UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

ARKANSAS TEACHER RETIREMENT SYSTEM, on Behalf of Itself and All Others Similarly Situated; JAMES EHOUSHEK-STANGELAND; ANDOVER COMPANIES EMPLOYEE SAVINGS AND PROFIT SHARING PLAN, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, Defendant,	No. 21-1069
LIEFF CABRASER HEIMANN & BERNSTEIN, LLP, Interested Party – Appellant, v. LABATON SUCHAROW LLP; THORNTON LAW FIRM LLP; KELLER RORHBACK L.L.P.; MCTIGUE LAW LLP; ZUCKERMAN SPAEDER LLP, Interested Party – Appellees.	

HAMILTON LINCOLN LAW INSTITUTE'S RENEWED MOTION FOR AN ORDER TO APPEAR AT ORAL ARGUMENT AND DEFEND THE DISTRICT COURT'S JUDGMENT ON APPEAL

No appellee/respondent opposes appellant Lieff Cabraser, so no party will champion the interests of absent class members that appellant hopes to secure additional attorneys' fees from. On August 13, this Court granted the motion by

Hamilton Lincoln Law Institute (HLLI) motion for it to file an overlength *amicus* brief in this appeal as a *de facto* appellee brief. Order, Doc. 00117774936. It further ordered that "Should argument be scheduled, HLLI may file a motion for leave to appear at that time." *Id.* The Court subsequently scheduled oral argument for November 2, 2021 at 9:30 a.m.

As F.R.A.P. 27 and 29(a)(8) permit, *amicus* HLLI moves to appear and argue in Case No. 21-1069 with time allotted as if it were a appellee at the otherwise uncontested oral argument scheduled for November 2.[1] HLLI (and its predecessor organization) participated as an *amicus* in the district court repeatedly since 2017. The district court praised its contributions, most recently in granting HLLI a modest fee request in connection with certain work the district court asked it to perform in 2018. "CCAF's work was not only helpful to the court, it also contributed to a decision by the court that provided an additional almost $15,000,000 for the benefit of the class." *Ark. Teacher Ret. Sys. v. State Street Bank & Tr. Co.*, No. 11-10230-MLW, 2021 U.S. Dist. LEXIS 9826, at *18-19 (D. Mass. Jan. 19, 2021). HLLI attorney Theodore H. Frank is available and would argue on November 2. Frank is an experienced appellate attorney who has argued dozens of cases in federal appellate courts and once in the Supreme Court. *E.g.*, Oral Argument, No. 19-56297, *Briseno v. ConAgra Foods, Inc.* (9th Cir. Dec. 8, 2020), *available at* https://www.youtube.com/watch?v=o7qGuCRW2wE (arguing against Lieff's appellate counsel in this case).

[1] This Court concluded that HLLI would not be an appellee if Lieff did not seek to disturb the portions of the district court's orders granting HLLI's fee award. Apr. 2, 2021 Order, Doc. 00117725504. Lieff made clear in its opening brief that it seeks only money from residual funds that might remain in the settlement fund—not recovery from any other law firm. Op. Br., Doc. 00117599876. Thus, HLLI is not an appellee.

Such an order is appropriate because the nominal appellees—other law firms awarded funds from the settlement fund—have nothing at stake in this appeal and have neither filed briefs nor notice of their intent to appear at oral argument in the two weeks since the Court scheduled argument. Lieff seeks only to win money from the settlement fund residual otherwise distributable to class members. Thus, the nominal appellees cannot be made worse off by Lieff's appeal and rationally have not spent time protecting the settlement residual.

As a non-profit public interest law firm familiar with the facts of the appeal, HLLI is uniquely situated to step in and provide the Court with the benefit of an adversarial oral argument. It will not seek fees for the argument.

I. Background.

This appeal arises from a fee award granted after years of investigation and briefing arising from Class Counsel's admittedly erroneous representations in applying effectively *ex parte* for a long-since-vacated fee award in 2016. Without the benefit of adversarial presentation, the district court relied "heavily" on counsel's uncontradicted representations and granted a nearly $75 million (25%) attorneys' fees award on November 2, 2016. A46. Unbeknownst to the district court, the attorneys had agreed that 90% of the attorneys' fees would go collectively to Class Counsel (three firms, including appellant Lieff), and that they would pay nearly $4.1 million dollars of this money to Chargois & Herron LLP, a Texas firm that did absolutely no work in the case but was once well-connected to Arkansas politicians with oversight over the lead plaintiff, ATRS. The district court did not award Lieff any particular amount of money in 2016, but instead delegated allocation entirely to Class Counsel. Following a *Boston Globe* story that publicized double-counted hours in the 2016 fee application, class

counsel moved to vacate the original lump-sum fee award. Dkts. 178, 331. Lieff opposed neither this Rule 60 motion, nor the district court's order to appoint a Special Master to investigated the fee award.

