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 AMENDING ITS MOTION FOR LEAVE TO PARTICIPATE AS GUARDIAN *AD LITEM* FOR THE CLASS OR AS AN *AMICUS* (DKT. 126)

In accord with the Court's Order dated July 31, 2018 (Dkt. 410), as extended by the Court (Dkt. 432), the Competitive Enterprise Institute's Center for Class Action Fairness ("CCAF") supplements its initial motion to participate (Dkt. 126) to address the current circumstances of the case, nearly 18 months after CCAF filed its motion. CCAF also addresses objections raised by the parties in their filings and orally at the hearing on August 9, 2018.

EXECUTIVE SUMMARY

CCAF agrees that a settlement between the Special Master and Class Counsel (Labaton Sucharow LLP ("Labaton"), Lieff Cabraser Heimann & Bernstein LLP ("Lieff"), and the Thornton Law Firm ("TLF")) *may* be in the best interest of the class, although that of course depends on the substance of such settlement. If such a settlement is reached, CCAF's motion for appointment as guardian *ad litem* may not be necessary—but only if the terms of the deal sufficiently protect the class and the named plaintiffs and Class Counsel agree to waive collateral attacks on the settlement on any ground. If such a settlement is proposed, CCAF recommends that its terms, which will certainly include a reconstituted request for attorneys' fees, be noticed to the class, with an opportunity for objection pursuant to Rule 23(h). In such event, CCAF will respectfully request leave to file an *amicus* brief in advance of the hearing on such a settlement. Just as the Court was not bound by the plaintiffs' initial request, it will not be bound by the proposed settlement reached now. Additionally, the Court should consider non-monetary sanctions to regulate the conduct of counsel before it, even if the parties stipulate to a report devoid of such recommendation.

In the event that counsel does not settle with the Special Master, or if material disagreements remain concerning his Report and Recommendations (Dkt. 357, "Report"), then CCAF and its co-counsel Burch, Porter & Johnson PLLC should be appointed guardian *ad litem* on behalf of the class. As previously described in CCAF's Response to the Court's Order of July 31, 2018 (Dkt. 420, "CCAF Response"), the guardian *ad litem* ought to be paid on an hourly basis. CCAF's proposed rates follow

its co-counsel's Memphis, Tennessee market rates, which represents a significant discount to CCAF attorneys' lodestar rates awarded in other cases, which in turn are lower than the rates most CCAF attorneys billed in previous law-firm practice. CCAF's proposed rates for attorneys in this case range from $200 to $500 per hour, which compares favorably to the staff attorney rates up to $515/hour that Class Counsel charged and that the Special Master did not recommend reducing in his Report, and is, of course, substantially lower than what the partners and associates for class counsel charged the class.

ARGUMENT

I. Regarding Potential Settlement

CCAF has no interest in hindering a settlement that provides class members significant benefits without the uncertainty and additional cost of appeal. But the Court should ensure that any settlement binds the parties to prevent collateral attack. The settlement should also provide at least as much recovery to absent class members as the Report recommends. This is because the Report already balances the interests of class members and Class Counsel; a less favorable departure from these recommendations would suggest that Class Counsel has been able to ratchet up fees because no advocate like CCAF negotiated from the position that the Report does not go far enough.

Presuming the Special Master mediates a thorough and favorable settlement for the class, the Court should treat it as a new fee application and notice absent class members just as it notified them of the appointment of the Special Master. The notice should advise class members of their right to object at a Rule 23(h) hearing. As *amicus*, CCAF would ask for leave to express its views of the settlement should this occur.

Finally, the Court should exercise its inherent authority to govern the conduct of attorneys appearing before it and to deter any similar behavior in future cases. Following final approval of the settlement, if appropriate, the Court should order relevant counsel to show cause why remedial

measures for apparent misconduct should not issue. Although the parties can stipulate that disciplinary findings not appear in an amended Report, the parties cannot waive the Court's inherent authority.

A. Settlement terms needed to protect the class.

Based on their discussion Thursday, the parties and Special Master anticipate that they can negotiate revisions to the Report that will "obviate some or all of" Class Counsel's 300 pages' worth of objections. Tr. 8/9/2018 at 14. Counsel for the Special Master suggested that the Court defer action on CCAF's motion for about three weeks for this process (*id.* at 40), and the parties will file a proposed schedule on August 16. *See* Dkt. 445 at 4.

CCAF agrees that a settlement mediated by the Special Master may lessen the need for a guardian *ad litem*, but the Court should ensure that such settlement includes terms to protect the class. Any settlement should (1) include waiver of counsel's rights to collaterally challenge it and (2) provide the class at least as much relief as the Report recommends.

First, the settlement must be completely airtight given Class Counsel's extraordinary litigation tactics to date—retaining a phalanx of seven experts to rebut one, filing frivolous motions, and lodging an absurd and certain-to-fail mandamus petition. *See* CCAF Response at 17-18. Unless the parties waive all rights to collaterally challenge the settlement and the underlying proceedings, the settlement provides no true peace and must be rejected. To date, it seems as if parties have only agreed that "*discussions relating to settlement* . . . today and in the future will not be a basis for any party to seek the master's disqualification as well as not being a basis to seek my disqualification." Tr. 8/9/2018 at 15 (emphasis added); *see also id.* at 23-24 ("They waived any right to object . . . based on his participation in discussion to try to resolve things as between the master and the lawyers."). From this it seems that plaintiffs and their counsel remain free to seek the Special Master's disqualification provided they do not cite the settlement discussions themselves, which are subject to FRE 408. Without a much broader release, CCAF should be appointed as guardian *ad litem* to protect the class from later collateral attack.

Such appointment is necessary because neither an ordinary *amicus* like CCAF nor the Special Master has the right to submit party briefs and argue on appeal without another order authorizing such participation or the right to engage in motion practice on the class's behalf.[1] That said, CCAF is confident that the Special Master will not agree to a settlement that contains such loopholes.

Second, the terms of the settlement should be at least as favorable to absent class members as the Report recommends. Thus, the Court should expect that the settlement reallocates $7.4 to 8.1 million more to the class relative to the now-vacated original fee order (Dkt. 111), less fees for the Special Master.[2]

Even if the settlement provides the class $8.1 million as recommended, the Court should weigh whether vigorous opposition from a guardian *ad litem* could provide the class even more value. While the class certainly benefits greatly from a final resolution of the fee dispute, the Special Master recognized that his advocacy for the class was constrained by the detailed—and scrupulously balanced—report that he produced. "[W]e are not sure that we are in a position to independently represent and advocate for the class, as at numerous junctures in our Report, we mitigated findings and recommendations as to Labaton's conduct, including in our recommended remedies, leaving

[1] Among the arguments Class Counsel could make: (1) that the Special Master lacks authority to negotiate a settlement because no such power is implied by the orders appointing him, Dkt. 173, (2) that the Special Master's conclusions are tainted as demonstrated by him negotiating as an adversary, (3) that the Special Master could not possibly negotiate on behalf of the class without either a client or appointment, (4) that the Court must recuse due to its alleged bias, and so forth. If Class Counsel does appeal, the class will need representation at the First Circuit to avoid an *ex parte* presentation of the issues.

