Wisconsin, and United States District Court for the District of Columbia.

9. I am a member of the bar in good standing to practice in each of the jurisdictions listed above, and in every jurisdiction in which I have been admitted to practice.

10. I have never been suspended or disbarred in my jurisdiction, and there are no disciplinary actions pending against me in any federal or state court or in any jurisdiction in which I am a member of the bar.

11. I have never had a *pro hac vice* admission to this court (or other admission for a limited purpose under this rule) revoked for misconduct.

12. I have read and agree to comply with the Local Rules of the United States District Court for the District of Massachusetts.

13. If the Court allows the Motion for me to appear *pro hac vice* in this matter, I will represent CEI in this proceeding until the final determination thereof, and with reference to all matters, incidents, or proceedings, I agree that I shall be subject to the orders and to the disciplinary action and the civil jurisdiction of this Court in all respects as if I were regularly admitted.

The Center for Class Action Fairness

14. I founded the non-profit Center for Class Action Fairness ("CCAF"), a 501(c)(3) non-profit public interest law firm based out of Washington, D.C., in 2009. In 2015, CCAF merged into the 501(c)(3) non-profit Competitive Enterprise Institute ("CEI") in Washington, D.C.

15. Several CCAF attorneys including Frank Bednarz, Adam Schulman, Anna St. John, and Melissa Holyoak will be assisting me on this matter under my supervision. We have retained local counsel, Ellen Tanowitz, who bills us at her normal rates.

16. CCAF litigates 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) (Posner J.) (praising CCAF's work); *In re Dry Max Pampers Litig.*, 724 F.3d 713, 716-17 (6th Cir. 2013) (Kethledge, J.) (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) (Bates, J.) (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).

17. CCAF has been successful, winning reversal or remand in fourteen federal appeals decided to date. *In re Target Corp. Customer Data Security Breach Litig.*, __F.3d__, 2017 U.S. App. LEXIS 1767 (8th Cir. Feb. 1, 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, 1039 (9th Cir. 2011); *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935 (9th Cir. 2011).

18. CCAF has won more than a hundred million dollars for class members by driving the settling parties to reach an improved bargain or by reducing outsized fee awards. *See, 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).

19. Because settlement proponents often employ *ad hominem* attacks in attempting to discredit objections, it is perhaps relevant to distinguish CCAF's mission from the agenda of those who are styled "professional objectors." A "professional objector" is a specific term referring to for-profit attorneys who threaten to disrupt a settlement unless plaintiffs' attorneys buy them off with a share of the attorneys' fees. *See* Edward Brunet, *Class Action Objectors: Extortionist Free Riders or Fairness Guarantors*, 2003 U. CHI. LEGAL F. 403, 437 n.150 (2003) (public interest groups are not professional objectors). This is not CCAF's modus operandi. Paul Karlsgodt & Raj Chohan, *Class Action Settlement Objectors: Minor Nuisance or Serious Threat to Approval*, BNA: CLASS ACTION LITIG. REPORT (Aug. 12,

2011) (distinguishing CCAF from professional objectors). CCAF refuses to engage in quid pro quo settlements and does not extort attorneys; it has never withdrawn an objection in exchange for payment to CCAF. Instead, it is funded entirely through charitable donations and court-awarded attorneys' fees. Indeed, tax law would not permit any employees of CEI to personally profit from this objection.

20. Indeed, CCAF feels strongly enough about the problem of bad-faith objectors profiting at the expense of the class through extortionate means that it has initiated litigation to require such objectors to disgorge their ill-gotten gains to the class. *Pearson v. NBTY, Inc.*, No. 11-cv-7972 (N.D. Ill.); *see also* Jacob Gershman, *Lawsuits Allege 'Objector Blackmail' in Class Action Litigation*, Wall Street Journal Law Blog (Dec. 7, 2016).

21. CCAF is interceding in good faith to encourage reconsideration of an inequitable fee award. To demonstrate such good faith, I would gladly stipulate to an injunction prohibiting myself from accepting compensation in exchange for walking away from the matter. *See* Brian T. Fitzpatrick, *The End of Objector Blackmail?*, 62 VAND. L. REV. 1623 (2009) (suggesting inalienability of objections as best means of eliminating bad-faith objectors without discouraging good-faith ones).

22. CCAF has no interest in pursuing "baseless objections," because every objection we bring on behalf of a class member involves the opportunity cost of not having time to pursue a meritorious objection in another case. That is especially true in this case, where CCAF time commitment may be especially intensive. We are confronted with many more opportunities to object (or appeal erroneous settlement approvals) than we have resources to use, and make painful decisions several times a year picking and choosing which cases to pursue, and even which issues to pursue within the case. CCAF turns down the opportunity to represent class members wishing to object to settlements or fees when CCAF believes the underlying settlement or fee request is relatively fair.

23. While I am often accused of being an "ideological objector," the ideology of the Center's objections is merely the correct application of Rule 23 to ensure the fair treatment of class members. Likewise, I have often seen class counsel assert that I oppose all class actions and am seeking to end them, not improve them. The accusation—aside from being utterly irrelevant to the legal merits

of any particular objection—has no basis in reality. I have been writing and speaking about class actions publicly for nearly a decade, including in testimony before state and federal legislative subcommittees, and I have never asked for an end to the class action, just proposed reforms for ending the abuse of class actions and class-action settlements; I have frequently confirmed my support for the principles behind class actions in declarations under oath, interviews, essays, and public speeches, including a January 2014 presentation in New York that was broadcast nationally on C-SPAN and in my certiorari petition filed in 2015 in *Frank v. Poertner*. I was elected to membership of the American Law Institute in 2008. That I oppose class action abuse no more means that I oppose class actions than someone who opposes food poisoning opposes food.

24. On October 1, 2015, after consultation with its board of directors and its donors, the Center merged with the much larger Competitive Enterprise Institute ("CEI"), to take advantage of the economies of scale realized by eliminating some of the enormous fixed costs required for bureaucratic administration of and regulatory compliance by non-profits. The Center was on financially sound footing, and consistently growing its assets faster than its spending, but a disproportionate amount of attorney time was taken up with non-litigation tasks, and we were not large enough to justify hiring full-time communications or fundraising or regulatory-compliance staff, which I felt was limiting our effect.

25. Prior to its merger with CEI, the Center never took or solicited money from corporate donors other than court-awarded attorneys' fees. CEI, which is much larger than the Center, does take a percentage of its donations from corporate donors. As part of the merger agreement, I negotiated a commitment that CEI would not permit donors to interfere with CCAF's case selection or case management. In the event of a breach of this commitment, I am permitted to treat the breach as a constructive discharge entitling me to substantial severance pay. CEI has honored that commitment.

26. None of the corporate donors to CEI have earmarked contributions to CCAF. I am unaware of whether there exist any corporate donors to CEI who take a position on the underlying litigation in this case, though it is possible one exists.

27. For example, I am personally the objector-appellant in a pending Ninth Circuit appeal against the *cy pres* settlement of a corporate donor to CEI who has contributed substantially to CEI. No one at CEI has complained that I am currently prosecuting that appeal against the donor, sought to interfere with the pending appeal, or even told me that I was adverse to the donor. I only discovered that information by happenstance when looking at the corporate donor's website.

28. Similarly, CEI represented an objector to the massive Volkswagen diesel MDL settlement, arguing that the settlement structure short-changed class members by hundreds of millions of dollars. I learned only after a plaintiffs' attorney opposed our motion for leave to file an *amicus* brief in that case that Volkswagen had previously donated to CEI. No one at CEI had told me Volkswagen was a donor, or asked me to refrain from litigating against a donor's interests.

29. My understanding is that CEI's litigation history includes several lawsuits against the interests of some of its corporate donors. Based on this and based on my own experience working at CEI since 2015, I have every confidence that CCAF will continue to have the autonomy for which I negotiated.

My involvement with the *Boston Globe* article

30. On or about November 4, 2016, Andrea Estes of the *Boston Globe* contacted me and asked me several questions about the *State Street* fee request.

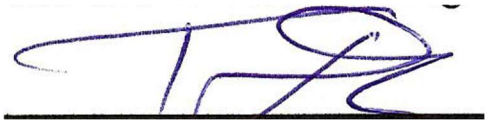
31. I spent a great deal of time that day and over the next several weeks discussing with Ms. Estes class action fee requests and the tactics attorneys sometimes use to maximize their own recovery. I agreed to analyze the fee application. I provided Ms. Estes a memo identifying problems with the fee application on November 13, 2016. The report is necessarily incomplete because, though the fee request had hundreds of pages of exhibits, it was nevertheless opaque in many critical areas. A true and correct copy of that memo is attached as Exhibit 1.

32. On November 23, 2016, Ms. Estes emailed me and told me that Labaton had requested that they be permitted to look at my memo. I gave her that permission. Ms. Estes told me that she provided the memo that day to Labaton's public-relations person, Diana Pisciotta. If this is

correct, Labaton and its agents have had access to the substance of CCAF's challenge to their fee request for nearly three months.

33. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on February 17, 2017, in Washington, DC.



Theodore H. Frank

Certificate of Service

I certify that on February 17, 2017, I served a copy of the above on all counsel of record by filing a copy via the ECF system.

Dated: February 17, 2017

/s/ Ellen Rappaport Tanowitz
Ellen Rappaport Tanowitz

1310 L Street, NW, 7th Floor
Washington, DC 20005
cei.org

202 331 1010 main
202 331 0640 fax

Date: November 13, 2016
From: Ted Frank
To: Andrea Estes
Re: *ATRS v. State Street Bank & Trust Co.*, No. 11-cv-10230-MLW (D. Mass.)

Executive Summary

Per your request, I have reviewed the fee request and associated papers in the *State Street* case. Had a class member contacted my organization and retained us to object on his or her behalf, we would have objected to the fee request as excessive in terms of lodestar, multiplier, and percentage of the fund requested. The Court awarded $75.8 million in fees and expenses. A more appropriate number would have been approximately $41 million, and perhaps as low as $27.5 million, and in no circumstances more than $55 million. In other words, class counsel received between $20 million and $48.3 million more than they should have.

This estimate is from the information disclosed in the fee request; relevant information that we have used in the past to object to a fee request was not disclosed, and we would have sought discovery of that information. Such discovery might have demonstrated additional grounds for fee reductions.

In a similar case with similar exaggerations, *In re Citigroup Securities Litigation*, our objections achieved a fee reduction of tens of millions of dollars that instead went to class members.

You also asked me whether there is any precedent for the post-judgment November 10 letter of David Goldsmith to Judge Wolf. I have never seen such a letter presented after a judge has already ruled upon a fee request. If discovery were permitted and taken, my strong suspicion is that it would show that the letter was prompted by your inquiries to the firms about the fee request.

My Experience

In 2009, I founded the Center for Class Action Fairness in Washington, DC, which became part of the Competitive Enterprise Institute in 2015. Operating on a shoestring budget, we've won over $100 million for class members by challenging abusive settlement practices and fee requests, including several landmark rulings in federal appellate courts requiring stricter scrutiny protecting class members. I graduated the University of Chicago Law School in 1994, and am an elected member of the American Law Institute. Adam Liptak of the *New York Times* has written that I am the leading critic of abusive class-action settlements. I regularly speak before legislative committees, law schools, and lawyer groups about these issues.

Scope of Review

I reviewed the following documents in full or in part:

8. Memorandum for appointment of interim lead counsel (April 7, 2011)
71. Stipulation and joint motion to continue stay (May 30, 2014)

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89. Settlement (July 26, 2016)
97. Preliminary Approval Order (August 11, 2016)
102. Motion for Fees (September 15, 2016)
103-1. Memorandum in support of motion for fees (September 15, 2016)
104. Sucharow Declaration (September 15, 2016)
104-15. Sucharow Declaration (September 15, 2016)
104-16. Bradley Declaration (September 15, 2016)
104-17. Chiplock Declaration (September 15, 2016)
104-24. Master Chart (September 15, 2016)
104-31. Fitzpatrick Article
108. Reply in Support of Motion for Fees (October 21, 2016)
111. Order (November 2, 2016)
116. Letter (November 10, 2016)

You provided me with a spreadsheet partially summarizing staff attorney time, but I ultimately generated my own, which I attach.

Fee Request

In a typical fee request, plaintiffs' attorneys justify the request by asking for a certain percentage of the fund, and cross-check it by presenting their hours expended on the case ("the lodestar"), or vice versa. Under either method, *State Street* class counsel substantially and objectionably exaggerated their request.

Percentage of the Fund

Class counsel requested 24.85% of the $300 million fund plus expenses. They argued that this was appropriate because this was in line with the median award in all class action settlements (Dkt. 103-1 at 10-11, citing 104-31). But this claim is misleading for two reasons.

First, the appropriate comparison is not "all class-action settlements," but "megafund settlements," because fee awards as a percentage of the fund typically decline monotonically as the award to the class increases. The percentage of a $1 million settlement will be larger than the percentage of a $10 million settlement, which will be larger than the percentage of a $100 million settlement, and so on. Plaintiffs' own cited evidence shows that the mean fee award in a settlement of $250 million to $500 million is only 17.8%. (Dkt. 103-1 at 839.)

Second, this case appears to have been considerably less risky than the typical $300 million settlement. Percentages are higher if plaintiffs have litigated a case to trial or the eve of trial, or overcome summary judgment motions. None of that happened here. There was preliminary skirmishing with a motion to dismiss (something any non-frivolous complaint well grounded in law can overcome simply by making plausible factual allegations that are assumed by the court to be true for purposes of resolving the motion). Then, proceedings were immediately stayed so that the parties could engage in settlement negotiations for several years. (Dkt. 71; Dkt. 104 at ¶¶ 52-106.) While there was "confirmatory discovery" during these settlement negotiations, it is unclear the degree to which this

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was done to "churn" hours to increase the lodestar for a future fee request, and to what degree litigation continued after the defendant made an offer to pay the 20-cents-on-the-dollar of alleged damages that the case ultimately settled for. (Dkt. 104 at ¶ 109.) A higher contingent-fee percentage (and multiplier of lodestar) is designed to compensate class counsel for the risk that they will be unpaid in litigation, and if the defendant has made clear its willingness to settle rather than to win, class counsel is facing substantially smaller risk of being unpaid.

Assuming that this case was of average risk, an appropriate percentage would have been in the 17.8% range. If, as the record appears to indicate, class counsel faced little or no post-motion-to-dismiss risk because of the willingness of State Street to resolve the case in mediation once government investigations concluded, even an 17.8% figure would overcompensate class counsel. Asking for 24.85% while misrepresenting the Fitzpatrick report as class counsel did is, in my opinion, abusive and objectionable, though it is certainly true that some courts have chosen to award similarly oversized percentages of similarly-sized settlements. Others have not. For example, around the same time as this fee request, class counsel in *Dial Corp. v. News Corp.*, 2016 U.S. Dist. LEXIS 150528 (S.D.N.Y. Oct. 31, 2016) asked for 30% of a $244 million settlement fund. The court awarded 20%.

Lodestar

Class counsel also justified their fee request with a lodestar cross-check, claiming that they devoted 86,113.7 hours with a total lodestar of $41.3 million, asking for a multiplier of 1.8. The Court agreed to these amounts, an effective blended rate of over $860/hour for every partner, staff attorney, and paralegal. This is objectionable for several reasons.