After investigation made lengthier by several firms' withholding of information, the Special Master submitted a 377-page Report and Recommendation in June 2018. A359-A735. The Special Master recommended awarding Lieff $12.8 million. ADD161. Ultimately, following several rounds of briefing and three days of hearings including live testimony, the district court awarded Lieff $15.2 million. ADD148. The district court did not impose monetary sanctions on any of the firms, but instead determined that a 20% fee award would be appropriate in a $300 million case, and that "even absent the serious, repeated misconduct of Labaton and Thornton [the two other Class Counsel firms], an award of less than 25% of the common fund would be most appropriate." A28. After determining this overall fee award, the court allocated fees to each of the firms. Although the overall attorneys' fee award was 20% lower than the original vacated fee award, the fee to Lieff was only 7% lower. The district court awarded Lieff over $2.4 million more than the Special Master recommended. A162. Lieff appeals this award, characterizing it as a "sanction." Its opening brief neglected to mention that the district court vacated the original $75 million fee award after an unopposed Rule 60 motion by class counsel.

II. HLLI and its interest in this case

The district court repeatedly praised HLLI's work and appointed it as *amicus* below. *See* Doc. 00117757725 at 10-11. HLLI has a successful track record for appellate advocacy, including appointments as appellate *amicus*. *Id.* at 11-13.

HLLI seeks to defend the district court's decision because that decision appropriately faults Lieff for representations it made in signing unopposed and essentially *ex parte* fee papers in securing a long-since-vacated fee award in 2016. While the district court did not impose a monetary sanction, it articulate several deficiencies in Lieff's conduct. Lieff had reviewed and signed the 2016 fee memorandum, which mischaracterized an academic strudy. A148. Additionally, Lieff had misleadingly claimed that the rates submitted were "the same as my firm's regular rates charged for their services, which have been accepted in other complex class actions." A26. In fact Lieff has only billed a "handful of paying clients over the years." A26. These representations were made by Lieff on an unopposed fee application, and the district court expressly relied upon the truthfulness of the representations. Thus, although no monetary sanctions were imposed, the district court appropriately found that Lieff had violated Rule 11. A125.

HLLI advocates for absent class members. Nowhere is the conflict between class counsel and putative class members more direct than when counsel moves for fees from a common fund. "[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. *See also Pearson*, 772 F.3d at 787 ("acute conflict of interest"); *In re HP Inkjet Printer Litigation*, 716 F.3d 1173, 1178 (9th Cir. 2013) ("the interests of class members and class counsel nearly always diverge."). This is because the defendant, having agreed to fund a common fund settlement has little interest in how the fund is allocated between class members and attorneys; "it is hard to see why defendants would have cared very much how the money they paid was divided" *Hill v. State Street Corp.*, 794 F.3d 227, 231 (1st Cir. 2015). The conflict is especially difficult to scrutinize because in most class action settlements, as in this one,

no coherent objector appears to challenge class counsel's effectively *ex parte* representations in support of their fee award.

III. This Court would benefit from adversarial argument.

"[O]ral argument is at the court's discretion. But a court is usually delighted to hear additional arguments from able amici that will help the court toward right answers, and the amici can easily seek…time to participate in oral argument." *Massachusetts Food Ass'n v. Massachusetts Alcoholic Bevs. Control Comm'n*, 197 F.3d 560, 567 (1st Cir. 1999) (cleaned up); *see also In re Merrimac Paper Co.*, 420 F.3d 53, 58 n.3 (1st Cir. 2005) (expressing appreciation for the "helpful amicus brief and oral argument" of amicus).

Oral argument would be particularly helpful here because Lieff will argue unopposed on November 2 unless HLLI participates. "[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." *Cardinal Chem. Co. v. Morton Int'l*, 508 U.S. 83, 104 (1993) (Scalia, J., concurring) (listing Supreme Court cases); *see also Weinberger v. Great Northern Nekoosa Corp.*, 925 F.2d 518, 525 n.8 (1st Cir. 1991) (granting participation of amicus where there was concern that "negotiated attorneys' fees in plaintiffs' class actions can be a potential source of abuse."). The Eighth Circuit appointed HLLI's predecessor to argue as *amicus* in a similar procedural posture in a class-action related appeal to resolve the lack of adversary presentation. *Adams v. USAA Cas. Ins. Co.*, 863 F.3d 1069 (8th Cir. 2017).

This Court has discretion to limit the amount of time afforded to *amici*, but because no appellee will argue, HLLI requests the same amount of time as Lieff. *Amicus* HLLI should be permitted to rigorously test Lieff's arguments as a *de facto* substitute for

the true appellees: the absent class members that Lieff hopes to claim residual funds from.

CONCLUSION

HLLI therefore asks this Court for an order permitting *amicus curiae* HLLI to participate in oral argument on behalf of affirming the district court in this appeal as *de facto* appellee.

Respectfully submitted,

Dated: September 27, 2021

/s/ Theodore H. Frank

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COMPLIANCE WITH WORD LIMIT REQUIREMENTS

I certify that this motion complies with Fed. R. App. Proc. 27(d)(1)(E) and (d)(2) because it contains 1,614 words and complies with the typeface requirements of Fed. R. App. Proc. 32(a)(5) and the type style requirements of Fed. R. App. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Garamond font.

Dated: September 27, 2021

/s/ Theodore H. Frank
Theodore H. Frank

CERTIFICATE OF SERVICE

I certify that I have this day, September 27, 2021, served this document upon all parties by electronically filing to all ECF-registered parties in this action.

Dated: September 27, 2021

/s/ Theodore H. Frank
Theodore H. Frank