[2] The $3.4 million inter-firm reallocation of fees is of less interest to class members provided that the settlement provides rough justice to, for example, ERISA counsel (innocent of misconduct) relative to Labaton (which the Special Master found especially culpable). An advocate for the class might well argue that all sums disgorged from Class Counsel revert to class members (rather than ERISA co-counsel) as they were most clearly owed a fiduciary duty from Labaton.

Labaton in a position in which it would, despite its conduct, still retain a multiplier above even its adjusted (post-double-counting and Chargois) lodestar." Dkt. 345-1 at 6.[3] In fact, each of "the Labaton, Lieff and Thornton law firms will still be left with not only their base lodestar claim, but a substantial multiplier." Report at 367. The Report's suggested lodestar multiplier for Class Counsel strikes CCAF as especially astonishing given the above-market leverage that Special Master allowed. The Report declines to adjust staff attorney rates of up to $515/hour even though such attorneys are paid a fraction of what partnership-track associates make. *See* Report at 169 n.134; Dkt. 104-17 at 8 (five staff attorneys with rates of $515/hour billed for over $2 million combined lodestar). The Special Master's failure to accurately price the fair market rate of staff attorneys is among the most conspicuous oversights of his report.[4] In short, the Report already credits Class Counsel's interests—excessively so—and should not be further watered down.

A settlement that materially deviates downward from the Report's recommendations suggests that the Special Master may have negotiated against himself, so to speak, allowing Class Counsel to dilute his carefully considered recommendations. That is exactly the cause for concern of an *ex parte* presentation. A settlement that provides significantly less than the Report, which itself is already a

[3] In their opposition to CCAF's Response, Labaton continues to argue that the Report does not constitute an "impartial opinion," and that the Special Master acted as a partisan for the class. Dkt. 427 at 4. The record shows otherwise, including an unedited version of the quote Labaton cites, which shows the Special Master sought to "balance the interests of the class," *with* "**the law firms**, the legal profession, the public and the institutional needs of the Judiciary." Report at 327 (emphasis added). Labaton does not address CCAF's argument that, in the Special Master's own words, he "mitigated findings and recommendations" whereas an advocate would argue the Report does not go far enough. CCAF Response at 9 (quoting Dkt. 345-1 at 5).

[4] Staff attorneys are paid a fraction of what partnership-track attorneys make, and the market for legal services recognizes this difference with lower rates. While law firms may be entitled to leverage on their permanent attorneys, the market rate for staff attorney time is much lower than the senior associate-level rates approved here. *See*, *e.g.*, Hildebrant Consulting LLC & Citi Private Bank, *2017 Client Advisory* (noting permanent non-partner track attorneys' "rates are lower than associates"), available online at: http://amlawdaily.typepad.com/2017CitiReport.pdf.

compromise, does not adequately protect the class, and should be rejected by the Court in favor of a *de novo* review of the Report where CCAF can act as a full-throated advocate on behalf of the class as guardian *ad litem*.

B. Further notice and a Rule 23(h) hearing is required for any new settlement.

Presuming counsel reaches an adequate settlement with the Special Master, the Court should require class members to be notified of this new settlement and heard pursuant to Rule 23(h).

While the contours of the potential settlement are unclear to CCAF, the result would be some stipulation as to the Special Master's Report on attorneys' fees. Like all attorneys' fee requests following a class action settlement, the parties' forthcoming stipulation falls under Rule 23(h), so requires all of the process of this rule including: (1) reasonable notice to class members, (2) the opportunity for class members to object to the fee award, and (3) a hearing on the fee motion. *See In re Southwest Airlines Voucher Litig.*, 2016 WL 3418565, at *5 (N.D. Ill. Jun 22, 2016); *Jacobson v. Persolve*, 2016 WL 7230873, at *16-17 (N.D. Cal. Dec. 14, 2016).

The Court long ago determined that it would allow class members to object following the release of the Special Master's Report, and for good reason.

> [T]he court will order that class members be sent an additional notice after the Special Master issues his Report and Recommendation, and that any objections or comments by class members be filed in response to that notice. The form of that notice and the procedure for making such objections will be addressed in connection with the submission of the Special Master's Report and Recommendation.

Order dated March 31, 2017, Dkt. 192 at 4. As a general matter, whenever a court is contemplating "material alterations to the settlement," "[c]lass members should be notified." *In re Baby Prods. Antitrust Litigation*, 708 F.3d 163, 176 n.10 (3d Cir. 2013). This principle applies to matters of class counsel's fees as well, because under Rule 23(h), class members are entitled to accurate, complete notice and a fair opportunity to object to counsel's fee requests. *See, e.g., In re Mercury Interactive Secs. Litig.*, 618 F.3d

988, 994 (9th Cir. 2010); *accord Redman v. Radioshack Corp.*, 768 F.3d 622, 637-38 (7th Cir. 2014). Notice allows unopposed fee requests to receive "the closest and most systematic scrutiny before gaining judicial approval." *Weinberger v. Great Northern Nekoosa Corp.*, 925 F.2d 518, 526 (1st Cir. 1991). "[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.

To date, it appears that the Special Master and class counsel have not addressed the form of notice to class members, so it seems efficient for them to stipulate to notice in their settlement. CCAF has some guidance below, which will hopefully assist the parties.

First, direct notice by first-class mail *and* email should be employed. The Court previously determined that mailing to 1300 or so addresses was "reasonable" notice under these circumstances. Dkt. 192 at 4. While Labaton opposed providing email notice and represented to the Court that it "does not have email addresses for class members" (Dkt. 190 at 4), the Court observed that email notice was appropriately provided to 115 email addresses by the settlement administrator pursuant to its order.[5] Such notice should be provided again, supplementing the prior email addresses with additional addresses the administrator may have received through inquiries over the intervening 15 months. *See* Eric Miller (Settlement Administrator) Decl., Dkt. 205-2 at 4. The expense of this supplemental notice to about 1300 addresses should be deducted from class funds, and the Court can decide at a later date exactly which costs should be ultimately borne by Class Counsel. At least some of the additional costs should be deducted from Class Counsel's eventual fee award. "Those who made the misstatements should bear the costs of a notice to correct misstatements." Manual for

[5] The Court ordered Labaton to explain why its representation was not false or misleading. Dkt. 203. Labaton characteristically responded that "[n]either Labaton Sucharow nor its counsel intended or anticipated that the language would be construed to suggest that the Firm had no email addresses for any Class Members." Dkt. 205 at 5.