First, if the case was destined to settle at an early stage, a 1.8 multiplier is excessive. An appropriate multiplier in a case where class counsel has a 75% chance of being paid is 1.33.

Second, as class counsel admitted in their November 10 letter, they double-counted over 9000 hours, exaggerating lodestar by over $4 million. Their letter claims this to be harmless error, because it merely reduces their multiplier to 2.0.

Third, the bulk of hours—about 49,000, over 63%—were performed by "staff attorneys" being billed for hundreds of dollars an hour, over half of the $37.3 million lodestar. These are temporary contract attorneys doing menial work reviewing documents, often with little supervision as to their efficiency or efficacy. The legal standard is that work should not be billed to the class for more than what a paying client would pay, and a paying client would pay $24 to $39/hour for this work. In practice, courts have either rubber-stamped fee requests with the 1000% markup or, as in *Citigroup*, reduced the hourly rate to $200/hour. (The *Dial Group* fee request was unusual in that class counsel admitted to using contract attorneys and asked for reimbursement at $39/hour.) We would argue for the $24 to $39/hour figure, which suggests that the correct lodestar should be reduced by over **$17.6 million** against the $37.3 million figure. This would suggest the real lodestar is **$19.7 million**, and the multiplier class counsel is requesting is actually **3.8**. With an appropriate multiplier between 1.33 and 2, the cross-check would suggest a fee of $26.2 million to $39.4 million is more

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appropriate, or between 8.7% and 13.1%. This analysis does not test whether paralegals were actually performing paralegal, rather than secretarial, work.

Note that in *Citigroup*, our objection obtained discovery demonstrating that there was thousands of hours of overbilling that the court ultimately eliminated from the lodestar figure. The data provided in this fee application does not permit us to analyze whether there was similar overbilling here, and whether the multiple law firms duplicated work or churned hours by having multiple attorneys perform tasks that a paying client would insist be performed by fewer attorneys. The *Dial Group* judge found substantial duplicative billing.

Other Issues Possibly Meriting Fee Reduction

Federal Rule of Civil Procedure 23(e) requires all agreements relating to the settlement be disclosed to the court. Paragraph 21 of the Settlement provides "Lead Counsel will in good faith promptly distribute any award of attorneys' fees and/or payment of Litigation Expenses among Plaintiffs' counsel." However, the agreement amongst the various law firms how to divvy up the lump sum awarded by the court was never disclosed to the court or the class. That undisclosed agreement may demonstrate that the law firms involved did not believe the case to be particularly risky if one or more firms was willing to accept a lower multiplier than other firms, and, if so, would be additional grounds for reducing the total award rather than accepting the 2.0 multiplier demanded by class counsel. If we had objected, we would have demanded disclosure of that agreement.

Lack of Objections

Class counsel makes much of the fact that no class member objected to the fee request, and the lack of objection may have encouraged the district court to avoid going through the hundreds of pages of the fee request looking for the discrepancies you and I found. (Courts that have the experience of knowing where overbilling is happening are rare; most rely upon adversarial presentation to learn of problems, and in the absence of objectors, the court only heard one side of the story.) It is worth noting that no class member had the incentive to object to the fee request. The problems with the fee request are buried deep in hundreds of pages of legal documents, and are not made clear by the notice to the class. Even though this settlement provided an average of $200,000 to class members, a successful objection reducing the fee request $20 million would have provided less than $20,000 of additional settlement funds to the objecting party—and there is no guarantee the objection would be successful. An investigation to determine whether an objection was worthwhile would have cost more than $20,000 if conducted by a private law firm, and very few private law firms have the experience of me and the non-profit attorneys who work for me what to look for, or would be willing to incur the wrath of powerful plaintiffs' firms like Lieff Cabraser.

There are barriers to objection even when a non-profit like mine can be involved. *In re Capital One TCPA Litigation* is a case where we caught Lieff Cabraser and other firms overbilling by millions of dollars and charging the class over $5,000/hour for nearly risk-free litigation. Though we achieved a $7 million reduction of fees at the district-court level, we believed we could win even more for the class on appeal. Lieff Cabraser paid my client $25,000 to drop his appeal. Legal ethics required us to

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follow our client's wishes, and Lieff Cabraser avoided having $10 million of excessive fees placed under appellate scrutiny.

November 10 Letter to Court

You also asked me whether there is any precedent for the post-judgment November 10 letter of David Goldsmith to Judge Wolf. I have never seen such a letter presented after a judge has already ruled upon a fee request. If discovery were permitted and taken, my strong suspicion is that it would show that the letter was prompted by your inquiries to the firms about the fee request. The double-counting was likely the result of sloppiness assuming that there would be no objectors' or court scrutiny of the fee request, and it wouldn't surprise me to learn that other fee requests contain similar inadvertent errors. The misrepresentation of the Fitzpatrick report and the hourly rates of the staff attorneys is, in my mind, less excusable, but class counsel would likely defend these actions by pointing to other instances where attorneys have done the same thing and were rewarded for it without consequence. Until courts sanction attorneys for overbilling, they have no incentive not to play "heads I win, tails don't count": if objectors or a court does not notice the overbilling, class counsel receives the full benefit of overbilling. Unfortunately, to date, when objectors do call overbilling to the court's attention, the only consequence is to reduce the fees to what they would have been if no overbilling had occurred. This incentivizes class counsel to "free roll" and overbill, which is precisely why everybody does it, especially since most fee requests do not receive objections at all.

My organization, with only five attorneys spending the majority of their time on this work, has many more opportunities to object to abusive class action practices than time to pursue every possible objection. We rely on the generosity of private charitable donors to pay our expenses. Furthermore, we cannot pursue an objection without a class-member client, and because of this, there are dozens of cases every year where we would wish to object, but are helpless to do anything to protect the class.

Please do not hesitate to contact me if you have any questions.

Ted Frank
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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

CORPORATE DISCLOSURE STATEMENT OF THE COMPETITIVE ENTERPRISE INSTITUTE'S CENTER FOR CLASS ACTION FAIRNESS

In accordance with Local Rule 7.3, *amicus curiae* Competitive Enterprise Institute's Center for Class Action Fairness discloses as follows. Competitive Enterprise Institute ("CEI") is an IRC § 501(c)(3) non-profit corporation incorporated under the laws of Washington, D.C., with its principal place of business in Washington, D.C. The Center for Class Action Fairness is a sub-unit within CEI. CEI does not issue stock and is neither owned by nor is the owner of any other corporate entity, in part or in whole. The corporation is operated by a volunteer board of directors.

Dated: February 17, 2017

Respectfully submitted,

/s/ Ellen Rappaport Tanowitz

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Certificate of Service

I certify that on February 17, 2017, I served a copy of the above on all counsel of record by filing a copy via the ECF system.

Dated: February 17, 2017

/s/ Ellen Rappaport Tanowitz
Ellen Rappaport Tanowitz

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

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THE COMPETITIVE ENTERPRISE INSTITUTE'S CENTER FOR CLASS ACTION FAIRNESS'S MOTION FOR LEAVE TO FILE *AMICUS CURIAE* RESPONSE TO COURT'S ORDER OF FEBRUARY 6 AND FOR LEAVE TO PARTICIPATE AS *GUARDIAN AD LITEM* FOR CLASS OR *AMICUS* IN FRONT OF SPECIAL MASTER

In accordance with Local Rule 7.1, and in response to this Court's Memorandum and Order dated February 6, 2017 soliciting briefing on this matter (Dkt. 117), *amicus curiae* The Competitive Enterprise Institute's Center for Class Action Fairness ("CCAF")[1] seeks leave of this Court (1) to file an *amicus* response to the February 6, 2017 order suggesting the appointment of a special master, and (2) to be permitted to participate during the proposed special master proceedings as either *guardian ad litem* for the class or as *amicus* for the Court.

In support of this motion, CCAF relies upon the accompanying memorandum of law, which explains why CCAF should be permitted to file a response to the Court's February 6 order and why CCAF should be permitted to participate during the proposed special master's proceedings that will reevaluate class counsel's billing records, and the declaration of Theodore H. Frank and its exhibit, attached to his motion for admission *pro hac vice*. CCAF's 13-page proposed *amicus* response to the February 6 order is also attached to this motion.

For reasons discussed in the accompanying memorandum, CCAF respectfully seeks the relief requested above.

Request for Oral Argument

Under Local Rule 7.1(d), CCAF hereby requests that oral argument on this motion, if necessary, be held on March 7, 2017 at 10:00 am, contemporaneous with the hearing that the Court already scheduled for that time and date in its February 6 order. *Amicus's* counsel intends to attend the hearing in any event.

[1] Prior to October, CCAF was a standalone 501(c)(3) non-profit public-interest law firm. On October 1, 2015, the Competitive Enterprise Institute ("CEI") merged with CCAF. CCAF has become a division within CEI's law and litigation program.

Dated: February 17, 2017

Respectfully submitted,

/s/ Ellen Rappaport Tanowitz

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Attorneys for Amicus Curiae
Competitive Enterprise Institute
Center for Class Action Fairness

Certificate of Compliance with Local Rule 7.1(a)(2)

I certify that on February 14, 2017 CCAF emailed counsel for Plaintiff Arkansas Teacher Retirement System and the settlement class and counsel for Defendant State Street Corporation, in a good faith effort to narrow or resolve the issues raised in this motion. CCAF received an email from Defendant that they did not feel the need to confer in light of the subject matter of the motion. Via telephone on the same day, CCAF attorneys conferred with class counsel in good faith effort to narrow or resolve the issues raised in this motion. Class counsel does not consent to this motion nor to the timing of its filing.

Dated: February 17, 2017

/s/ Ellen Rappaport Tanowitz
Ellen Rappaport Tanowitz

CERTIFICATE OF SERVICE

I certify that on February 17, 2017, I served a copy of the above on all counsel of record by filing a copy via the ECF system.

Dated: February 17, 2017

/s/ Ellen Rappaport Tanowitz
Ellen Rappaport Tanowitz

IN THE UNITED STATES DISTRICT COURT
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THE COMPETITIVE ENTERPRISE INSTITUTE'S CENTER FOR CLASS ACTION FAIRNESS'S *AMICUS* RESPONSE TO COURT'S ORDER OF FEBRUARY 6

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Amicus Competitive Enterprise Institute's Center for Class Action Fairness ("CCAF") submits this response to the February 6, 2017 memorandum and order (Dkt. 117) ("Order") suggesting the appointment of a special master, in order to voice recommendation on a few matters.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Class counsel have conceded they exaggerated the lodestar in the fee request by more than $4 million, but suggest this Court do nothing about it. Dkt. 116. As the Court noted, there are other discrepancies revealed by a *Boston Globe* story; furthermore, the memo CCAF attorney Theodore H. Frank wrote to *Boston Globe* reporter Andrea Estes about the fee request reveals still other problems. Declaration of Theodore H. Frank Exhibit 1 ("Frank Memo") (filed contemporaneously with Frank's motion for *pro hac vice* status). The questions become what can and should the Court do about this overbilling, and what can and should the Court do to investigate other potential excesses in counsel's proffered lodestar. The "should" half is easy: the Court should discharge its fiduciary obligations to exercise a "jealous regard" for class members' interest in the settlement fund, and that means conducting as rigorous as possible an examination of the proposed fee award. *Rodriguez v. Disner*, 688 F.3d 645, 655 (9th Cir. 2012); *accord Weinberger v. Great Northern Nekoosa Corp.*, 925 F.2d 518, 525-27 (1st Cir. 1991) (Selya, J).[1] Because of the current procedural posture, the "can" half is more difficult to navigate, though not insurmountable.

The Court's Order proposes to appoint former United States District Judge Gerald Rosen as a special master to investigate and then report concerning the accuracy and reliability of class counsel's representations made in the course of seeking fees last year, the reasonableness of the $74.5 million fee award and the $1.25 million expense award, and any related issues that emerge including whether any misconduct occurred and whether it should be sanctioned. Order 8, 10. The Court proposes to

[1] Theodore Frank's five-page single-spaced memorandum to Globe reporter Andrea Estes (attached as Exhibit 1 to Declaration of Theodore H. Frank in Support of Motion for Admission *Pro Hac Vice*) explains precisely why a reexamination of the fee award is necessary. Those reasons will not be repeated here.

confer upon the special master the power to subpoena documents, interview witnesses, and take testimony, while minimizing *ex parte* communication with the Court. Order 9. The Court proposes to pay the special master from the fee fund awarded to class counsel. Order 10.

CCAF largely endorses the Court's proposed path, with only a few substantive suggestions: 1) appointing a guardian *ad litem* to advocate to the class's interests during and after the special master proceedings; 2) charging the special master's fees to class counsel directly, in proportion to the fee they have received, rather than taxing the fee fund; 3) requiring notice to absent class members who filed claims on the common fund under the Court's Rule 23(d)(1)(B) authority if the court declines to appoint a guardian.

ARGUMENT

I. The role that the Court envisions for the special master is permissible under Fed. R. Civ. P. 53.

The Order outlines a dual role for the special master: investigating and then issuing a report and recommended disposition. Both the text of Rule 53—governing special master appointments—and the case law interpreting the rule would permit this type of assignment. Rule 53(c)(1)(C) contemplates that, even without an appointment order, the master has authority to conduct an evidentiary hearing, compel, take, and record evidence. Rule 53(b)(2)(A) allows the appointing order to specify particular "investigation or enforcement duties." The subsequent report and recommendation is an implicit expectation of most if not every special master under Rule 53(e) and (f).

The issue is slightly more complicated because the Court intends to appoint a special master post-judgment. A post-judgment "master's role in enforcement may extend to investigation in ways that are quite unlike the traditional role of judicial officers in an adversary system." Advisory Committee Notes to 2003 Amendments to Rule 53. In *National Organization for Reform of Marijuana Laws v. Mullen*, the Ninth Circuit held that it was a valid exercise of discretion for the district court to delegate to the special master "the power to act as investigator as well as hearing officer." 828 F.2d 536, 544-45 (9th Cir. 1987) (adopting the position of Fifth Circuit decisions). Likewise, the First Circuit has upheld a "circumspect" post-judgment special master appointment for "limited

investigatory and advisory purposes." *In re Pearson*, 990 F.2d 653, 659 n.7 (1st Cir. 1993) (Selya, J.); *see also Stauble v. Warrob, Inc.*, 977 F.2d 690, 698 (1st Cir. 1992) (special master appointment would be warranted for "consummatory, remedy-related issues (such as, say, the performance of an accounting)"); *Hofmann v. EMI Resorts, Inc.*, 689 F. Supp. 2d 1361, 1366 (S.D. Fla. 2010) (appointment for investigation and recommendation).

Pearson is particularly significant because it ratified a district court's *sua sponte* decision to appoint a special master post-settlement to investigate whether an ongoing consent decree should be modified. 990 F.2d at 659. The referral for purposes of investigation and recommendation was permissible, even "concinnous," because it was "more akin to rendering mere assistance to the court" than to impermissibly abdicating the adjudicatory function. *Id.* Even though the district court in *Pearson* failed to provide advance notice of the special master appointment to the plaintiffs, that was not sufficient to constitute an abuse of discretion. *Id.* at 660. Moreover, *Pearson* affirmed the use of a special master without determining whether after the special master finished its investigation, the district court would have the *sua sponte* authority to modify the consent decree under Rule 60(b)(5). *Id.* at 659 n.7.

