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)

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

202 331 1010 main
202 331 0640 fax

COMPETITIVE ENTERPRISE INSTITUTE
Advancing Liberty from the Economy to Ecology

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

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

202 331 1010 main
202 331 0640 fax

COMPETITIVE ENTERPRISE INSTITUTE
Advancing Liberty from the Economy to Ecology

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

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

202 331 1010 main
202 331 0640 fax

COMPETITIVE ENTERPRISE INSTITUTE
Advancing Liberty from the Economy to Ecology

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

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

202 331 1010 main
202 331 0640 fax

COMPETITIVE ENTERPRISE INSTITUTE
Advancing Liberty from the Economy to Ecology

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
ted.frank@cei.org
(703) 203-3848 cell