Complex Litigation (Fourth) § 21.313 (2004). Moreover, by default, plaintiffs generally bear the costs of notifying the class. *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 177-78 (1974).[6]

Second, the notice should succinctly describe the conclusions and proposed remedies under the settlement, including any material differences between the original Report and the report as modified by the settlement.

Finally, notice should apprise class members of their right to object.

C. CCAF intends to participate as an *amicus* if a settlement is reached that resolves Class Counsel's objections and the Court concludes a guardian *ad litem* is unnecessary.

Even if CCAF's motion to defend class interests as guardian *ad litem* is denied, CCAF intends to assist the Court concerning any settlement between counsel and the Special Master. As the Court outlined (Tr. 8/9/2018 at 41), CCAF may be invited to file an *amicus* brief, or it may file a short motion to file an attached proposed *amicus* brief. If the Court finds CCAF's filings helpful, as it has "several times, last year and recently" (*id.* at 9), the Court can grant CCAF's motion as to the particular *amicus* filing. *Cf.* Dkt. 172.

D. Regardless of any settlement, the Court should sanction misconduct before it.

While the contours of the potential settlement are obscure to CCAF, we anticipate that Class Counsel will agree to return funds to the class in exchange for softening the language of the Special Master's report regarding apparent misconduct. This may be the best solution for the class, as it avoids

[6] Lieff argues that the American Rule means Class Counsel cannot be made to pay for their adversary—i.e. the Special Master following issuance of his Report. Dkt. 418 at 3. Lieff does not say who *should* pay, and the Court need not decide the issue now because at this moment the entire recovery consists of class funds. However, it would be inequitable to make the class bear the full cost of the Special Master's negotiation because Class Counsel's conduct necessitated the expense. *See* CCAF Response, Dkt. 420 at 25-26; *see also Belleville Catering Co. v. Champaign Mkt. Place, LLC,* 350 F.3d 691, 694 (7th Cir. 2003) ("Clients should pay just once for the litigation and should not pay for lawyers' time that has been wasted for reasons beyond the clients' control.") (cleaned up).

the uncertainty and delay of appeal. However, while the Special Master may adeptly mediate the best result for the class, the Court has an independent obligation to sanction misconduct before it.

Therefore, following a decision on any fee request, the Court should make an independent evaluation of whether the non-monetary sanctions originally recommended by the Special Master should be implemented. Regardless of settlement, the Court retains jurisdiction to sanction misconduct that occurred before it. *See 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). The non-monetary remedies in the original Report include "that Garrett Bradley be referred the Massachusetts Board of Bar Overseers for appropriate disciplinary proceedings," Report at 365, and that Labaton and TLF "establish a consulting process that will ensure consistent ethical compliance." *Id.* at 373.

The Court should also consider further remedies regarding the Chargois arrangement, which the Special Master declined to recommend in spite of Labaton erecting "a wall of legalistic and formalistic excuses and blame-shifting (largely to the Court)." *Id.* at 362. The Special Master declined to make such a recommendation because "formal disciplinary proceedings could spell the end of the firm." *Id.* While sanctions should be proportional, the *de facto* "too big to sanction" approach seems unhelpful to the profession, and more importantly, unhelpful to future absent shareholders at the mercy of their representatives. Labaton has been particularly evasive, and continues to defend its mind-boggling refusal to initially provide any hint of the Chargois arrangement that it orchestrated. Dkt. 359 at 17. Had TLF not appropriately produced emails concerning Chargois, Labaton's dubious referral arrangement would have been completely hidden from the Special Master. One wonders what other facts Labaton has hidden from courts which have not asked, in Labaton's view, sufficiently specific questions. Referral for attorney discipline may be the only way to find out.

Discovery from the investigation further suggests the possible need for law enforcement follow-up, even though the Special Master purposely did not inquire to the ultimate disposition of the millions of dollars paid to Chargois over the years. The Court should consider ordering that certain discovery from this this case be provided to at least the United States Attorney's Offices in the District of Massachusetts, which previously expressed interest in the dealings in this case (Dkt. Dkt. 358 at 39), and the Eastern District of Arkansas, where FBI agents not so long ago interviewed Tim Herron of Chargois & Herron about his free-rent tenant circa 2008, convicted former Arkansas Treasurer and ATRS Trustee Martha Shoffner. *See* Dkt. 420-1, Bednarz Decl. Ex. D (Chad Day, ARK. DEMOCRAT-GAZETTE (May 22, 2013), *Shoffner lived rent-free near the Capitol for most of her first term, landlord says*). Veteran investigators and United States Attorneys are best-positioned to determine whether the facts of Labaton's referral arrangement require further investigation.

II. The Court Should Appoint a Guardian *Ad Litem* to Protect the Class

Several prior filings explain why the Court should appoint a guardian *ad litem* if further advocacy for the class is needed. CCAF Response at 14-22, Dkt. 154 at 6-13; Dkt. 127 at 8-12. In short, "[e]ven 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). This is especially true during fee setting, where an "acute conflict of interest" exists. *Pearson v. NBTY, Inc.*, 772 F.3d 778, 787 (7th Cir. 2014). An independent advocate is even more necessary given the issues that the Special Master uncovered, which would put Class Counsel in the untenable position of vindicating their own questionable conduct while purporting to represent the class. The appointment of a guardian *ad litem* enables a "genuinely adversarial process" and "serve[s] to enhance the accuracy and legitimacy of fee awards." *Laffitte v. Robert Half Int'l., Inc.*, 376 P.3d 672, 691 (Cal. 2016) (Liu, J., concurring).

As previously explained, CCAF does not currently have the capacity to serve as guardian *ad litem* alone, nor can it serve *pro bono* at this time. CCAF Response at 23. That said, CCAF could assist

the Court in this capacity with the assistance of Burch, Porter & Johnson, PLLC, and it would do so at comparatively modest rates. Both firms have excellent qualifications, and the costs of such representation "'pale in comparison to the significant amounts of money' to be divided between plaintiffs and counsel in high-value cases." *Laffitte*, 376 P.3d at 691 (quoting William Rubenstein, *The Fairness Hearing: Adversarial and Regulatory Approaches*, 53 UCLA L. Rev. 1435, 1455 (2006)). And if the Court is somehow troubled by the *ad hominems* aimed at CCAF, CCAF would not oppose the Court inviting Burch, Porter & Johnson to serve as GAL alone, independent of CCAF.