Thus, the Court has the authority to appoint a special master to conduct the necessary investigation of class counsel's fee petition and related issues.

II. The Court should appoint a guardian *ad litem* for the class, or, in the alternative, order that class members be notified of the current posture of the action.

Allowing CCAF to file an *amicus* response to the Court's February 6 order is a band-aid but it is not a permanent cure, because the lack of adversarialness will reemerge during any proceedings in front of the special master. Just like a district court evaluating a settlement without objectors, a judge revaluating fee submissions on an *ex parte* basis 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).

Again, the lack of adversarial process is doubly problematic in the class action context 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"); *Inkjet*, 716 F.3d at 1178 ("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. In certain cases, the parties negotiate "clear sailing" settlement clauses whereby the defendant agrees not to oppose class counsel's fee; thus "depriv[ing] the court of the advantages of the adversarial process." *Weinberger*, 925 F.2d 518, 525. 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)); Frank Memo 4; *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, recently 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.

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 (1st Cir. 1991). 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). To avoid an unenlightening one-sided reexamination of the issues (to the detriment of absent class members), this Court should appoint a *guardian ad litem* to represent the class's interests in front of the special master. "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 v. Robert Half Int'l., Inc.*, 376 P.3d 672, 691 (Cal. 2016) (Liu, J., concurring).

This guardian *ad litem* need not be CCAF, but CCAF is willing to accept the responsibility and offers at least two distinct advantages. One concern about appointing a *guardian ad litem* is that doing so will encourage attorneys to stir up litigation for fees: who will watch the watchmen? CCAF is insulated from this concern by the inherent protection of tax law governing § 501(c)(3) non-profits. Tax law prohibits CEI from covering more than half of its long-term program expenses with attorneys' fees, or considering the receipt of fees in its case-selection decisions. Rev. Proc. 92-59. Thus, CCAF is willing to serve as guardian at whatever rate this Court sets in advance, be it lodestar, a blended court-appointed rate below lodestar, a single-digit percentage of any class recovery, or even, if the Court feels it to be the best course, *pro bono* without compensation.[2] *Second*, CCAF's experience—deriving from involvement in dozens of cases involving class action settlement and fee proceedings, and hours of review of the fee application in this case for the *Boston Globe*—can provide an illuminating background to supplement and situate the special master's inquiry. CCAF is prepared to direct the master to precedent involving excessive fee grabs (involving, *inter alia*, the overbilling of temporary

[2] Moreover, the issue of guardian costs should not sway the Court against appointing a guardian who (unlike CCAF) would require a fee. Simply put, the costs would "'pale in comparison to the significant amounts of money' to be divided between plaintiffs and counsel in high-value cases." *Laffitte v. Robert Half Int'l., Inc.*, 376 P.3d 672, 691 (Cal. 2016) (Liu, J., concurring) (quoting William Rubenstein, *The Fairness Hearing: Adversarial and Regulatory Approaches*, 53 UCLA L. Rev. 1435, 1455 (2006)).

contract attorneys) and discuss the evolution of fee jurisprudence, justifying the realistic fear about awarding windfall compensation to class counsel. *E.g.*, Frank Memo.

One objection to a guardian's appointment may be that the special master doesn't need any support in serving the class's interests. But that ignores the foundational premise of the American legal system: the adversary system reaches better results than does a purely inquisitional Continental system of adjudication. An *ex parte* proceeding will make things more onerous and tedious for the special master, and inevitably will make review more costly as well. A guardian's presence would relieve some of the special master's burden, more easily enable him to complete his investigation within the six month proposed period, and effectively give the class a double security: two sets of eyeballs scrutinizing class counsel's billing records. If CCAF is appointed as that guardian, CCAF's willingness to perform its services *pro bono* or on a contingent basis means that the class stands to gain much in the best case, but lose nothing in the worst case.

It is far from unprecedented to introduce adversarial presentation into special master fee proceedings. *Kaplan v. Rand*, 192 F.3d 60, 65 (2d Cir. 1999) (noting objector participation in front of special master); *UFCW Local 880-Retail Food v. Newmont Mining Corp.*, 352 Fed. Appx. 232, 234 n.2 (10th Cir. 2009) (same); *In re Volkswagen & Audi Warranty Extension Litig.,* 784 F. Supp. 2d 35, 38 (D. Mass. 2011), *rev'd on other grounds*, 692 F.3d 4 (1st Cir. 2012) (noting that class members were permitted an opportunity to speak in front of special master regarding fees); *see generally In re High Sulfur Content Gasoline Prods. Liab. Litig.*, 517 F.3d 220, 232 n.18 (5th Cir. 2008) ("Other guidelines for minimal procedural protections appear in the federal rules governing special masters and magistrate judges, who may be asked by a district court to oversee an attorneys' fee allocation. In either situation, all interested parties present their data to the deciding officer; have limited if any right to engage in ex parte contacts; and may, on a fully developed record, seek reconsideration or modification of the allocation by the district court.") (internal citations omitted). On one occasion, CCAF was granted permission, over the opposition of class counsel in the case, to represent an absent class member in adversarial fee proceedings in front of a special master. *See In re Johnson & Johnson Derivative Litig.*, 2013

U.S. Dist. LEXIS 180822 (D.N.J. June 13, 2013) (reducing proclaimed lodestar hours by more than 20%), *adopted by district court at* 2013 U.S. Dist. LEXIS 167066 (D.N.J. Nov. 25, 2013). More generally than just the fee context, the Advisory Committee Notes recommend that "in most settings…*ex parte* communications [between the master and] the parties should be discouraged or prohibited." Advisory Committee Notes to 2003 Amendments to Rule 53; *cf. also In re Community Bank of N. Va.*, 418 F.3d 277, 319 (3d Cir. 2005) (criticizing *ex parte* determinations into settlement fairness that excluded objectors).

Adversarial presentation is especially helpful here, because the overbilling here involves systematic actions by class counsel common to class-action fee requests that the special master has no reason to be familiar with and may not notice in the course of an *ex parte* proceeding where he is only hearing one side of the issue. While the *Boston Globe* article superficially spots some issues with the fee request in a story written for its lay audience in the limited space of a Sunday newspaper, and this Court has demonstrated a willingness to require investigation of those issues, the Frank Memo demonstrates that there are other problems and potential problems with the fee request well beyond the scope of the *Boston Globe* article and the Court's proposal in Dkt. 117.

Maybe even more significantly, there is a fundamental procedural need for a guardian to represent the class's interests. As mentioned above, *In re Pearson* declined to answer whether the district court at the conclusion of a special master's could *sua sponte* reopen the judgment and modify the underlying consent decree. 990 F.2d at 659 n.7. Hewing to the same course as *Pearson*, more recent First Circuit decisions have also left unresolved the question of whether district courts may issue Rule 60(b) orders on their own initiative. *Quincy V, LLC v. Herman*, 652 F.3d 116, 121 (1st Cir. 2011); *Dr. Jose S. Belaval, Inc. v. Perez-Perdomo*, 465 F.3d 33, 37 (1st Cir. 2006). While the majority consensus of other circuits is that that *sua sponte* orders are allowable, there is a contrary minority view. *Contrast* U*nited States v. Northshore Mining Co.*, 576 F.3d 840, 847 (8th Cir. 2009) (allowing a district court to grant Rule 60(b) relief *sua sponte*); *Golden Blount, Inc. v. Robert H. Peterson Co.*, 438 F.3d 1354, 1359 n.1 (Fed. Cir. 2006) (same); *Fort Knox Music Inc. v. Baptiste*, 257 F.3d 108, 111 (2d Cir. 2001) (same); *McDowell v.*

Celebrezze, 310 F.2d 43, 44 (5th Cir. 1962) (same), *with United States v. Pauley*, 321 F.3d 578, 581 n.1 (6th Cir. 2003) (prohibiting the granting of relief under Rule 60(b) in the absence of a motion); *Dow v. Baird*, 389 F.2d 882, 884-85 (10th Cir. 1968) (same). Class members rights should not be wagered on the First Circuit following the majority rule of a circuit split if it can be helped.

Particularly if the Court declines to appoint a class guardian, the Court should strongly consider requiring class counsel to notify absent class members of the current status of the proceedings, thereby giving them an opportunity to voice their opinions and even to intervene. *See* Fed. R. Civ. P. 23(d)(1)(B)(i)-(iii). 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). Because class counsel's initial fee accounting and fee motion were admittedly inaccurate, to date class members still not received the adequate 23(h) notice that they are due. *See, e.g.* Charles Alan Wright *et al., Federal Practice and Procedure* § 1796.6 (3d ed. 2005) ("A proposed notice that is incomplete or erroneous or that fails to apprise the absent class members of their rights will be rejected as it would be ineffective to ensure due process."). As a salubrious byproduct of sending notice now, one or more class members might feel encouraged to retain counsel, to intervene for purposes of filing a 60(b) motion, or for other beneficial purposes. If CCAF is not appointed a formal guardian for the class, the class's notice could be used to alert class members to the possibility of *pro bono* representation from CCAF. At a minimum, the notice should reference the Boston Globe exposé, describe class counsel's confession of error, explain the Court's intentions for further proceedings, and invite class members to comment.

Without a 60(b) motion to modify the fee award, *sua sponte* disciplinary sanction and disgorgement would remain another option within the jurisdiction of the court.[3] Still, sanctions are a more severe remedy subject to more exacting appellate review due to the reputational harm they could inflict. Class counsel, for example, will likely defend against any potential disciplinary sanction by arguing that exaggerated billing practices are commonplace among practitioners, and countless courts have approved similar submissions in the past, albeit mostly in similar *ex parte* proceedings with similar lack of notice to the court. A 60(b)(3) motion undoing the fee award on the basis of "fraud," "misrepresentation," or "misconduct" appears to be the more ideal vehicle to remedy the harm to the class in this instance.[4] *See Roger Edwards, LLC v. Fiddes & Son*, 427 F.3d 129, 134 (1st Cir. 2005) ("fraud perpetrated in the course of litigation interferes with the process of adjudication, and it is this kind of litigation-related fraud that principally concerns Rule 60(b)(3)'s fraud provision."). Factual findings undergirding a 60(b) order are only reviewed on appeal for clear error,[5] in contrast to the mixed questions of law and fact regarding a typical Rule 11 sanction.

Pragmatic considerations counsel in favor of appointing a guardian *ad litem* and, if not, then sending supplemental notice to class members. "When lawyers request fees from a class settlement fund; they are not like adversaries in litigation; they are like artists requesting a grant from the National Endowment for the Arts." *In re Continental Ill. Secs. Litig.*, 962 F.2d 566, 573 (7th Cir. 1992). "If we are

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[3] *See, e.g., Cooter v. Gell & Hartmarx*, 496 U.S. 384, 395 (1990) (district court retains jurisdiction to issue Rule 11 sanctions with respect to misconduct occurring before dismissal); *see also Mellott v. MSN Communications, Inc.*, 492 Fed. Appx. 887, 890 (10th Cir. 2012) (court retains jurisdiction to vindicate its inherent authority).

[4] CCAF does not mean to exclude the other subsection of Rule 60, as valid potential avenues to reopen the judgment. For example, Rule 60(d)(3) reserves the court's power to "set aside a judgment for fraud on the court." Fraud on the court is an "unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter" or an "intentional deflecting of the Court from knowing all the facts necessary to make an appropriate judicial decision on the matter before it." *Pearson v. First NH Mortgage Corp.*, 200 F.3d 30, 37 (1st Cir. 1999) (quoting *Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1118 (1st Cir. 1989) and *In re Pearson*, 210 B.R. 500, 501 (Bankr. D.N.H. 1997)).

[5] *Ungar v. PLO*, 599 F.3d 79, 83 (1st Cir. 2010).

asked to do nonadversary things, we need different procedures"; "the appointment of a special master to advise the court is an obvious possibility." *Id.* CCAF respectfully suggests that the Court also try to reintroduce adversary process through appointment of a class guardian or through sending notice to absent class members.

III. Even if there is no guardian *ad litem*, the special master's investigation scope should be expanded.

The Court's order focuses on the issues identified by the *Boston Globe* story. That story was based in part on Theodore H. Frank's November 13 memorandum to *Boston Globe* Andrea Estes, written at her request. The Frank Memo (Exhibit 1 to the Declaration of Theodore H. Frank, filed contemporaneously) identifies several objectionable issues with the fee request that were not included in the *Boston Globe* story. *E.g., compare* Dkt. 103-1 at 10-11 (asserting empirical study found mean awards of 23.5% to 25.7%) *with* Dkt. 104-31 at 839 (17.8% mean for relevant comparison of megafund settlements) *and In re Neurontin Mktg. & Sales Practices Litig.*, 58 F. Supp. 3d 167, 172 (D. Mass. 2014) (same). Though class counsel has had access to the Frank Memo since November 23 (Frank Declaration ¶ 32), they did not flag any of its issues for the Court, and cannot be expected to flag them for the special master. The special master should be free to investigate issues identified as problems or potential problems in the Frank Memo.

IV. For several reasons, it is preferable to tax class counsel directly for the special master's costs, rather than taxing the fee fund.

The Court's order proposes to compensate the special master "from the $74,542,250 awarded to plaintiffs' counsel." Order 10. For several reasons, CCAF recommends that instead of debiting the fee fund, the Court's appointment order should tax the master's costs to class counsel directly, divided amongst counsel in proportion to the funds they have received from the fee fund.[6] First, a fair reading

[6] As with the special master's fees, equity dictates that the costs of renoticing the class should be borne by class counsel: "[t]hose who made the misstatements should bear the costs of a notice to correct misstatements." Manual for Complex Litigation (Fourth) § 21.313 (2004). Equity aside, law also dictates that it is the plaintiffs who generally must bear the costs of notifying the class. *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 177-78 (1974).

of the settlement makes it seem doubtful that the fee fund currently has any funds in it at all. *See* Stipulation of Agreement and Settlement (Dkt. 89) ¶19, 21 ("Attorneys' fees, Litigation Expenses, and Service Awards, as awarded by the Court, shall be paid from the Class Escrow Account to the Lead Counsel Escrow Account immediately upon award by the Court…. Unless otherwise ordered by the Court, and subject to the provisions of the Lead Counsel Escrow Account, Lead Counsel will in good faith promptly distribute any award of attorneys' fees and/or payment of Litigation Expenses among Plaintiffs' Counsel"). Thus, although Fed. R. Civ. P. 53(g)(2)(B) allows the master's compensation to be paid "from a fund or subject matter of the action within the court's control," it is unclear whether there is a fee fund within the Court's control from which to draw.

Even if the fee fund has not yet been distributed, it is not certain that it is within the jurisdiction of the court to divert funds out of it. The February 6 Order notes that in the Court's final judgment it "retained jurisdiction over, among other things, the determination of attorneys' fees and other matters related or ancillary to them." Order 8 (citing Dkt. 110 at 10). But that final judgment preceded the final order on fees, which only retains jurisdiction "over the subject matter of the Class Actions and over all parties to the Class Actions, including the administration and distribution of the Net Class Settlement Fund to Settlement Class Members." Dkt. 111 at 5. While a colorable reading of this language could cover jurisdiction over the fee fund, but there we find still another issue.

