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.

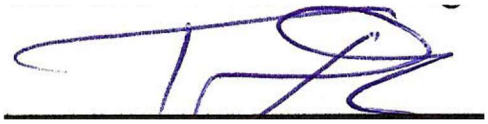
31. I spent a great deal of time that day and over the next several weeks discussing with Ms. Estes class action fee requests and the tactics attorneys sometimes use to maximize their own recovery. I agreed to analyze the fee application. I provided Ms. Estes a memo identifying problems with the fee 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