A. CCAF and Burch, Porter & Johnson are experienced in efficiently litigating complex cases and have extensive knowledge of the applicable law

1. CCAF

CCAF was founded in 2009 as a 501(c)(3) non-profit public-interest law firm based out of Washington, DC, in 2009. In 2015, CCAF merged into the non-profit Competitive Enterprise Institute ("CEI") and became a division within their law and litigation unit. *See generally* Dkt. 125-1 (2017 Frank Declaration), at 2-3.

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

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. Andrea Estes, *Critics hit law firms' bills after class-action lawsuits,* Boston Globe (Dec. 17, 2016). *See also, e.g., McDonough v. Toys "R" Us*,

80 F. Supp. 3d 626, 661 (E.D. Pa. 2015) ("CCAF's time was judiciously spent to increase the value of the settlement to class members") (internal quotation omitted); *In re Citigroup Inc. Secs. Litig.*, 965 F. Supp. 2d 369 (S.D.N.Y. 2013) (reducing fees, and thus increasing class recovery, by more than $26 million to account for a "significantly overstated lodestar"); *In re Apple Inc. Sec. Litig.*, No. 5:06-cv-05208-JF, 2011 U.S. Dist. LEXIS 52685 (N.D. Cal. May 17, 2011) (parties nullify objection by eliminating *cy pres* and augmenting class fund by $2.5 million). CCAF does not object to simply "r[un] up a tab with minimal value added." *See In re Southwest Airline Voucher Litig.*, --F.3d--, 2018 WL 3651028, at *4 (7th Cir. Aug. 2, 2018).

CCAF has received national acclaim for its work. *See, e.g.*, Adam Liptak, *When Lawyers Cut Their Clients Out of the Deal*, N.Y. Times, Aug. 13, 2013 (calling CCAF director "the leading critic of abusive class action settlements"); Roger Parloff, *Should Plaintiffs Lawyers Get 94% of a Class Action Settlement?*, Fortune, Dec. 15, 2015 (calling CCAF director "the nation's most relentless warrior against class-action fee abuse"); The Editorial Board, *The Anthem Class-Action Con*, Wall St. J., Feb. 11, 2018 (opining "[t]he U.S. could use more Ted Franks" while covering CCAF's role in exposing "legal looting" in the Anthem data breach MDL, including by lead class counsel Lieff).

CCAF has a particularly strong record of appellate advocacy. It has won reversal or remand in sixteen federal appeals, which have help reshape the law governing class action settlements, ensuring class members secure real recovery with reasonable fees.[7] Several of these appeals centered around excessive fee awards. *E.g., Redman*; *Pearson*; *Bluetooth.*

[7] *In re Southwest Airlines Voucher Litig.*, --- F.3d ----, 2018 WL 3651028 (7th Cir. Aug. 2, 2018); *In re Subway Footlong Mktg. Litig.*, 869 F.3d 551 (7th Cir. 2017); *In re Target Corp. Customer Data Sec. Breach Litig.*, 847 F.3d 608 (8th Cir. 2017); *In re Walgreen Co. Stockholder Litig.*, 832 F.3d 718 (7th Cir. 2016); *In re EasySaver Rewards Litig.*, 599 Fed. Appx. 274 (9th Cir. 2015) (unpublished); *In re BankAmerica Corp. Secs. Litig.*, 775 F.3d 1060 (8th Cir. 2015); *Pearson v. NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014); *Redman v. RadioShack Corp.*, 768 F.3d 622 (7th Cir. 2014); *In re MagSafe Apple Power Adapter Litig.*, 571 Fed. Appx. 560 (9th Cir. 2014) (unpublished); *In re Dry Max Pampers Litig.*, 724 F.3d 713 (6th Cir. 2013); *In*

CCAF currently employs five attorneys including the undersigned. *See* Declaration of Theodore H. Frank ("Frank Decl."), filed with this memorandum, at ¶¶ 7-16. Each of the CCAF attorneys has years of experience representing objectors to class action settlements, and most have years of prior experience in civil litigation. *Id.*.

2. Burch Porter

Burch, Porter & Johnson, PLLC ("Burch Porter") is well-equipped to assist CCAF as guardian *ad litem*. Burch Porter is a leading firm in Memphis, Tennessee, with forty attorneys, about half of whom are litigators. *See* Peeples Decl. (filed contemporaneously with this memorandum). Senior Burch Porter associate Gary S. Peeples would undertake day-to-day responsibility for the case. Mr. Peeples has been following the case for months and has a head-start in the major issues raised by Class Counsel's objections. CCAF and Burch Porter expect that the legal team for this matter will consist of Mr. Peeples, Jef Feibelman, Jennifer S. Hagerman, and William D. Irvine. *See generally*, Declaration of Gary S. Peeples ("Peeples Decl."), filed with this memorandum.

Each attorney on this proposed team has stellar credentials and a background in commercial civil litigation. For example, all four attorneys clerked for federal district court judges. Mr. Peeples and Ms. Hagerman also clerked for Sixth Circuit judges. Additionally, Joseph (Jef) Feibelman, has nearly fifty years of complex business litigation experience. Peeples Decl. at ¶¶ 5-8.

B. CCAF and Burch would litigate on especially efficient terms.

Because of Burch Porter's location in Memphis, Tennessee, its standard billing rates are much lower that the rates sought by Class Counsel in this case, and this benefits the class. In order to undertake the role of guardian *ad litem*, CCAF proposes that Burch attorney time be compensated at

re HP Inkjet Printer Litigation, 716 F.3d 1173 (9th Cir. 2013); *In re Baby Products Antitrust Litigation*, 708 F.3d 163 (3d Cir. 2013); *Dewey v. Volkswagen*, 681 F.3d 170 (3d Cir. 2012); *Robert F. Booth Trust v. Crowley*, 687 F.3d 314 (7th Cir. 2012); *Nachshin v. AOL, LLC*, 663 F.3d 1034 (9th Cir. 2011); *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935 (9th Cir. 2011).

their ordinary billing rates, while CCAF attorney time is substantially discounted to mirror the prevailing rates of its affiliate attorneys in Memphis, Tennessee. The proposed rates are as follows:

Attorney	Position (class year)	Proposed Rate	
Jef Feibelman	Burch Porter member (1969)	**$475/hr**	
Jennifer S. Hagerman	Burch Porter member (1999)	**$375/hr**	
Gary S. Peeples	Burch Porter associate (2010)	**$275/hr**	**Standard CCAF Rates**
William D. Irvine, Jr.	Burch Porter associate (2016)	**$200/hr**	
Theodore H. Frank	CEI director of litigation (1994)	**$475/hr**	$900/hr
Melissa A. Holyoak	CEI senior attorney (2003)	**$365/hr**	$525/hr
Anna St. John	CEI attorney (2006)	**$325/hr**	$475/hr
M. Frank Bednarz	CEI attorney (2009)	**$275/hr**	$375/hr
Adam E. Schulman	CEI attorney (2010)	**$275/hr**	$375/hr

CCAF proposes to set these modest rates to preempt accusations that it is overbilling the class or Class Counsel. By adopting a similar pay scale as its affiliated counsel, neither the Court nor the class would need to worry about the allocation of time among the attorneys, as might otherwise result from the large disparity between Memphis and major metropolitan billing rates; that said, CCAF anticipates that the majority of time will be billed by Burch Porter.