The Fee Order of November 2nd is a final order from which no appeal was taken within the allotted 30 days. As one would expect, the settlement itself does not provide that the fee fund may be used to pay the special master. *See Peterson v. Islamic Republic of Iran*, 2016 U.S. Dist. LEXIS 174092 (D.D.C. Dec. 15, 2016) (declining to charge the master's fees to the qualified settlement fund when said fund did not provide for such charges). A special master appointing order that charges fees to that fund could effectively be construed as a reopening and modification of that final judgment. *Cf. In re Pearson*, 990 F.2d 653, 659 n.7 (1st Cir. 1993) (where defendant agreed to defray the master's fees, "we cannot say, on the record as it currently stands, that the district court's action is tantamount to a gratuitous modification of the consent decrees."). Again, this raises the specter of *sua sponte*

modifications, but is doubly problematic currently because it would be done before the necessary finding of any Rule 60 predicate.

Given the thicket of thorny issues surrounding ordering payment to originate from the fee fund, it is preferable to directly tax the costs of the master against class counsel. "A party whose unreasonable behavior has occasioned the need to appoint a master…may be charged all or a major portion of the master's fees." Advisory Committee Notes to 2003 Amendments to Rule 53. "The district court has broad discretion…in determining which of the parties to charge." *Morgan v. Kerrigan*, 530 F.2d 401, 427 (1st Cir. 1976); *accord Latin Am. Music Co. v. Archdiocese*, 499 F.3d 32, 43 (1st Cir. 2007). Class counsel may be liable for these costs. *Aird v. Ford Motor Co.*, 86 F.3d 216, 221 (D.C. Cir. 1996) (affirming district court's decision to tax class counsel for special master's costs as the losing party in the case).

And so they should be liable here. It light of the fact that class counsel's admitted billing practices have occasioned the need for a special master, it is class counsel that should foot the bill. *Neslin v. Wells*, 104 U.S. 428, 437 (1882) ("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."); *c.f. also Commonwealth Electric Co. v. Woods Hole*, 754 F.2d 46, 49 (1st Cir. 1985) ("Outside-chance opportunity for a megabucks prize must cost to play."). The order regarding allocation of the master's payment may be subject to later modification should unforeseen circumstances arise. Fed. R. Civ. P. 53(g)(3). But at least for now, class counsel has already admitted $4 million of overbilling and nevertheless proposes no consequence. It is only fair to have them cover the fees of a master's services in recommending an appropriate consequence.

CONCLUSION

For the foregoing reasons, in addition to appointing a special master, CCAF recommends appointing a guardian *ad litem*, and ordering class counsel directly responsible for the master's costs. If a guardian *ad litem* is not appointed, CCAF recommends supplemental notice to class members who have filed claims on the common fund.

Dated: February 17, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 17, 2017, I served a copy of the above on all counsel of record by filing a copy via the ECF system.

Dated: February 17, 2017

/s/ Ellen Rappaport Tanowitz
Ellen Rappaport Tanowitz

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 COMPETITIVE ENTERPRISE INSTITUTE'S CENTER FOR CLASS ACTION FAIRNESS'S MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO FILE *AMICUS CURIAE* RESPONSE TO COURT'S ORDER OF FEBRUARY 6 AND FOR LEAVE TO PARTICIPATE AS *GUARDIAN AD LITEM* FOR CLASS OR *AMICUS* IN FRONT OF SPECIAL MASTER

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Competitive Enterprise Institute's Center for Class Action Fairness ("CCAF") submits this memorandum in support of its motion for leave of this Court (1) to file an *amicus* response to the February 6, 2017 order suggesting the appointment of a special master, and (2) to be permitted to participate during the proposed special master proceedings as either *guardian ad litem* for the class or as *amicus* for the Court.

INTRODUCTION

Class counsel sought and obtained the second largest non-securities attorneys' fee in First Circuit history (from the third largest non-securities common fund settlement). Dkts. 103-1, 111. Class counsel avoided any reduction in the request by attesting to a lodestar fee multiplier of 1.8, and by misrepresenting the empirical work of Brian Fitzpatrick. *Compare* Dkt. 103-1 at 10-11 *with* Dkt. 104-31 at 839 *and In re Neurontin Mktg. & Sales Practices Litig.*, 58 F. Supp. 3d 167, 172 (D. Mass. 2014) (noting Fitzpatrick found 17.8% mean for megafund settlements). After inquiries from the *Boston Globe* relating to questionable billing practices, class counsel only then acknowledged that their attestation was false; they had double counted $4 million worth of attorney hours in their earlier submissions to the Court. Dkt. 116. The best case scenario is extreme negligence.

But the import of the lodestar issues here transcend this case. Fee submissions like class counsel's here are emblematic of systematic overbilling practices in today's large scale class action environment. *See, e.g.,* Daniel Fisher, *Judge Cuts Fees in Citigroup Settlement, Citing 'Waste and Inefficiency'*, FORBES, Aug. 1, 2013; Scott Flaherty, *Judge Slashes $10M in Fees Over Firm's Use of Temporary Associates*, NEW YORK LAW JOURNAL, Jan. 3, 2017. Such practices reinforce "perception among a significant part of the non-lawyer population…that class action plaintiffs' lawyers are overcompensated for the work that they do." Third Circuit Task Force Report, Selection of Class Counsel, 208 F.R.D. 340, 343-44 (2002). Just last year, California Supreme Court Justice Goodwin Liu entreated courts to combat this perception by zealously scrutinizing fee requests, noting that "public confidence in the fairness of attorney compensation in class actions is vital to the proper enforcement of substantive law." *Laffitte v. Robert Half Int'l*, 376 P.3d 672, 688-92 (Cal. 2016) (Liu, J., concurring). Indeed, the First Circuit

requires the same: "a fee accord in a class action should be subject to the closest and most systematic scrutiny before gaining judicial approval." *Weinberger v. Great Northern Nekoosa Corp.*, 925 F.2d 518, 526 (1st Cir. 1991) (Selya, J.). "[P]rivate fee agreements cannot substitute for the conscientious application of the court's informed judgment to the lawyers' detailed billing records." *Id.* at 527.

This Court has a real opportunity to make an economic difference by demonstrating that overbilling will not be tolerated. Given the size of the class action settlement industry,[1] such exaggeration likely costs consumers, investors and businesses billions.

INTEREST OF AMICUS CURIAE

Established in 2009, CCAF represents class members *pro bono* in class actions where class counsel employs unfair class action procedures to benefit themselves at the expense of the class. *See, e.g.*, *Pearson v. NBTY, Inc.*, 772 F.3d 778, 787 (7th Cir. 2014) (observing that CCAF "flagged fatal weaknesses in the proposed settlement" and demonstrated "why objectors play an essential role in judicial review of proposed settlements of class actions"); *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."); *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 objectors in ascertaining the fairness of a settlement.").[2] CCAF's founder has been recognized as "the leading critic of abusive class action settlements." Adam Liptak, *When Lawyers Cut Their Clients Out of the Deal*, N.Y. TIMES, Aug. 13, 2013, at A12. CCAF attorneys have won numerous appeals, many of them landmark published decisions in support of the principles that settlement fairness requires that the primary beneficiary of a class-action settlement should be the

[1] The securities class action settlement industry alone amounted to more than $3 billion in 2015, and over $80 billion between 1996-2014. *Securities Class Action Settlements 2015 Review and Analysis*, CORNERSTONE RESEARCH, at 3 (2016), *Available at* http://securities.stanford.edu/research-reports/1996-2015/Settlements-Through-12-2015-Review.pdf.

[2] On October 1, 2015, CCAF merged with the Competitive Enterprise Institute ("CEI"). CCAF has become a division within CEI's law and litigation program.

class, rather than the attorneys or third party *cy pres* recipients; and that courts scrutinizing settlements should value them based on what the class actually receives, rather than on illusory measures of relief. *E.g.*, *In re BankAmerica Corp. Secs. Litig.*, 775 F.3d 1060 (8th Cir. 2015); *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163 (3d Cir. 2013); *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935 (9th Cir. 2011). CCAF was recently appointed by the Eighth Circuit to defend a district court's decision invoking Rule 11 sanctions against class counsel for forum shopping a questionable settlement into state court contrary to absent class members' interests. *Adams v. USAA et. al.*, Nos. 16-3382, 16-3482 (8th Cir.).

Another core aspect of CCAF's work is policing fee requests, including lodestar submissions, to ensure that class counsel does not claim a windfall at the expense of class member recovery. *E.g. In re Citigroup Inc. Secs. Litig.*, 965 F. Supp. 2d 369 (S.D.N.Y. 2013) (reducing fees by more than $26 million to account for a "significantly overstated lodestar"); *In re Citigroup Inc. Secs. Litig.*, No. 07-cv-9901(SHS), Dkt. No. 286, Order at 1-2 (S.D.N.Y. Sept. 10, 2013) ("Frank's objections enhanced the adversarial process and played a not insignificant role in focusing the Court on instances of overbilling."); *In re Capital One Tel. Consumer Prot. Act Litig.*, 80 F. Supp. 3d 781, 806 (N.D. Ill. 2015) (finding class counsel's $22 million fee request to exceed the market rate; awarding 30% less); *In re Johnson & Johnson Derivative Litig.*, 2013 U.S. Dist. LEXIS 167066 (D.N.J. Nov. 25, 2013) (ultimately awarding $5.3 million of overbloated $10 million fee request); *see also* Roger Parloff, *Should Plaintiffs Lawyers Get 94% of a Class Action Settlement?*, FORTUNE, Dec. 15, 2015 (calling CCAF's founder "the nation's most relentless warrior against class-action fee abuse"). *Boston Globe* reporter Andrea Estes quotes CCAF head Theodore H. Frank extensively in her December 17, 2016 article "*Critics hit law firms' bills after class-action lawsuits*" and describes him too as a "leading national critic." Dkt. 117, Ex. B. Moreover, Mr. Frank provided Ms. Estes with an extensive report ("Frank Memo," attached as Exhibit 1 to Declaration of Theodore H. Frank in Support of Motion for Admission *Pro Hac Vice* (filed contemporaneously)) detailing likely excesses of class counsel's bills.

CCAF's interest lies in advancing the interests of absent class members and vouchsafing that Rule 23 operates in a systematically fair manner. An old Italian proverb warns that "[a] lawsuit is a

fruit tree planted in a lawyer's garden." *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 469 (2d Cir. 1974) (internal quotation omitted). CCAF makes sure that the deed to that garden remains with the class, and that class counsel remains but a faithful gardener.

ARGUMENT

I. CCAF should be permitted to file an *amicus* response to the Court's February 6 order.

There are two principal schools of thought regarding acceptance of opposed *amicus curiae* briefs. The permissive school, expounded in a Third Circuit opinion by then-Judge Alito, would allow the brief to be filed as long as the movant can demonstrate an (a) an adequate interest, (b) desirability, and (c) relevance. *Neonatology Assocs., P.A. v. Comm'r*, 293 F.3d 128, 131 (3d Cir. 2002).[3] *Neonatology* disavowed any requirement that an *amicus* be impartial, as difficult if not impossible to reconcile with the textual requirement that *amicus* have an interest in the case. *Id.* Instead, *Neonatology* concluded that, for a number of reasons, "it is preferable to err on the side of granting leave." *Id.* at 133. First, there is the "eminently practical" reason that "if denied, the court may be deprived of the advantage of a good brief, but if granted, the court can readily decide for itself whether the brief is beneficial. If beneficial, the court will be edified; if not, the brief will be disregarded." *Animal Prot. Inst. v. Martin*, 2007 U.S. Dist. LEXIS 13378, at *10 (D. Me. Feb. 23, 2007) (following *Neonatology*). Second, "[a] restrictive policy with respect to granting leave to file may also create at least the perception of viewpoint discrimination" unless the court follows a blanket policy of denying any amicus." *Neonatology*, 293 F.3d at 133. Third, "[a] restrictive policy may also convey an unfortunate message about the openness of the court." *Id.*

Judge Posner, conversely, advocates for the restrictive school that would only permit an amicus filing "when a party is not represented competently or is not represented at all, when the

[3] Although *Neonatology* was interpreting Fed. R. App. P. 29, given the lack of a local rule regarding amicus participation, it is appropriate to import the *Neonatology* standard to district court proceedings. *See, e.g., Portland Pipe Line Corp. v. City of S. Portland*, 2:15-cv-00054-JAW, 2017 U.S. Dist. LEXIS 2592 (D. Me. Jan. 9, 2017) (granting leave to file); *Animal Prot. Inst. v. Martin*, 06-cv-128-B-W, 2007 U.S. Dist. LEXIS 13378 (D. Me. Feb. 23, 2007) (same).

amicus has an interest in some other case that may be affected by the decision in the present case (though not enough affected to entitle the amicus to intervene and become a party in the present case), or when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide." *Ryan v. CFTC*, 125 F.3d 1062, 1063 (7th Cir. 1997) (in chambers opinion); *accord NOW, Inc. v. Scheidler*, 223 F.3d 615, 617 (7th Cir. 2000). *Ryan* worries that *amicus* participation too often imposes unnecessary costs upon the court without concomitant benefit. *Id.*[4]

The First Circuit has not addressed the subject for nearly fifty years. There it recognized that "the acceptance of amicus briefs is within the sound discretion of the court" and that an amicus cannot be expected to be impartial. *Strasser v. Doorley*, 432 F.2d 567, 569 (1st Cir. 1970). Otherwise, *Strasser* takes a skeptical approach, aligned more with Judge Posner's camp. "[A] district court lacking joint consent of the parties should go slow in accepting…an amicus brief unless, as a party, although short of a right to intervene, the amicus has a special interest that justifies his having a say, or unless the court feels that existing counsel may need supplementing assistance." *Id.* Nonetheless, *Strasser* implies that unsolicited *amicus* participation, focusing on legal questions, and in support of a previously unrepresented or underrepresented party can be beneficial. *Id.*

It matters little for this motion which of the above standards applies here, because CCAF satisfies all of them. Take the most restrictive standard, the disjunctive three-part test espoused by *Ryan*.

CCAF possesses a special interest in virtue of representing class members across the nation, for whom an equitable attorneys' fee jurisprudence matters. *See e.g., In re HP Inkjet Printer Litig.*, 716 F.3d 1173 (9th Cir. 2013) (reversing for failure to comply with attorneys' fees limitations prescribed

[4] It is not clear that Judge Posner's view is the universal in the Seventh Circuit. *See Bethune Plaza, Inc. v. Lumpkin*, 863 F.2d 525, 533 (7th Cir. 1988) (Easterbrook, J.) ("Participation as amicus curiae will alert the court to the legal contentions of concerned bystanders, and because it leaves the parties free to run their own case is the strongly preferred option.")

by the Class Action Fairness Act of 2005). CCAF is currently representing clients in pending litigation regarding proposed exorbitant common fund fees. *Edwards v. National Milk Producers Fed'n*, No. 11-cv-04766 (N.D. Cal.). Circumscribing windfall fees is thus a highly important issue to CCAF's constituency. Second, because of CCAF's extensive experience and familiarity with complex class action fee issues, its response would aid this Court in evaluating its proposed course regarding appointment of a special master to investigate potential sanctions or reassess class counsel's attorneys' fees. As the Federal Judicial Center notes, "[i]nstitutional 'public interest' objectors may bring a different perspective...Generally, government bodies such as the FTC and state attorneys general, as well as nonprofit entities, have the class-oriented goal of ensuring that class members receive fair, reasonable and adequate compensation for any injuries suffered. They tend to pursue that objective by policing abuses in class action litigation." *Managing Class Action Litigation: A Pocket Guide for Judges*, 17 (3d ed. 2010).