As shown above, CCAF is asking for significantly lower rates than it typically requests—and has been approved—in other cases. CCAF has been awarded attorneys' fees for time at or near the "standard" rates indicated in the table above. *See* Frank Decl. ¶¶ 8, 10, 12, 14, 16. Moreover, the "standard" rates listed above likely already understate CCAF attorneys' market value. For example, Mr. Frank recently turned down work as an expert witness, which would have paid $1800/hr. *See* Frank Decl. ¶ 8. Additionally, attorneys Holyoak, St. John, and Bednarz previously worked at law firms when they were less experienced attorneys than they are today, but where paying clients were billed at *higher* hourly rates than the "standard" rates listed above. (Holyoak as an associate at O'Melveny & Myers LLP, St. John as an associate at Covington & Burling LLP, and Bednarz as an associate at Goodwin Procter LLP. *See* Frank Decl. ¶¶ 9-14.)

Additional guidelines will further control the costs of guardian *ad litem*.

- Midlevel attorneys for CCAF and Burch Porter—Messrs. Bednarz and Peeples, respectively—will spend more time on this matter than more senior attorneys.
- Travel time not spent on substantive legal work will be billed at only one half the proposed hourly rate.
- CCAF and Burch Porter attorneys will bill only for the price of economy flights and reasonable hotel accommodations in connection with their work.

As guardian *ad litem*, CCAF will also avoid pitfalls it criticizes in this and other class action settlements. CCAF discloses that no fee sharing or referral arrangement exists between CCAF, Burch Porter, or any other party concerning this litigation. Should CCAF be appointed guardian *ad litem*, the fee and reimbursement requests it submits for CCAF and Burch time shall be remitted to CCAF and Burch Porter precisely as requested—there is no undisclosed fee split between CCAF and Burch Porter.

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

C. Proposed payment process.

CCAF proposes that attorneys' fees for guardian *ad litem* should be paid in a similar fashion as fees for the Special Master have been paid.

Specifically, the Court should require Labaton to deposit $1,000,000 with the Clerk of the United States District Court for the District of Massachusetts. *Cf.* Dkt. 173 at 6. (Because the fee order was vacated, Dkt. 331, all funds held by Labaton are properly considered class funds, and their transfer to the Clerk obviously does not prejudice counsel's right to contest which party or parties should ultimately bear the cost of the guardian *ad litem*.) The guardian *ad litem* will submit monthly detailed

billing invoices documenting both hours and expenses for reimbursement along with supporting documentation for any expenses to be reimbursed, and the Court will award properly justified hours and costs from the fund. *Cf.* Dkt. 173 at 7. Assuming appeals are taken, the Court retains jurisdiction over these collateral fee awards, so the guardian *ad litem* will have resources necessary to defend the Court's decision on appeal and cross-appeal issues for the benefit of the class.

When the guardian *ad litem* concludes his task defending the interests of absent class members, a final accounting of fees should be filed. Hours spent and reimbursements should also be filed on the public docket with only minimal redactions if absolutely necessary to protect, for example, credit card numbers, and the substance of privileged communication. CCAF expects that any redactions will be minimal. The Court should retain jurisdiction over collateral litigation, including disputes over the guardian *ad litem*'s fees.

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

CCAF anticipates billing and staffing efficiently; in the event of a challenge by class counsel to claims of overbilling, the guardian ad *litem* intends to subpoena counsels' contemporaneous time records. The guardian would ask the court to Court presume that time submitted by the guardian *ad litem* is reasonable to the extent Class Counsel spends similar amounts of time in opposition.

III. Counsel's Arguments Provide No Reason to Disqualify CCAF as Either Amicus or Guardian *Ad Litem*.

Plaintiffs' counsel advance a large number of arguments that CCAF should not serve as a guardian *ad litem* or even as an *amicus*, but none of these arguments carry weight. First, contrary to Lieff's belief, the silence of absent class members does not indicate that they are adequately represented, much less that they support Class Counsel's bloated fee petition. Dkt. 127 at 9. Second, certain ERISA counsel misunderstand the purpose of appointing guardian *ad litem*: while Rule 53 may indeed permit the Special Master to transform into a zealous advocate on behalf of the class, the lack of controlling authority on the subject suggests this course exposes the Court's ultimate decision to unnecessary risk on appeal should a settlement not fully resolve the matter. Third, CCAF does not have an ideological agenda that should preclude it from representing the class—in fact, CCAF's alleged interest in reducing attorneys' fees is exactly the sort of advocacy the class now needs. Fourth, counsel articulates no reason to disclose CEI's donors given the First Amendment rights of non-profits like CEI, and donors have never influenced CCAF litigation anyway. Fifth, Labaton identifies no intentional misrepresentations by CCAF, and indeed Labaton misrepresented the state of the record in the course of its accusations. Sixth, CCAF's public commentary on the case—including Mr. Frank's use of social media like Twitter—is the ordinary sort of commentary that attorneys engage in, including Labaton. Finally, the Court should disregard the incendiary and false misconduct accusations that Lieff casually hurls. The Court previously indicated that it did not find *ad hominem* attacks persuasive, so CCAF will not waste the Court's time rebutting every speck of mud thrown, but will happily supplement the record if the Court found any of the accusations troubling or in need of detailed refutation. The Court can also skip (or just quickly skim) the remainder of this section if it is has indeed already rejected the abuse thrown at CCAF, as it suggested it had.

Therefore, if Class Counsel and the Special Master cannot reach a settlement resolving the objections, the Court should appoint a guardian *ad litem*, and no good reason exists to reject CCAF's appointment.