CCAF's participation will be yet more helpful because neither the named plaintiffs, class counsel have or can reasonably be expected to adequately represent absent class members at this stage. In negotiations with the defendant over the size of the gross settlement, they likely protected class members' interests perfectly well. But during the fee-setting stage of a case, the relationship between class counsel and the class "turns adversarial," necessitating the Court's "jealous regard to the rights of those who are interested in the fund." *In re Mercury Interactive Secs. Litig.*, 618 F.3d 988, 994 (9th Cir. 2010). Class counsel has already explicitly taken the position that, despite a concession of error, their fee award should remain the same. Dkt. 116. The defendant, reasonably concerned only with its aggregate payment into the common fund, did not oppose class counsel's initial request (Dkt. 102 at 5), and has expressed no inclination to get involved now. Nor have any of the named class representatives interceded on the class's behalf.

Judge Posner himself is acutely cognizant of the "lack of adversary procedure" in this circumstance, where neither the defendant nor any individual absent class members have the incentive to resist class counsel's fee incursions. *In re Continental Ill. Sec. Litig.*, 962 F.2d 566, 573 (7th Cir. 1992)

As a result, absent class claimants' naturally-preferred position, one in favor of stringent special master review and disgorgement to the class of excess attorneys' fees, is currently unrepresented. As amicus, CCAF could provide proper support for this class-centric view. *See Ryan*, 125 F.3d at 1063; *see also Neonatology*, 293 F.3d at 132 ("To be sure, an amicus brief may be particularly helpful with the party supported is unrepresented or inadequately represented.").

CCAF's proposed response to the Court's February 6 order is attached to the contemporaneously-filed motion. CCAF requests that this Court either deem that version filed or allow CCAF leave to file it subsequently as a separate docket entry. CCAF intends to have an attorney attend the March 7, 2017 hearing to observe, and, if the Court so wishes, to discuss any ideas presented in CCAF's or the parties' responses.

Class counsel opposes this motion, claiming prejudice from the fact of the filing and the timing. This is wrong. Class counsel would not be unduly prejudiced by an *amicus* brief because they have no inherent right to avoid adversary presentation. Indeed, as a fiduciary for the class it is especially improper for them to resist efforts that provide a fair hearing to their clients. This is especially true here, because, on information and belief, class counsel's agents were given Frank's November 13 memorandum to Andrea Estes on November 23, 2016. Frank Decl. ¶ 32. We do not object if class counsel is given an opportunity to reply to CCAF's *amicus* response in addition to their February 20 filing, or if the March 7 hearing is continued to accommodate that response.[5]

We apologize in advance that this brief in support of CCAF's right to file an *amicus* brief is repetitive of many of the points we make in our proposed *amicus* brief; class counsel's insistence that they would oppose our motion to file anything requires us to make the points both in this paper and the response.

[5] If the March 7 hearing is rescheduled, please note that CCAF attorney Theodore H. Frank is required to be in California March 13 through March 16 for a Ninth Circuit oral argument and a series of speaking engagements arranged by the Competitive Enterprise Institute.

II. To remedy the adversarial deficit, CCAF should be permitted to participate as *guardian ad litem* for the class, or in the alternative as *amicus curiae*, during the proceedings in front of the special master.

Allowing CCAF to file an *amicus* response to the Court's February 6 order is a band-aid but it is not a permanent cure, because the lack of adversarialness will reemerge during any proceedings in front of the special master. Just like a district court evaluating a settlement without objectors, a judge revaluating fee submissions on an *ex parte* basis 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).

Again, the lack of adversarial process is doubly problematic in the class action context 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"); *Inkjet*, 716 F.3d at 1178 ("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. In certain cases, the parties negotiate "clear sailing" settlement clauses whereby the defendant agrees not to oppose class counsel's fee; thus "depriv[ing] the court of the advantages of the adversarial process." *Weinberger*, 925 F.2d 518, 525. 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)); Frank Memo 4; *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, recently 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.

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 (1st Cir. 1991). 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). To avoid an unenlightening one-sided reexamination of the issues (to the detriment of absent class members), this Court should appoint a *guardian ad litem* to represent the class's interests in front of the special master. "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 v. Robert Half Int'l., Inc.*, 376 P.3d 672, 691 (Cal. 2016) (Liu, J., concurring).

This *guardian ad litem* need not be CCAF, but CCAF is willing to accept the responsibility and offers at least two distinct advantages. One concern about appointing a *guardian ad litem* is that doing so will encourage attorneys to stir up litigation for fees: who will watch the watchmen? CCAF is insulated from this concern by the inherent protection of tax law governing § 501(c)(3) non-profits. Tax law prohibits CEI from covering more than half of its long-term program expenses with attorneys' fees, or considering the receipt of fees in its case-selection decisions. Rev. Proc. 92-59. Thus, CCAF is willing to serve as guardian at whatever rate this Court sets in advance, be it lodestar, a blended

court-appointed rate below lodestar, a single-digit percentage of any class recovery, or even, if the Court feels it to be the best course, *pro bono* without compensation.[6] *Second*, CCAF's experience—deriving from involvement in dozens of cases involving class action settlement and fee proceedings, and hours of review of the fee application in this case for the *Boston Globe*—can provide an illuminating background to supplement and situate the special master's inquiry. CCAF is prepared to direct the master to precedent involving excessive fee grabs (involving, *inter alia*, the overbilling of temporary contract attorneys) and discuss the evolution of fee jurisprudence, justifying the realistic fear about awarding windfall compensation to class counsel. *E.g.*, Frank Memo.

Alternatively, CCAF is willing to participate as *amicus* in front of the special master on equivalent terms. CCAF's concern is not really the particular designation the class advocate would have, but what functional role it would be permitted. The advocate must have the ability to review class counsel's billing records, conduct discovery from class counsel, engage in and respond to motion practice and to brief relevant legal questions that arise. That said, appointing a formal guardian may be superior simply because in that event there should be no question that the class's advocate would have authority to file a motion on behalf of the class. In particular, after the special master concludes its commission, before November there will likely be a need for someone to file a Fed. R. Civ. P. 60(b)(3) motion on the class's behalf, to reopen and disgorge a portion of the final fee awarded to class counsel. In the First Circuit it is an open question whether the Court is allowed to make a Rule 60(b) motion *sua sponte*. *Quincy V, LLC v. Herman*, 652 F.3d 116, 121 (1st Cir. 2011); *Dr. Jose S. Belaval, Inc. v. Perez-Perdomo*, 465 F.3d 33, 37 (1st Cir. 2006). Other circuits are divided on the question. *Ocean City Costa Rica Inv. Group, LLC v. Camaronal Dev. Group, LLC*, 571 Fed. Appx. 122, 127 (3d Cir. 2014)

[6] Moreover, the issue of guardian costs should not sway the Court against appointing a guardian who (unlike CCAF) would require a fee. Simply put, the costs would "'pale in comparison to the significant amounts of money' to be divided between plaintiffs and counsel in high-value cases." *Laffitte v. Robert Half Int'l., Inc.*, 376 P.3d 672, 691 (Cal. 2016) (Liu, J., concurring) (quoting William Rubenstein, *The Fairness Hearing: Adversarial and Regulatory Approaches*, 53 UCLA L. Rev. 1435, 1455 (2006)).

(cataloguing four circuits in favor and two against). Perhaps an absent class member would intervene to do so but that is not a prospect that can be counted on. The safest course is to appoint a guardian on behalf of the class who has the authority to make such motions on the class's behalf.

CCAF requests that the court appoint CCAF as a guardian to act on behalf of the class during the upcoming proceedings regarding the reevaluation of class counsel's attorneys' fees. If not, CCAF encourages the court to seek out a third-party to act as guardian or as a fee expert advocating on the class's behalf. If no guardian ad litem is presented, supplemental notice should be sent to claiming class members notifying them of these proceedings and notifying them of their right to retain counsel and intervene to seek review of the fee order.

CONCLUSION

Based on the foregoing, CCAF respectfully moves this Court for leave to file the *amicus* response attached to this motion, and for leave to participate in any special master proceedings as guardian *ad litem* for the class or *amicus curiae*.

Dated: February 17, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 17, 2017, I served a copy of the above on all counsel of record by filing a copy via the ECF system.

Dated: February 17, 2017

/s/ Ellen Rappaport Tanowitz
Ellen Rappaport Tanowitz

UNITED STATES DISTRICT COURT
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, 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, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 12-cv-11698 MLW

MEMORANDUM OF LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
CONSENTING TO APPOINTMENT OF SPECIAL MASTER

Lieff Cabraser Heimann & Bernstein, LLP ("LCHB"), co-counsel for the plaintiff class, respectfully submits this memorandum pursuant to the Court's Memorandum and Order dated February 6, 2017 ("Mem. & Order," ECF No. 117), as follows:

1. LCHB has no objection to the appointment of a Special Master.

2. LCHB has no objection to the appointment of Judge Rosen as the Special Master.

3. LCHB does not believe Judge Rosen's disqualification would be required under 28 U.S.C. § 455(a) or (b), and, in any event, LCHB waives any such ground for disqualification.

4. LCHB has no objection to the terms of the appointment and powers of the Special Master or the contemplated period for completion of his duties, as discussed in the Memorandum and Order. *See* Mem. & Order at 9, 12-13.

Dated: February 17, 2017

Respectfully submitted,

Lieff Cabraser Heimann & Bernstein, LLP

By: */s/ Richard M. Heimann*

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Co-counsel for the Plaintiff Class

Certificate of Service

I certify that on February 17, 2017, I caused the foregoing Memorandum of Lieff Cabraser Heimann & Bernstein, LLP Consenting to Appointment of Special Master to be filed through the ECF system in the above-captioned action(s) and accordingly to be served electronically upon all registered participants identified on the Notices of Electronic Filing or by e-mail.

/s/ Richard M. Heimann
Richard M. Heimann

UNITED STATES DISTRICT COURT
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 **PURSUANT TO FEBRUARY 6, 2017 ORDER OF THE COURT**
ARNOLD HENRIQUEZ, MICHAEL T. COHN, WILLIAM R. TAYLOR, RICHARD A. SUTHERLAND, and those similarly situated, 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, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 12-cv-11698 MLW

MEMORANDUM OF LABATON SUCHAROW LLP
CONSENTING TO APPOINTMENT OF SPECIAL MASTER
AND PROPOSING APPOINTMENT OF CO-SPECIAL MASTER

Labaton Sucharow LLP ("Labaton Sucharow" or the "Firm"), Lead Counsel for Plaintiff Arkansas Teacher Retirement System and the Settlement Class in the above-titled consolidated actions, respectfully submits this memorandum pursuant to the Court's Memorandum and Order dated February 6, 2017 ("Mem. & Order," ECF No. 117).

A. Appointment of Judge Rosen as a Special Master

Labaton Sucharow has appeared before Judge Rosen during his distinguished tenure on the federal bench, having served as co-lead counsel for lead plaintiffs in a securities class action settled in January 2009. *In re General Motors Corp. Securities & Derivative Litigation*, MDL No. 06-1749 (E.D. Mich.) ("*GM*"), is listed among the representative matters in Judge Rosen's biography annexed to the Memorandum and Order. Mem. & Order Ex. C, at 2.

Based on Judge Rosen's qualifications, the Firm has no objection to his appointment as a Special Master here. Moreover, Labaton Sucharow does not believe Judge Rosen's disqualification would be required under 28 U.S.C. § 455(a) or (b). In any event, Labaton Sucharow waives any such ground for disqualification.

The Firm has no objection to Judge Rosen's proposed powers and authority as a Special Master or the contemplated period for completion of his duties, as discussed in the Memorandum and Order at page 9, *provided*, *however*, that Labaton Sucharow must respectfully reserve its rights with regard to the Court's reference to "any related issues that may emerge in the special master's investigation." Mem. & Order at 8. The Firm cannot give knowing consent either as to process or participants for unknown and undefined matters.

B. Proposed Appointment of the Hon. Layn R. Phillips (Ret.) as Co-Special Master

In addition to permitting comment on the appointment of Judge Rosen as Special Master, the Court provided all parties with the opportunity to propose alternative eligible candidates for

possible appointment. *See* Mem. & Order at 12; *see also* Fed. R. Civ. P. 53(b)(1) ("Any party may suggest candidates for appointment.").

The Firm respectfully proposes that the Court appoint the Hon. Layn R. Phillips (Ret.) to serve as Co-Special Master together with Judge Rosen. Judge Phillips is the founder of, and a mediator and arbitrator with, Phillips ADR Enterprises, P.C. ("PADRE") in Corona del Mar, California. He is a former United States District Judge for the Western District of Oklahoma and former United States Attorney for the Northern District of Oklahoma. After leaving the bench in 1991, Judge Phillips joined the law firm of Irell & Manella, where for 23 years he specialized in complex civil litigation, internal investigations, and alternative dispute resolution. In November 2014, Judge Phillips formed PADRE, an organization exclusively devoted to alternative dispute resolution. Judge Phillips's biography and declaration are annexed hereto as Exhibits A and B.[1]

Judge Phillips is a nationally respected mediator of class actions who is regularly engaged by counsel for both plaintiffs and defendants. Among the complex matters in which he has served recently as a mediator is *In re The Bank of New York Mellon Corp. Forex Transactions Litigation*, No. 12-MD-2335 (LAK) (JLC) (S.D.N.Y.) ("*BNYM FX*"). That litigation, which settled in September 2015, included a class action that asserted claims similar to the underlying claims in this action against The Bank of New York Mellon, a major custody bank and State Street's primary competitor. *See* Ex. B hereto, ¶ 2.

The Firm's request that Judge Phillips be appointed as Co-Special Master is principally premised upon the following: One of the key questions to be investigated under the Court's Memorandum and Order is the accuracy and reliability of the submissions supporting plaintiffs'

[1] Judge Phillips will participate in the March 7, 2017 hearing by telephone if the Court so requests. If the Court wishes to meet with Judge Phillips at a subsequent time, the Firm will make appropriate arrangements.

counsel's fee and expense application, which involves industry-standard private firm procedures in large class actions. Of particular import to this process, the latter includes the use of contract attorneys to review documents. As a result of his many years as a mediator and practitioner, Judge Phillips has substantial knowledge and experience with these issues, and in particular of industry standards in this area. *See id.* ¶ 4.

Judge Phillips has mediated numerous disputes involving securities class action attorney fees, a number of which have involved the review of detailed billing information. In a securities class action involving Merck, part of Judge Phillips's assignment as Special Master required him to review and analyze the billing and lodestar information for the more than a dozen plaintiff firms involved in that case. *See id.* In sum, appointing Judge Phillips together with Judge Rosen will promote judicial economy and serve the interests of justice. *See In re Schering-Plough Corp. Enhance Sec. Litig.*, Civ. No. 08-397 (DMC) (JAD), 2013 WL 5505744, at *6-7 (D.N.J. Oct. 1, 2013) (two special masters, who had mediated the settlement negotiations, reviewed plaintiffs' counsel's fee and expense application and submitted joint report and recommendations); *M.D. ex rel. Stukenberg v. Abbott*, No. 11-CV-84, 2017 WL 74371, at *1-2 (S.D. Tex. Jan. 9, 2017) (two special masters conducted investigation and submitted joint report and recommendations).

Labaton Sucharow does not believe there is any ground for Judge Phillips's disqualification under 28 U.S.C. § 455(a) or (b). *See* Ex. B hereto, ¶ 8. In any event, the Firm waives any such ground for disqualification. *See* Fed. R. Civ. P. 53(a)(2) & (b)(3); *see also* Mem. & Order at 12 n.4.

Although there are no grounds for disqualification, Judge Phillips wishes to disclose that he has been selected as a neutral by the majority of the firms involved in this matter, and has

previously served as a mediator in numerous class actions involving many of these firms, and continues to do so today. *See* Ex. B hereto, ¶ 9.

For example, with respect to the plaintiffs' firms involved here, these cases include *BNYM FX* and *GM*, noted above, in which Labaton Sucharow, Thornton Law Firm LLP, Lieff Cabraser Heimann & Bernstein, LLP ("Lieff Cabraser"), Keller Rohrback L.L.P. ("Keller Rohrback"), Zuckerman Spaeder LLP, or some combination of them represented the plaintiffs. Further, Judge Phillips is currently serving as a mediator in class actions in which Labaton Sucharow, Lieff Cabraser, and/or Keller Rohrback represent the plaintiffs. *See id.* ¶ 10.

Additionally, Judge Phillips has previously served as a mediator in a number of actions in which Wilmer Hale (which represents State Street here) or one of its predecessor firms represented the defendants. Further, Judge Phillips is currently serving as a mediator in multiple actions involving Wilmer Hale or one of its predecessor firms. *See id.* ¶ 11.

Labaton Sucharow, as Lead Counsel, is prepared to deposit funds with the Clerk of the Court, in such sums and at such times as the Court may order, to be used to pay the fees and expenses of the Co-Special Masters. *See* Mem. & Order at 10-11.

Accordingly, Labaton Sucharow respectfully submits that the Court should appoint Judge Phillips together with Judge Rosen as Co-Special Masters here.

Dated: February 17, 2017

Respectfully submitted,

/s/ Joan A. Lukey

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Certificate of Service

I certify that on February 17, 2017, I caused the foregoing Memorandum of Labaton Sucharow LLP Consenting to Appointment of Special Master and Proposing Appointment of Co-Special Master to be filed through the ECF system in the above-captioned actions, and accordingly to be served electronically upon all registered participants identified on the Notices of Electronic Filing.

/s/ Joan A. Lukey
Joan A. Lukey

Exhibit A

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LAYN PHILLIPS

CEO / MEDIATOR / ARBITRATOR

Layn R. Phillips, founder of Phillips ADR Enterprises (PADRE), is both a former United States Attorney and a former United States District Judge.

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Judge Phillips joined the United States Attorney's office in Los Angeles in 1980 as an Assistant United States Attorney, serving as a federal prosecutor in the Central District of California for four years. During the Reagan administration, he returned to his home state of Oklahoma, where, at age 31, he was nominated to serve as a United States Attorney.

At age 34, he again was nominated by President Reagan to serve as a United States District Judge in Oklahoma City. During his tenure on the bench, he presided over more than 140 federal trials in Oklahoma, New Mexico, and Texas. He also sat by designation on the United States Court of Appeals for the Tenth Circuit in Denver, Colorado, where he participated in numerous panel decisions and published multiple opinions.

In 1991, he resigned from the federal bench and joined Irell & Manella, where for 23 years he specialized in complex civil litigation, internal investigations, and alternative dispute resolution. For his years of commitment to public service, he was named as one of the 10 Outstanding Young Americans by the U.S. Junior Chamber of Commerce. As a result of his trial work, Judge Phillips was elected into the American College of Trial Lawyers. He has the dual honor of being named by LawDragon as one of the "Leading Judges in America" and as one of the "Leading Litigation Attorneys in America." In Augus t 2016, Judge Phillips was named as one of the top seven mediators in the United States of American by Chambers and Partners (http://www.chambersandpartners.com/12788/79/editorial/5/1).

Judge Phillips received both his B.S. and J.D. from the University of Tulsa. He also completed two years of an LLM program at Georgetown University Law Center in the field of antitrust and economic regulation of industry.

Judge Phillips has also been inducted into the University of Tulsa Athletic Hall of Fame. He was a four-year letter winner in tennis, serving as the captain of the men's varsity team and winning the NCAA Missouri Valley Conference Championship at #1 singles.

Judge Phillips has a passion for travel and has visited every continent. He currently resides in Laguna Beach, California with his wife, Kathryn. He has three grown children Amanda, Parker and Graham and a granddaughter, Stella and a grandson, Owen Layn.

Phillips ADR

ADR FEE SCHEDULE

Mediator/Arbitrator	Fees	
Former United States District Judge Layn R. Phillips	Newport Beach Flat Fee Per Day	$33,000*
	Subsequent Day Newport Beach Flat Fee	$28,000*
	New York Flat Fee Per Day	$43,000*
	Subsequent Day New York Flat Fee	$38,000*
	Hourly Follow-Up Rate	$ 1,500
	Advance payment is required before any in-person mediation or arbitration sessions can begin.	
	Cancel/Reschedule: Once mediation/arbitration session(s) are scheduled, if it is cancelled or rescheduled 30 days or more prior to the scheduled date, there is no cancellation charge, and 100% of the full fee will be refunded. However, if the session(s) are cancelled or rescheduled less than 30 days prior to the date, 100% of the full fee will be charged to the parties, unless Judge Phillips is able to reschedule a new ADR matter for the date(s) that was cancelled or changed.	
	* The Flat Fee includes all travel time and expenses, if applicable, but does not include any follow up work after the initial scheduled mediation date(s). All telephonic and email follow-up work will be billed at the current hourly rate. All in-person follow-up mediation sessions will be billed at the applicable subsequent day rate. Weekend mediation sessions are different and will be determined on a case-by-case basis.	

Exhibit B

UNITED STATES DISTRICT COURT
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, 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, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 12-cv-11698 MLW

DECLARATION OF LAYN R. PHILLIPS

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the following is true and correct:

1. I am the founder of, and a mediator and arbitrator with, Phillips ADR Enterprises, P.C. ("PADRE") in Corona del Mar, California. I served as United States Attorney for the Northern District of Oklahoma from 1984 through June 1987, and as a United States District Judge for the Western District of Oklahoma from June 1987 through June 1991. After resigning from the bench, I joined the law firm of Irell & Manella in Newport Beach, California, where for 23 years I specialized in complex civil litigation, internal investigations, and alternative dispute resolution. In November 2014, I formed PADRE, an organization exclusively devoted to alternative dispute resolution. This declaration is made upon personal knowledge.

2. Each year for the past several years, I have presided over several billion dollars in mediated settlements, primarily arising out of the financial crisis. Among the complex matters in which I have served as a mediator are *In re The Bank of New York Mellon Corp. Forex Transactions Litigation*, No. 12-MD-2335 (LAK) (JLC) (S.D.N.Y.) ("*BNYM FX*"), which settled in September 2015, and *In re General Motors Corp. Securities & Derivative Litigation*, Master Case No. 06-md-1749 (E.D. Mich.) (Rosen, J.) ("*GM*"), which settled in 2008-2009. *See also In re Bank of America Corp. Sec. Litig.* ($2.425 billion), *In re Merck & Co. Securities, Derivative & ERISA Litig.* ($1.1 billion), *National Credit Union Administration Board v. RBS Securities Inc., et al.* ($1.1 billion), *Lawrence E. Jaffe Pension Plan, et al. v. Household International, Inc., et al.* ($1.575 billion), *In re American International Group, Inc. 2008 Securities Litig.* ($960 million).

3. Given my extensive knowledge of the mechanisms and structures by which plaintiffs' law firms litigate large cases, I have been asked by Labaton Sucharow LLP ("Labaton

Sucharow"), Lead Counsel for the Plaintiffs and the Class, about my availability and ability to serve as a Co-Special Master together with the Hon. Gerald E. Rosen (Ret.) in a matter involving the application for attorneys' fees and expenses. I should note here that Judge Rosen and I are longtime personal friends, and that we have mediated matters together during his tenure on the bench in Detroit on multiple occasions when I served as a Special Master for him.

4. Though I have had no involvement with this case to date, I am intimately familiar with the issues discussed in the Court's Memorandum and Order dated February 6, 2017, which I have read. These issues include the use of attorneys to review documents in the discovery process, the "billing out" of such attorneys, and, more generally, how plaintiffs' firms handle discovery in large class actions. I have mediated numerous disputes involving securities class action attorney fees, and attorney fee disputes in other types of securities cases, a number of which have involved my review of detailed billing information. For example, in the *Merck* matter referenced above, part of my Special Master assignment required me to review and analyze the billing and lodestar information for the more than a dozen plaintiff firms involved in that case. Labaton Sucharow believes, as do I, that given my knowledge and experience, my working with Judge Rosen could effectively and efficiently frame the issues involved and obtain enhanced judicial economy.

5. I understand from the Memorandum and Order that the law firms that submitted applications for fees and expenses in this matter are Labaton Sucharow; Thornton Law Firm LLP ("Thornton Law"); Lieff Cabraser Heimann & Bernstein LLP ("Lieff Cabraser"); Keller Rohrback L.L.P. ("Keller Rohrback"); McTigue Law LLP; Zuckerman Spaeder LLP ("Zuckerman Spaeder"); Richardson, Patrick, Westbrook & Brickman LLC; Beins, Axelrod, P.C.; and Feinberg, Campbell & Zack, PC.

6. I understand that the Defendants in the underlying actions are represented by the law firm of Wilmer Cutler Pickering Hale and Dorr LLP ("Wilmer Hale"), which was formed by the merger of Wilmer, Cutler & Pickering LLP and Hale and Dorr LLP.

7. Pursuant to Fed. R. Civ. P. 53(b)(3)(A) and 28 U.S.C. § 455, a potential Special Master must disclose any possible conflicts or other grounds for disqualification.

8. I do not believe there are any grounds for my disqualification to serve as a Special Master under 28 U.S.C. § 455(b). Further, I believe no reasonable person would have grounds to question my impartiality under 28 U.S.C. § 455(a).

9. Although there are no grounds for disqualification, I wish to disclose that I have been selected as a neutral by the majority of the firms referenced above and have previously served as a mediator in numerous class actions involving many of these firms, and continue to do so today.

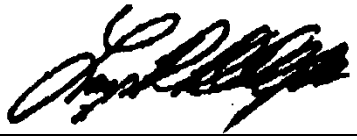
10. For example, with respect to the plaintiff firms involved here, in addition to *BNYM FX* and *GM*, in which Labaton Sucharow, Thornton Law, Lieff Cabraser, Keller Rohrback, Zuckerman Spaeder, or some combination of them represented the plaintiffs, including but not limited to *In re Whirlpool Corp. Front-Loading Washer Products Liability Litig.*, *Dover v. British Airways PLC*, *In re Celestica Inc. Sec. Litig.* *In re Fannie Mae 2008 Sec. Lit.*, *Santomenno, et al. v. Transamerica Life Ins. Co., et al.*, *Pat Cason-Merenda, et al. v. Detroit Medical Center et al.*, *In re Crocs Inc. Sec. Litig.*, and *Freedman et al. v. Weatherford Int'l Ltd. et al.* Further, as of the date hereof, I am currently serving as a mediator in class actions in which Labaton Sucharow, Lieff Cabraser and/or Keller Rohrback represent the plaintiffs.

11. Additionally, I have previously served as a mediator in a number of actions in

which Wilmer Hale or one of its predecessor firms represented the defendants, including but not limited to *Haddock v. Nationwide Life Insurance Co., In re Satyam Computer Services, Ltd., In re Collins & Aikman Corp. Sec. Litig.,* and *In re Refco, Inc. Sec. Litig.* Further, as of the date hereof, I am currently serving as a mediator in multiple actions involving Wilmer Hale or one of its predecessor firms.

12. Other than my personal relationship with Judge Rosen, I have no relationships with any of the law firms or lawyers in this case other than in connection with my service as a mediator, as generally described above. I believe I could effectively serve as a co-Special Master with Judge Rosen in this matter.

I declare under penalty of perjury that the foregoing is true and correct. Executed on February 17, 2017.



LAYN R. PHILLIPS

UNITED STATES DISTRICT COURT
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, 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, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 12-cv-11698 MLW

NOTICE OF APPEARANCE

Pursuant to Local Rule 83.5.2(a), please enter the appearance of Brian T. Kelly as an attorney of record for the THORNTON LAW FIRM LLP in the above-captioned action. I certify that I am admitted to practice in the United States District Court for the District of Massachusetts.

Respectfully submitted,

/s/ Brian T. Kelly_____
Brian T. Kelly, BBO #549566
NIXON PEABODY LLP
100 Summer Street
Boston, MA 02110
Telephone: (617) 345-1000
Facsimile: (617) 345-1300
Email: bkelly@nixonpeabody.com

Attorney for the THORNTON LAW FIRM LLP

Dated: February 17, 2017

CERTIFICATE OF SERVICE

I, Brian T. Kelly, hereby certify that this Notice of Appearance was filed electronically on February 17, 2017 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 parties identified in the NEF as non-registered participants.

/s/ Brian T. Kelly_____
Brian T. Kelly

UNITED STATES DISTRICT COURT
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, v. STATE STREET BANK AND TRUST COMPANY, STATE STREET GLOBAL MARKETS, LLC and DOES 1-20, Defendants.	No. 11-cv-12049 MLW
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MEMORANDUM OF THE THORNTON LAW FIRM LLP
CONSENTING TO APPOINTMENT OF SPECIAL MASTER

Pursuant to the Court's February 6, 2017 Order, the Thornton Law Firm LLP ("Thornton"), Liaison Counsel for Plaintiff Arkansas Teacher Retirement System and the Settlement Class, respectfully consents to the appointment of Judge Rosen as a Special Master. Furthermore, Thornton does not believe Judge Rosen's disqualification is required under 28 U.S.C. § 455(a) or (b) and, in any event, waives any ground for disqualification. With respect to the terms of the appointment, the powers of the Special Master, and the recommendation of Judge Layn R. Phillips (Ret.) as a Co-Special Master, Thornton concurs with the filing made by Labaton Sucharow LLP at Docket No. 129.

Respectfully submitted,

/s/ Brian T. Kelly
Brian T. Kelly, BBO #549566
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Boston, MA 02110
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Facsimile: (617) 345-1300
Email: bkelly@nixonpeabody.com

Attorney for the THORNTON LAW FIRM LLP

Dated: February 17, 2017

CERTIFICATE OF SERVICE

I, Brian T. Kelly, hereby certify that this Memorandum of the Thornton Law Firm LLP Consenting to Appointment of Special Master was filed electronically on February 17, 2017 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 parties identified in the NEF as non-registered participants.