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

At the August 9 hearing, counsel for Lieff suggested that "not a single class member has come forward to object" because the class of "sophisticated individuals and entities" has "sat silent." Tr. 8/9/2018 at 35. Contrary to Lieff, silence cannot be read as support because individual class members lack the incentive to intervene simply in hopes of a "miniscule *pro rata* gain." *Goldberger v. Integrated Res.*, 209 F.3d 43, 52-53 (2d Cir. 2000) (citing *In re Continental Ill. Sec. Litig.*, 962 F.2d 566, 573 (7th Cir. 1992)). It is "naïve" to assume class acquiescence to class-action abuse from the lack of objections. *Redman v. RadioShack Corp.*, 768 F.3d 622, 628 (7th Cir. 2014). Only 23% of securities settlements engender any fee objectors at all (Lynn A. Baker, et. al., *Is the Price Right? An Empirical Study of Fee-Setting in Securities Class* Actions, 115 COLUM. L. REV. 1371, 1389 (2015)), though, as class counsel's own experts indicate, virtually every fee request in large-scale securities actions engages in abuses similar to the ones the special master identified here. The class members in this case—or rather, the class member funds' directors and trustees—are understandably reluctant to respond to notice at all given that the cost of obtaining an attorney opinion on the 374-page Report and 300+ pages of objections could easily dwarf whatever *pro rata* increase an objector might achieve. "Class members have no real incentive to mount a challenge that would result in only a minuscule pro rata gain from a fee reduction." *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 123 (2d Cir. 2005).

Moreover, class silence does not excuse—in fact it emphasizes the need for—compliance with Rule 23(a) and (b)(3). Neither ATRS nor Class Counsel can be regarded as adequate representatives of the class when their own conduct is at issue. CCAF Response at 14-16; *see also* Dkt. 345-1 (letter from Special Master).

Labaton argues that the conflict of interest between Class Counsel and the class is present in every common fund class action settlement (Dkt. 427 at 1), but the conflict is much more severe in this case where the dispute will have repercussions on Class Counsel's other cases. CCAF agrees that the relationship between class and counsel "turns adversarial" in fee setting, and it discussed this precise phenomenon in its first filing with this Court. Dkt. 127 at 6. The conflict of interest in this case is extraordinary, however, because a decision on the propriety of the Chargois arrangement and bare referral fees, determination of acceptable rates for staff and contract attorneys, and the specific apparent misconduct by certain Class Counsel extend far beyond the boundaries of this case. This is what Labaton in particular has invested so thoroughly in the litigation. *See* CCAF Response at 16-17.

B. The Special Master's authority to act as an advocate is uncertain.

Keller Rohrback L.L.P. ("Keller") and Zuckerman Spaeder LLP ("Zuckerman") argue that the parties need not consent for the Special Master to act as an advocate under Rule 53. Dkt. 430 at 3-4. Perhaps attributing Labaton's argument to CCAF, Keller and Zuckerman misunderstand CCAF's suggestion that consent of the parties is necessary to prevent the uncertain outcome of a later challenge by class counsel. CCAF agrees that Class Counsel's objections are properly resubmitted to the Special Master (CCAF Response at 6), and the Court has since ordered the Special Master to prepare a supplemental report (to the extent that settlement does not moot it). Dkt. 445.

Other activity by the Special Master is much less certain under the thin case law. For example, case law provides no firm answer as to whether the Special Master may appropriately defend the district court's decision on appeal, or move for substitution of lead counsel or the named representative. The Court should only rely on the Special Master to act in this way if the parties agree to waive arguments challenging his neutrality in writing the Report or his authority to act as a *de facto* guardian *ad litem*. If the Court can avoid it, class members' rights should not be wagered on future First Circuit decisions on matters of first impression.

C. CCAF's alleged ideological agenda perfectly aligns with the class's interest.

Labaton rehashes argument it briefed in 2017, that partisan *amici* are allegedly forbidden (Dkt. 427 at 11), but CCAF anticipated this argument in its very first filing. There are two approaches to *amicus* filings, one that disfavors such filings, and the majority rule which tends to permit them. Dkt. 127 at 4-7. Even under the restrictive minority rule, which Labaton cites, CCAF's *amici* filings are properly allowed. The suitability of amicus briefs turns on "whether the brief will assist the judges by presenting ideas, arguments, theories, insights, facts, or data that are not to be found in the parties' briefs." *Voices for Choices v. Illinois Bell Tel. Co.*, 339 F.3d 542, 545 (7th Cir. 2003) (Posner, J.) (cited by Labaton at Dkt. 427 at 11). The Court discussed this precedent Thursday. Tr. 8/9/2018 at 41. Here, CCAF's briefs offer unique arguments, insights, and facts—in fact, Labaton *criticizes* CCAF for bringing up topics not addressed prior to its filing on August 6. Dkt. 427 at 7.

Labaton, Keller, and Zuckerman further argue that CCAF should be barred from participating in this case due to CEI's alleged bias against class action firms. Dkt. 427 at 11-12; 430 at 5; Tr. 8/9/2018 at 30, 36. Plaintiffs' counsel dramatically overstate their argument because neither Mr. Frank nor CCAF is biased against class actions or class action firms. In fact, Mr. Frank is lead plaintiff in a TCPA class action being litigated by a prolific plaintiffs' frim. *See* Frank Decl. ¶ 4. In any event, the First Amendment protects cause-driven litigation, including that brought by an organization serving as litigation counsel. *E.g., NAACP v. Button*, 371 U.S. 415, 420, 429-31 (1963). Even if, *arguendo*, CCAF did endeavor to eliminate class action litigation, such advocacy is protected expressive activity, particularly where there is no allegation that the litigation positions are unsupported by law.

Even if such anti-class action attorney prejudice existed, which it does not, the alleged prejudice perfectly align with class interests at the fee-setting stage. CCAF seeks to trim excessive attorneys' fees, which returns millions of dollars to class members. CCAF's interest in the case better

serves the class than Class Counsel's overriding interest to avoid sanctions and secure attorneys' fees they applied for in 2016 with incomplete and inaccurate declarations.

D. CEI need not disclose its donors, who in any event had no role in CCAF's selection and participation in this case.

Keller and Zuckerman further argue that CEI should be compelled to disclose its donors "so that Court can consider whether CEI's impartiality would be compromised as a result of any of those major funding relationships." Dkt. 430 at 6; Tr. 8/9/2018 at 30.

Counsel fail to provide any precedent for the proposition that a donor's identity would be remotely relevant to a non-profit's ability to advocate on behalf of a class. After all, CCAF seeks to be appointed guardian *ad litem*, an expressly partisan appointment—not a neutral special master or court-appointed expert. Do Keller and Zuckerman submit full rosters of past clients whenever they move to be appointed class counsel for the purpose of verifying that it is not compromised to act on the class's behalf? We think not.