/s/ Brian T. Kelly
Brian T. Kelly

AO 458 (Rev. 06/09) Appearance of Counsel

UNITED STATES DISTRICT COURT

for the

District of Massachusetts

ARKANSAS TEACHER RETIREMENT SYS., ET AL
Plaintiff
v.
STATE STREET BANK AND TRUST CO., ET AL
Defendant

Case No. 11-cv-10230-MLW

APPEARANCE OF COUNSEL

To: The clerk of court and all parties of record

I am admitted or otherwise authorized to practice in this court, and I appear in this case as counsel for:

Labaton Sucharow LLP, Lead Counsel for Pltf. AR Teacher Retirement Sys. and the Settlement Class .

Date: 02/18/0201

/s/ Joan A. Lukey
Attorney's signature

Joan A. Lukey, BBO 307340
Printed name and bar number

CHOATE, HALL & STEWART LLP
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Print Save As... Reset

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, Defendants.	)	C.A. No. 11-10230-MLW
ARNOLD HENRIQUEZ, MICHAEL T. COHN, WILLIAM R. TAYLOR, RICHARD A. SUTHERLAND, and those similarly situated, Plaintiff v. STATE STREET BANK AND TRUST COMPANY, Defendants.	)	C.A. No. 11-12049-MLW
THE ANDOVER COMPANIES EMPLOYEE SAVINGS AND PROFIT SHARING PLAN, on behalf of itself, and JAMES PEHOUSHEK-STANGELAND and all others similarly situated, Plaintiff v. STATE STREET BANK AND TRUST COMPANY, Defendants.	)	C.A. No. 12-11698-MLW

ORDER

WOLF, D.J. February 21, 2017

It is hereby ORDERED that class counsel shall, by February 27, 2017, respond to the Competitive Enterprise Institute's Center for Class Action Fairness's Motion for Leave to File Amicus Curiae

Response to Court's Order of February 6 and for Leave to Participate as Guardian Ad Litem for Class or Amicus in Front of Special Master (Docket No. 126). Any reply shall be filed by March 2, 2017.

UNITED STATES DISTRICT JUDGE

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
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CORPORATE DISCLOSURE STATEMENT OF THE COMPETITIVE ENTERPRISE INSTITUTE'S CENTER FOR CLASS ACTION FAIRNESS

In accordance with Local Rule 7.3, *amicus curiae* Competitive Enterprise Institute's Center for Class Action Fairness discloses as follows. Competitive Enterprise Institute ("CEI") is an IRC § 501(c)(3) non-profit corporation incorporated under the laws of Washington, D.C., with its principal place of business in Washington, D.C. The Center for Class Action Fairness is a sub-unit within CEI. CEI does not issue stock and is neither owned by nor is the owner of any other corporate entity, in part or in whole. The corporation is operated by a volunteer board of directors.

Dated: February 17, 2017

Respectfully submitted,

/s/ Ellen Rappaport Tanowitz

Ellen Rappaport Tanowitz (BBO No. 630710)
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Attorney for Amicus Curiae
Competitive Enterprise Institute
Center for Class Action Fairness

Certificate of Service

I certify that on February 17, 2017, I served a copy of the above on all counsel of record by filing a copy via the ECF system.

Dated: February 17, 2017

/s/ Ellen Rappaport Tanowitz
Ellen Rappaport Tanowitz

UNITED STATES DISTRICT COURT
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
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ZUCKERMAN SPAEDER LLP'S RESPONSE TO THE COURT'S FEBURARY 6, 2017 MEMORANDUM AND ORDER

Zuckerman Spaeder LLP, one of the ERISA counsel, does not object to the appointment of Judge Rosen as Special Master or to his conducting the investigation indicated in the Court's February 6, 2017 Memorandum and Order. Zuckerman Spaeder LLP, however, did not use any contract attorneys in this case or include time for any contract attorneys in the declaration submitted by Carl Kravitz concerning the firm's lodestar. Nor did Zuckerman Spaeder LLP have any involvement in the double-counting or other issues noted in the Court's February 6, 2017 Order or the Boston Globe article attached to the Court's Order. *See also* Lead Counsel's 11/10/16 Ltr. to Judge Wolf notifying the Court of the double counting (Exh. A to the Court's Order) at 2 n. 3 (stating that "the lodestar reports ... submitted by ERISA counsel ... are unaffected" by the double-counting). Mr. Kravitz will appear on March 7, 2017, as ordered by the Court, unless excused before that time.

Dated: February 20, 2017

Respectfully submitted,

ZUCKERMAN SPAEDER LLP

/s/ Carl S. Kravitz

Carl S. Kravitz
1800 M Street, NW, Suite 1000
Washington, DC 20036-8106
Telephone: (202) 778-1800
Facsimile: (202) 822-8106
ckravitz@zuckerman.com

Counsel for Arnold Henriquez

CERTIFICATE OF SERVICE

I hereby certify that the forgoing ***Zuckerman Spaeder LLP's Response to the Court's February 6, 2017 Memorandum and Order*** were filed through the ECF System on February 20, 2017 and accordingly will be served electronically upon all registered participants identified on the Notice of Electronic Filing.

/s/ Carl S. Kravitz
Carl S. Kravitz

UNITED STATES DISTRICT COURT
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
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MCTIGUE LAW LLP'S RESPONSE TO THE
COURT'S FEBURARY 6, 2017 MEMORANDUM AND ORDER

McTigue Law LLP ("McTigue Law") is a firm representing plaintiffs who brought claims in this action pursuant to ERISA, 29 U.S.C. §1001 *et seq*. McTigue Law respectfully files this response to the Court's February 6, 2017 Memorandum and Order (Dkt. No. 117; "Order").[1]

McTigue Law does not object to the appointment of a special master, as discussed in the Court's Order. However, McTigue Law does request three modifications of the proposal in the Order.

I. The Proposed Scope of the Special Master's Investigation is Too Broad

The Order proposes that the special master investigate "the accuracy and reliability of the representations that were made in connection with the request for an award of attorneys' fees and expenses, the reasonableness of the award of $74,541,250 in attorneys' fees and $1,257,697.94 in expenses, and any related issues that may emerge in the special master's investigation." (Order at 8).

McTigue Law believes the scope of the proposed investigation is too broad. All of the allegations of irregularities referenced in the Court's Order pertain exclusively to the three firms that served as co-counsel for non-ERISA Plaintiff Arkansas Teachers Retirement System: Labaton Sucharow LLP, Lieff Cabraser Heimann & Bernstein LLP, and the Thorton Law Firm LLP.[2] There have been no allegations of irregularities with respect to the fee petition of McTigue Law. McTigue Law had no co-counsel agreement with any of the three firms at issue, represented distinct clients in independently filed actions, did not employ any contract attorneys,

[1] Docket numbers refer to those in the captioned Arkansas Teacher Retirement System v. State Street Bank and Trust Company, No. 11-cv-10230 MLW.

[2] While the law firm of Labaton Sucharow LLP identified itself as Plaintiffs' Lead Counsel for the settlement, McTigue Law does not believe that position applies in these post settlement proceedings, especially where the firms involved clearly now have different interests.

included none in its lodestar report, did not engage in make-work document review, and had no knowledge of the alleged irregularities of the three firms at issue until after they became public. Moreover, McTigue Law's multiplier in the case is 0.90, likely far below the multipliers of the three firms at issue, and reflects that McTigue Law provided its services at a discount to the class in this case. McTigue Law thus requests that the terms of the special master's appointment be limited to an investigation of the accuracy and merit of the fee and expense petitions of the three firms at issue. Requiring McTigue Law to expend time and expenses to resolve irregularities in which it had no part, and of which it no knowledge, unnecessarily and unfairly burdens it.

II. McTigue Law Objects to Judge Rosen and Suggests Judge Rosenbaum as an Alternative

McTigue Law objects to the appointment of Judge Rosen (ret.) as a special master in this case. McTigue Law believes the relationship between Judge Rosen and a partner, Ms. Elizabeth Cabraser, of one of the firms at issue, is of a nature that the special master's "impartiality might be reasonably questioned." See 28 U.S.C. § 455(a). Disqualification under §455(a) is appropriate where "the facts provide what an objective, knowledgeable member of the public would find to be a *reasonable* basis for doubting the judge's impartiality." *United States v. Salemme,* 164 F. Supp. 2d 49, 52 (D. Mass. 1998), quoting *In re Allied-Signal, Inc.*, 891 F.2d 967, 970 (1st Cir. 1989) (emphasis in the original, citations omitted). "[A] reasonable person may question impartiality without the presence of any evidence that a judge is subjectively biased." *In re Bulger*, 710 F.3d 42, 46 (1st Cir. Mass. 2013) (reasonable to question the impartiality of a judge who had supervised prosecutorial actions in the same district and during some of the time of the events of the immediate criminal case, despite the court's belief in the judge's "sincerity"). The disqualification decision is balancing act that "must reflect not only the need to secure public confidence through proceedings that appear impartial, but also the need to

prevent parties from too easily obtaining the disqualification of a judge. . . ."). *Salemme,* 164 F. Supp. 2d at 52, quoting *In re Allied-Signal,* 891 F.2d at 970 (emphasis omitted).

Ms. Cabraser worked on this case. (Dkt. #104-17, Exh A). Her firm's fee petition would be reviewed by the special master. (Dkt. #117, at 8, 11). Ms. Cabraser and the proposed special master are co-authors of a book which produces royalties semi-annually, and requires continuing collaboration. They have served on panels together at various legal events. (Dkt. #117, at Exh. D). Given these relationships, McTigue Law believes that an "objective, knowledgeable member of the public" would be justifiably concerned about the special master's ability to fairly assess the conduct of Ms. Cabraser's firm under these circumstances, despite no evidence of Judge Rosen's subjective bias. *Salemme,* 164 F. Supp. 2d at 52; *In re Bulger*, 710 F.3d at 46.

McTigue Law proposes Judge James M. Rosenbaum (ret.) be appointed as special master. See Judge Rosenbaum's biography, McTigue Declaration, Exhibit 1 ("Exh. 1"). Judge Rosenbaum is a retired federal district court judge for the District of Minnesota and a former U.S. Attorney for Minnesota. Judge Rosenbaum is a member of JAMS. McTigue Law has no personal, financial or contractual relationship with Judge Rosenbaum. (*Id.*) McTigue Law does not believe Judge Rosenbaum has any real or apparent conflicts in serving as the special master. McTigue Law believes that Judge Rosenbaum represents an unquestionable, alternate choice for special master.

III. The Burden of Paying the Special Master's Compensation Should be Placed Solely on the Firms Whose Fee Petitions and Practices Gave Rise to the Investigation

The Order seeking comment states that the "court may order that up to $2 million [of the fee award to Plaintiffs' counsel] be returned to the Clerk of the District Court" for purposes of compensating the special master. McTigue Law respectfully requests that any such order specify that only the three firms whose fee petitions have required the investigation be liable and

responsible for returning these funds. As noted above, McTigue Law had no prior knowledge of or involvement with the alleged irregularities.

McTigue Law brings the following to the Court's attention. On November 21, 2016, two weeks after the Court issued its Order Awarding Attorneys' Fees, Payment of Litigation Expenses, and Payment of Service Awards (Dkt. #111), but before distribution, Lead Counsel Labaton Sucharow sent an email to McTigue Law and other Plaintiffs' firms. The email contained a draft agreement that purported to give Lead Settlement Counsel the right to claw back the attorney's fees, expenses and service awards previously awarded by the Court if the Court later reduced the award. It further stated that Lead Counsel would not distribute fees, expenses or service awards to any firm unless the agreement was signed by the recipient firm. McTigue Law LLP delayed and signed on December 7th when it was the only firm that had not signed. (See "Clawback Agreement", McTigue Decl., Exhibit 2.) The next day Lead Counsel distributed the funds.

McTigue Law is concerned that Lead Settlement Counsel, one of the three firms at issue, may attempt to utilize the Clawback Agreement as a means to force firms not involved in any irregularities to pay for fee reductions (or special master compensation) that result from the alleged irregularities in the fee petitions of the three firms at issue. Any attempt to do so would of course result in further litigation that would likely come before this Court. This is another reason why McTigue Law requests that the Court clarify that only the alleged defending firms will be responsible to pay the special master's compensation. McTigue Law also requests the same regarding any resulting reduction in attorney's fees that may ultimately be ordered.

Dated: February 20, 2017

Respectfully submitted,

McTIGUE LAW LLP

/s/ J. Brian McTigue
J. Brian McTigue
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Washington, DC 20036
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Facsimile: (202) 364-9960
bmctigue@mctiguelaw.com

Counsel for Arnold Henriquez, William Taylor, Michael Cohn, and Richard Sutherland

CERTIFICATE OF SERVICE

I hereby certify that the forgoing document was filed through the ECF System on February 20, 2017 and accordingly will be served electronically upon all attorneys of record.

/s/ J. Brian McTigue

UNITED STATES DISTRICT COURT
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
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DECLARATION OF J. BRIAN MCTIGUE IN SUPPORT OF MCTIGUE LAW LLP'S RESPONSE TO THE COURT'S FEBRUARY 6, 2017 MEMORANDUM AND ORDER.

I, Brian McTigue, declare as follows, pursuant to 28 U.S.C. § 1746:

1. I submit this declaration in support of *McTigue Law LLP's Response To The Court's February 6, 2017 Memorandum And Order*.

2. I am the founder and managing partner of McTigue Law LLP ("McTigue Law" or "Firm"). McTigue Law is a law firm that focuses its practice on the representation of private pension plans qualified under the Employee Retirement Income Security Act of 1974 ("ERISA"), their trustees, participants, and beneficiaries in class actions.

3. Attached as **EXHIBIT 1** is a true and correct copy of a biography of Honorable James M. Rosenbaum (Ret.) which was downloaded today from the website of JAMS, the private alternative dispute resolution provider, at this link: https://www.jamsadr.com/rosenbaum/

4. My firm and I have no personal, financial nor contractual relationship with Judge Rosenbaum (Ret.)

5. Attached as **EXHIBIT 2** is a true and correct copy of an agreement dated November 28, 2016 and signed by myself on December 7, 2016, as entered between seven plaintiff counsel firms on behalf of the Arkansas Teacher Retirement System, the Henriquez clients, and the Andover clients, as captioned above.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this 20th day of February, 2017 in Washington, DC.

J. Brian McTigue

Exhibit 1

T: 612-332-8225
F: 612-332-9887

Case Manager
Debra Lewis
JAMS
333 So. Seventh St.
Ste. 2550
Minneapolis, MN
612-332-8225 Phone
612-332-9887 Fax
Email:
dlewis@jamsadr.com

Recognized as a Best Lawyer, Alternative Dispute Resolution Category, Best Lawyers in America, 2014

"Minnesota Lawyer's Attorney of the Year Award for Outstanding Service to the Profession," Minnesota Attorney of the Year Award Video Testimonial, Minnesota Lawyer, 2012

"Retiring the Gavel," Minnesota Public Radio audio interview, July 6, 2010

Designated one of "The 100 Most Influential Minnesota Lawyers of All Time," Minnesota Law & Politics, 2007

Hon. James M. Rosenbaum (Ret.)

Hon. James M. Rosenbaum (Ret.) served 25 years on the federal bench as a United States District Court Judge for the District of Minnesota and for the four years prior, as Minnesota's United States Attorney. While on the bench, he presided over the construction of the Minneapolis federal courthouse, the most technologically advanced courthouse in its time. He served as Chief Judge of the District, represented the Eighth Circuit at the Judicial Conference for eight years, and served on the Conference's Executive Committee.

Judge Rosenbaum has taught seminars for judges and lawyers in 20 countries worldwide on comparative law, intellectual property rights, patent litigation and enforcement, counterfeit goods and products, and United States trial practice. He has written several articles raising issues at the intersection of law, privacy, and technology. He is co-author of the U.S. Courts Design Guide and author of the recently published How Lawyers Benefit from Early Neutral Evaluation.

ADR Experience and Qualifications

- Presided over cases including:
  - o Arbitration, domestic and international
  - o Bankruptcy
  - o Business and commercial law
  - o Civil rights
  - o Class actions and Multi-District Litigations (MDL)
  - o Employment
  - o Environmental law
  - o Insurance coverage
  - o Intellectual property, patent, and trade secrets
  - o International terrorism
  - o Medical devices and pharmaceuticals
  - o Mass tort/product liability
  - o Securities
  - o White collar crime

Representative Matters

- Civil Rights: Presided over many cases involving claims against federal agencies, states, and municipalities including Hollman Consent Decree; Beaulieu v. Ludeman, Civ. No. 06-4045 (JMR); Holly v. Konieska, Civ. No. 04-1489; Schaub v. County of Olmsted, 656 F. Supp. 2d 990 (D. Minn. 2009)
- Class Action/Mass Tort MultiDistrict Litigation:
  - o In re Medtronic, Inc., Implantable Defibrillators Products Liability Litigation, MDL No. 05-1726, presided over a 2005 action involving a group of plaintiffs implanted with faulty Medtronic defibrillators; most cases settled and the MDL was dissolved in December 2008
  - o In re Mirapex Product Liability Litigation, MDL No. 07-1836, presided over bellwether trials in the Mirapex cases involving patients prescribed the drug Mirapex who developed pathological gambling and other compulsive behaviors as a side effect; majority of cases settled
- Employment:
  - o Jenson v. Eveleth Mines, certified the first hostile work environment dispute in the nation, on behalf of female miners in the Iron Range; this landmark case was the basis for the book "Class Action" and later the major motion picture "North

Country" starring Oscar Award winner Charlize Theron
    - Holden v. Burlington Northern, Inc., 665 F. Supp. 1398 (D. Minn. 1987), presided over a long-running sexual harassment class action by female employees of the Burlington Northern railroad; approved payment of $2.5 million to the class
- Environmental:
    - Atlantic Research Corp. v. United States, 459 F.3d 827 (8th Cir. 2006), affd., United States v. Atlantic Research Corp., 551 U.S. 128 (2007), sat by designation on the Eighth Circuit panel which heard the claim of a government contractor which sought to share with the United States the burden of voluntarily cleaning up its property. The Court found the contractor was able to pursue a claim under CERCLA § 107, a decision later affirmed by the Supreme Court
    - As a trial judge, Judge Rosenbaum oversaw many environmental cases, including a decade-long environmental litigation claim between the buyer and seller of a contaminated industrial property, Kennedy Building Associates v. CBS Corp.
- Insurance
    - Suits against federal crop as well as private insurers are a regular part of a Federal Judge's caseload in Minnesota. The Red River of the North flows between Minnesota and North Dakota. The River lies in a notorious flood plain, and "seriously" floods on frequently. In doing so, it floods residential, agricultural, and business properties. Suits against private and federal insurers are a regular result of this flooding
    - In the early 2000's the Twin Cities experienced a "500 year" rain. Rainfall measured between 71/2 and 8 inches in a matter of hours. This event generated a number of flood and rain claims against both private and government insurers
- Intellectual Property:
    - Patent: presided over cases involving various medical devices including:
        - Medtronic, Inc. v. Advanced Cardiovascular Systems, Inc., 182 F. Supp. 2d 810 (D.Minn. 2000) involving coronary stents
        - Arthrex Inc. v. Depuy Mitek, Inc. (Middle District of Florida, 2010) plaintiff sought, and the Judge granted, summary judgment of infringement of a patent relating to a surgical method for loading tendons into the knee
    - Trademark Infringement
        - American Dairy Queen Corp. v. New Line Productions, Inc. 35 F. Supp. 2d 727 (D. Minn. 1998), granted a preliminary injunction to the owner of the "Dairy Queen" trademark against a film studio which had planned to release a movie entitled "Dairy Queens," satirizing contestants in a Minnesota beauty pageant. The movie was subsequently released under the title "Drop Dead Gorgeous"
- Securities: In re UnitedHealth Group Incorporated PSLRA Litigation, presided over simultaneous class action and shareholder derivative suits arising out of stock options backdating. The Judge ultimately approved settlements in both cases. As part of the PSLRA settlement, UnitedHealth paid $895 million, and its ex-CEO paid $30 million and forfeited 3.6 million shares stock options
- Special Master: Lectured extensively throughout the United States on electronic discovery, served on the Sedona Conference since 2006, and is a regular participant at TechShow and other conferences dedicated to exploring the intersection of law and technology
- Tribal (Native American): Minnesota is a state with Federal Indian Reservations. As such, Judge Rosenbaum has extensive experience in matters involving sovereignty, land patent, and jurisdictional issues, as well as tribal compact/state tax questions, in "Indian Country"

Honors, Memberships, and Professional Activities

- Member, Academy of Court Appointed Masters
- Recognized as Best Lawyer, Alternative Dispute Resolution Category, Best Lawyers in America, 2014
- Author, How Lawyers Benefit from Early Neutral Evaluation, Law360, April 2013
- Honoree, Power 100 Advocate, On Being a Black Lawyer (OBABL), 2013
- Recipient, Minnesota Lawyer's Attorney of the Year Award for Outstanding Service to the Profession, Minnesota Lawyer, 2012
- Designated one of "The 100 Most Influential Minnesota Lawyers of All Time, Minnesota

Law & Politics, August 2007
- Recipient, Hennepin County Judicial Professionalism Award, 2007
- Recipient, Honorary Doctor of Law, Western New England College, 2007
- Member, Federal Bar Association, Minnesota chapter, 1981-present (President, 1992-1993)
- Board of Advisors, The Green Bag, 2008-present
- Board of Directors, Hennepin Theater Trust, 2008-2013
- University of Minnesota:
  - Alumnus of Notable Achievement, 2010
  - Alumni Association and Board of Advisors, 2009-present (Chairman 2012-2013)
  - English Department Advisory Committee, 2008-present
  - Law School Board of Visitors, 1991-1997
- Judicial Board of Advisors, The Sedona Conference (a legal community think tank that examines forward-looking principles, best practices, and guidelines in specific areas of the law), 2004-present (taught programs on Antitrust, E-Discovery, Patent Law, Co-Author "Cooperation Proclamation")
- Founding member ["Master"], Minnesota's first Patent Law Inn of Court, 2014
- Frequent speaker and teacher, including:
  - Faculty Member, National Judicial College, Reno, Nevada, 1998-2006 (taught courses in complex litigation, legal technology)
  - Teacher at "Baby Judges School" (training and orientation for newly appointed federal judges), prosecutor and defender school, and Attorney General's Advocacy Institute, 1990-present
  - Inaugural James M. Rosenbaum National Security Symposium: Trans-Atlantic Approaches to Counterterrorism, William Mitchell College of Law, April 2010
- Select publications:
  - "Negotiating the Shoals of Mediation," 18 The Green Bag 2D 305 (2015)
  - "In Defense of Rule 808, Federal Rules of Evidence," 12 Green Bag 2D 165 (2009)
  - "The Death of E-Discovery," The Federal Lawyer 26, July 2007
  - "Rohwer v. Federal Cartridge Co.," The Green Bag Almanac & Reader 316, 2006
  - "In Defense of the Sugar Bowl," 9 Green Bag 2D, Autumn 2005
  - "In Defense of the Hard Drive," 4 Green Bag 2D 169, 2001
  - "In Defense of the Delete Key," 3 Green Bag 2D 393, 2000
  - "Retiring the Gavel," Minnesota Public Radio Audio Interview, July 6, 2010

Background and Education
- Judge, U.S. District Court for the District of Minnesota, 1985-2010
- U.S. Attorney, District of Minnesota, 1981-1985
- Partner, Gainsley, Squier & Korsh, 1979-1981
- Partner, Rosenbaum & Rosenbaum, 1977-1979
- Associate, Katz, Tuabe, Lange & Frommelt, 1973-1977
- Staff Attorney, Leadership Council for Metropolitan Communities, 1970-1972
- Staff Attorney, VISTA, Chicago, Illinois, 1969-1970
- J.D., University of Minnesota Law School, Minneapolis, MN, 1969
- B.A., University of Minnesota, Minneapolis, MN, 1966

Disclaimer

Exhibit 2

Labaton Sucharow

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Partner
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November 28, 2016

By E-Mail

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J. Brian McTigue, Esq.
McTigue Law LLP
4530 Wisconsin Ave, N.W., Suite 300
Washington, D.C. 20016

Re: Arkansas Teacher Retirement System v. State Street Bank & Trust Co.,
No. 11-CV-10230 MLW (D. Mass.)
Henriquez v. State Street Bank & Trust Co.,
No. 11-CV-12049 MLW (D. Mass.)
The Andover Companies Employee Savings
& Profit Sharing Plan v. State Street Bank & Trust Co.,
No. 12-CV-11698 MLW (D. Mass.)

Dear Counsel:

As you are aware, on November 8, 2016, after Judge Wolf issued the Order Awarding Attorneys' Fees, Payment of Litigation Expenses, and Payment of Service Awards to Plaintiffs (the "Fee Order," ECF No. 111), counsel in the Arkansas action received an inquiry from the Boston Globe concerning certain of the individual firm lodestar reports supporting our motion for attorneys' fees.

In response, as you are also aware, we filed a detailed letter with the Court on November 10, 2016 ("Letter," ECF No. 116). The Letter disclosed certain inadvertent errors in these submissions, and provided a corrected combined time spent, corrected combined lodestar, and the resulting corrected multiplier. Because the fee was determined based on the percentage-of-fund method, and the overstatement of the lodestar resulted only in a modest increase in the multiplier cross-check, we

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argued that the fee was fully supportable under the Court's stated rationale and that no changes were required.

Further, the Letter offered our apology for the errors, and indicated that we were available to respond to any questions or concerns the Court may have.

The Fee Order and the Court's Order and Final Judgment (the "Judgment," ECF No. 110) become Final on December 2, 2016, and the Settlement will become Effective shortly thereafter, on December 7, 2016.[1] Because there were no objections to the Settlement or requested fees, no Class member has standing to appeal the Fee Order or Judgment.

As of today, the Court has not acted in response to the Letter. If the Court remains silent as of close of business on December 7, 2016, we will begin the process of withdrawing the approved fees, expenses, and service awards from the Lead Counsel Escrow Account for prompt distribution to your respective firms pursuant to our agreements.

It is possible, however, that the Court, on or after December 8, 2016, will respond adversely to the Letter and ultimately reduce the fee award. This could occur after the fees, expenses and service awards have been distributed to your respective firms (and to the other ERISA counsel).

Accordingly, before we distribute your share of the fees, expenses, and service awards, we will require an undertaking, evidenced by your signature below, confirming your agreement to refund to us within five (5) business days, for redeposit into the Lead Counsel Escrow Account, your pro rata share of any Court-ordered reduction of fees, expenses, and/ or service awards.

Please sign below and return an executed copy to us. Thank you for your cooperation. Please let me know if you have any questions.

Very truly yours,

Lawrence A. Sucharow

[1] The time to appeal the Judgment and Fee Order expires on December 2, 2016 (a Friday), 30 days after entry. See Settlement Agmt. ¶ 1(z)(iii). After that, however, State Street has two (2) business days to make its formal settlement offer to the SEC before the Effective Date is reached. That brings the Effective Date to December 7.

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LAS/idi

ACCEPTED AND AGREED:

Michael P. Thornton

Thornton Law Firm LLP
Name: Michael P. Thornton
Dated: 11/28/16, 2016

Lieff Cabraser Heimann & Bernstein, LLP
Name: _____
Dated: _____, 2016

Robert L. Lieff, Esq.
Name: _____
Dated: _____, 2016

Keller Rohrback L.L.P.
Name: _____
Dated: _____, 2016

Zuckerman Spaeder LLP
Name: _____
Dated: _____, 2016

McTigue Law LLP
Name: _____
Dated: _____, 2016

Labaton Sucharow

LAS/idi

ACCEPTED AND AGREED:

Thornton Law Firm LLP
Name: _____
Dated: _____, 2016

Lieff Cabraser Heimann & Bernstein, LLP
Name: Daniel P. Chiplock
Dated: 11-28, 2016

Robert L. Lieff, Esq.
Name: _____
Dated: _____, 2016

Keller Rohrback L.L.P.
Name: _____
Dated: _____, 2016

Zuckerman Spaeder LLP
Name: _____
Dated: _____, 2016

McTigue Law LLP
Name: _____
Dated: _____, 2016

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LAS/idi

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Thornton Law Firm LLP
Name: _____
Dated: _____, 2016

Lieff Cabraser Heimann & Bernstein, LLP
Name: _____
Dated: _____, 2016

Robert L. Lieff, Esq.
Name: Robert L. Lieff
Dated: 11/28, 2016

Keller Rohrback L.L.P.
Name: _____
Dated: _____, 2016

Zuckerman Spaeder LLP
Name: _____
Dated: _____, 2016

McTigue Law LLP
Name: _____
Dated: _____, 2016

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LAS/idi

ACCEPTED AND AGREED:

Thornton Law Firm LLP
Name: _____
Dated: _____, 2016

Lieff Cabraser Heimann & Bernstein, LLP
Name: _____
Dated: _____, 2016

Robert L. Lieff, Esq.
Name: _____
Dated: _____, 2016

Keller Rohrback L.L.P.
Name: Lynn L. Sarko
Dated: November 29, 2016

Zuckerman Spaeder LLP
Name: _____
Dated: _____, 2016

McTigue Law LLP
Name: _____
Dated: _____, 2016

Labaton
Sucharow

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ACCEPTED AND AGREED:

Thornton Law Firm LLP
Name: _____
Dated: _____, 2016

Lieff Cabraser Heimann & Bernstein, LLP
Name: _____
Dated: _____, 2016

Robert L. Lieff, Esq.
Name: _____
Dated: _____, 2016

Keller Rohrback L.L.P.
Name: _____
Dated: _____, 2016

Zuckerman Spaeder LLP
Name: Cavis. Krawitz
Dated: Nov 28, 2016

McTigue Law LLP
Name: _____
Dated: _____, 2016

Labaton Sucharow

LAS/idi

ACCEPTED AND AGREED:

Thornton Law Firm LLP
Name: _____
Dated: _____, 2016

Lieff Cabraser Heimann & Bernstein, LLP
Name: _____
Dated: _____, 2016

Robert L. Lieff, Esq.
Name: _____
Dated: _____, 2016

Keller Rohrback L.L.P.
Name: _____
Dated: _____, 2016

Zuckerman Spaeder LLP
Name: _____
Dated: _____, 2016

McTigue Law LLP
Name: J. Brian McTigue
Dated: December 7, 2016