Moreover, counsel failed to identify any grounds for relevance that offset the core First Amendment associational rights implicated by this harassing request. *NAACP v. Alabama*, 357 U.S. 449 (1958) ("overriding valid interest of the State" is required for compelled disclosure of membership lists). At the hearing Thursday, counsel had no response to this well-known precedent taught in law school, except to suggest that CEI's tax forms were somehow unusual for not disclosing its donors. They're not; after all, the NAACP litigated for the right not to disclose donor information on government forms, and the NAACP Legal Defense Fund's tax forms are exactly like CEI's—with donor identities left blank. *See* Frank Decl. ¶ 26 and Ex. B.

This is not the first time Keller in particular has attempted to harass CCAF by seeking to discover donors to CCAF's relatively shoe-string operation. Apparently a six-digit sanction for serving harassing subpoenas on CCAF was insufficient to stem Keller's curiosity. *See In re Classmates.com Consol.*

Litig., No. C09-45RAJ, 2012 WL 3854501, at *11 (W.D. Wash. June 15, 2012) (reducing attorneys' fees by $100,000 or 10% of the total fee request).

In any event, CEI's donors had no role in CCAF's effort to defend the class in this case, and Mr. Frank has no idea whether any donor even has a position in the underlying litigation. *See* Frank Decl. ¶ 25. CCAF retains independence from its donors and is indeed litigating multiple appeals directly adverse to corporate donors. *Id.* ¶ 24.

E. CCAF did not mislead the Court.

Finally, Labaton argues that CCAF's Response attempted to mislead the Court. Dkt. 427 at 14-17. In fact, CCAF accurately characterized the facts available to it, and Labaton's attempt to shoot the messenger provides no reason to deny CCAF's motion.

First, CCAF accurately characterized the Court's vacatur of the initial fee award. Dkt. 331. While the Court's grant of Rule 60 relief did not itself disgorge money from Class Counsel, CCAF accurately stated that the original fee order has been vacated, as the Court itself has now confirmed. Dkt. 455 at 3 n.2. Labaton, of course, prefers not to be called out for "baldly misrepresent[ing] the procedural state of affairs to the First Circuit" (Dkt. 420 at 4 n.2), but attacking CCAF for its accurate statement does not rehabilitate Labaton's candor. Even if it were credible for Labaton to have believed the fee award was not "vacated," the omission of the order granting Labaton's own Rule 60 motion created an incomplete and misleading picture of the procedural posture before the First Circuit. CCAF contends that a guardian *ad litem* would be especially helpful given what the Special Master called a "troubling disdain for candor and transparency that at times crossed the line into outright concealment of important material facts, including the payment of an enormous amount of money from class funds to a lawyer who never appeared in the case, did no work on the case, and whose identity was intentionally hidden from the clients, the class, co-counsel and the Court." Report at 7.

Second, Labaton attacks CCAF's presentation of its connections to convicted former Arkansas Treasurer Martha Shoffner. Labaton does not deny that Shoffner, as a trustee of ATRS, was a member of the only body empowered to approve or terminate Labaton's role as monitoring counsel. It simply quibbles that the campaign contributions from Labaton partners, including Eric Belfi and Thomas Dubbs, were made "a full year *after* the ATRS Board of Trustees approved Labaton's application to become monitoring counsel." Dkt. 427 at 15. Labaton does not address the free rent that their referral affiliate Chargois & Herron provided to Shoffner continuously throughout the time that Labaton and Chargois' submitted a joint application to ATRS (SM Ex. 128)[8] until the application was approved by the Board of Trustees. While trustees do not direct the day-to-day operation of ATRS, their ability to *rescind* agreements is potent, so Labaton's New Yorker partners' otherwise inexplicable interest in the Arkansas Treasurer election is suggestive. Labaton claims that "CCAF does not attempt to connect these contributions to anything related to issues in this case," but in fact they show that Labaton yet again attempted to mislead the Court by falsely stating it had given no such contributions. CCAF Response at 19. Labaton's candor (or stunning lack thereof) is a central issue in this case in so far as it bears on their ability to represent the class and the ultimate fee they should receive.[9]

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[8] "SM Ex." refers to exhibits to the Special Master's Report and Recommendations, the public versions of which are available at Dkt. 401. CCAF does not currently have access to unredacted versions of any documents that remain under seal, and its response here is limited by what is publicly available.

[9] Labaton also takes exception to CCAF's argument that George Hopkins' ostrich-like supervision of attorneys' fees makes him ill-suited to represent the class in deciding the propriety of attorneys' fees. CCAF does not suggest that Hopkins was an unsuitable representative for the merits of the underlying suit, but the underlying suit is resolved and the class now needs assistance resolving attorneys' fees, which is the exact topic Mr. Hopkins has abdicated and on which further investigation might cause embarrassment or political controversy to Mr. Hopkins or ATRS. Similarly, CCAF does not object to Labaton's administration of the settlement. Dkt. 427 at 9. Instead, Labaton inadequately represents the class *with respect to Labaton's fee request*. CCAF Response at 14-15.

Finally, Labaton expresses umbrage that CCAF suggested it failed to disclose the Chargois arrangement to *Facebook IPO* class members. Dkt. 427 at 17. If in fact Labaton never intended to pay Chargois from the *Facebook IPO* fee award, a fact on which their declaration (Dkt. 428) is conspicuously silent, then CCAF regrets the error. But Labaton's assertion that no "factual basis" existed to believe Chargois would be paid from the *Facebook IPO* settlement is wrong. Both Mr. Chargois and counterparties at Labaton testified their arrangement applied to any case where Labaton was "selected to represent any institutional investor that I [Chargois] facilitated an introduction." SM Ex. 125, at 50. Labaton partner Eric Belfi did not disagree that this obligation applied "[e]ven if Chargois was not involved specifically as a referring attorney and even if Chargois did no work on the case[.]" SM Ex. 122, at 19. In fact, evidence suggest that *Facebook IPO* was consciously covered by the Chargois arrangement because Labaton partners sent Mr. Chargois updates on the case. SM Exhs. 134 & 135. Thus, the Special Master surmised that *Facebook IPO* was among the cases falling under the Chargois arrangement. Report at 102. Labaton points to nothing in the record showing a reasonable observer should have believed otherwise, and instead James Johnson filed a declaration that says only "no referral fee has been paid or will be paid to Damon Chargois in the Facebook case." Dkt. 428 at 1. The declaration does not say that *Facebook IPO* was *never* covered by the Chargois arrangement, and it raises questions about the arrangement that the Court should ask. When and why was it decided to not pay referral fees in *Facebook IPO*? Is the Chargois arrangement no longer in effect, or was the decision made only for *Facebook IPO*? Why?

In any event, CCAF has not attempted to mislead the Court, and Labaton instead accuses others of behavior it engages in itself.

F. CCAF's public commentary on the case is unremarkable.

Labaton contends that CCAF's participation in the case should be rejected because it is "self-serving," "self-promoting," and "self-aggrandizing." Dkt. 427 at 12-14. As evidence of this, Labaton cited Mr. Frank's correspondence with the *Boston Globe* reporter whose story inspired the appointment of a special master. Feb. 6, 2017 Order, Dkt. 117, Exhibit B. Labaton condemns the

Boston Globe correspondence as part of a "pattern of interjecting new facts." Dkt. 427 at 13. Apparently, Labaton believes illuminating relevant facts is a bad thing—or that Frank was supposed to hang up when the *Boston Globe* called him first to ask him to help interpret the fee application in this case. *See* Frank Decl. ¶ 22.

Labaton also cites two tweets (Twitter social-media messages) made by Theodore H. Frank regarding the case. The complaint—and the fact that Labaton paid for attorneys to research and write it—is absurd, as is the false characterization by Labaton's counsel that Frank ridiculed a Choate associate, and CCAF will not waste the Court's time with it, but to the extent the Court cares, a detailed, if similarly absurd, explanation of the social-media commentary is provided in Frank Decl. ¶¶ 27-34 & Ex. C.

Labaton does not cite any other examples of supposed self-promotion. Class counsel's narrative under which CCAF inserted itself into this case in an effort to seek fees and self-promotion is belied by the course of proceedings, not to mention CCAF's busy schedule. CCAF Response at 23. Indeed, Frank recently turned down an offer to act as a consulting expert witness in his private practice for $1800/hour. Because Frank realizes no personal profit from any fees CCAF receives, he would have been much better off financially if CCAF's August 5 filing simply stated "We are too busy to serve as guardian *ad litem*" and he used the time to instead accept the offer to consult on another case. Frank Decl. ¶ 8.

While CEI highlights the work of its attorneys with press highlights and news releases, and social-media commentary, other firms do the same, including Labaton. In fact, the legal profession virtually *requires* some degree of self-promotion. Attorneys necessarily describe their past experience when seeking new clients, and CCAF admits it does this. And of course, so does Class Counsel. While counsel for Lieff complained that "the press picks up on" CCAF filings, it certainly picks up on Class Counsel's filings and statements as well. Labaton maintains an entire archive of press releases for this

very purpose. *See* Labaton Press Room, https://www.labaton.com/en/about/press/News-and-Press.cfm.

Labaton and the other counsel have engaged in extensive out-of-court commentary on this case, far more extensive—and inflammatory!—than a few flame emojis. For example, Labaton provided a "lengthy statement" to American Lawyer (Law.com) reporter Scott Flaherty.[10] Labaton said that the Special Master's Report was "wholly unmoored from the relevant law and the actual facts." *Id.* Labaton told the press that the Special Master acted inappropriately as an adversary seeking to impugn Labaton:

> "The master could have concluded his endless and costly investigation long ago once he verified that the double-counting was, indeed, inadvertent," the firm said. "Instead, he opted to go down the rabbit hole chasing the scent of an 'improper' referral payment because he believed it should have been disclosed to the court. In doing so, he elected not to act as a neutral fact-finder (as was his stated charge) but rather as an adversary seeking to impugn Labaton and customer class counsel for making a referral payment that was entirely legal, ethical and appropriate under Massachusetts law. Judge Rosen may be offended by a 'bare referral' fee—one where the referring attorney does not have to do any work in order to receive the referral fee, but it is the law in Massachusetts."

Id. And, of course, Labaton sought to distract from the important news of its odd referral fees to a politically-connected Texas law firm that has led to an investigation by the Arkansas legislature with a patently meritless motion for recusal and even more meritless mandamus petition, each of which generated its own headlines.

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[10] Scott Flaherty, AMERICAN LAWYER (LAW.COM), *Report Railing Against Lawyers' Conduct in State Street Case 'Unmoored,' Says Labaton* (Frank Decl. Ex. F), available online at: https://www.law.com/americanlawyer/2018/06/29/report-railing-against-lawyers-conduct-in-state-street-case-unmoored-says-labaton/.

If the Court accepts Labaton's position that self-serving out-of-court statements somehow disqualify advocacy for absent class members, it is only a further reason that Labaton cannot continue representing the class in fee proceedings.

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

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

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

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

Dkt. 154 at 11 n.5.

Lieff did not and cannot refute the underlying point of the footnote: that class counsel can and has successfully evaded appellate review by offering money to objectors, instead Lieff provides an avalanche of disingenuous characterizations and personal attacks to bury this central point. (With notable chutzpah, Lieff complained about CCAF's *ad hominem* attacks at the hearing. Tr. 8/9/2018 at 35. Again, the pattern and practice of class counsel has been to levy allegations against the Court, the Special Master, and CCAF that are better aimed at Class Counsel and the class representative.) But

Lieff's filings admit that they indeed paid $25,000 to Mr. Collins personally (and unknown amounts to other objectors) to end the *Capital One TCPA* appeal. *See* Dkt. 166-4 at 39 of 73, ¶¶ 13-15 (Selbin Decl., detailing settlement offer to Mr. Collins); *see also* 166-6 (2015 Frank Decl.). CCAF will be happy to provide additional detail rebutting Lieff's attacks if the Court wishes, but the point of this proceeding is not Lieff's and CCAF's litigation in another case, nor undisclosed expert opinions that Lieff did not even feel confident enough to submit to the Seventh Circuit, much less be tested by discovery and cross-examination, but that it seeks this Court to rely upon.

CONCLUSION

Any settlement between Class Counsel and the Special Master should provide at least as much relief to class members as the Report does, and such settlement should unambiguously waive counsel's ability to collaterally attack the settlement in the future. If these conditions are not met, the Court should appoint a guardian *ad litem* for the class (and it should consider the potential benefits of appointing a guardian even if a minimally acceptable settlement is reached).

If no settlement is reached, given the certainty of appellate challenges to any adverse ruling against Class Counsel, the Court should appoint an independent and separate guardian *ad litem* if any party objects to the Special Master serving in that role. CCAF is well-positioned to serve in this role with the assistance of Burch, Porter & Johnson, PLLC. All CCAF and Burch Porter attorneys have suitable experience to act as guardian *ad litem*, and their proposed rates are modest, especially compared to Class Counsel.

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

Respectfully submitted,

Dated: August 13, 2018

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CERTIFICATE OF SERVICE

I certify that on August 13, 2018, I served a copy of the forgoing on all counsel of record by filing a copy via the ECF system.

Dated: August 13, 2018

/s/ M. Frank Bednarz
M. Frank Bednarz